

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Eberhardt Bus Service, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Motor Fuel Tax :
under Article 12A of the Tax Law for the Period :
9/76 - 12/79. :
AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon Eberhardt Bus Service, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eberhardt Bus Service, Inc.
316 Smithtown Blvd.
Lake Ronkonkoma, NY 11779

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
18th day of January, 1984.

David Parchuck

James A. Hughes
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Eberhardt Bus Service, Inc. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Motor Fuel Tax :
under Article 12A of the Tax Law for the Period :
9/76 - 12/79. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon Brian E. Glickman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Brian E. Glickman
900 W. Jericho Tpke.
Smithtown, NY 11787

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
18th day of January, 1984.

David Parchuck

James A. Hagedorn
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Eberhardt Bus Service, Inc.
316 Smithtown Blvd.
Lake Ronkonkoma, NY 11779

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Brian E. Glickman
900 W. Jericho Tpke.
Smithtown, NY 11787
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
EBERHARDT BUS SERVICE, INC. :
for Revision of a Determination or for Refund :
of Motor Fuel Tax under Article 12-A of the Tax :
Law for the Periods September, 1976 through :
December, 1979.

Petitioner, Eberhardt Bus Service, Inc., 316 Smithtown Boulevard, Lake Ronkonkoma, New York 11779 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 September, 1976 through December, 1979 (File No. 32815).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on March 17, 1983 at 11:30 A.M., with all briefs to be submitted by June 3, 1983. Petitioner appeared by Brian E. Gluckman, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether an inactive wholly-owned subsidiary of a corporation is entitled to a refund of motor fuel tax as a provider of transportation services to a school district, when the transportation was actually provided by the parent and the cost of the fuel was incurred by the parent.

FINDINGS OF FACT

1. Petitioner, Eberhardt Bus Service, Inc., ("Eberhardt") filed claims for refund of New York State Motor Fuel Tax for the periods September 6, 1976 through December 31, 1979. The refunds were claimed on the ground that petitioner

was exempt from the Motor Fuel Tax Law as the operator of a school bus service.

The refund claims were filed and approved by the Audit Division as follows¹:

| <u>PERIOD</u> | <u>FILED</u> | <u>APPROVED</u> | <u>AMOUNT</u> |
|---------------------------------------|--------------------|------------------|---------------|
| September 6, 1976 - December 31, 1976 | September 11, 1978 | January 11, 1979 | \$ 684.00 |
| January 1, 1977 - December 31, 1977 | September 11, 1978 | January 11, 1979 | 2,137.86 |
| January 1, 1978 - December 31, 1978 | February 15, 1979 | April 11, 1979 | 2,141.94 |

Although the record established that refunds were issued in accordance with the foregoing, the record does not establish when the refund checks were issued.

2. Following the issuance of the refunds, an audit of Eberhardt was commenced. The audit revealed that during the periods in issue petitioner was inactive. The audit also disclosed that petitioner was affiliated with Bruno Bus Service, Inc. ("Bruno"). Bruno had the same address as petitioner. During the audit periods, Bruno had a contract with the Sayville Union Free School District to transport the students of the school district. The gasoline used to fulfill the contract was provided by Gulf Oil Company and billed to petitioner. However, the gasoline was paid for by Bruno. The Audit also revealed that the licenses for the buses used to transport the students were in the name of Bruno. On the basis of the foregoing, the Audit Division concluded that Bruno

¹ The Audit Division did not take formal action on the refund claim for the period January 1, 1979 through December 31, 1979. Since the perfected petition does not pertain to this period, it will not be treated in this decision. It is noted that the original refund for the first period listed in Finding of Fact "2" was returned by the Audit Division to petitioner because of a filing error. Petitioner subsequently refiled as shown above.

was the proper party to have applied for the refund and that since petitioner was not a party to the contract to transport students and did not pay for the gasoline, it was not entitled to a refund. Accordingly, on February 2, 1981 the Audit Division issued a Notice of Determination of Tax Due under Motor Fuel Tax Law for the periods September, 1976 through December, 1978 asserting a deficiency of tax equal to the amount that had been refunded, that is, \$4,963.80, plus interest of \$739.20, for a total of \$5,703.00.

3. During the periods at issue, Eberhardt was wholly owned and controlled by Bruno. Although Eberhardt was inactive during this time, Bruno held itself out to the public as Eberhardt Bus Service. Bruno paid all of Eberhardt's necessary corporate expenses during the audit periods. Bruno and Eberhardt had the same president and vice-president.

4. The school buses used to transport the students were owned by Bruno and controlled by Bruno.

5. Petitioner filed for a refund under its own name because its name was on the bills from Gulf Oil Company.

6. Prior to the periods in issue, Eberhardt had applied for and was granted a refund of Motor Fuel Tax. It is unclear from the record that Eberhardt and Bruno had the same practices as those at issue herein.

7. In the past, Eberhardt authorized the payment of its refund of Motor Fuel Tax to be applied to the tax liability of Bruno.

8. On occasion, the State Insurance Fund has treated the liabilities of Bruno as the liabilities of Eberhardt.

9. At the hearing, petitioner argued that since the Audit Division did not grant the refund of motor fuel tax within two years of the filing of the 1976 and 1977 applications, the portion of the deficiency pertaining to these periods should be cancelled.

CONCLUSIONS OF LAW

A. That paragraphs (b) and (d) of subdivision 3 of section 289 of the Tax Law provide for the reimbursement of motor fuel tax paid by an omnibus carrier provided that such motor fuel or diesel motor fuel has been consumed by such carrier.

B. That during the period at issue section 289-c(3)(c) provided, in part:

"The claimant shall 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, the operation of a pleasure or recreational motorboat upon or over the waterways of the state including waterways bordering on the state, or in the case of an omnibus carrier, taxicab licensee or nonpublic school operator 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."²

In view of the facts that the tax was born by Bruno and that the motor fuel was consumed by Bruno, the Audit Division properly determined that Eberhardt was not entitled to the refund which had been issued to it (see Matter of Soft Drink Leasing Corp. v. State Tax Comm., 96 A.D.2d 612; Matter of Liberty Coaches v. State Tax Comm., 79 A.D. 2d 775).

C. That section 289(c) of the Tax Law further provides:

"The amount of any erroneous or excessive payment to a claimant for reimbursement may be determined by the department of taxation and finance and may be recovered from such claimant in the same manner as a tax imposed by this article, provided, however, that any such determination

2

This section was changed by the laws of 1978, chapter 737, section 2, effective on the 60th day after August 7, 1978. The amendment incorporated separate amendments by the laws of 1974, chapters 756 and 863 and inserted "or volunteer ambulance service" in the sentence beginning "the claimant shall". It also substituted "paragraph (b), (d) (e) or (f)" for "paragraph (b) or (d) or (e)".

shall be made within two years after the date of such erroneous or excessive payment."

In view of the fact that the record does not establish the date of the payment, petitioners have failed to establish that the two year requirement of section 289(c) of the Tax Law was not complied with.

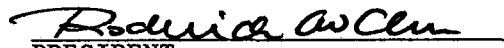
D. That since the circumstances herein presented a certain amount of uncertainty and petitioner acted in good faith, interest is waived (Matter of Liberty Coaches, Inc., State Tax Commission, August 17, 1983, supra).

E. That the petition of Eberhardt Bus Service, Inc. is granted only to the extent of Conclusion of Law "D", as is, in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER