

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Liberty Coaches, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Motor Fuel Tax :  
under Article 12-A of the Tax Law  
for the Period 12/71 - 3/74. :

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of August, 1979, he served the within notice of Decision by mail upon Liberty Coaches, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Liberty Coaches, Inc.  
31 Edgecomb Pl.  
Yonkers, NY 10710

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
17th day of August, 1979.

Victoria Gary

Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

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Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of August, 1979, he served the within notice of Decision by mail upon Samuel B. Zinder the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Samuel B. Zinder  
The Atrium  
98 Cutter Mill Rd.  
Great Neck, NY 11021

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  
17th day of August, 1979.

Victoria Gary

Jay Vredenburg



STATE OF NEW YORK  
STATE TAX COMMISSION  
TAX APPEALS BUREAU  
ALBANY, NEW YORK 12227

STATE TAX COMMISSION

JAMES H. TULLY JR., PRESIDENT  
MILTON KOERNER  
THOMAS H. LYNCH

JOHN J. SOLLECITO  
DIRECTOR

Telephone: (518) 457-1723

August 17, 1979

Liberty Coaches, Inc.  
31 Edgecomb Pl.  
Yonkers, NY 10710

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 288 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

A handwritten signature in cursive script, reading "Michael Alexander".

cc: Petitioner's Representative  
Samuel B. Zinder  
The Atrium  
98 Cutter Mill Rd.  
Great Neck, NY 11021  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of :

LIBERTY COACHES, INC. :

DECISION

for Revision or for Refund of Diesel Motor :  
Fuel Taxes under Article 12-A of the Tax :  
Law for the period December, 1971 through :  
March, 1974. :

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Petitioner, Liberty Coaches, Inc., 31 Edgecomb Place, Yonkers, New York 10710, filed a petition for revision or for refund of diesel motor fuel taxes under Article 12-A of the Tax Law for the period from December, 1971 through March, 1974 (File No. 00521).

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 November 18, 1976 at 10:45 A.M. Petitioners appeared by Samuel B. Zinder PC. The Miscellaneous Tax Bureau appeared by Peter Crotty, Esq. (James A. Scott, Esq., of counsel).

#### ISSUE

I. Whether the Miscellaneous Tax Bureau properly assessed tax and penalty (pursuant to Article 12-A of the Tax Law) against petitioner, based on the disallowance of omnibus carrier credits claimed by petitioner for diesel motor fuel purchased by it but consumed by an affiliated omnibus corporation engaged in mass transportation, namely, Resort Bus Lines, Inc.

II. Whether, in the event the credits taken by petitioner were properly disallowed, Resort Bus Lines, Inc. is entitled to a refund or credit for diesel motor fuel purchased by petitioner but consumed by it.

FINDINGS OF FACT

1. Petitioner, Liberty Coaches, Inc., filed diesel motor fuel tax returns for the period December 1, 1971 through March 31, 1974.
2. The Miscellaneous Tax Bureau issued a ten-day notice to file a corrected or sufficient return for diesel motor fuel tax for the months of December, 1971 through March, 1974, on January 22, 1975. Said notice found that petitioner had overstated charter gallons by 38,162 (gallons) and, therefore, a tax was due of \$1,144.86; that local transit gallons were overstated by petitioner by 360,691 (gallons) and, therefore, a tax was due of \$21,641.46; that there were three other minor changes resulting in an adjustment of \$624.05 in petitioner's favor and that "penalty and interest" of \$5,584.42 was due. The tax due on the notice (plus penalty and interest) totaled \$27,746.69.
3. On March 17, 1975, a Notice of Determination of Tax Due Under Diesel Tax Law was issue to petitioner for \$27,746.69.
4. Petitioner does not dispute other then the local transit gallons and adjustments made thereon.
5. Petitioner, Liberty Coaches, Inc., is an omnibus carrier and operates pursuant to a certificate of public convenience and necessity, issued by the New York State Department of Transportation. Petitioner operates extensive local transit routes throughout Westchester County.
6. During the period in question, petitioner and Resort Bus Lines, Inc. (hereinafter "Resort"), which also operates under a certificate of public convenience and necessity, were affiliated companies by virtue of their common stockholders, George Bernacchia, Sr., George Bernacchia Jr. and Arthur Bernacchia.

7. Both petitioner and Resort operated from the same garage facility at 41 Railroad Avenue, Yonkers, New York. Resort did not have its own employees and for most of the period, owned no omnibuses. All maintenance and service of omnibuses were performed by employees of petitioner.

8. All diesel motor fuel consumed by the two omnibus carriers was purchased (pursuant to contract) by petitioner from the Mobil Oil Corp. and stored in bulk storage tanks at the Railroad Avenue address, where both corporations fueled omnibuses. Petitioners paid for the fuel and also paid the diesel motor fuel tax.

9. Petitioner and Resort allocated the cost of fuel on a miles/hours basis. Such method was approved by the New York State Department of Transportation, subject to a uniform system of accounts for purposes of the reports required by the Commissioner of that Department. A change in the allocation method employed by petitioner and Resort required the Department of Transportation's permission.

10. A field audit of petitioner's diesel fuel tax returns for the period January 1, 1966 to December 31, 1968 was conducted. No adjustment or additional assessments were made for that period due to the combined reporting of petitioner and Resort, as is the method employed herein. The affiliation of the carriers was clear on the face of the materials examined during that audit.

11. Returns for the period after the field audit described in Finding of Fact "10," above, and prior to the audit here in issue (both of which were calculated in the same manner) were not questioned.

12. An officer of and the accountant for petitioner and Resort Bus Lines, Inc. were, or had been, involved in the operations of other omnibus carriers in Westchester County. This involvement included audits of Yonkers Transit Corp. and its affiliate, Cross County Coach, wherein Yonkers Transit Corp. filed diesel motor fuel tax returns identical to those at issue here and that such returns were not questioned on audit. This involvement also include audits of Westchester Street

Transportation Co., Inc. and its affiliate, West Fordham Transportation Corp; where-  
in Westchester Street Transportation Co., Inc. filed diesel motor fuel tax returns  
identical to those at issue here, and that on audit for 1972, 1973, and 1974 (pur-  
suant to instructions from the auditor), West Fordham Transportation Corp. had typed  
on its Return of Information on Purchases of Diesel Motor Fuel at Retail - "Bulk  
user - Diesel Fuel Purchased from Westchester Street Transportation Co., Inc.,  
Taxes Paid."

13. By letter dated January 31, 1975 and received on February 21, 1975, the  
accountant for Liberty Coaches, Inc. enclosed schedule O's for Resort for the  
period here in issue. The schedules totaled the tax stated to be due for this  
period, based on fuel consumed by Resort.

14. On April 17, 1975, petitioner conferred with the Miscellaneous Tax Bureau.  
A Bureau memorandum dated April 23, 1975 states that "... Schedule "O" claims in the  
name of Resort Bus Lines, Inc. for the period November 1, 1971 through March 31, 1974  
are similarly denied."

15. By letter of April 18, 1975, petitioner requested a review of this matter  
and a legal opinion from the Counsel to the State Tax Commission.

16. By letter of May 21, 1975, Saul Heckelman, Deputy Commissioner and Counsel,  
answered petitioner and advised it that the determination regarding the reimbursement  
of Liberty for local transit service on fuel consumed in the omnibus operations of  
Resort was correct. The letter further stated that Resort is not eligible to claim  
credit on a Schedule "O" since Resort is not a bulk user and, furthermore, that no  
returns to which schedule O's can be attached were filed. Thus, Counsel concluded  
that the Notice of Determination is correct. The letter further advised that Resort  
could claim a refund subject to the two-year period of limitations. However, it must  
be shown that a) Resort Bus Lines, Inc. bought the diesel motor fuel, b) the taxes  
had been paid, c) the fuel was consumed by it and d) the burden of tax was borne  
by it. To so establish (the letter concluded), Resort Bus Lines, Inc. cannot rely

on an allocation for accounting purposes, but must show that Liberty purchased the fuel as Resort's agent and that Resort actually paid or was liable for the fuel purchased by petitioner on its behalf.

17. The Resort Bus Lines, Inc. printed bus schedule for the route from New York City to the Berkshires (effective during the period in question) states on the front thereof "Resort Bus Lines, Inc. Agent of Liberty Coaches, Inc."

CONCLUSIONS OF LAW

A. That paragraphs (b) and (d) of subdivision 3 of section 289 of the Tax Law provide for reimbursement of an omnibus carrier and an omnibus carrier engaged in local transit service where "...such...diesel motor fuel has been consumed by such carrier in the operation of an omnibus in this state..." or where "... such... diesel motor fuel has been consumed by such carrier in the operation of an omnibus in local transit service in this state pursuant to a certificate of convenience and necessity...".

B. That paragraph (c) of subdivision 3 of section 289-c provides that where a claim for reimbursement is made by an omnibus carrier, the claimant must satisfy the Department of Taxation and Finance that "...he has borne the tax and that the amount claimed is the amount of such tax reimbursable under paragraph (b) or (d) or (e) of subdivision three of this section ...".

C. That petitioner, Liberty Coaches, Inc., purchased all the diesel motor fuel and paid the tax, but did not consume that fuel utilized in the operation of Resort's omnibuses and could not, therefore, claim credit or reimbursement for such fuel.

D. That the proper party to claim reimbursement for diesel motor fuel tax paid on such fuel consumed by Resort is Resort.

E. That for the period in question, all reimbursement claimed by petitioner, if properly claimed, would have been due either to petitioner or its affiliate, Resort.



F. That Resort is neither a bulk user nor retail vendor and cannot, therefore, claim a credit but can only claim a refund within the restrictions of the two-year period from the date of the earliest purchase of diesel motor fuel.

G. That the diesel motor fuel purchased by petitioner and consumed by Resort was purchased by petitioner as agent for Resort.

H. That all reimbursement claimed by an omnibus carrier must be on fuel purchased and consumed by such carrier; however, since the circumstances herein lend an amount of uncertainty to the appropriate measures to be taken by petitioner, and since the petitioner herein has acted in good faith, the petition is granted to the extent that all penalty and interest are waived and that the Schedule O's submitted by Resort under cover of a letter dated January 31, 1975 (see Finding of Fact "13", above) shall be considered appropriate refund claims submitted by Resort for payments made within the two years preceeding February 21, 1975 (the date the aforementioned letter of January 31, 1975 was received) and that, except as so granted, the Notice of Determination of Tax Due under Diesel Tax Law dated March 17, 1975 is sustained.

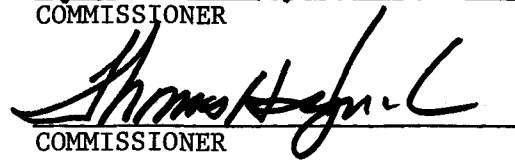
DATED: Albany, New York

AUG 17 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER