

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JAMES J. JOHNSON	:	DECISION
D/B/A JIM'S HESS SERVICE	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1982	:	
through May 31, 1985.	:	

Petitioner, James J. Johnson d/b/a Jim's Hess Service, P.O. Box 122, Plattsburgh, New York 12901, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1982 through May 31, 1985 (File No. 61665).

On June 9, 1986, petitioner, by its duly authorized representatives, Ziff, Weiermiller, Learned & Hayden, Esqs. (Thomas E. Reilly, Esq., of counsel), waived a hearing and submitted its case for decision based on the entire file, including briefs to be filed by August 22, 1986. After due consideration, the Commission renders the following decision.

ISSUE

Whether the Audit Division's denial of petitioner's claim for refund of sales tax paid to its supplier of gasoline for the period in question was proper.

FINDINGS OF FACT

1. On or about March 22, 1985, petitioner, James J. Johnson d/b/a Jim's Hess Service, filed a group of applications for Credit or Refund of State and Local Sales or Use Taxes seeking a refund of sales tax allegedly overpaid in the aggregate amount of \$25,453.59 for the period in question.

2. Petitioner operates a retail service station located in Plattsburg, New York, selling petroleum products including, specifically, gasoline at retail. Petitioner, during the period in question, purchased gasoline from its supplier, Amerada Hess Corp., and paid sales tax on such purchases to Amerada Hess Corp. based on the regional average retail sales price for gasoline. Thereafter, petitioner sold the gasoline to its retail customers.

3. Submitted by petitioner in connection with its refund application was a schedule for the months during the period at issue showing, inter alia, the gallons of gasoline purchased and the tax paid thereon to petitioner's supplier [at the combined State (4%) plus Clinton County (3%) rate of tax].

4. Petitioner's refund claim is premised upon the assertion that for some months, tax payments to the supplier exceeded the amount of tax which would be due if computed based on petitioner's actual retail sales (apparently based on petitioner's actual selling prices), whereas for other months, payments to the supplier were less than the tax computed on such actual retail selling prices. The \$25,453.59 refund sought by petitioner represents the net of the resulting differences (a net claimed overpayment) over the period in question.

5. By a letter dated July 22, 1985, the Audit Division denied petitioner's application for refund, taking the position that the Tax Law does not allow a refund under the circumstances presented. It is petitioner's position, by contrast, that the amount of refund sought corrects a collection of sales tax in excess of the maximum amount allowable pursuant to Tax Law § 1105.

CONCLUSIONS OF LAW

A. That Tax Law Article 28, § 1105(a), authorizes the imposition of a statewide sales tax at the rate of four percent upon the receipts from every retail sale of tangible personal property. Said section encompasses the sale

of gasoline, as is herein at issue. Under the authority of Tax Law Article 29, Clinton County imposes an additional sales tax at the rate of three percent upon the receipts from such sales of gas. Thus petitioner, located in Clinton County, faces a total sales tax rate of seven percent.


B. That Tax Law § 1111(d) authorizes the Tax Commission to prescribe and amend schedules determining the amount of sales tax to be collected by a distributor for each gallon of gasoline sold. Tax Law § 1111(e), as in effect during the period in question, provided, inter alia, that the retail sales tax imposed by Tax Law § 1105(a) was, with respect to automotive fuel, to be based on the regional average retail sales price and collected in accordance with the noted § 1111(d) schedules. Here, petitioner's distributor collected tax upon its delivery of gas to petitioner at the rate of seven percent upon such regional average retail sales price, as was required by Tax Law § 1111(d) and (e). Such price, rather than the actual (subsequent) selling price set by a gasoline station at its pumps, had been determined by the Legislature as the retail selling price upon which the tax was to be paid. Accordingly, petitioner's subsequent selling price, though different, does not under the adopted statutory scheme constitute an overpayment by petitioner or form a basis for allowing a refund.

C. That the petition of James J. Johnson d/b/a Jim's Hess Service is hereby denied and the Audit Division's denial of petitioner's application for refund is sustained.

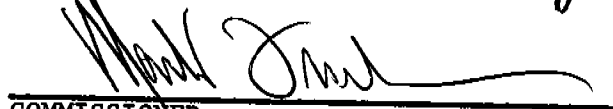
DATED: Albany, New York

STATE TAX COMMISSION

DEC 23 1986


PRESIDENT


COMMISSIONER


COMMISSIONER