

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
	:	
of	:	
	:	
AQUA GULF CORPORATION	:	DETERMINATION
	:	
for Review of a Denial of a Claim	:	
for Refund of Fuel Use Taxes under	:	
Subdivision 3 of Section 503-a of the	:	
Highway Use Tax Law Article 21 of the	:	
Tax Law for the Periods January 1, 1969	:	
through September 30, 1970.	:	

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Aqua Gulf Corporation, 84 Bloomfield Avenue, Staten Island, New York 10314, filed an application under subdivision 3 of section 503-a of Article 21 of the Tax Law for review of a determination denying a claim for refund of fuel use taxes under section 503-a of Article 21 of the Tax Law for the periods January 1, 1969 through September 30, 1970. (File No. 01869). The amount of refund or credit claimed is \$2,662.11.

A formal hearing was held on May 23, 1974, at 9:15 A.M., at the offices of the State Tax Commission, Two World Trade Center, New York, New York, before Nigel G. Wright, Hearing Officer. The applicant appeared by Joseph Lempel CPA, of Lennox, Lempel, Rogal & Nasser. The Miscellaneous Tax Bureau appeared by Saul Heckelman, Esq. (Solomon Sies, Esq. of counsel).

The record of said hearing has been duly examined and considered.

ISSUE

Whether a refund can now be granted to applicant for amounts paid under the diesel fuel tax on fuel concededly used out-of-state when both the diesel fuel tax and the claim for refund herein were made beyond the one-year limitation period provided in section 503-a subdivision 3 of Article 21 of the Tax Law.

FINDINGS OF FACT

1. Applicant, Aqua Gulf Corporation, entered the trucking business in New York State in 1966. It uses diesel fuel. At that time, applicant purchased its fuel at the pumps of various retail motor fuel stations in both New York and other states. All such fuel purchased in New York was thus tax-paid for the fuel taxes under Article 12-A of the Tax Law.

2. Sometime in January, 1969, applicant purchased its own fuel storage tanks and began to purchase fuel directly from fuel distributors. Applicant, did not, however, begin to file returns for diesel fuel tax under Article 12-A on the correct form MT-104.

3. During the periods January 1, 1969 through September 30, 1971, the applicant had purchased 175,795 gallons of diesel fuel tax free, and used 11,352 gallons for uses which are not taxable and which are not involved in the issues herein. The remaining 164,443 gallons should, it is now conceded, have been reported as taxable under the diesel fuel tax. The amount of \$1,086.21 was

paid to the State which, at nine cents a gallon, would represent 1,207 gallons. This amount was paid on the wrong forms, but applicant has received credit for it. The remaining fuel was not reported on any timely filed return. During the periods January 1, 1969 through September 30, 1970, the periods here in issue, the applicant used 23,166 gallons of fuel outside of New York State. Under prescribed procedures, a refund may have been due to applicant under the Fuel Use Tax of section 503-a of the Tax Law on some of this fuel.

4. An audit of applicant was commenced sometime prior to October, 1971. The Miscellaneous Tax Bureau notified applicant on December 7, 1971 by a "ten-day notice" to file returns for diesel fuel taxes under Article 12-A of the Tax Law for the four quarters of 1969, the four quarters of 1970 and the first three quarters of 1971. This computed a diesel fuel tax on 164,443 gallons at nine cents a gallon for the sum of \$14,799.87. It added a delinquency penalty of \$2,866.82 for a total tax due of \$17,666.69. A credit was given for the taxes paid on the fuel use tax return of \$1,086.21 leaving a net amount due of \$16,580.48. The applicant paid the amounts stated on the ten-day notice to be due by payments beginning on January 18, 1972 and thus, by terms of such notice, a proper diesel tax return was deemed to be filed

on that date. Such taxes were paid under protest and under the duress of a danger of not receiving plates for the truck mileage tax imposed by Article 21 of the Tax Law.

5. On or about October 27, 1971, applicant filed a claim for refund of fuel use taxes for the periods January 1, 1969 through September 30, 1970, in the amount of \$2,662.11 on 23,166 gallons of fuel. This claim was filed on advice of a tax examiner for the Department. On or about November 5, 1971, the claim was rejected on the grounds that the credits which were claimed had accrued prior to one year from the filing of the claim and were, therefore, time-barred under section 503-a subdivision 3 of the Tax Law as of October 1, 1971 at the latest. By letter dated January 26, 1972, the Miscellaneous Tax Bureau restated its rejection of these claims for refund.

6. Also on or about October 27, 1971, applicant filed a claim for refund for the period October 1, 1970 through September 30, 1971. This was originally rejected but was finally allowed in the amount of \$2,342.60, and is not now contested.

7. On January 18, 1972, the applicant filed a request for a hearing to review the denial of its claim for refund for fuel used outside of New York State.

CONCLUSIONS OF LAW

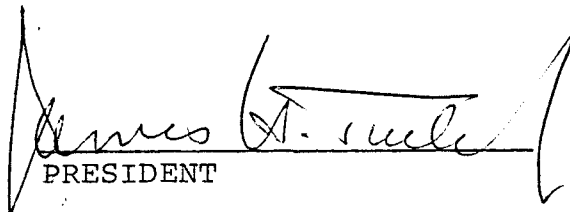
A. That the applicant, Aqua Gulf Corporation, failed to file its claim for refund of excess credits within the one year statutory time period as provided in section 503-a(3) of the Tax Law and 20 NYCRR 493.3(a) and, therefore, said claim for refund is barred by the statute of limitations.

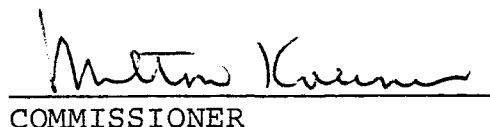
B. That the application of Aqua Gulf Corporation is denied.

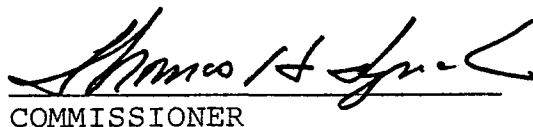
DATED: Albany, New York

June 7, 1977

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER