

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
O'Connell Oil Company : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Fuel Use Tax under :
Article 21 of the Tax Law for the Period :
7/79 - 3/82.

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 5th day of October, 1984, he served the within notice of Decision by certified mail upon O'Connell Oil Company the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

O'Connell Oil Company
ATTN: David Wesley
545 Merrill Rd.
Pittsfield, MA 01201

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
5th day of October, 1984.

David Parchuck

William J. Haggard
Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

O'Connell Oil Company
ATTN: David Wesley
545 Merrill Rd.
Pittsfield, MA 01201

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) 510 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 30 days 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
O'CONNELL OIL COMPANY	:	DECISION
	:	
for a Hearing to Review a Determination of Fuel	:	
Use Tax under Article 21 of the Tax Law for the	:	
Period July 1979 through March 1982.	:	

Petitioner, O'Connell Oil Company, 545 Merrill Road, Pittsfield, Massachusetts 01201, filed a petition for a hearing to review a determination of fuel use tax under Article 21 of the Tax Law for the period July 1979 through March 1982 (File No. 40948).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building No. 9, State Office Campus, Albany, New York on March 12, 1984 at 1:15 P.M., with all documents to be submitted by April 9, 1984. Petitioner appeared by David V. Wesley, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner has substantiated the payment of tax on a certain purchase of diesel fuel oil for use in its vehicles, thus entitling petitioner to utilize such tax paid as a credit under Tax Law section 503-a(3) against fuel use tax due.

FINDINGS OF FACT

1. On June 24, 1982, following a field audit, the Audit Division issued to petitioner, O'Connell Oil Company, a Proposed Audit Adjustment of Tax Due under Article 21 of the Tax Law, indicating additional fuel use tax due in the

amount of \$1,012.43 for the period July 1979 through March 1982, plus interest. On November 10, 1982, the Audit Division issued to petitioner an Assessment of Unpaid Fuel Use Tax for the noted period in the amount of \$1,012.43, plus interest.

2. The above assessment of fuel use tax arises from the Audit Division's disallowance of petitioner's claims for credit against such tax under Tax Law section 503-a(3) in the amounts of \$722.83 and \$289.60, for the quarters ended September 30, 1979 and December 31, 1979, respectively. The disallowance of claimed credit is premised upon the assertion that petitioner was unable to substantiate the payment of tax on certain diesel fuel oil it used in its vehicles on New York public highways. It is the alleged payment of tax which gave rise to the noted credits claimed by petitioner.

3. Petitioner is a fuel oil dealer who operated motor vehicles on the public highways of New York during the period in question, and it is not disputed that petitioner is subject to the imposition of tax under Article 21 of the Tax Law based on the fuel it used in such operation. The instant matter does not question the amount of mileage travelled or the amount of tax reported as due by petitioner, each of which was found on audit to have been correctly reported by petitioner, but rather questions whether petitioner actually paid the tax upon which the disallowed credit was claimed.

4. The claimed credit arises from the alleged payment by petitioner of tax due on one tanker load (7,500 gallons) of number 2 fuel oil purchased in Rensselaer, New York during July 1979 and held in petitioner's yard tank (at its Pittsfield, Massachusetts location) for use as diesel fuel in its vehicles. More specifically, petitioner allegedly picked up the oil, consigned to McEnaney Oil Corporation ("McEnaney"), at Amoco's Rensselaer, New York terminal, was

billed by and paid Amoco for the oil and was billed by and paid McEnaney for the tax.

5. Petitioner had, prior to the purchase in question, purchased diesel fuel from McEnaney for use in its vehicles. Copies of checks, invoices and vouchers pertaining to three such prior purchases were offered in evidence, covering September and December of 1978 and February of 1979. These documents reflect, in each instance, that the payments for the fuel (at specified rates per gallon) and all taxes were made directly to McEnaney. The invoices reflect the breakdown of separate amounts paid for the fuel and for excise taxes [federal and New York State] and New York sales tax.

6. With respect to the purchase and payment in question, petitioner produced the following:

- a. a cancelled check dated July 31, 1979 payable to McEnaney in the amount of \$1,186.50;
- b. voucher number 7-091 dated July 24, 1979 reflecting the amount of \$1,186.50 payable to McEnaney;
- c. a cancelled check dated January 14, 1980 payable to Amoco in the amount of \$4,620.22, together with a voucher with the same date and amount reflected as payable to Amoco, with the notation handwritten on its face, "Bill and Inv. sent to McEnaney instead of us -- they never paid", and with the notation "refer to VR 7-091" (the above voucher to McEnaney);
- d. a bill of lading from Amoco reflecting 7,500 gallons of diesel oil sold on July 23, 1979 at a sale price of \$4,620.22, with McEnaney as the original consignee crossed out and petitioner's name written in.¹

7. There is no computation, separate statement or apparent inclusion of taxes in the amount computed as due per Amoco's bill of lading or on the payment by petitioner to Amoco.

¹ The selling price is computed per the bill of lading as 7,464 net gallons at .619 per gallon.

8. Petitioner asserts that the only time it bought fuel from McEnaney was for use in its vehicles and that such purchases were made to enable payment of tax on the wholesale price from the distributor (rather than payment of tax based on the average retail price). Petitioner maintains that the billing became confused in some manner, as is evidenced by payment to Amoco for the fuel not occurring until January 15, 1980, approximately six months after the July 23, 1979 sale date. Petitioner could advance no explanation as to why the apparent billing mix up occurred or why the entire billing (oil plus tax) was split and was not paid entirely to either McEnaney, as with the prior purchases, or to Amoco.

9. The check payable to McEnaney for \$1,186.50, together with its accompanying voucher, bears no indication that the payment was for taxes, nor was there any evidence presented as to how this dollar amount was computed. This voucher to McEnaney reflects posting to account number 502, while the voucher payable to Amoco reflects posting to account number 501. The three other vouchers submitted by petitioner reflect postings to account number 502 for the entire amount except for the February voucher which is posted to account number 608.

10. Petitioner noted that attempts to obtain an invoice from McEnaney have proven futile, and attribute this to the fact that McEnaney is no longer in business.

CONCLUSIONS OF LAW

A. That petitioner, in seeking a credit based upon taxes paid, as made available by subdivision 3 of section 503-a of the Tax Law must, pursuant to said subdivision, furnish proof that the tax has been paid. Specifically,

"...[e]ach carrier claiming such credit components shall furnish to the tax commission such evidence of payment of such taxes as it may require."

B. That 20 NYCRR 493.3 provides as follows:

"493.3 Fuel purchases and invoices. [Tax Law §507] (a) Fuel purchases shall be evidenced by the original invoice of such purchases, except that charge purchases including credit card purchases, shall be evidenced by duplicate invoices in the name of the person filing the fuel use tax return, together with an original periodic statement of purchases.

(b) Such invoices shall show the name and address of the vendor, name and address of purchaser or licensee, identification of the power unit of the vehicle by company unit number or by state and number of motor vehicle registration, name of product, retail price of each gallon of the product, state of purchase, Federal, State and local excise and sales tax charged, number of gallons, date of sale and signature of purchaser. Invoices for sales made out to 'cash' will not be accepted."

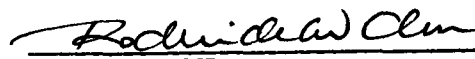
C. That petitioner has not proven that tax was paid, either to McEnaney or otherwise, on the load of fuel at issue. The documentary evidence submitted does not establish the payment of tax nor was there any testimony regarding the issue of payment by anyone involved with the transaction at the time of its occurrence.

D. That the petition of O'Connell Oil Company is hereby denied and the Assessment of Unpaid Fuel Use Tax dated November 10, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984


COMMISSIONER


COMMISSIONER


COMMISSIONER