

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**GLOBAL COMPANIES LLC** : DECISION  
for Revision of Determinations or for Refund of Motor : DTA NO. 828980  
Fuel Excise Tax under Article 12-A, Petroleum :  
Business Tax under Article 13-A, and Sales and Use :  
Taxes under Articles 28 and 29 of the Tax Law for the :  
period May 1, 2011 through February 29, 2012. :

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Petitioner, Global Companies LLC, filed an exception to the determination of the Administrative Law Judge issued on July 29, 2021. Petitioner appeared by Wichler & Gobetz, P.C. (Kenneth C. Gobetz, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq. of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was heard on June 23, 2022, by teleconference, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioner is entitled to a refund of motor fuel excise tax, petroleum business tax, prepaid sales and use taxes and associated interest assessed and paid on 13,838,236 gallons of motor fuel.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except for finding of fact 25, which we have modified for clarification. The Administrative Law Judge's findings of

facts and the modified finding of fact are set forth below.

1. This proceeding is for a refund of motor fuel excise tax, petroleum business tax, and prepaid sales tax and related interest that was assessed and collected from petitioner, Global Companies LLC, by the Division of Taxation (Division), as the result of an audit of petitioner's books and records.

2. Petitioner is a Delaware limited liability company with an address at 800 South Street, Waltham, Massachusetts 02453. During the period at issue, petitioner was registered as a distributor of motor fuel in New York pursuant to Tax Law § 283.

3. During the period at issue, CITGO Petroleum Corporation (CITGO) was registered as a distributor of motor fuel in New York pursuant to Tax Law § 283.

4. Form PT-101, Tax on Motor Fuel, reflects motor fuel transactions in New York State on a monthly basis. It is used to report liabilities to the Division for motor fuel excise tax and petroleum business tax on the sale of motor fuel. The total tax due on motor fuel sales is then transferred to line one of form PT-100, Petroleum Business Tax Return.

5. On form PT-101, a distributor reports, among other things, the fully taxable gallons of motor fuel it receives each month and the number of those fully taxable gallons it receives where it paid the taxes due to its supplier. A distributor takes a credit on its returns for the taxes on those gallons that it paid to its supplier.

6. When a distributor purchases a quantity of motor fuel and has paid the correct amount of motor fuel excise tax and petroleum business tax to its supplier on that fuel, it will pay no additional tax on this quantity of motor fuel when it files form PT-101.

7. Form FT-945/1045, Report of Sales Tax Prepayment on Motor Fuel/Diesel Motor Fuel Return, is used to report liabilities for prepaid sales tax on motor fuel. A distributor may

also take a credit on this form for prepaid sales tax paid to a supplier and will not have to pay that amount when filing its return.

8. The Division performed an audit of petitioner that began in April 2011 and was completed in March 2018. The audit period was December 1, 2008 through April 31, 2013 (audit period).

9. On December 26, 2017, petitioner and the Division entered into a mutual agreement to extend the limitation period for the assessment of taxes for the audit period. The period for the assessment of these taxes was extended by agreement to March 31, 2018.

10. On January 18, 2018, the Division issued to petitioner statements of proposed audit adjustment for, among others not relevant here, audit case numbers X066990728 (motor fuel excise tax), X066958687 (petroleum business tax) and X066991011 (prepaid sales tax) for additional tax due for the audit period.

11. Included in the additional motor fuel excise tax, petroleum business tax and prepaid sales tax that was determined to be due were taxes due on 13,838,236 gallons of ethanol fuel that petitioner imported into New York State and transferred to CITGO at its Albany, New York, terminal from May 1, 2011 through February 29, 2012 (refund audit period) pursuant to an ethanol exchange agreement (ethanol exchange gallons). When petitioner imported the ethanol exchange gallons, it did not include them on its returns or pay the taxes due.

12. An exchange, like the exchange involving the ethanol exchange gallons, is a contractual agreement between two suppliers whereby terminal position holders agree to deliver fuel to the other party in bulk (e.g., barges) or at their respective loading racks. An exchange agreement between two suppliers allows the lifting (removal) of product at one time and location by one party in exchange for the other party's entitlement to lift product at another time and

location. The exchange is recorded by each supplier as a terminal removal by the receiving supplier.

13. When petitioner transferred the gallons to CITGO, it did not pass through the taxes due on the motor fuel. It also did not provide CITGO with a certification that it paid the taxes due.

14. On January 22, 2018, James LaCelle, Section Head in the Audit Division of the Division, prepared and sent the e-mail below to Joseph Vanderlinden, Director of Field Audit Management, and Sean Campbell (an auditor from the Buffalo District Office who was assigned to audit Global on its next audit cycle):

“We received word from Ken Gobetz, Global’s POA, that Global is going to agree and full pay our audit assessments. However, there is one issue that they are still researching. They will use the 6 months following payment to conduct the research, and if they determine that they over paid, they plan on filing a refund claim.

Overall, the taxpayer had errors that amounted to \$46,065,426.84 tax and interest. They also had errors that resulted in refunds of \$24,430,353.04 . . . The taxpayer will be making a payment of \$17,482,719.98 that will full pay the audit.

The outstanding issue: Global imported 13,838,236 gallons of Gasoline without paying the taxes. They then sold these gallons to Citgo via an exchange agreement for the period from May 11 through Feb 12, without charging the taxes to Citgo. We billed Global for these gallons. Global believes Citgo paid tax on for [sic] these gallons on their returns. Moheb Gerguis and I looked into this issue by looking at the Citgo returns. For the period in question, Citgo had receipts from inside the state of 196,291,270 gallons, and they claimed 196,050,058 gallons as being tax paid, leaving only 241,222 gallons available for offset . . . All of the Global transactions were reported on the Citgo receipts from inside the state. If somehow Citgo paid the tax and Global can prove that, then they would be entitled to a refund.”

15. By letter dated January 24, 2018 from petitioner to the Division, the two entered into an agreement regarding proposed assessments from the audit period, wherein petitioner agreed to

close the audit with a payment of tax of \$10,025,987.98 and interest of \$7,456,731.11 on or before February 16, 2018. The letter agreement also stated:

“Due to Global’s uncertainty concerning the proper resolution of issues forming a part of the \$10,025,987.98 in additional tax, Global will not sign a closing agreement in connection with its payment. Global and New York State Department of Taxation & Finance each acknowledge that Global is preserving its rights to file claims for refund (within applicable statutes of limitation) related to the period under audit. As part of its closing paperwork, the Department will include DTS-Form 996 [sic].”

16. On or about February 2, 2018, petitioner sent the Division a letter reiterating its statements from the January 24, 2018 letter. Petitioner also executed consents to the proposed assessments.

17. On or about February 21, 2018, petitioner paid \$1,816,902.42 in motor fuel excise tax, \$4,313,567.46 in petroleum business tax and \$3,895,518.10 in prepaid sales tax. Interest totaling \$7,456,731.11 was paid on these assessments.

18. On August 17, 2018, through amended forms PT-100, forms FT-945/1045 and form FT-949, Application for Refund of Prepaid Sales Tax on Motor Fuel Sold Other than at Retail Service Stations, petitioner timely filed claims for refund for taxes and interest paid on the ethanol exchange gallons. The monthly gallons and corresponding refund amounts are set forth below:

Month	Ethanol Exchange Gallons	12-A and 13-A Tax	Prepaid Sales Tax
May 2011	1,898,193	\$475,497.35	\$265,747.02
June 2011	1,265,145	\$316,918.82	\$177,120.31
July 2011	1,591,582	\$398,691.54	\$222,841.62
August 2011	1,674,505	\$419,463.50	\$234,430.70
September 2011	1,588,694	\$397,967.85	\$222,417.16

October 2011	840,381	\$210,515.44	\$117,653.34
November 2011	1,661,871	\$416,298.68	\$232,661.94
December 2011	1,052,355	\$263,614.93	\$147,329.71
January 2012	1,071,556	\$276,997.23	\$150,017.84
February 2012	1,193,953	\$308,636.85	\$167,153.42
Total	13,838,236	\$3,484,602.19	\$1,937,373.06

19. Petitioner's claims for refund were received by the Division no later than August 20, 2018.

20. Petitioner's claims for refund were timely because they were filed within two years after the payment of taxes and interest and/or prior to September 30, 2018 (six months after the expiration of the extended statutes of limitations).

21. These claims for refund were denied by refund claim determination notices dated October 31, 2018. Each of these notices states:

"Issue on hand: TP claims NYS collected taxes on the same gallons twice. An exchange agreement between Global Companies LLC (TP) – Citgo Petroleum Corp to exchange Ethanol as tax-free gallons. As per the TP, between 05/11 – 02/12 the total of 13,828,236 gallons sold within Albany Terminals as in-tank exchange. TP (Global) was assessed on audit for the imported gallons. TP claims that Citgo paid the taxes on PT Rtn. Upon a quick review of Citgo's PT Rtns, the claim is not supported."

22. At the hearing in this matter, the auditor, Moheb Gerguis, testified that petitioner's books and records for the audit period were not complete or adequate. He stated that some transactions reflected on returns were late and some transactions were entered incorrectly as tax being paid when they should have been tax free or vice versa. Petitioner also mixed up motor fuel and diesel fuel in its reporting. There were also issues with exemption forms.

23. Mr. Gerguis testified that most of the people who prepared the returns during the audit period were no longer working for petitioner and that made it difficult because petitioner's employees had a hard time explaining other peoples' work and reconciling the returns.

24. Mr. Gerguis testified that due to all of the issues with petitioner's records, it needed to revise its returns. He explained that the Division made an agreement with petitioner that it did not need to formally send in amended returns, it just needed to prepare them for audit, and the auditor would audit the amended returns and compare them to the original returns to determine what, if anything, was owed. Petitioner revised the proposed amended returns on an average of seven times, with some monthly periods needing fewer attempts and others needing more, before they were correct.

25. Mr. Gerguis testified that as a result of the audit, petitioner owed additional tax for the audit period. He stated that, ultimately, the Division and petitioner reached a settlement where petitioner paid \$21,500,000.00 in full satisfaction of all outstanding taxes due.<sup>1</sup>

26. Mr. Gerguis testified that on November 9, 2017, he finalized the audit file from the audit period, submitted it for review, and then met with petitioner's representative on November 16, 2017. The auditor stated that thereafter, on November 28, 2017, petitioner raised for the first time its intention to claim a refund for the ethanol exchange gallons. The auditor explained that petitioner believed the taxes were paid to the Division twice for the ethanol exchange gallons, first by CITGO when it filed its returns for the refund audit period and later by petitioner as part of the settlement payment resulting from the audit. The auditor testified that petitioner filed

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<sup>1</sup> Mr. Gerguis testified that the audit concluded that petitioner owed \$46,065,426.84 in additional tax and interest, but was also due \$24,430,353.04 for refunds arising during the audit period. According to Mr. Gerguis, the Audit Division allowed interest to be paid to petitioner on some of the refund amounts. This resulted in a net amount due in tax and interest of \$21,635,073.80, of which \$17,482,719.98 was reported to be paid to the Division in satisfaction of the audit.

amended returns for the refund audit period to apply for a refund on the payment for the ethanol exchange gallons.

27. Mr. Gerguis testified that he did not audit CITGO. He stated that CITGO was subject to two audits during the refund audit period. The first audit concluded in August of 2011 and the second audit began in September of 2011. Mr. Gerguis testified that he did not know the results of these audits. He also testified he did not review the CITGO returns to determine whether CITGO claimed the tax paid credit on the ethanol exchange gallons. He reviewed the supporting schedules that the Division had in its files for the returns as a courtesy to petitioner.

28. Mr. Gerguis testified that he did a mathematical review comparing petitioner's amended returns to CITGO's supporting schedules that were used to prepare its returns for the period of January 1, 2011 through April 30, 2012, including form PT-101.1, Motor Fuel Receipts. These schedules were not submitted into evidence at the hearing. He stated that for this period, according to petitioner's returns, petitioner claimed to have sold CITGO 175,879,397 gallons of motor fuel but, according to CITGO's schedules, CITGO claimed to have purchased 177,371,786 gallons of motor fuel. Mr. Gerguis testified that CITGO then claimed that it received 177,980,729 gallons from petitioner where CITGO paid the tax to petitioner. He explained that this resulted in CITGO claiming to have paid petitioner tax on 608,943 more gallons than it claimed to have purchased from petitioner in total for the same period.

29. Included in the audit file was a schedule of the total amount of motor fuel CITGO purchased in this state from all vendors during the refund audit period according to its forms PT-101.1. Mr. Gerguis testified that this schedule showed that CITGO purchased 196,291,270 gallons of motor fuel in New York State during the refund audit period. Of these gallons, the amount where taxes were paid to the supplier when the motor fuel was purchased by CITGO

totaled 196,050,048. The remaining gallons where CITGO paid the tax to the Division with its returns from all vendors, not just petitioner, totaled 241,222.

30. Mr. Gerguis concluded that for the refund audit period, petitioner's amended returns and CITGO's schedules used to prepare its returns did not support petitioner's assertion that CITGO paid taxes to the Division equal to the taxes due on the ethanol exchange gallons. He also concluded that the analysis of all the gallons purchased by CITGO from all suppliers, when compared to those gallons where CITGO claimed taxes were paid to the supplier when the gallons were purchased, did not support petitioner's claim that CITGO paid the Division taxes equal to the tax due on the ethanol exchange gallons.

31. James LaCelle is a Division section head and the auditor's supervisor. On December 15, 2017, Mr. Gerguis and Mr. LaCelle approached Jeremy Crowley, the auditor who audited CITGO's motor fuel returns for September 2011 through November 30, 2013. When petitioner's position was explained to him, Mr. Crowley "was leaning to agree with the argument that Citgo paid on the tax-free MF: Ethanol gallons purchased from [petitioner]."

32. Mr. Crowley sent Mr. Gerguis an Excel file containing CITGO tax information, but this spreadsheet was not included in the auditor's report or introduced by the Division at the hearing.

33. At the hearing, petitioner submitted the affidavit of Gregory Anderson, the Motor Fuel Senior Analyst for CITGO. Since 1999, Mr. Anderson has worked for three entities, including CITGO, where his responsibilities included the filing of federal and state excise tax returns. Mr. Anderson has worked on state motor fuel excise tax return filings, audits, and compliance for state excise taxes throughout the United States, including the New York fuel excise tax returns. Since March of 2017, Mr. Anderson has been providing consulting and

advice regarding the types of transactions reported on CITGO's monthly New York fuel excise tax returns.

34. In his affidavit, Mr. Anderson averred that he is aware of the methods used by CITGO to electronically store the information used to prepare its forms PT-100 and the schedules that are filed with it. He stated that he is the custodian of the information used by CITGO to prepare the forms PT-100 during the refund audit period. He further stated that the information used to prepare the returns for the refund audit period is routinely and regularly electronically stored in computers owned by CITGO in the ordinary course of CITGO's business. He averred that the information was created, compiled and stored at or about the time that each of the returns for the refund audit period was filed.

35. Mr. Anderson stated that, at the request of petitioner, he extracted from CITGO's records a true and accurate representation of the information stored in CITGO's electronic records showing the detailed information used to prepare the returns for the refund audit period. He also extracted the same information for the periods from January 2011 through April 2011 and for April 2012 from CITGO's stored electronic records. This information was retrieved from the database used by CITGO to prepare the returns during 2011 and 2012. Mr. Anderson averred that using this information, he created a workbook matching the electronically stored information used by CITGO to prepare the returns (Workbook). Mr. Anderson claimed the Workbook accurately matches the stored information used by CITGO to prepare the returns for the refund audit period as there was no change in data.

36. Mr. Anderson stated in his affidavit that for each month from January 2011 through April 2012, the Workbook fairly represented each transaction that was used to prepare the monthly forms PT-101 for CITGO. He later stated that the Workbook consists of spreadsheets

for each month's motor fuel receipts by CITGO for February 2011 through March 2012 and spreadsheets for the credits claimed by CITGO for tax paid to the supplier for February 2011 through March 2012.

37. Mr. Anderson explained in his affidavit that the CITGO motor fuel spreadsheets contained in the Workbook identify each motor fuel receipt with a "Control" number. The "receipts" spreadsheets identify the vendor, gallons received, the specific monthly form PT-101 on which the gallons were reported as received and the month a credit was claimed on such receipt, if a credit was claimed. The "receipts" spreadsheets showing receipt of the ethanol exchange gallons were admitted into evidence and attached to Mr. Anderson's affidavit. The pertinent information from the portion of the Workbook admitted into evidence, identifying the receipt of the ethanol exchange gallons, is as follows:

Bill of Lading Date	Gallons	CITGO Control #	Period Receipt Reported
5/8/2011	1,263,289	G-10772	5/2011
5/26/2011	634,904	G-10667	5/2011
6/9/2011	841,410	G-13999	6/2011
6/28/2011	423,735	G-15750	6/2011
7/3/2011	745,272	G-18791	7/2011
7/17/2011	846,311	G-18865	7/2011
8/2/2011	840,666	G-21625	8/2011
8/22/2011	833,839	G-19904	8/2011
9/5/2011	783,731	G-25578	9/2011
9/27/2011	804,963	G-25577	9/2011
10/20/2011	840,381	G-26066	10/2011

11/10/2011	841,372	G-30371	11/2011
11/28/2011	820,499	G-30755	11/2011
12/18/2011	1,052,355	G-34789	12/2011
1/11/2012	1,071,556	G-37039	1/2012
2/6/2012	1,193,953	G-38815	2/2012
Total	13,838,236		

38. Mr. Anderson averred that the excerpts from the Workbook show that CITGO properly reported the receipt of the ethanol exchange gallons on its forms PT-101 and, by virtue of the absence of any entry in the “Period Tax Paid Receipt was Reported” column, also shows that no credits were claimed for tax paid to suppliers on these receipts.

39. Mr. Anderson further stated in his affidavit that the ethanol exchange gallons were reported as “receipts” of motor fuel and such receipts are not listed on any of the “tax paid” spreadsheets. He asserted that he searched the “tax paid” spreadsheets in the Workbook using the “Control” number for the ethanol exchange gallon receipts and determined that these receipts do not appear on the “tax paid” spreadsheets.

40. Mr. Anderson asserted in his affidavit that the Division’s auditors were incorrect when they determined that CITGO overclaimed the credits for payments to petitioner on purchases of motor fuel. Mr. Anderson averred that the information from petitioner’s excise tax returns, CITGO’s returns, and CITGO’s electronic records, shows that CITGO did not claim any excess credits from its receipt of motor fuel from petitioner. He continued that the auditor did not account for (i) timing differences between petitioner’s and CITGO’s reporting of the sale and receipt of the ethanol exchange gallons; (ii) timing differences between CITGO’s reporting of

receipt of motor fuel and credits that were claimed arising from the receipts from petitioner; or  
(iii) CITGO's errors in reporting diesel motor fuel and motor fuel on its forms PT-100.

41. Mr. Anderson averred that as to the second issue, CITGO believed that credits for a particular receipt of motor fuel could not be claimed until the taxes incurred were actually paid to a supplier. He explained that it was not unusual for CITGO to receive motor fuel in one month and pay for that fuel (with all charged taxes) in a subsequent month due to the timing of when invoices are received and subsequently paid. Rather than claiming the credit for the taxes paid in the same month that a receipt was reported, CITGO deferred claiming the credit until the taxes on a receipt of motor fuel were actually paid to its supplier. Mr. Anderson stated that on its monthly returns, "CITGO routinely claimed credits for receipts of motor fuel that were reported in a prior month." Mr. Anderson averred that the timing of CITGO's claims for the credits is based upon direction it received from a New York State Department of Taxation auditor.

42. In his affidavit, Mr. Anderson also stated that for certain receipts of diesel motor fuel during the refund audit period, CITGO claimed a credit on its motor fuel tax return schedules despite reporting the receipts as diesel motor fuel receipts. Mr. Anderson averred that using electronic information maintained by CITGO, he verified that the diesel receipts were reported as diesel motor fuel receipts on the proper form PT-102, Tax on Diesel Motor Fuel, but the credit was then claimed on the motor fuel form PT-101. Mr. Anderson asserted that CITGO corrected some, but not all of these errors on its PT-100 returns. He stated that the total amount that was uncorrected where a credit was claimed for payment to a supplier on motor fuel instead of diesel motor fuel was 2,958,417 gallons. The result of these errors was that the credits claimed on the motor fuel schedules were overstated and the credits claimed on the diesel motor fuel schedules were understated. Mr. Anderson stated that the net result was that CITGO underpaid the taxes

due by the difference in the tax rate for motor fuel and diesel motor fuel on the 2,958,417 gallons. Mr. Anderson asserted that these underpayments were negligible. He also created an example form PT-100 to show that for July 2011, CITGO underpaid the taxes due by \$48,886.74 as a result of claiming the diesel credits as motor fuel credits. He averred that the Division's auditors did not attempt to reconcile the reporting errors regarding the credits for the diesel motor fuel.

43. Mr. Anderson also stated that it can be shown that CITGO did not claim excess credits on motor fuel receipts from petitioner by making adjustments to the reconciliation of CITGO's reported motor fuel receipts and claims for credits. Mr. Anderson created schedules attached as exhibit 7 to his affidavit showing that CITGO did not claim credits on the ethanol exchange gallons. The first schedule shows breakdowns for gallons CITGO received from petitioner where credits were claimed in a prior month, in the current month, or in future months and the remaining gallons where a credit was not claimed. The remaining gallons where a credit was not claimed during the refund audit period equaled the ethanol exchange gallons. The second and third schedules show a breakdown based on the timing of the receipt of the motor fuel.

44. Mr. Anderson averred that, using information contained in the Workbook, he reconciled and verified the accuracy of CITGO's returns for the refund audit period. Mr. Anderson averred that he reviewed the CITGO forms PT-100 filed with New York for the refund audit period as well as the electronically stored data related to the filing of those returns. He continued that for the returns filed for the refund audit period, CITGO reported the receipt of all of the ethanol exchange gallons. He stated further that CITGO did not claim a credit for tax paid to petitioner for any of the ethanol exchange gallon receipts reported during the refund audit

period or in any subsequent returns. He averred that “the CITGO Returns and the electronic records maintained by CITGO establish and confirm that CITGO paid the taxes due to the State of New York on the [ethanol exchange gallons].”

45. At the hearing, Mr. Gerguis was unable to dispute Mr. Anderson’s assertion that the Division’s analysis failed to reconcile the timing differences between CITGO’s reporting of receipt of motor fuel and tax paid credit claims arising from receipts from petitioner and CITGO’s errors in reporting diesel motor fuel and motor fuel on its forms PT-100. Mr. Gerguis did, however, look at sales between the two distributors from January 2011 through April of 2012 to account for timing differences in the sale and receipt of the ethanol exchange gallons and credits claimed.

46. CITGO reported its receipt of the ethanol exchange gallons on its forms PT-100 and prepaid sales tax returns.

47. Pursuant to 20 NYCRR 3000.15 (d) (6), petitioner submitted 48 proposed findings of fact to the Administrative Law Judge in the hearing below. In accordance with State Administrative Procedure Act § 307 (1), the Administrative Law Judge accepted proposed findings of fact 1, 4, 6, 8 through 14, 17, 19, 23, 25, 28, 30, 31, 34, 35, 37 through 41, and 48 as supported by the record, and consolidated, condensed, combined, renumbered and substantially incorporated those proposed findings of fact in her determination. Proposed findings of fact 2, 5, 7, 16, 24, 26, 29, 32, 36 and 47 were modified by the Administrative Law Judge to more accurately reflect the record or were accepted in part or rejected in part as conclusory, irrelevant and/or not supported by the record; to the extent the Administrative Law Judge accepted such proposed findings of fact, they were consolidated, condensed, combined, renumbered and substantially incorporated herein, as modified. Proposed findings of fact 3, 15, 18, 20, 21, 22,

27, 33, and 42 through 46 were rejected by the Administrative Law Judge as conclusory, irrelevant and/or not supported by the record.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge began her determination by reviewing the relevant sections of the Tax Law relating to motor fuel excise tax, petroleum business tax and prepaid sales tax applicable to motor fuel imported by a distributor or sold by a distributor in the State of New York. Next, the Administrative Law Judge described the reporting requirements for distributors of motor fuel, which require distributors to file monthly tax returns stating, inter alia, the number of gallons of motor fuel it imported for use, distribution, storage or sale, along with a corresponding sales tax return.

The Administrative Law Judge observed that petitioner did not dispute that it was a registered distributor of motor fuel during the period in issue. The Administrative Law Judge also noted that, at the time petitioner imported the ethanol exchange gallons, it did not file returns reporting such importation or remit any taxes due on those gallons. Furthermore, petitioner did not pass the tax through to CITGO nor did it provide CITGO with a certification stating that the applicable motor fuel, petroleum business and prepaid sales taxes had been paid on the ethanol exchange gallons.

While the Administrative Law Judge agreed with the Division that an importing distributor would not be in a position to claim a tax paid credit, she disagreed with the Division's position that petitioner could never claim a refund. She observed that if the taxes were already paid to the Division by CITGO, the Division should not have assessed petitioner for those same taxes a second time. If such tax was collected more than once, one of the parties that paid the tax would be due a refund, barring any prohibition by the relevant statute of limitations, so as to be

in compliance with the Tax Law's prohibition on collection of the taxes more than once. The Administrative Law Judge noted that it was incumbent on the taxpayer to furnish sufficiently detailed records to enable the Division to confirm taxable receipts, and the Division is not required to accept non-source records to determine the correct tax liability.

Finding that petitioner submitted sufficient evidence to establish that it transferred the ethanol exchange gallons at issue to CITGO, the Administrative Law Judge then concluded that petitioner had not established that CITGO had paid tax on the ethanol exchange gallons in the first instance and therefore that petitioner was not entitled to a refund. According to the Administrative Law Judge, petitioner needed to have shown a clear-cut entitlement to the claimed tax refund, which it failed to do. For the Administrative Law Judge, while petitioner could explain the discrepancies between its records and CITGO's, this was not sufficient to prove that CITGO properly paid the tax due on the ethanol exchange gallons at issue, as petitioner claims it did.

The Administrative Law Judge also found the fact that petitioner did not submit any evidence of tax payments made by CITGO significant in reaching her conclusion. According to the Administrative Law Judge, petitioner produced no checks, letters or even an explanation and submission of internal records from CITGO reflecting payment with the returns. The Administrative Law Judge dismissed petitioner's argument that a negative inference should be drawn from the Division's failure to produce evidence that the taxes were paid, stating that it was petitioner's, and not the Division's, burden to prove that the taxes had been paid twice, thus proving its entitlement to the refund it seeks. Accordingly, the Administrative Law Judge concluded that petitioner failed to meet its burden of showing its entitlement to the refund claimed and affirmed the refund denial.

***ARGUMENTS ON EXCEPTION***

Petitioner argues that the Administrative Law Judge erred in concluding that it failed to meet its burden of showing its entitlement to a refund. According to petitioner, a failure to claim a motor fuel tax paid credit results in payment of money in error, resulting in an overpayment as a matter of law (*see Mobil Oil Corp. v State Tax Commn.*, 62 AD2d 668 [3d Dept 1978]).

Petitioner further asserts that the Administrative Law Judge also failed to recognize that petitioner had rebutted the presumption of correctness accorded to the refund denial notice, thereby shifting the burden of proof to the Division, where petitioner had provided credible evidence that CITGO did not claim the tax paid credits. Since the only direct evidence in the record was the Anderson affidavit and its attachments, such evidence must be given conclusive effect. As the Division never countered this evidence, the conclusion that CITGO could have claimed the tax paid credits after the period covered in the Anderson affidavit was improper speculation by the Administrative Law Judge, according to petitioner.

Petitioner also argues that the burden of proof allocated to a taxpayer is less where the taxpayer is tasked with proving a negative. In the absence of proof that CITGO claimed the tax paid credits, the Administrative Law Judge should have concluded that CITGO bore the taxes on the motor fuel when it filed its tax returns for the imported motor fuel. According to petitioner, the Division's failure to provide opposing evidence should give rise to a negative inference regarding its determination. Petitioner posits that the Division's failure to introduce such evidence is proof that no such claims for tax paid credits were made by CITGO and that the Division's refund denial had no rational basis.

Finally, petitioner argues that the sole focus of the inquiry should be the ethanol exchange gallons at issue, not CITGO's receipts and credits from all sources. Petitioner points to

the relevant regulations and states that they require tracking specific importations of motor fuel, rather than examining a distributor's total receipts and credits over a given time period.

Furthermore, petitioner claims that the Division should have more fully investigated the differences in timing of reports of receipts and claims for credits between it and CITGO and any mistakes it made in diesel fuel tax paid reporting should not impact that analysis.

The Division states that the Administrative Law Judge correctly determined the issues in her determination below. It argues that petitioner ultimately failed to satisfy its burden of proof that the taxes imposed on the ethanol exchange gallons were paid more than once. According to the Division, petitioner's argument that the burden of proof shifted to the Division upon petitioner's submission of evidence in its favor is misplaced. Ultimately, the Division contends it is the taxpayer that bears the burden of showing a clear-cut entitlement to the claimed refund.

According to the Division, the Administrative Law Judge also properly determined that summaries of CITGO's return information were insufficient to prove that CITGO did not claim tax paid credits on the ethanol exchange gallons, as the Division is not required to accept non-source records such as lists or summaries. Furthermore, the Division asserts that the Administrative Law Judge properly relied on the absence of any evidence in the record regarding CITGO's payment of the taxes at issue as further demonstrating the lack of proof that the taxes were paid twice. According to the Division, the timing discrepancies, reporting delays, and inaccuracies on CITGO's motor fuel returns call into question the credibility of the information contained therein and undermine petitioner's assertion that CITGO paid the taxes due.

Finally, the Division states that the Administrative Law Judge properly rejected petitioner's assertion that a negative inference should be drawn against the Division for its failure

to produce relevant evidence in support of the refund claim denial. The Division reiterates that petitioner bears the burden of proof in this matter and not the Division.

### ***OPINION***

We begin with the relevant sections of the Tax Law that together impose tax on distributors of motor fuels in the State of New York. Tax Law § 284 imposes an excise tax on motor fuel imported into or caused to be imported into New York for use, distribution, storage or sale. Tax Law § 301-a imposes a tax on every petroleum business for the privilege of doing business in the state. Tax Law § 1102 (a) (1) imposes a prepaid sales tax on each gallon of motor fuel imported or caused to be imported into New York for use, distribution, storage or sale.

Tax Law § 285-a (2) provides for a presumption that all motor fuel imported, manufactured or sold, received or possessed in New York is subject to the taxes imposed until the contrary is established (*see also* 20 NYCRR 412.1 [a] [1]). Tax Law § 1132 (h) (1) (ii) similarly creates a presumption that all motor fuel imported, manufactured or sold, received or possessed in the state is subject to tax until the contrary is established. Tax Law § 315 (a) provides that, except where inconsistent, the provisions of article 12-a of the Tax Law apply to administration and procedure of the tax imposed on petroleum businesses under article 13-a. Furthermore, Tax Law § 285-a (3) requires a distributor-seller of motor fuel to give a purchaser a certification that the distributor-seller assumed the payment of or paid the taxes imposed and is passing through such taxes. Tax Law § 287 (1) provides for allowance of a credit for such prepaid taxes upon a subsequent sale of motor fuel to the extent that such taxes were paid and included in the price. Under Tax Law § 289-a, the taxes shall not be imposed more than once on any quantity of motor fuel sold within the state (*see also* 20 NYCRR 412.1 [a] [3]).

It is undisputed that during the period at issue, petitioner was a distributor of motor fuel for purposes of the Tax Law and registered with New York as such pursuant to Tax Law § 282 (2). There is similarly no dispute that at the time petitioner imported the ethanol exchange gallons, it failed to report the importation of motor fuel, failed to remit taxes due on that motor fuel and failed to later provide certification to CITGO that taxes were paid on the ethanol exchange gallons as required under the Tax Law. What petitioner is challenging is the Division's determination to impose motor fuel, petroleum business and prepaid sales taxes on petitioner relating to the more than 13 million gallons of motor fuel that petitioner transferred to CITGO during the audit period, because petitioner claims that CITGO previously paid the tax due thereon, and thus petitioner's subsequent payment of those taxes was contrary to the Tax Law (*see* Tax Law § 289-a; 20 NYCRR 412.1 [a] [3] [prohibiting requiring the motor fuel tax to be paid more than once on any quantity of motor fuel sold in the state]). In support of its argument, petitioner points to the fact that there is no evidence in the record that CITGO ever claimed a tax paid credit for the ethanol exchange gallons at issue. According to petitioner, this claim is evidenced through the affidavit of Gregory Anderson, Motor Fuel Senior Analyst for CITGO, who averred that his review of information compiled for preparation of CITGO's motor fuel tax returns for the period revealed that no claims for tax paid credits on the ethanol exchange gallons were made during the audit period. Thus, according to petitioner, it should be concluded that CITGO paid the taxes due on the ethanol exchange gallons. The Division counters that petitioner has failed to prove that the tax on the ethanol exchange gallons have been paid more than once.

We agree with the Division and affirm the determination below.

Petitioner's assertions and the Anderson affidavit support the Administrative Law Judge's conclusion that petitioner transferred the ethanol exchange gallons to CITGO, which reported their receipt on its motor fuel returns for the period at issue. However, this alone does not establish that the taxes were paid twice on this quantity of ethanol exchange gallons, thereby entitling petitioner to a refund.

The credit available under Tax Law § 287 is a form of tax exemption and therefore petitioner bore the burden to show "a clearcut entitlement" thereto (*Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.*, 181 AD2d 216, 219 [3d Dept 1992], quoting *Matter of Grace v NY State Tax Commn.*, 37 NY2d 193, 197 [1975], *rearg denied* 37 NY2d 816 [1975], *lv denied* 338 NE2d 330 [1975]; *see also Matter of Luther Forest Corp. v McGuiness*, 164 AD2d 629, 632 [3d Dept 1991]). Statutes and regulations authorizing exemptions from taxation are to be strictly and narrowly construed (*Matter of International Bar Assn. v Tax Appeals Trib. of State of N.Y.*, 210 AD2d 819 [3d Dept 1994]), *lv denied* 85 NY2d 806 [1995]). If ambiguity or uncertainty exists, it is to be resolved in favor of the Division and against allowing the exemption (*Matter of Charter Dev. Co., L.L.C. v City of Buffalo*, 6 NY3d 578, 582 [2006]). Moreover, as petitioner seeks a refund of taxes erroneously or illegally paid, petitioner must fairly and accurately substantiate the amount of the claimed overpayment (*Matter of Raemart Drugs v Wetzler*, 157 AD2d 22, 25 [3d Dept 1990]).

We agree with the Administrative Law Judge that petitioner failed to bear its burden of proof in showing that CITGO paid the taxes due on the ethanol exchange gallons after their transfer. Petitioner argues that Mr. Anderson's assertion in his affidavit that CITGO never claimed a tax paid credit on those ethanol exchange gallons is dispositive on the issue of whether the tax was paid. According to petitioner, this is because the Division did not counter that

assertion with its own evidence demonstrating that the tax had not been paid (*Matter of Bass v Tax Commn. of N.Y.*, 179 AD2d 387 [1st Dept 1992] *lv denied* 80 NY2d 751 [1992], citing *Mobil Oil Corp. v Tax Commn. of City of N.Y.*, 60 AD2d 910, 911 [2d Dept 1978]). According to petitioner, the burden of proof is lower when a taxpayer is tasked with proving a negative (*see e.g. Matter of Peck*, State Tax Commn., June 5, 1981).<sup>2</sup>

Petitioner misconstrues the burden of proof allocated to it. Petitioner is not tasked with “proving a negative,” but rather with proving that the tax due on the ethanol exchange gallons was paid twice. Petitioner is not incorrect in stating that the presumption of validity of an assessment disappears as soon as credible evidence to the contrary is received (*see Matter of Bass; Mobil Oil Corp.*). However, petitioner bears the burden of showing a clearcut entitlement to a tax credit in the first instance by presenting credible evidence thereof (*Matter of Luther Forest Corp.*). The discrepancies between the Anderson affidavit and the audit analysis, including the “timing differences” regarding when the ethanol exchange gallons were reported as received and when the taxes were paid, the total number of gallons for which tax was paid by CITGO during the audit period, and petitioner’s claim that no tax paid credits due to these ethanol exchange gallons were ever claimed by CITGO calls into question the accuracy of the proof submitted. As noted by the Administrative Law Judge, Mr. Anderson’s statement that CITGO did not claim any tax paid credits on the transferred ethanol exchange gallons on any subsequent returns was undermined by his assertion that CITGO would sometimes claim tax paid credits on subsequent returns for motor fuel received in prior months. Although Mr. Anderson states that he reviewed the information compiled to prepare CITGO’s motor fuel

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<sup>2</sup> Although decisions of the former State Tax Commission are not binding precedent on this Tribunal, they may be looked to for guidance and are entitled to respectful consideration (*see Matter of Racal Corp.*, Tax Appeals Tribunal, May 13, 1993).

returns during the audit period, his affidavit is unclear as to how he knows for a fact that CITGO never claimed any tax paid credits for the ethanol exchange gallons at issue on any subsequent return. Furthermore, as found by the Administrative Law Judge, there is no direct evidence in the record of any tax remittance on the ethanol exchange gallons at issue having been made by CITGO. Taken together, this evidence (and lack thereof) undercuts petitioner's claim of a clearcut entitlement to a refund of the taxes it paid at the conclusion of its audit. This is because the evidence in the record does not clearly prove that the taxes imposed on the ethanol exchange gallons at issue were ultimately paid twice.

We also considered petitioner's argument that *Matter of Mobil Oil Co. v State Tax Commn.* (62 AD2d 668 [3d Dept 1978]) controls the outcome of this case. Petitioner argues that there, the Appellate Division held that a failure to claim motor fuel tax paid credits resulted in a payment of tax in error, and thus an overpayment, as a matter of law. We find *Matter of Mobil* to be distinguishable from the case at hand. The issues presented in *Matter of Mobil* were whether 1) the taxpayer timely claimed its tax paid credits incurred in one audit period on subsequent motor fuel returns; and 2) if so, whether the Division could apply part of those overpayments to tax deficiencies arising in a subsequent audit period and deny the overpayments to the extent they exceeded the subsequent deficiencies. Unlike here, the question of whether an overpayment of motor fuel tax occurred was not at issue in that case, but rather whether the claim of a refund due to an overpayment was timely made and whether application of any resulting overpayments of motor fuel tax were properly applied to subsequent audit periods.

We note that petitioner's predicament here is largely of its own making. Petitioner should have paid the taxes due on the ethanol exchange gallons upon their importation into New York, as required by Tax Law § 285-a (2) and certified such payment or assumption of taxes

through a certification pursuant to Tax Law § 285-a (3) upon their transfer to CITGO. However, it did not do so.

We have considered petitioner's remaining arguments and deem them to be without merit.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Global Companies, LLC is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Global Companies, LLC is denied; and
4. The refund claim determination notice dated October 31, 2018, is sustained.

DATED: Albany, New York  
September 22, 2022

/s/ Anthony Giardina  
Anthony Giardina  
President

/s/ Dierdre K. Scozzafava  
Dierdre K. Scozzafava  
Commissioner

/s/ Cynthia M. Monaco  
Cynthia M. Monaco  
Commissioner