

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
O'Driscoll, James :
d/b/a Fleet Fuel Service Co. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Sales & Use Tax :
under Article 28 & 29 of the Tax Law :
for the Period 8/1/65 - 2/28/73. :

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 2nd day of January, 1980, he served the within notice of Determination by mail upon O'Driscoll, James, d/b/a Fleet Fuel Service Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

O'Driscoll, James
d/b/a Fleet Fuel Service Co.
Ninham Rd., RFD #3
Carmel, NY 10512

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
2nd day of January, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
O'Driscoll, James :
d/b/a Fleet Fuel Service Co. : AFFIDAVIT OF MAILING
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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 2nd day of January, 1980, he served the within notice of Determination by mail upon Gertrude Belvedere the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ms. Gertrude Belvedere
Woodland Terrace, Seven Hills Lake
Carmel, NY 10512

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
2nd day of January, 1980.

Joanne Knapp

J. Vredenburg

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

January 2, 1980

O'Driscoll, James
d/b/a Fleet Fuel Service Co.
Ninham Rd., RFD #3
Carmel, NY 10512

Dear Mr. O'Driscoll:

Please take notice of the Determination of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Gertrude Belvedere
Woodland Terrace, Seven Hills Lake
Carmel, NY 10512
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
JAMES O'DRISCOLL d/b/a/ FLEET FUEL SERVICE CO.	:	DETERMINATION
	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period August 1, 1965 through February 28, 1973.	:	

Applicant, James O'Driscoll, d/b/a Fleet Fuel Service Co., Ninham Road, RFD #3, Carmel, New York 10512, filed an application for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period August 1, 1965 through February 28, 1973 (File No. 01457).

A formal hearing was held before Neil Fabricant, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 23, 1977 at 1:15 P.M. Applicant appeared by Gertrude Belvedere, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUES

I. Whether sales of gasoline and diesel fuel by applicant were nontaxable sales by reason of Federal control.

II. Whether applicant's sales of diesel fuel to fishing party boats were tax exempt under the provisions of section 1115(a)(8) of the Tax Law, as sales to commercial vessels engaged in interstate or foreign commerce.

FINDINGS OF FACT

1. On May 17, 1973, as the result of an audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant, James O'Driscoll d/b/a Fleet Fuel Service Co. The Notice assessed a tax due of \$36,640.66, plus penalty and interest of \$16,994.02, for a total due of \$53,634.68 for the period August 1, 1965 through February 28, 1973.

2. Applicant timely filed on July 2, 1973 an application for a hearing to review the aforementioned determination.

3. During the period under review, applicant operated a retail motor fuel business selling gasoline and diesel fuel for use in vessels. Applicant's business activities were carried on aboard a floating barge in Sheepshead Bay, New York and aboard the vessel the "Oil King."

4. Applicant's sales were comprised mostly of sales of diesel fuel to operators of fishing party boats that were moored in Sheepshead Bay. The fishing party boats were operated for the purpose of securing paying passengers for fishing trips. In the course of the fishing trips, these boats frequently passed nearer to the New Jersey shore than to the New York shore, and usually travelled to fishing locations in waters further than three miles from the New York coastline. The vessels did not land at any New Jersey or foreign port but returned to Sheepshead Bay upon completion of their voyages.

5. Applicant made additional sales of diesel fuel to the Day Line, Inc., the Circle Line Statute of Liberty Ferry, Inc. and the Circle Line Sightseeing Yachts, Inc. Exemption certificates were received which covered these sales.

6. Applicant's sales of gasoline were made to comparably situated vessels and smaller, privately-owned vessels. All sales were made from pumps situated on the floating barge in Sheepshead Bay. Sales tax was collected, reported and remitted on the sales that were made to privately-used boats.

7. On audit, the Sales Tax Bureau's auditor was unable to secure for examination all the books and records of applicant for during the course of his review Mr. James O'Driscoll became ill and required hospitalization. Using available records, the gross sales of applicant was estimated. In the auditor's determination of taxable sales, there was no allowance for the sales to the tour lines furnishing exemption documents. Credit was allowed against the tax determined due for the payments that were made with the returns filed for the period August 1, 1965 through November 30, 1968.

8. Applicant's vessel the "Oil King" was self-propelled and was capable of carrying just over 20,000 gallons of motor fuel. The vessel was the sole mode for the distribution of diesel fuel, although applicant also used the boat to obtain from depots in New Jersey all the motor fuel that was sold.

9. The "Oil King" was licensed and operated under the rules and regulations of the United States Coast Guard as were the fishing party boats that applicant serviced.

10. The waters where applicant's sales were made were navigable waters within the territorial boundaries of New York that came under Federal maritime jurisdiction.

CONCLUSIONS OF LAW

A. That sales of gasoline and diesel fuel by applicant on navigable waters within the territorial boundaries of New York are subject to the sales tax imposed by section 1105(a) of the Tax Law.

B. That applicant's sales of diesel fuel to fishing party boats are not exempt sales as said boats are not "commercial vessels primarily engaged in interstate or foreign commerce" within the meaning and intent of section 1115(a) (8) of the Tax Law.

C. That sales of diesel fuel by applicant to the Day Line, Inc., the Circle Line Statute of Liberty Ferry, Inc. and the Circle Line Sightseeing Yachts, Inc. are excluded from sales tax by reason of the acceptance of a properly completed exemption certificate.

D. That the application of James O'Driscoll d/b/a Fleet Fuel Service Co. is granted to the extent set forth in "Conclusion of Law "C"; that the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 17, 1973, and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

JAN 2 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER