

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
AJAYEM LUMBER CORPORATION

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Diesel Motor Fuel :  
Taxes under Article (a) 12-A of the :  
Tax Law for the ~~XXXXXX~~ Period(s) :  
April 1971 through April 1975

State of New York  
County of Albany

Marsina Donnini, being duly sworn, deposes and says that  
she is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 21st day of June, 1977, she served the within  
Notice of Decision by ~~(certified)~~ mail upon Ajayem Lumber Corporation  
~~XXXXXX~~ the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Ajayem Lumber Corporation  
Route 208, P.O. Box 399  
Walden, New York 12586  
and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the ~~representative~~  
~~XXXXXX~~ petitioner herein and that the address set forth on said wrapper is the  
last known address of the ~~representative of the~~ petitioner.

Sworn to before me this

21st day of June, 1977

Marsina Donnini

Janet Mack

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of  
AJAYEM LUMBER CORPORATION

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Diesel Motor Fuel :  
Taxes under Article (8) 12-A of the :  
Tax Law for the ~~Year(s)~~ Period(s) :

State of New York  
County of Albany

Marsina Donnini, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 21st day of June, 1977, she served the within Notice of Decision by ~~(certified)~~ mail upon Finkelstein, Mauriello, Kaplan & Levine, P.C. (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Finkelstein, Mauriello, Kaplan & Levine, P.C.  
184 Liberty Street  
Newburgh, New York 12550  
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the (representative of the) petitioner herein and that the address set forth on said wrapper is the last known address of the (representative of the) petitioner.

Sworn to before me this

21st day of June, 1977

Marsina Donnini

Janet Mack



STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE

TAX APPEALS BUREAU

STATE CAMPUS  
ALBANY, N.Y. 12227

June 21, 1977

STATE TAX COMMISSION

ADDRESS YOUR REPLY TO

TELEPHONE: (518) **457-1723**

Ajayem Lumber Corporation  
Route 208, P.O. Box 399  
Walden, New York 12586

Gentlemen:

Please take notice of the **Decision**  
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to  
Section ~~(22)~~ **288** of the Tax Law, any  
proceeding in court to review an adverse deci-  
sion must be commenced within **4 months**  
from the date of this notice.

Inquiries concerning the computation of tax  
due or refund allowed in accordance with this  
decision or concerning any other matter relative  
hereto may be addressed to the undersigned. They  
will be referred to the proper party for reply.

Very truly yours,

**PAUL B. COBURN**  
Supervising Tax  
Hearing Office

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
of	:	
AJAYEM LUMBER CORPORATION	:	DECISION
for Revision of a Determination or for	:	
Refund of Diesel Motor Fuel Tax under	:	
Article 12-A of the Tax Law for the	:	
Period from April 1971 through April	:	
1975.	:	

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Applicant, Ajayem Lumber Corporation, Route 208, P.O. Box 399, Walden, New York 12586, filed applications for revision of a determination or for refund of diesel motor fuel tax under Article 12-A of the Tax Law for the period from April 1971 through April of 1975. (File No. 15777).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on December 8, 1976 at 2:45 P.M. The applicant appeared by Finkelstein, Mauriello, Kaplan and Levine, P.C. (Michael O. Gittelsohn, Esq., of counsel). The Miscellaneous Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether applicant, Ajayem Lumber Corporation, is entitled to a credit against Article 12-A tax for fuel use tax refunds, claimed by applicant pursuant to Article 21 of the Tax Law, for the same periods, which refunds were denied because they were not timely filed.

II. Whether the Miscellaneous Tax Bureau, in applying other refunds and credits due the applicant against the diesel motor fuel tax assessment at issue herein, erred by not applying such credits and refunds to also effect a proportionate reduction of the penalty and/or the accrued penalty.

III. Whether the provisions of Article 12-A, which authorize the Department of Taxation and Finance to determine the amount of tax due any time within three years from the date of the earliest sale covered in the determination where a return is filed, but which restricts the application for refunds or credits to one year from the end of a quarter in which the credit accrued, (Tax Law §503(d)) are discriminatory and unconstitutional.

IV. Whether the provisions of section 503-a of the Tax Law, which restricts the claim for refund for a fuel tax paid to another state (similar in effect to New York's fuel use tax) to the amount of tax paid per gallon, rather than the tax rate imposed by New York, is unconstitutional.

FINDINGS OF FACT

1. On January 7, 1976, the Miscellaneous Tax Bureau issued a Notice of Determination of Tax Due for diesel motor fuel tax to Ajayem Lumber Corporation for the period from April of 1971 to April of 1975. The tax determined, after computation of taxable use understated and credits due for overstatement, totalled \$12,792.97, plus a penalty of \$5,341.80. A computation of audited credits for truck mileage tax for the period from May of 1971 through March of 1975, and fuel use tax for the second and fourth quarters of 1974 and the second quarter of 1975, were subtracted from the tax and penalty due. Applicant does not contest the amount of diesel motor fuel tax assessed.

2. By letter of June 9, 1976, the applicant was advised that the assessment described in Finding of Fact "1", above, was sustained after a conference thereon, and accrued penalty of \$486.82 was added to the total due. Additional subtractions from the balance due for further credits and refunds were enumerated. Included therein were additional truck mileage tax credits of \$2,504.27 for the period in question, unpaid motor fuel refund claims for the period from October of 1973 through March of 1976, and fuel use tax refunds for the first, third and fourth quarters of 1975. The balance due was stated to be

\$2,046.37. Applicant, Ajayem Lumber Corporation, asserts that these credits and refunds applied to reduce the tax should also have affected a proportionate reduction of the penalty.

3. The applicant filed claims for fuel use tax refunds as follows:

<u>Quarter Ending</u>	<u>Refund Claimed</u>
June 30, 1971	\$ 400.22
September 30, 1971	420.72
December 31, 1971	358.26
March 30, 1972	312.48
June 30, 1972	393.02
September, 1972	621.35
December 30, 1972	557.20
March 31, 1973	648.80
June 30, 1973	674.45
September, 1973	677.41
December 31, 1973	703.04
	<u>\$ 5,766.95</u>

All of these claims for refund of fuel use tax were rejected by the Miscellaneous Tax Bureau because they were not filed within one year from the end of the quarter for which the credit was accrued. The applicant, Ajayem Lumber Corporation, contends that credit should be allowed since these rejected claims fall within the audit period in which the diesel motor fuel tax was assessed.

4. Applicant, Ajayem Lumber Corporation, raised constitutional objections to the provisions of section 503-a (Article 21 of the Tax Law), asserting that the credit in the amount of tax

paid another state per gallon for fuel should not be limited to the amount paid, but should instead be a credit for the tax rate per gallon in New York.

CONCLUSIONS OF LAW

A. That the tax assessed applicant, Ajayem Lumber Corporation, pursuant to Article 12-A of the Tax Law in the Notice of Determination of Tax Due dated January 7, 1976, was correctly determined.

B. That the penalty imposed on the tax determined is authorized by section 289-b of the Tax Law.

C. That Article 12-A of the Tax Law provides no credit against diesel motor fuel tax imposed for refunds or credits pursuant to Article 21 of the Tax Law.

D. That applicant's claims for fuel use tax refunds, pursuant to section 503-a of Article 21, which claims were denied due to a failure to file said claims within the time prescribed by the statute, are not available as an offset against Article 12-A taxes due since such claims, in accord with Conclusion of Law "C", above, would not be considered in computing the Article 12-A tax liability.

E. That the administrative application by the Miscellaneous Tax Bureau of fuel use tax and truck mileage tax refunds, in order to reduce the balance due on diesel motor fuel taxes, is

solely administrative in nature and does not affect the Article 12-A tax liability initially imposed, or the penalties forfeited pursuant to section 289-b of the Tax Law.

F. That the accrued penalty of \$486.62, as stated in the June 9, 1976 letter, is reduced to \$316.11 to reflect a one percent penalty per month for five months on the balance of Article 12-A tax due per the January 7, 1976 Notice of Determination of Tax Due, \$6,322.26, (\$12,792.97 minus \$6,470.71 for audited credits allowed).

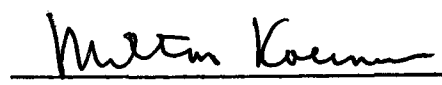
G. That the State Tax Commission lacks jurisdiction to consider constitutional questions raised by applicant, Ajayem Lumber Corporation.

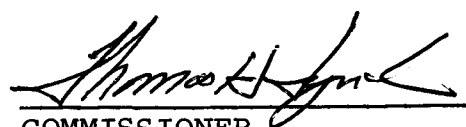
H. That the application of Ajayem Lumber Corporation are granted to the extent provided in Conclusion of Law "F". supra; and that, in all other respect the Notice of Determination of Tax Due dated January 7, 1976, with such recomputed accrued penalty as may be due, is sustained.

DATED: Albany, New York  
June 21, 1977

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER