

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Soft Drink Leasing Corp.

:

:

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Motor Fuel under :
Article 12A of the Tax Law for the Periods Ended :
3/31/77, 6/30/77, 9/30/77, 3/31/78 & 9/30/78.

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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Soft Drink Leasing Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Soft Drink Leasing Corp.
5 Dakota Dr.
Lake Success, NY 11040

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
6th day of November, 1981.

Carrie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Soft Drink Leasing Corp. :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Motor Fuel under :
Article 12A of the Tax Law for the Periods Ended :
3/31/77, 6/30/77, 9/30/77, 3/31/78 & 9/30/78 :
:

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 6th day of November, 1981, he served the within notice of Decision by certified mail upon Leonard B. Austin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard B. Austin
Stillman, Herz & Austin
300 Garden City Plaza, Ste. 538
Garden City, NY 11530

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
6th day of November, 1981.

Connie R. Hagelund

J. Vredenburg

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

November 6, 1981

Soft Drink Leasing Corp.
5 Dakota Dr.
Lake Success, NY 11040

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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Leonard B. Austin
Stillman, Herz & Austin
300 Garden City Plaza, Ste. 538
Garden City, NY 11530
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SOFT DRINK LEASING CORP.	:	DECISION
	:	
for Revision of a Determination or for	:	
Refund of Motor Fuel Tax under Article	:	
12-A of the Tax Law for the Periods Ended	:	
March 31, 1977, June 30, 1977,	:	
September 30, 1977, March 31, 1978 and	:	
September 30, 1978.	:	

Petitioner, Soft Drink Leasing Corp., 5 Dakota Drive, Lake Success, New York 11040, filed a petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the periods ended March 31, 1977, June 30, 1977, September 30, 1977, March 31, 1978 and September 30, 1978 (File No. 25947).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 30, 1980 at 1:15 P.M. Petitioner appeared by Stillman, Herz & Austin (Leonard B. Austin, Esq., of counsel). The Audit Division appeared by Ralph Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether petitioner is entitled to reimbursement for motor fuel taxes paid, by virtue of section 289-c(3)(a) of the Tax Law.

FINDINGS OF FACT

1. On August 7, 1978, the Audit Division issued to petitioner, Soft Drink Leasing Corp. ("Soft Drink"), a proposed audit adjustment of tax due under Article 12-A of the Tax Law for the periods ended March 31, 1977 through

September 30, 1977 in the total amount of \$5,618.55, including interest.

Thereafter, the Division issued to petitioner a Notice of Determination of Tax Due under Motor Fuel Tax Law for said amount.

The deficiency was asserted by reason of allegedly erroneous refunds made to petitioner. The Audit Division was of the opinion that petitioner had failed to establish it was the purchaser and user of fuel; consequently, petitioner did not qualify for reimbursement under section 289-c(3)(a).

2. Each period since the quarterly period commencing January 1, 1977, petitioner has made application for refund of motor fuel tax paid. The claims for the periods January 1 through March 31, 1978 and July 1 through September 30, 1978 were denied by the Audit Division on the ground that the claimant and the consumer were not the same entity.

3. Pursuant to an agreement dated July 12, 1971 between petitioner and the Coca-Cola Bottling Company of New York, Inc. ("Coca-Cola"), which agreement is still in force, petitioner has provided and continues to provide a total program of maintenance for vehicles utilized on and off the highways of this State. Schedule I of said contract provides, in pertinent part:

"Soft Drink Leasing Corp., (hereinafter called S.D.L.C.), will furnish all fuel, oil, lubricants, tires, tubes and manpower necessary to operate and properly maintain the fleet."

Schedule I thence sets forth the timetable for performance of the various maintenance tasks by Soft Drink, such as tire inspection, battery check, lubrication, repair of metal damage and re-painting.

4. The within proceeding is concerned solely with off-highway vehicles: gasoline-powered forklifts, scrubbers and sweepers, which vehicles are owned by Coca-Cola and serviced by petitioner. Coca-Cola personnel operate said vehicles

in loading Coca-Cola trucks and in cleaning the premises. During maintenance activities, petitioner's employees operate the vehicles.

5. Coca-Cola is billed by Soft Drink in accordance with the monthly rates (adjusted for hours over or under the number of hours contemplated by said rates) enumerated at Schedule II of the contract.¹ Schedule II, effective June 1, 1979, provided in pertinent part:

<u>"No. of Units" (1)</u>	<u>Type</u>	<u>Weekly Rate</u>	<u>Monthly Rate</u>	<u>Miles or Hours Per Month Included in Monthly Rate</u>	<u>Excess/Credit Per Mile or Hour (2)</u>
25	Sweepers & Scrubbers	\$ 49.93	\$216.36	87 hours	46.1¢/42.1¢
25	Forklifts (Gasoline)	110.70	479.70	173 hours	46.1¢/42.1¢

(1) The number of units as stated above are to be used for provisional billing and will be adjusted to actual each month.

(2) Mileage or hours in excess or under the allowed miles or hours will be averaged and billed or credited every three months.

For each change of one tenth of one cent (\$.001) per gallon...of fuel in the Corp.'s costs of fuel as shown on Schedule D's, the following increase or decrease shall be in addition to rates shown above and will be billed or credited monthly on a supplemental invoice. Except that Excess or Credit Charges for mileage or time will be billed and adjusted annually.

<u>Type of Unit</u>	<u>Increase or Decrease Per Unit</u>		<u>Fuel Base Price</u>	<u>Excess/Credit Per Mile or Hour</u>
	<u>Per Week</u>	<u>Per Month</u>		
Sweeper & Scrubber	\$.015	\$.07	\$.567	\$.00075
Forklifts	.030	.13	.567	.00075"

As heretofore stated, petitioner furnishes gasoline for the forklifts, scrubbers and sweepers. The cost of the fuel as negotiated by the parties is

¹ Schedule II has been amended as of June 1 of each of the years 1977, 1978 and 1979.

included in the monthly rates and is based upon the net cost to Soft Drink; it does not embrace Federal or state gasoline tax. Nor is petitioner reimbursed in any manner by Coca-Cola for such taxes.

6. Coca-Cola does not have the capability or personnel to accomplish the maintenance services or to provide to its vehicles the fuel, lubricants, tires and other materials furnished by Soft Drink under the July 12, 1971 agreement.

7. Upon audit of petitioner's Federal returns, the Internal Revenue Service approved, in 1979 and in prior years, petitioner's deduction of Federal motor fuel tax paid.

CONCLUSIONS OF LAW

A. That paragraph (a) of subdivision 3 of section 289-c of the Tax Law makes provision for refund of motor fuel tax paid, as follows:

"...[A]ny person who shall buy any motor fuel...on which the tax imposed by this article shall have been paid, and shall consume the same in any manner except in the operation of a motor vehicle upon or over the highways of this state...shall be reimbursed the amount of such tax..."

B. That paragraph (c) of the same subdivision provides that where a claim for reimbursement is made, the claimant must satisfy the Department of Taxation and Finance that:

"...he has borne the tax and that the motor fuel has been consumed by him in a manner other than the operation of a motor vehicle upon or over the highways of this state..."

C. That consumption of gasoline by the forklifts, scrubbers and sweepers on the premises of Coca-Cola did not constitute consumption of fuel in the operation of said vehicles upon or over the highways of this State. The Appellate Division has articulated the legislative purpose underlying subdivision 3 of section 289-c, as follows:

"The intention of the Legislature seems crystal clear. If the motor fuel is consumed, i.e., 'used' in the operation

of a motor vehicle upon the highways of this State, it is taxable. If it is consumed in any other manner, it is not taxable. It is difficult to perceive how the Legislature could have spoken more plainly." Central Greyhound Lines, Inc. v. Graves, 274 A.D. 679, 681 (3d Dept. 1948).

D. That although the motor fuel was not expended in a taxable manner, petitioner is not a proper party to claim reimbursement for tax paid thereon. Petitioner purchased the motor fuel and paid the tax but did not consume the fuel utilized in the operation of Coca-Cola's forklifts, scrubbers and sweepers. See Liberty Coaches, Inc. v. State Tax Commission, 435 N.Y.S. 2d 69 (3d Dept. 1980).

Allied New York Services, Inc. v. Bragalini, 4 A.D.2d 802 (3d Dept. 1957), cited by petitioner in support of its claim, is clearly distinguishable. The petitioner in the cited case was both purchaser and consumer. The petitioner supplied aviation fuel to airlines under contracts which required it to make good any losses of fuel while in its possession, by paying the price thereof to the oil company. The Third Department found petitioner was a "purchaser" of the fuel lost by evaporation, spillage and related ways, and was thus entitled to refund of fuel tax borne by it.

E. That the petition of Soft Drink Leasing Corp. is hereby denied and the Notice of Determination is sustained in full.

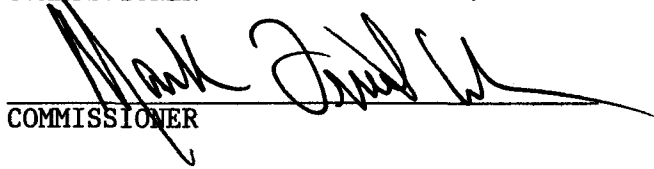
DATED: Albany, New York

NOV 06 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER