

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Petroleum Sales & Service, Inc. :  
for Redetermination of a Deficiency or for Refund :  
of Motor Fuel and Diesel Motor Fuel Taxes under :  
Article 12-A of the Tax Law for the Periods 1/73 :  
- 12/75 & 6/73 - 4/76. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

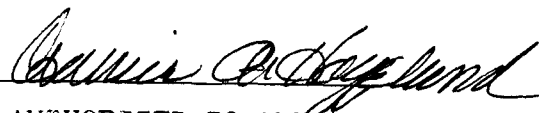
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 3rd day of December, 1982, he served the within notice of Decision by certified mail upon Petroleum Sales & Service, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Petroleum Sales & Service, Inc.  
300 Ohio St.  
Buffalo, NY 14204

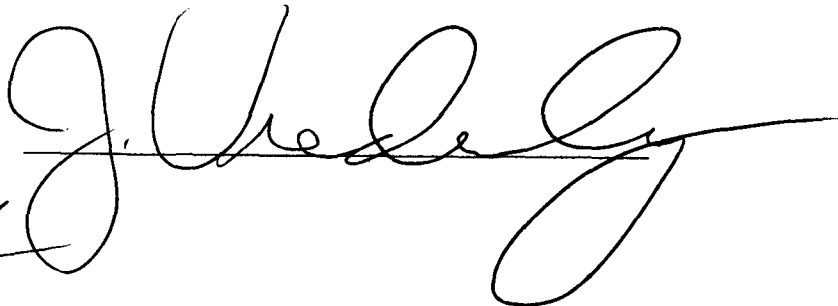
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
3rd day of December, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW



STATE OF NEW YORK

STATE TAX COMMISSION

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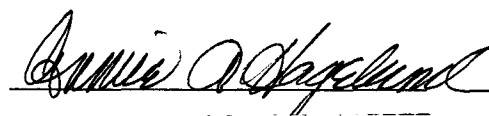
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 3rd day of December, 1982, he served the within notice of Decision by certified mail upon Donald J. Egan the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

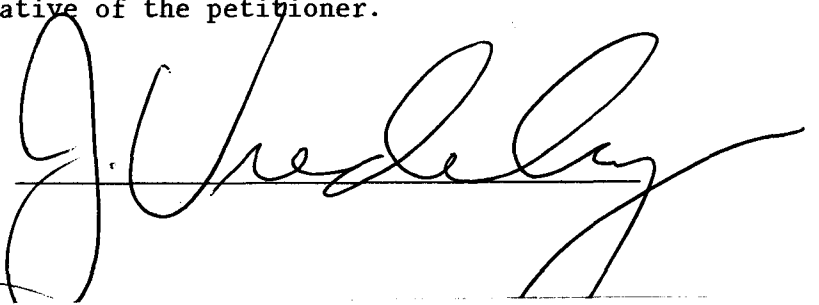
Donald J. Egan  
Magavern, Magavern, Lowe, Beilewech & Dopkins  
20 Cathedral Pk.  
Buffalo, NY 14202

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  
3rd day of December, 1982.





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

December 3, 1982

Petroleum Sales & Service, Inc.  
300 Ohio St.  
Buffalo, NY 14204

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Donald J. Egan  
Magavern, Magavern, Lowe, Beilewech & Dopkins  
20 Cathedral Pk.  
Buffalo, NY 14202  
Taxing Bureau's Representative

## STATE TAX COMMISSION

A formal hearing was held before Alan R. Golkin, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on September 20, 1978 at 9:00 A.M. Petitioner appeared by Magavern, Magavern, Lowe, Beilewech & Dopkins, Esqs. (George Rich, Esq. and Donald J. Egan, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Barry Bresler, Esq., of counsel).

## ISSUES

I. Whether petitioner maintained adequate records of the number of gallons of diesel motor fuel sold, and reported and paid the proper amount of fuel taxes due thereon for the period June, 1973 through April, 1976.

II. Whether petitioner was entitled to deduct from its computation of motor fuel sold and subject to tax under Article 12-A, gallons lost by evaporation, spillage and temperature changes.

FINDINGS OF FACT

1. Petitioner, Petroleum Sales and Service, Inc. ("Petroleum Sales"), is a New York corporation engaged in the distribution and sale of petroleum products. It is a licensed distributor of motor fuel to retail stations and in addition, operates a truck stop at which it makes retail sales of diesel fuel.
2. Petitioner timely filed New York State returns for motor fuel taxes and diesel motor fuel taxes on its sales of such fuels for the periods involved.
3. As the result of a field audit of petitioner's business, the Audit Division issued the following documents to petitioner:
  - a. A Ten Day Notice to File a Corrected or Sufficient Return of Tax Due under the Diesel Fuel Tax Law, under date June 22, 1976, showing additional tax due in the amount of \$13,248.90, plus penalty and interest of \$2,914.76, for a total due of \$16,163.66 for the period June, 1973 through April, 1976; a Notice of Determination of Tax Due under the Diesel Fuel Tax Law, under date August 24, 1976, assessing against petitioner the amounts due as claimed in the Ten Day Notice;
  - b. A Ten Day Notice to File a Corrected or Sufficient Return of Tax Due under the Motor Fuel Tax Law, under date June 22, 1976, claiming additional taxes due in the amount of \$40,367.16, plus penalty and interest of \$10,697.30, for a total of \$51,064.46 for the period January, 1973 through December, 1975; and a Notice of Determination of Tax Due under the Motor Fuel Tax Law, under date August 17, 1976, assessing against petitioner the amounts due as claimed in the Ten Day Notice.
4. Petitioner paid the aforesaid amounts under protest and thereafter filed petitions for redetermination of the deficiencies.
5. Petitioner sells diesel motor fuel through its retail truck stop in Buffalo. Each pump at the stop has four separate, key-controlled meters, which restrict access to the pumps, and a master totalizer. In addition, every pump has a ticket printer which supplies a record of each individual sale, in the amount of gallons as recorded on the key-controlled meter. At the time of a sale, one portion of the ticket is given to the customer and one portion is

retained by the attendant. At the close of the attendant's shift, he transmits his accumulated tickets to the bookkeeping office. Said office checks the tickets against the cash receipts and enters in the sales journal the total number of gallons sold on that day. Petroleum Sales prepared its tax returns for motor fuel taxes and diesel motor fuel taxes from these sales journals.

6. At the request of the Tax Commission, petitioner kept monthly master totalizer meter readings but abandoned this system after seven months, since it found the system to be less accurate than the key-controlled system, above described. Because petitioner is located in a highly industrialized area near Lake Erie, dirt particles and/or ice from time to time become lodged between the wheels of the master totalizer, causing erroneous readings. If the same problem occurred in one of the key-controlled meters, it would be more readily detected: by the customer who is paying for the gallonage, by the attendant or by the bookkeeping office pursuant to its cross-check of tickets and cash receipts.

7. During the audit conducted of Petroleum Sales, the auditor examined sales journals for the entire period and the master totalizer meter readings for the seven months for which they were available (October, 1975 through April, 1976). The auditor calculated an error factor of 2.618 percent by comparing master totalizer readings, which he accepted as accurate, to reported taxable sales. The auditor then applied the error factor to the entire three year audit period. The auditor also found errors in the sales journal amounting to \$1,546.40 in additional tax due.

8. Petitioner purchases motor fuel at refineries and takes delivery thereof in its trucks. Petitioner's purchases are metered by the refineries, and a receipt indicating the gallonage of each purchase is given to the driver.

Petitioner then transports the fuel to various retailers, where it unloads said fuel into storage tanks, metering the fuel as it flows from the truck to the retailer's tank. After the fuel is metered out, a ticket is printed, showing the number of gallons dropped off.

9. Petitioner's reported purchases of motor fuel from the refineries exceeded petitioner's reported sales by 313,868 gallons during the period in question. This missing motor fuel was reported on petitioner's tax returns as losses caused by, among other things, spillage, evaporation and contraction of volume. On audit, the Audit Division disallowed said losses and claimed additional taxes due of \$24,151.36.

10. The audit also revealed the following:

- a. Purchases of 58,349 gallons from Atlantic Richfield in September, 1973 were not reported.
- b. Purchases of 31,200 gallons from Evans Oil in October, 1973 were not reported.
- c. Sales to registered distributors in January, 1975 were overstated by 100,000 gallons.
- d. Taxable sales of 100 gallons were understated in December, 1973.
- e. The tax return for June, 1974 was overpaid by \$3.00.

These discrepancies resulted in additional taxes of \$15,168.92.

#### CONCLUSIONS OF LAW

A. That petitioner maintained adequate records and reports, as well as an acceptable system of recording and reporting its sales of gallonages of diesel motor fuel for the period June, 1973 through April, 1976, in accordance with section 286 of the Tax Law. The method utilized by the Audit Division to compute the additional taxes alleged to be due relied upon readings of the master totalizer which, according to the testimony, occasionally malfunctioned

and was not subject to the same cross-checks as was the key-controlled system. The application of a test period to the entire period under audit is an accepted method for computation of tax liability, but where, as here, petitioner's recording method was demonstrated to be more accurate, petitioner's records must be deemed to accurately reflect its purchases and sales (except for easily identifiable clerical errors and rare mistakes, see Conclusion of Law "B", infra).

B. That petitioner offered no proof with regard to sales journal errors amounting to \$1,546.40 and that this amount of tax is due.

C. That petitioner is a distributor of motor fuels as defined in section 282.1 of the Tax Law.

D. That petitioner made its sales of motor fuels subject to excise tax under sections 284 and 284-a of the Tax Law when it pumped motor fuels through the meters of its trucks into the underground storage tanks of its customers who operated retail gas stations from which the motor fuel was dispensed to the motoring public of this state. Tax Law section 282.5; Evans v. Gallman, 48 A.D.2d 466 (3d Dept.).

E. That petitioner attributed its losses of 313,868 gallons of motor fuel to spillage, evaporation and contraction of volume but offered no proof that the losses were caused in these ways, and not in other ways such as unaccounted-for sales, loss of tickets or errors in record-keeping.

F. That because the burden of proof that sales are exempt rests solely on petitioner, it must be presumed that any unaccounted-for purchases must have been sold as taxable.

G. That the petition of Petroleum Sales and Service, Inc. is granted to the extent indicated in Conclusion of Law "A"; that the Notices of Determination



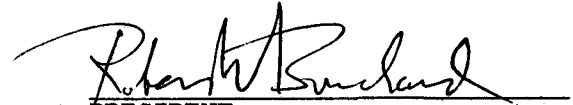
issued August 17 and 24, 1976 are to be modified accordingly; and that except as so modified, the determinations are in all other respects sustained.

DATED: Albany, New York

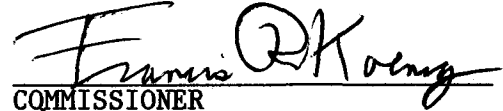
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STATE TAX COMMISSION

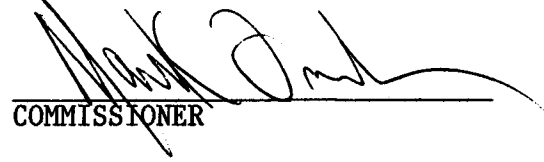
ACTING PRESIDENT

A handwritten signature in dark ink, appearing to read "Robert W. Burchard", written over a horizontal line.

COMMISSIONER

A handwritten signature in dark ink, appearing to read "Francis Q. Koenig", written over a horizontal line.

COMMISSIONER

A handwritten signature in dark ink, appearing to read "Mark J. [unclear]", written over a horizontal line.