

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
James J. Johnson :
d/b/a Jim's Hess Service

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law :
for the Period 9/1/82 - 5/31/85.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 23rd day of December, 1986, he/she served the within notice of Decision by certified mail upon James J. Johnson, d/b/a Jim's Hess Service the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James J. Johnson
d/b/a Jim's Hess Service
PO Box 122
Plattsburgh, NY 12901

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
23rd day of December, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

James J. Johnson
d/b/a Jim's Hess Service

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law :
for the Period 9/1/82 - 5/31/85.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 23rd day of December, 1986, he served the within notice of Decision by certified mail upon Thomas E. Reilly, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas E. Reilly
Ziff, Weiermiller, Learned & Hayden
301 William St., PO Box 1078
Elmira, NY 14902

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 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
23rd day of December, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

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

December 23, 1986

James J. Johnson
d/b/a Jim's Hess Service
PO Box 122
Plattsburgh, NY 12901

Dear Mr. Johnson:

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) 1139 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

In the Matter of the Petition	:	
of	:	
JAMES J. JOHNSON	:	DECISION
D/B/A JIM'S HESS SERVICE	:	
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 May 31, 1985.	:	

Petitioner, James J. Johnson d/b/a Jim's Hess Service, P.O. Box 122, Plattsburgh, New York 12901, 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 May 31, 1985 (File No. 61665).

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 March 22, 1985, petitioner, James J. Johnson d/b/a Jim's Hess Service, filed a group of applications for Credit or Refund of State and Local Sales or Use Taxes seeking a refund of sales tax allegedly overpaid in the aggregate amount of \$25,453.59 for the period in question.

2. Petitioner operates a retail service station located in Plattsburg, 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. Submitted by petitioner in connection with its refund application was a schedule for the months during the period at issue showing, inter alia, the gallons of gasoline purchased and the tax paid thereon to petitioner's supplier [at the combined State (4%) plus Clinton County (3%) rate of tax].

4. Petitioner's refund claim is premised upon the assertion that for some months, tax payments to the supplier exceeded the amount of tax which would be due if computed based on petitioner's actual retail sales (apparently based on petitioner's actual selling prices), whereas for other months, payments to the supplier were less than the tax computed on such actual retail selling prices. The \$25,453.59 refund sought by petitioner represents the net of the resulting differences (a net claimed overpayment) over the period in question.

5. By a letter dated July 22, 1985, 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, Clinton County imposes an additional sales tax at the rate of three percent upon the receipts from such sales of gas. Thus petitioner, located in Clinton County, faces a total sales tax rate of seven 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 seven percent upon such regional average retail sales price, as was required by 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.

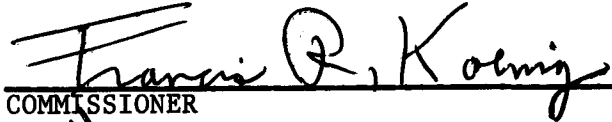
C. That the petition of James J. Johnson d/b/a Jim's Hess Service is hereby denied and the Audit Division's denial of petitioner's application for refund is sustained.

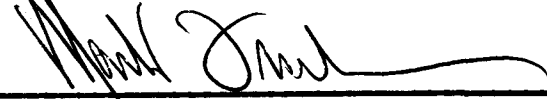
DATED: Albany, New York

STATE TAX COMMISSION

DEC 23 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

P 319 117 229

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Thomas E. Reilly Ziff Weiermiller Learned + Hayden	
Street and No.	
301 William St. PO Box 1078	
P.O., State and ZIP Code	
Elmira, N.Y. 14902	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

P 319 117 228

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

James J. Johnson Albia Jink Hess Service	
Street and No.	
P.O. Box 122	
P.O., State and ZIP Code	
Plattsburgh NY 12901	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	