

STATE TAX COMMISSION

In the Matter of the Petition
of
Mira Oil Co.

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
12/77 - 2/78.

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

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 20th day of December, 1983, he served the within notice of Decision by certified mail upon Mira Oil Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mira Oil Co.
Attn: Michael D'Attilo
53 S. Main St.
Spring Valley, NY 10977

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
20th day of December, 1983.

Daniel Paruchuk

James A. Hagedorn
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Mira Oil Co. :
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 :
12/77 - 2/78. :
_____ :

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 20th day of December, 1983, he served the within notice of Decision by certified mail upon Thomas A. Condon, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas A. Condon
Birbrower, Montalbano, Condon, Seidenberg & Frank
20 Squadron Blvd.
New City, NY 10956

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
20th day of December, 1983.

David Parchuck

James A. Hyslop
pursuant to Tax Law section 174

Authorized to administer oaths

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

December 20, 1983

Mira Oil Co.
Attn: Michael D'Attilo
53 S. Main St.
Spring Valley, NY 10977

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
Thomas A. Condon
Birbrower, Montalbano, Condon, Seidenberg & Frank
20 Squadron Blvd.
New City, NY 10956
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MIRA OIL COMPANY	:	DECISION
for a Hearing to Review a Determination of	:	
Motor Fuel Tax under Article 12-A of the Tax	:	
Law for the Period December 1977 through	:	
February 1978.	:	

Petitioner, Mira Oil Company, Attn: Michael D'Attilo, 53 S. Main St., Spring Valley, New York 10977, filed a petition for a hearing to review a determination of motor fuel tax under Article 12-A of the Tax Law for the period December, 1977 through February, 1978 (File No. 27301).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 20, 1983 at 9:50 A.M., with all briefs to be submitted by June 10, 1983. Petitioner appeared by Birbrower, Montalbano, Condon, Seidenberg & Frank, Esqs. (Thomas A. Condon, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether the Audit Division is bound by its answer which admitted that petitioner paid New York motor fuel tax on all of its purchases from Gasoline Marketers of America.

II. Whether petitioner, as a result of its importation into New York from New Jersey of motor fuel, is liable for New York State motor fuel taxes which it contends it paid to a distributor licensed by the State of New York.

III. Whether the Department of Taxation and Finance should be compelled to comply with subpoenas prepared by petitioner's attorney.

IV. Whether penalties should be abated.

FINDINGS OF FACT

1. On August 7, 1979, the Audit Division issued a Notice of Determination of Tax Due Under Motor Fuel Tax Law against petitioner, Mira Oil Company, showing additional tax due of \$12,150.88 plus penalties of \$2,855.46 for the period November 1, 1977 through February 28, 1978.

2. The Audit Division determined that New York motor fuel tax was not paid on petitioner's purchase of 151,886 gallons of motor fuel from Gasoline Marketers of America (hereinafter, "Gasoline Marketers") as follows:

	<u>Total N.Y. Purchases From Gasoline Marketers</u>	<u>N.Y. Tax Paid by Gasoline Marketers</u>	<u>N.Y. Tax Not Paid by Gasoline Marketers</u>
November, 1977	121,997	121,997	-0-
December, 1977	176,040	113,674	62,366
January, 1978	70,016	16,003	54,013
February, 1978	94,564	59,057	<u>35,507</u>
		TOTAL	151,886

According to the tax auditor who testified on behalf of the Audit Division, New York tax was not paid by Gasoline Marketers on invoices marked "Sun NWK" (where the source of the gasoline was Sun Company's Newark terminal). For January, 1978 and February, 1978, the gallons noted sold during such months on invoices marked "Sun NWK" totalled 54,013 and 35,507 respectively, as noted above. However, for December, 1977 the total gallons noted sold on invoices marked "Sun NWK" was only 48,867 not 62,366, as noted above.

3. Petitioner, an independent seller of motor fuel, operates several gasoline service stations under the name, Super Value Oil Company, in Rockland County, New York and northern New Jersey adjoining Rockland County.

4. Petitioner purchased its motor fuel from various sources including: Kimber-Allen Petroleum Corp., Atlantic Richfield, Ashland Petroleum, Coastal States Marketing and Gasoline Marketers. All purchases were made from motor fuel storage tank terminals in New Jersey. According to the audit report, proper motor fuel tax was charged and paid (either New York tax or New Jersey depending upon location of delivery) "except in the case of Gasoline Marketers of America." The report elaborated as follows:

"Concurrent audit of Gasoline Marketers of America revealed that where Gasoline Marketers was able to have its suppliers charge New York State tax¹ for New Jersey pick-ups it would charge Mira Oil the New York tax and remit same on their monthly MT104 reports. In other instances, it would bill Mira Oil the New Jersey tax for New Jersey pick-ups. The New York tax for these gallonages were not reported by Gasoline Marketers on their MT104's."

5. Petitioner arranged for transportation of the motor fuel it purchased in New Jersey to New York by a common carrier, Foley & Sheldon. Petitioner paid the freight and caused the motor fuel to be imported to New York.

6. Michael D'Attilo, president of petitioner, testified that petitioner and Gasoline Marketers had an agreement whereby Gasoline Marketers would collect both the federal and state motor fuel taxes and would pay the proper state according to the destination noted on the bill of lading.²

7. Petitioner was not registered with New York State as a licensed distributor of motor fuel products during the period at issue. Therefore, it paid motor fuel tax at the time it purchased its supply of gasoline.

¹ This language, "New York State tax", which originally appeared in the audit report, was later altered to read "No state tax".

² Petitioner's position is that on gasoline that went to its New Jersey service stations, New Jersey tax was paid to Gasoline Marketers and on gasoline that went to its New York service stations, New York tax was paid to Gasoline Marketers. "EXPORT TO NEW YORK" is noted on the bottom of invoices for gasoline purchased by petitioner from Gasoline Marketers which was shipped to New York.

8. All of petitioner's suppliers, except for Gasoline Marketers, collected the motor fuel tax of the state where the gasoline was finally delivered. Even Gasoline Marketers collected New York motor fuel taxes on a substantial portion of petitioner's purchases during the period at issue. Mr. D'Attilo testified that "It was my understanding that as long as we pay the taxes to the supplier, everything was okay..." However, one of Gasoline Marketer's suppliers, Sun Company, did not charge motor fuel tax depending on the final destination of the gasoline. A letter dated April 19, 1979 of W.A. Bauernschmidt, Manager of Excise Taxes for Sun Company, to the Audit Division, part of Exhibit "G" herein, provides as follows:

"You can be assured we have never charged the New York Gasoline Tax on any invoices for Gasoline Marketers. Gasoline Marketers pick up gasoline at our Newark, New Jersey terminal in their own trucks and we are, therefore, obliged to charge them the New Jersey tax and remit it to the State of New Jersey."

Therefore, it is reasonable to conclude that the gasoline upon which no New York motor fuel tax was paid by Gasoline Marketers was purchased from Sun Company in Newark, New Jersey. New Jersey motor fuel tax was paid on such purchases. Consequently, when Gasoline Marketers resold the New Jersey tax paid gasoline to petitioner, the tax paid by Mira Oil to Gasoline Marketers for such Sun Company gasoline was apparently treated by Gasoline Marketers as New Jersey motor fuel tax.

Nevertheless, petitioner contends that the New York State motor fuel tax was paid to Gasoline Marketers, a motor fuel distributor registered and licensed by New York State, to be paid over to New York State, and that its payment to Gasoline Marketers relieves it of further liabilities for New York motor fuel taxes. Petitioner argues that Gasoline Marketers is an agent of the State of

New York and its payment to Gasoline Marketers is equivalent to payment to the principal, the State of New York.

9. Petitioner prepared three subpoenas in an attempt to compel the presence at the hearing herein of the auditors who performed the audit at issue and to obtain tax records concerning Gasoline Marketers. Petitioner contends that the Commission should enforce the subpoenas since according to petitioner's representative, "We are unable to defend this action without that information".

10. Petitioner acted in good faith and did not intentionally fail to pay New York motor fuel tax. It relied on an understanding it had with one of its suppliers, Gasoline Marketers. However, there is no evidence in the record concerning what steps petitioner has taken to seek recourse from Gasoline Marketers, who it believed remitted New York motor fuel tax to the State of New York on purchases of gasoline which had a final destination in New York.

11. Petitioner in its brief contends that the Audit Division is bound by its answer to the petition wherein it admitted that petitioner paid New York motor fuel tax on all of its purchases of gasoline from Gasoline Marketers.

CONCLUSIONS OF LAW

A. That while the Audit Division admitted in its answer the allegation by petitioner that it paid New York motor fuel tax in full on gasoline purchased from Gasoline Marketers, it is clear that it was merely an oversight that the Audit Division failed to deny such allegation. This allegation is the central issue in this matter, and the fact that the Audit Division went forward with the hearing herein demonstrates that its intent was to deny such allegation in its pleading. Furthermore, petitioner was completely aware of the Audit Division's arguments and was not prejudiced by the Audit Division's failure to deny such allegation. Therefore, the allegation by petitioner that it paid New

York motor fuel tax on all its purchases from Gasoline Marketers is deemed to have been denied by the Audit Division's answer. Matter of Robert Dickinson, State Tax Commission, July 15, 1983.

B. That pursuant to C.P.L.R. §2308(b), petitioner should have sought enforcement of its subpoenas in the Supreme Court since it is not within the jurisdiction of this Commission to enforce subpoenas.

C. That Article 12-A of the Tax Law imposes an excise tax upon motor fuel sold within New York by a distributor. Tax Law §282.1 defines "distributor", in part, as follows:

"(A)ny person, firm, association or corporation, who or which imports or causes to be imported into the state, for use, distribution or sale within the state, any motor fuel..."

Tax Law §282.5 defines "sale" as follows:

"'Sale' shall include, in addition to its normal meaning, the transfer of fuel by a distributor into a motor vehicle or into a receptacle from which fuel is supplied by him or it to his or its own or other motor vehicles."

Therefore, since the petitioner caused the importation into New York of the gasoline it purchased from Gasoline Marketers (by its hiring and payment of a common carrier to transport such gasoline from New Jersey to New York), it is a distributor for purposes of the motor fuel tax and is liable for the New York motor fuel tax which was never paid by Gasoline Marketers as noted in Finding of Fact "2", supra. Matter of Certified Heating Oil, Inc., State Tax Commission, February 26, 1975.

However, as noted in Finding of Fact "2", supra, the record provides an adequate basis for concluding that New York motor fuel tax was not remitted by Gasoline Marketers on only 48,867 gallons for December, 1977. Therefore, the Audit Division is directed to recalculate its determination of motor fuel tax due for such period.

D. That Gasoline Marketers was not an agent of the State of New York. The fact that it was registered and licensed as a distributor of motor fuel by the State of New York does not transform it into an agent of the State. Therefore, petitioner's payment to Gasoline Marketers of motor fuel tax, which it contends was New York motor fuel tax since the fuel was for export to New York, does not relieve it of the tax liability at issue.


E. That pursuant to Tax Law §289-b, penalties are cancelled since petitioner's failure to pay New York motor fuel tax on all of its purchases of gasoline from Gasoline Marketers was excusable since it reasonably assumed, although incorrectly, that the tax it paid on such purchases was New York tax and not New Jersey tax.

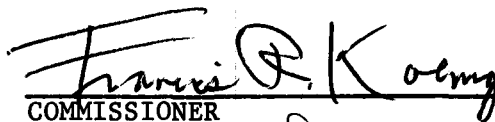
F. That the petition of Mira Oil Company is granted to the extent noted in Conclusions of Law "C" and "E", supra, but in all other respects is denied.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 20 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

