

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Burgess Oil Corp.

:

:

: 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 12/1/74 - 11/30/76.

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 26th day of June, 1981, he served the within notice of by mail upon Burgess Oil Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Burgess Oil Corp.
Allen L. Brady, Pres.
Leland Ave., P.O. Box 124
Utica, NY 13503

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
26th day of June, 1981.

Ernie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Burgess Oil Corp. :

: 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 12/1/74 - 11/30/76.

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 26th day of June, 1981, he served the within notice of by mail upon Miller F. Morgan the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Miller F. Morgan
307 State St.
Carthage, NY 13619

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
26th day of June, 1981.

Emmie A. Hagellund

J. Vredenburg

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

June 26, 1981

Burgess Oil Corp.
Allen L. Brady, Pres.
Leland Ave., P.O. Box 124
Utica, NY 13503

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 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 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
Miller F. Morgan
307 State St.
Carthage, NY 13619
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BURGESS OIL CORPORATION	:	DECISION
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 December 1, 1974 through	:	
November 30, 1976.	:	

Petitioner, Burgess Oil Corporation, Leland Avenue, P.O. Box 124, Utica, New York 13503, filed a petition 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 December 1, 1974 through November 30, 1976 (File No. 19404).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on July 22, 1980 at 9:15 A.M. Petitioner appeared by Miller F. Moran, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether fuel oil consumed by petitioner in heating oils for the purpose of delivery is exempt from the sales and use tax under section 1115(c) of the Tax Law.

II. Whether fuel oil consumed by petitioner for the purpose of heating and blending other oils for sale is exempt from the sales and use tax under section 1115(c) of the Tax Law.

FINDINGS OF FACT

1. On May 2, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Burgess Oil Corporation for the period December 1, 1974 through November 30, 1976. The Notice was issued as a result of an unagreed portion of a field audit asserting tax due of \$1,518.17 plus penalties and interest.

2. Petitioner operated a storage terminal selling Texaco oil products on consignment. Various oil products were received in a heated state and stored in petitioner's unheated storage tanks. Upon removal of #6 fuel oil from its storage tanks, petitioner heated the oil (using #4 fuel oil) since atmospheric temperature would cause it to solidify when cold. Petitioner sold #6 fuel oil in its delivered grade and also used it to blend with #2 fuel oil in various proportions to produce grades #4 and #5 fuel oil.

3. On audit, it was the Audit Division's position that the #4 blended oil used by petitioner in heating #6 fuel oil upon removal from its storage tanks for the purpose of delivery to its customers was subject to the sales and use tax. The Audit Division also determined that the petitioner did not maintain records to show the amount of #4 fuel oil used to heat the #6 oil for the purposes of producing other grades of oil. The Audit Division thereby asserted tax due of \$1,518.17 on all #4 fuel oil used by the petitioner based on the petitioner's cost.

4. It was the petitioner's position that the #4 oil used to heat other oils whether used for purposes of blending or for purposes of delivering such oil should be exempt from tax. It contended that oil grades #4, #5 and #6 had to be reheated to a temperature of up to 120° to be a saleable product.

5. Petitioner offered no substantiation as to the quantity or value of #4 oil used for heating in the blending operation.

6. Petitioner acted in good faith at all times.

CONCLUSIONS OF LAW

A. That section 1115(c) of the Tax Law exempts from tax imposed by section 1105(a) and 1110 fuel used or consumed directly and exclusively in the production of tangible personal property for sale by processing.

B. That the use of #4 fuel oil by petitioner to reheat #6 fuel oil for transport to its customers is not processing within the meaning and intent of section 1115(c) of the Tax Law. That the #6 fuel oil was in marketable form upon its receipt by petitioner in a heated state, and the reheating of same does not result in any change in character of the oil.

C. That section 1110(B) of the Tax Law imposes a use tax for the use within this state of any tangible personal property processed by the user, if items of the same kind of tangible personal property are offered for sale by him in the regular course of business. For purposes of said section, the tax shall be at the rate of four percent of the price at which items of the same kind are offered for sale by the user. The fuel used by petitioner solely for heating other oils is subject to tax in accordance with section 1110(B); however, for the periods involved herein, the tax shall be limited to that amount determined by the Audit Division.

D. That the use of #4 fuel oil by petitioner directly and exclusively in its blending operation to produce other grades of oil is exempt under the provisions of section 1115(c) of the Tax Law as processing.

E. That in the absence of records substantiating the exempt use of fuel in production, the audit performed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law.

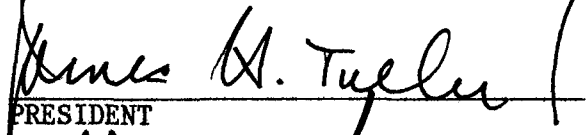
F. That the penalties and interest in excess of the minimum statutory rate are cancelled.

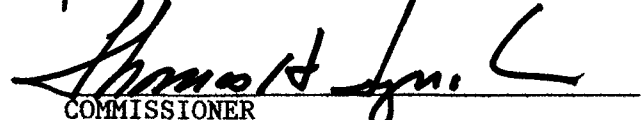
G. That the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 2, 1977 as noted in Conclusion "F" above; and that, except as so granted, the petition of Burgess Oil Corporation is in all other respects denied.

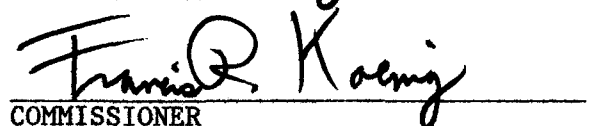
DATED: Albany, New York

JUN 26 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER