

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

December 23, 1986

Casco Service Station, Inc.  
482 South Road  
Poughkeepsie, NY 12601

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 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 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  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Thomas E. Reilly  
Ziff, Weiermiller, Learned & Hayden  
301 William St., PO Box 1078  
Elmira, NY 14902

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

CASCO SERVICE STATION, INC.

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 September 1, 1982  
through June 30, 1984. :

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Petitioner, Casco Service Station, Inc., 482 South Road, Poughkeepsie, New York 12601, 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 September 1, 1982 through June 30, 1984 (File No. 61579).

On June 9, 1986, petitioner, by its duly authorized representatives, Ziff, Weiermiller, Learned & Hayden, Esqs. (Thomas E. Reilly, Esq., of counsel), waived a hearing and submitted its case for decision based on the entire file, including briefs to be filed by August 22, 1986. After due consideration, the Commission renders the following decision.

#### ISSUE

Whether the Audit Division's denial of petitioner's claim for refund of sales tax paid to its supplier of gasoline for the period in question was proper.

#### FINDINGS OF FACT

1. On or about September 12, 1984, petitioner, Casco Service Station, Inc., filed an Application for Credit or Refund of State and Local Sales or Use Taxes seeking a refund of sales tax allegedly overpaid in the amount of \$3,000.86 for the period in question.

2. Petitioner operates a retail service station located in Poughkeepsie, New York, selling petroleum products including, specifically, gasoline at retail. Petitioner, during the period in question, purchased gasoline from its supplier, Amerada Hess Corp., and paid sales tax on such purchases to Amerada Hess Corp. based on the regional average retail sales price for gasoline. Thereafter, petitioner sold the gasoline to its retail customers.

3. Attached to petitioner's refund application was a schedule for the months during the period at issue showing the gallons of gasoline purchased and the tax paid thereon to petitioner's supplier, as well as the gallons of gasoline sold and the amount of tax which would be due thereon (apparently computed on the basis of petitioner's actual retail selling price[s]) at the combined State (4%) plus Dutchess County (1½%) rate of tax.

4. The foregoing schedule indicates that for some months, petitioner's tax payments to the supplier exceeded the amount of tax which would be due as computed by petitioner on actual retail sales. However, for other months, payments to the supplier were less than the tax which would be due as computed on such actual retail sales. The \$3,000.86 refund sought by petitioner represents the net of the resulting differences per month (a net claimed overpayment) over the period in question.

5. By a letter dated October 4, 1984, the Audit Division denied petitioner's application for refund, taking the position that the Tax Law does not allow a refund under the circumstances presented. It is petitioner's position, by contrast, that the amount of refund sought corrects a collection of sales tax in excess of the maximum amount allowable pursuant to Tax Law § 1105.

CONCLUSIONS OF LAW

A. That Tax Law Article 28, § 1105(a) authorizes the imposition of a statewide sales tax at the rate of four percent upon the receipts from every retail sale of tangible personal property. Said section encompasses the sale of gasoline as is herein at issue. Under the authority of Tax Law Article 29, Dutchess County imposes an additional sales tax at the rate of one and one-quarter percent upon the receipts from such sales of gasoline. Thus petitioner, located in Dutchess County, faces a total sales tax rate of 5½ percent.

B. That Tax Law § 1111(d) authorizes the Tax Commission to prescribe and amend schedules determining the amount of sales tax to be collected by a distributor for each gallon of gasoline sold. Tax Law § 1111(e), as in effect during the period in question provided, inter alia, that the retail sales tax imposed by Tax Law § 1105(a) was, with respect to automotive fuel, to be based on the regional average retail sales price and collected in accordance with the noted § 1111(d) schedules. Here, petitioner's distributor collected tax upon its delivery of gas to petitioner at the rate of 5½ percent upon such regional average retail sales price, as was required by and in accordance with Tax Law § 1111(d) and (e). Such price, rather than the actual (subsequent) selling price set by a gasoline station at its pumps, had been determined by the Legislature as the retail selling price upon which the tax was to be paid. Accordingly, petitioner's subsequent selling price, though different, does not under the adopted statutory scheme constitute an overpayment by petitioner or form a basis for allowing a refund.

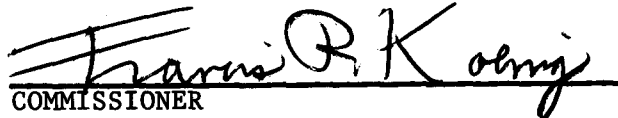
C. That the petition of Casco Service Station, Inc. is hereby denied and the Audit Division's denial of petitioner's application for refund is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 23 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER