

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Port Fuel Oil Company :

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:  
3/1/73-5/31/76.

State of New York  
County of Albany

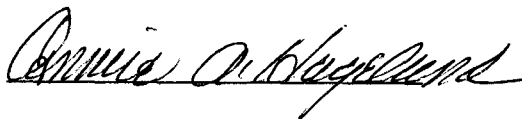
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 11th day of December, 1981, he served the within notice of Decision by certified mail upon Port Fuel Oil Company, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

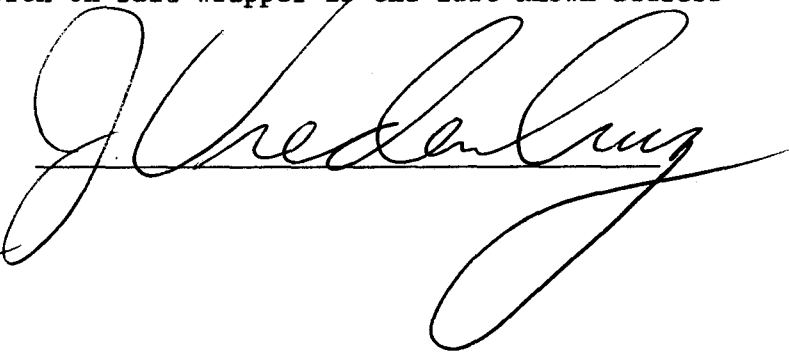
Port Fuel Oil Company  
1467 39th St.  
Brooklyn, NY 11218

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  
11th day of December, 1981.





STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Port Fuel Oil Company :  
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 3/1/73-5/31/76.

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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 11th day of December, 1981, he served the within notice of Decision by certified mail upon Joseph Koenig the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph Koenig  
2 W. 47th St., Rm. 1206  
New York, NY 10036

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  
11th day of December, 1981.

*Carrie A. Hegland*

*J. Vredenburg*

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

December 11, 1981

Port Fuel Oil Company  
1467 39th St.  
Brooklyn, NY 11218

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) 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  
Joseph Koenig  
2 W. 47th St., Rm. 1206  
New York, NY 10036  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
PORT FUEL OIL COMPANY : 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 March 1, 1973 :  
through February 28, 1977.

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Petitioner, Port Fuel Oil Company, 1467 - 39th Street, Brooklyn, New York, 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 March 1, 1973 through February 28, 1977 (File No. 27996).

A formal hearing was held before Gasper S. Fasullo, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 29, 1980 at 1:15 P.M. The petitioner appeared by Joseph Koenig, Accountant and Isidore L. Eichenthal, C.P.A. Thereafter, on October 28, 1980, Morris Turetsky, Esq. filed a post-hearing brief on behalf of the petitioner. The Audit Division appeared by Ralph Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

I. Whether the Audit Division's determination of additional sales and use taxes due from petitioner for the period March 1, 1973 through February 28, 1977 was correct.

II. Whether the tax assessment for the period March 1, 1973 to May 31, 1973 is barred by the Statute of Limitations because of late mailing of the Notice of Determination and Demand for Payment.

FINDINGS OF FACT

1. On June 18, 1976 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner for the period March 1, 1973 through May 31, 1976 in the estimated amount of \$616,689.28, plus penalty and interest of \$51,426.78, for a total of \$668,116.06.

2. The aforesaid document was issued after the petitioner failed on several occasions to make its books and records available for audit by the Audit Division, and after the petitioner failed to sign and return a Consent Extending the Period of Limitation for Assessment of Sales and Use Taxes (Form ST578) previously mailed to the petitioner.

3. The Audit Division in 1978 audited the books and records of the petitioner for the period March 1, 1973 through February 28, 1977. On March 13, 1978, a Notice of Assessment Review was issued wherein the amount of sales and use taxes due from the petitioner for the period March 1, 1973 to May 31, 1976 was revised and reduced to \$337,159.06, plus penalty and interest in the sum of \$174,491.50, for a total amount due of \$511,650.56. On March 15, 1978, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued for the period June 1, 1976 through February 28, 1977 in the amount of \$122,038.56, plus penalty and interest of \$40,665.55, for a total of \$162,704.11.

4. The petitioner contends the assessment for the period March 1, 1973 to May 31, 1973 is time barred in that the issuance of the Notice of Determination and Demand for Payment on June 18, 1976 was more than three years after the tax for that period became due.

5. At the hearing the petitioner failed to produce any of its books or records nor did it produce an independent audit for the period in issue. The petitioner relied solely upon the Audit Division's audit and the testimony

elicited from its (the Audit Division's) auditor on cross examination by petitioner's Certified Public Accountant.

6. When, during the course of the audit, the petitioner failed and or refused to furnish its books and records for the summer months of 1975 and 1976 for the purpose of verifying the petitioner's claimed non-taxable sales, the auditor disallowed all claimed non-taxable sales except for those that he had reviewed and accepted for the months of December 1975, January 1976 and February 1976. This resulted in from 90 percent to 95 percent of the non-taxable sales claimed by the petitioner to be disallowed by the Audit Division's auditor.

7. The parties are in agreement that the amount of purchases as set forth in petitioner's books is correct and that an increase by the Audit Division's auditor of \$107,480.00 in purchases for the year 1974 is erroneous.

#### CONCLUSIONS OF LAW

A. That the amount of purchases set forth in petitioner's books is correct and the increase by the Audit Division's auditor of \$107,480.00 in purchases for the year 1974 is erroneous. The petitioner should be given credit therefor and the tax thereon computed and deducted from the amount claimed by the Audit Division.

B. That petitioner's claim that the assessment for the period March 1, 1973 to May 31, 1973 is barred by the Statute of Limitations because the Notice of Determination and Demand was issued on June 18, 1976 has no merit and is disallowed. The return for said period was due on or before June 20, 1973 pursuant to section 1136(b) of the Tax Law.

Section 1147(b) of the Tax Law provides, in part, as follows:

"except in the case of a wilfully false or fraudulent return with the intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that

where no return has been filed as provided by law the tax may be assessed at any time. For the purpose of this subdivision, a return filed before the last day prescribed by law or regulation for the filing thereof or before the last day of any extension of time for the filing thereof shall be deemed to be filed on such last day".

Thus, the Audit Division had until June 20, 1976 to issue an assessment for said period.

C. That the Audit Division's auditor followed generally accepted audit procedures and tests consistent with the nature of the business operation to determine the petitioner's non-taxable and taxable sales. Since sufficient books and records were not made available to determine the exact amount of tax due, the audit was conducted in accordance with the meaning and intent of section 1138(a) of the Tax Law.

D. That petitioner has failed to sustain its burden of proof to show that the Audit Division erred in disallowing petitioner's non-taxable sales.

E. That petitioner has failed to sustain its burden of proof to show that the additional taxes due as determined by the Audit Division were incorrect.

F. That except for the credit to which the petitioner shall be entitled as set forth in Conclusion of Law "A" above, the petition of Port Fuel Oil Company is denied and the Notices of Determination and Demand for Payment of Sales and Use Taxes Due issued June 18, 1976 (revised March 13, 1978) and March 15, 1978 are sustained.

DATED: Albany, New York

DEC 11 1981

STATE TAX COMMISSION

*James H. Tuel*  
PRESIDENT

*Frank R. Koenig*  
COMMISSIONER

*Mark J. [illegible]*  
COMMISSIONER