STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **PEOPLE'S OIL CO., INC.** 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, 1977 through November 30, 1979.	: : : : : :	DECISION DTA NO. 800127

Petitioner, People's Oil Co. , Inc. , 59 Miner Street, Canton, New York 13617, filed an exception to the determination of the Administrative Law Judge issued on September 17, 1987 with respect to its 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, 1977 through November 30, 1979 (File No. 800127). Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq. and Kathleen D. Kalwa, Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Thomas C. Sacca, Esq., of counsel).

The petitioner filed a brief on exception. The Division filed a letter in opposition to the exception. Oral argument at the petitioner's request was held on June 9, 1988.

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

ISSUE

Whether petitioner is liable for additional sales and use tax assessed against it as a result of a field audit performed by the Division.

FINDINGS OF FACT

We find the facts as stated by the Administrative Law Judge and such facts are incorporated by this reference except that we modify finding of fact "11" as stated below and we find additional facts as stated below.

During the period in issue, petitioner, People's Oil Co., Inc. ("People's"), was a wholesale and retail distributor of petroleum products. People's also sold gasoline through four retail locations.

On May 12, 1980, petitioner consented to an extension of the period of limitation for assessment of sales and use taxes for the period May 31, 1977 through August 31, 1977 to any time on or before June 20, 1981.

On August 27, 1980, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner assessing sales and use taxes for the period March 1, 1977 through November 30, 1979 in the amount of $37,830.58 plus interest of $6,538.79 for a total amount due of $44.369.37. The notice was premised upon a field audit which led the Division to conclude that sales and use tax was due on three areas which were reviewed.

First, the Division determined that sales and use tax was due on petitioner's purchases of truck and pump repair parts in the amount of $942.62.

Second, the Division concluded that sales and use tax was due on gasoline sold on consignment to three firms - Perry's American, Heuvelton Mobil and Adam's Store. In order to calculate the amount of tax due from the sales of three particular firms, the Division first determined that there was additional tax due for the period ending November 30, 1978 in the

amount of $94.88. This amount was then divided by the sales tax reported by these three firms during the audit period of $18,999.33 resulting in a margin of error of one-half percent. The margin of error was then multiplied by the amount of tax paid during each of the sales tax audit periods resulting in additional tax due of $989.19.

When calculating the foregoing amount of tax reported during the audit period above, the Division took into account petitioner's payment of tax in the amount of $10,517.00 in conjunction with petitioner's sales and use tax return for the quarter ended May 31, 1977.

The last portion of the audit which led to the assessment of tax concerned sales on consignment to a service station leased to Nichol's Mobil Station ("Nichol's") in Gouverneur, New York. During the period in issue, petitioner supplied Nichol's with gasoline. Nichol's, in turn, prepared a weekly report which would show the weekly sales by grade, gallon and price and gross sales by grade. Nichol's also remitted sales receipts to petitioner at the time Nichol's submitted the report. It was petitioner's practice to report the sales made at Nichol's on petitioner's sales tax returns.

In order to ascertain the amount of tax due on sales made at Nichol's, the Division, utilizing petitioner's records, multiplied the gallons sold by the prices in effect at the time of delivery. This product was then reduced by the excise tax on gasoline, sales tax and prior tax paid to ascertain the additional tax due. The foregoing computations resulted in a finding of additional sales and use tax due of $35,898.77. In determining the amount of tax previously paid arising from sales at Nichol's, the Division did not take into account the payment of $10,517.00 which was made in conjunction with petitioner's sales and use tax return for the quarter ended May 31, 1977.

After the hearing, petitioner submitted a check in the amount of $1,931.81 representing the tax due on the first two portions of the audit described above.

Finding of fact "1l" is modified to read as follows:

> In September 1979, petitioner discovered that Nichol's had been substantially underreporting its sales. As a result, petitioner commenced a lawsuit against Nichol's and its proprietor. The lawsuit included a cause of action for breach of contract which alleged that Nichol's had breached its agreement to sell the gasoline delivered by petitioner and to account for the receipt plus tax, less a 3 cent per gallon commission, to petitioner. Petitioner requested damages in the amount of $530,601 based on Nichol's failure to remit the proceeds of the sales of 749,778 gallons of gasoline during the period of June 1, 1976 to December 16, 1979. Petitioner prevailed on the breach of contract cause of action and received a judgment in the amount of $530,601.57. This amount was based on the total selling price of the gasoline, less $22,493.34 which represented the 3 cent per gallon commission to which Nichol's was entitled.

Petitioner has been able to collect only $54,112.63 in satisfaction of its judgment against Nichol's.

We find the following additional facts.

Petitioner asserts that the deficiency at issue should be reduced to reflect the gallonage it claimed and proved Nichol's had not reported. Petitioner asserts the correct amount of the deficiency is $30,788.18 recalculated as follows. The total judgment of $530,601.57 less $59,982.24 ($.08 excise tax x 749,778 gallons) equals $470,619.33. Petitioner divides this amount by 107 percent, to determine the 7 percent sales tax, arriving at taxable sales of $439,831.14, and then a tax due of $30,788.18 ($439,831.14 x .07).

Petitioner's calculation is erroneous to the extent it begins with the judgment of $530,601.57, which reflected the subtraction of Nichol's commission of $22,493.34 from the total selling price. Since the sales tax was imposed on the total selling price of the gasoline, the

correct calculation begins with the amount of $553,094.91 (the $530,601.57 judgment plus the $22,493.34 commission). Subtracting $59,982.24 ($.08 excise tax x 749,778 gallons) yields $493,112.67. Dividing this total by 107%, to determine the 7 percent sales tax, results in taxable sales of $460,852.96. The correct tax due is then $32,259.71 ($460,852.96 x .07).

Although petitioner's claim against Nichol's includes amounts prior to the audit period, petitioner has provided no means to determine the gallonage unreported during this period, June 1, 1976 through February 28, 1977.

OPINION

The Administrative Law Judge determined that there was no sale of gasoline from petitioner to Nichol's, but instead that petitioner delivered the gasoline to Nichol's on consignment. Thus, the Administrative Law Judge determined that petitioner was a vendor required to collect sales tax on the sales of gasoline. The Administrative Law Judge also ruled that the petitioner could not qualify for the bad debt deduction because the petitioner, as consignor, did not sell the gasoline to Nichol's. Finally, the Administrative Law Judge determined that petitioner had properly been credited with a payment of $10,517.00 and that petitioner had not proved that the assessment should be reduced to $30,788.18.

On exception, petitioner argues that it is not liable for sales tax because it sold the gasoline to Nichol's and that this sale was, thus, a sale for resale excluded from tax by section 1105(b) of the Tax Law. The petitioner argues in the alternative that if the transactions were subject to tax, then petitioner qualifies for a credit under the bad debt provision of the law (Tax Law § 1132[e]) and regulations (20 NYCRR 534.7).

The petitioner also argues that the Administrative Law Judge erred in finding that the $10,517.00 payment had been credited to People's and in not reducing the assessment to $30,788.18.

We modify the determination of the Administrative Law Judge for the reasons stated below.

First, while we agree with the conclusion of the Administrative Law Judge that petitioner consigned the gasoline to Nichol's, we do not agree that this was not a sale. Section 1101(b)(5) of the Tax Law defines sale, in pertinent part, as "Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration . . . . " (See also, 20 NYCRR 526.7.) Clearly the transfer by petitioner to Nichol's of the gasoline was not a gift, but was supported by the consideration of Nichol's contractual obligation to sell the gasoline and remit the proceeds, less Nichol's commission, to petitioner. Therefore, the transaction between petitioner and Nichol's was a sale, for sales tax purposes.

Our finding that the transfers between petitioner and Nichol's constituted sales does not lead to the conclusion, as urged by petitioner, that petitioner is not responsible for the tax at issue. The issue of petitioner's liability for tax has become entangled in a much debated issue about the nature of the relationship between petitioner and Nichol's. The petitioner first argued at the hearing level that Nichol's, as consignee, was the agent of petitioner, not an independent contractor. The Division in opposition argued that Nichol's was an independent contractor and that Nichol's and petitioner were co-vendors of the gasoline, both responsible for the tax under section 526.10(f) of the regulations (20 NYCRR 526.10[f]). On exception, the parties have

reversed their positions, the petitioner arguing that Nichol's was independent from petitioner and the Division contending that Nichol's was the consignee of petitioner.

We conclude that it is not necessary to designate Nichol's status as an independent contractor, agent or consignee of petitioner because regardless of the designation, the relationship between petitioner and Nichol's obligated petitioner to remit the tax at issue to the Division. The pertinent facts are that petitioner delivered the gasoline to Nichol's who was obliged to sell it to the public and then pay over the receipts plus tax, less its three cent a gallon commission, to petitioner. Petitioner undertook the obligation to report the tax to the Division. Whether Nichol's was acting as agent, independent contractor or consignee, the Division has ample authority under section 1101(b)(8) of the Tax Law, which defines "vendor", to treat petitioner as the vendor, responsible for the tax on the receipts. The Division has exercised this authority through its regulations where it is explicitly stated that a principal making sales through an agent may be liable for the tax (20 NYCRR 526.10[a][8]), as may a supplier making sales through an independent contractor (20 NYCRR 526.10[f][2]), as may a lessor-vendor making sales through a leased department or concession (20 NYCRR 526.10[g][3]). Accordingly, we conclude that petitioner was a vendor responsible for the collection of the tax at issue here and is liable for such tax.

With respect to the applicability of a credit for a bad debt, the only ground articulated by the Administrative Law Judge for finding the bad debt provision inapplicable was his conclusion that there was no sale between petitioner and Nichol's. Since as set forth above we conclude there was a sale, for sales tax purposes, the ground stated by the Administrative Law Judge is not determinative.

The only argument advanced by the Division against application of the bad debt provision here is that it was not the retail customer who defaulted in paying, but instead Nichol's as consignee, agent or independent contractor.

Section 1132(e) of the Tax Law states that the Division of Taxation "may, provide, by regulation, for the exclusion from taxable receipts, amusement charges or rents of amounts representing sales where the contract of sale has been cancelled, the property returned or the receipt, charge or rent has been ascertained to be uncollectible . . . ."

The Division has exercised this authority, for bad debts claimed now, in section 534.7 of the regulations. The general rule of the regulation is:

> "(b) Allowance of refund or credit. (1) Where a receipt, amusement charge, or hotel rent has been ascertained to be uncollectible, either in whole or in part, the vendor of the tangible personal property or services, the recipient of the amusement charges, or the operator of the hotel (as such terms are defined in section 1101 of the Tax Law) may apply for a refund or credit of the tax paid on such receipt, amusement charge, or hotel rent within three years from the date the tax was payable by such person to the Tax Commission." (20 NYCRR 534.7[b][1].)

We see nothing in the face of the statute or regulation that limits its application to a contractural default by the retail purchaser, as opposed to a contractural default by a consignee, agent or independent contractor such as Nichol's who fails to turn over the receipt to the responsible vendor.

Although we do not see this limitation in the regulations, we do find that the petitioner has failed to satisfy one of the stated conditions of the regulations. Among the stated conditions for obtaining a credit for a bad debt is that the debt must be actually charged off for Federal income tax purposes (20 NYCRR 534.7[d][1]). Although the same condition was stated in the regulation in effect during the hearing on this matter (former 20 NYCRR 525.5[c][4]), the record indicates

no evidence that the petitioner did actually charge off the debt for Federal income tax purposes. Given the wide latitude granted to the Division by section 1132(e) of the Tax Law to prescribe the conditions for the granting of a bad debt credit, and since this condition, requiring the taxpayer to conform his sales tax treatment to his income tax treatment, is an appropriate requirement, petitioner's failure to satisfy this condition is fatal to his claim for a bad debt credit.

It is not appropriate to remand for additional facts on this issue since petitioner raised the bad debt issue at hearing and was on notice, through the existing regulations, of the condition.

With respect to petitioner's attack on the calculation of the assessment, we agree with the determination of the Administrative Law Judge that petitioner was properly credited with the payment of $10,517.00. This amount was credited to petitioner when calculating the liability due from sales at Perry's American, Heuvelton Mobil and Adam's Store. Accordingly, to credit it against the liability due arising as a result of sales from Nichol's would be to double count it.

We disagree with the Administrative Law Judge's conclusion that the petitioner has not proved that the tax assessment should be reduced. We conclude that through its suit against Nichol's seeking to recover the proceeds of 749,778 gallons of gasoline during the period June 1, 1976 to December 10, 1979, petitioner has established that the Division overestimated the underpayment by petitioner. However, to the extent petitioner's calculation begins with the receipts, plus tax, less Nichol's commission, it is erroneous. Recalculating the tax based on the total receipt (Tax Law §1101[b][3], 20 NYCRR 526.5[e]) results in tax due of $32,259.71.

Accordingly, we find that the total assessment for the period must be reduced to a total of $32,259.71. The difference in this amount and the assessment to be prorated evenly throughout the assessment period.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, People's Oil Co., Inc., is granted to the extent the assessment is reduced to $32,259.71, plus interest, but except as so granted is in all other respects denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in "1" above, but except as so modified is affirmed; and

3. The petition of People's Oil Co., Inc. is granted to the extent indicated in "I" above and in conclusions of law "H" and "I"' of the Administrative Law Judge's determination, and the Division of Taxation is directed to modify the Notice of Determination dated August 27, 1980 accordingly, but except as so granted, the petition is denied.

Dated: Albany, New York
December 08, 1988

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner