

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SHORELINE OIL CO., INC.	:	DECISION
	:	DTA No. 806954
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for	:	
the Year 1984.	:	

Petitioner Shoreline Oil Co., Inc., 34 Evans Street, New Rochelle, New York 10805 filed an exception to the determination of the Administrative Law Judge issued on May 28, 1992 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 year 1984. Petitioner appeared by Levine, Robinson & Algios, PC (Carl S. Levine and Kenneth L. Robinson, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioner filed a letter in lieu of a brief in support of its exception. The Division of Taxation filed a letter in reply. Oral argument, requested by petitioner, was heard on November 12, 1992.

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

ISSUE

Whether petitioner filed a timely application for a refund.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

On or about April 30, 1983, a bulk sale took place between Northern Hudson Oil Co., Inc., seller, and three purchasers, to wit: Shoreline Oil Co., Inc., Panco Equipment Corp. and Ronald Pufhal.

Following the sale, the Division of Taxation (hereinafter the "Division") conducted an audit of Northern Hudson's available books and records which revealed taxes due as follows:

Audited Sales and Use Taxes Due from Northern Hudson	\$ 9,886.68
Sales Tax Due from Bulk Sale of Assets to:	
Panco	1,760.69
Pufhal	977.50
Shoreline Oil Co., Inc.	<u>23,511.40</u>
Total	\$36,136.27

Panco, Pufhal and Hudson made payments totalling \$12,625.17, plus interest, reducing the outstanding liability from \$36,136.27 to \$23,511.10, plus statutory interest.

From the record in this matter, it is clear that a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to Northern Hudson Oil Co., Inc. on August 15, 1983, for the period March 1, 1982 through June 30, 1983, notice number S830815201L. Northern Hudson's president, Victor Kennon, by letter dated September 20, 1983, informed the Division that Pufhal had already paid \$977.50 of the assessment and Panco had paid \$915.00. With said letter, Northern Hudson enclosed a check in the sum of \$9,886.68, plus \$641.08 in interest, for its portion of the tax asserted on notice number S830815201L. The letter also stated that Shoreline was protesting its portion of the assessment in the sum of \$23,511.40 which included the tax assessed on the customer list and other property acquired from Northern Hudson in the bulk sale.

In a letter dated December 21, 1983, from one Edward P. Hand to the White Plains District Office it was reiterated that the portion of assessment number S830815201L with regard to the sale of a customer list by Northern Hudson to Shoreline Oil was "presently under protest" by Shoreline. By letter also dated December 21, 1983, the same Mr. Hand sent a letter to the New York State Tax Commission, Tax Appeals Bureau, allegedly enclosing three executed copies of a petition with regard to assessment number S830815201L and once again stating that the "portion

of the transfers attributable to the sale of customer lists to Shoreline Oil Co., Inc. is already under protest filed with your office on October 11, 1983." Said petitions were not placed in evidence.

There is no other evidence indicating further action by Northern Hudson with regard to its assessment, including any evidence of any proceedings before the former Tax Appeals Bureau.

On or about May 18, 1984, Northern Hudson Oil Co., Inc. was notified by the Division that an overpayment of tax by Northern Hudson had been applied to assessment number S830815201L in the sum of \$17,686.09.

It is this sum for which petitioner herein seeks a refund, pursuant to an assignment dated April 12, 1985 by Northern Hudson Oil Co., Inc. to Shoreline Oil Co., Inc. for "any and all claims for reimbursement of sales taxes paid to the State of New York as a result of the sale to SHORELINE OIL CO., INC. of certain of the customer lists of WESTCHESTER HUDSON FUEL CO., INC. on or about April 30, 1983."¹

On August 15, 1983, the Division issued to Shoreline Oil Co., Inc. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessment number S830815200L, setting forth total tax due of \$36,136.27, plus interest. On the same date, the Division issued to Shoreline Oil Co., Inc. a Notice of Assessment Review which reflected a reduction in the tax liability set forth on said notice to \$23,511.40, plus interest. This adjustment reflected the payments made by Panco, Pufhal and Northern Hudson. Petitioner timely protested this assessment, as modified, but its petition was denied by the New York State Tax Commission on January 28, 1986. Petitioner filed an Article 78 proceeding and paid tax and interest due in the sum of \$30,223.32. It also paid \$250.00 representing security for costs.

On or about February 19, 1987, the Court of Appeals in Audell Petroleum Corp. v. New York State Tax Commn. (69 NY2d 818, 513 NYS2d 962) ruled that the sale of a customer list by an entity not in the business of selling customer lists was not subject to sales tax. On April 6, 1987, petitioner and the former State Tax Commission entered a stipulation discontinuing the Article 78 proceeding. Thereafter petitioner received a full refund on notice number

¹The record reflects a claim of \$17,000.00 which was an estimate made in the September 29, 1987 letter from Dolores David to the Division (Division's Exhibit "F").

S830815200L, which included the assessment of tax on the customer list acquired in the bulk sale from Northern Hudson.

On September 29, 1987, Shoreline Oil Co., Inc. directed a letter to the Central Office Audit Bureau - Sales Tax Refunds Bureau indicating that the letter was to "serve as a protective claim so that the statue [sic] of limitations does not run out and we will be able to recover our money." The letter also indicated that Northern Hudson had lost \$17,000.00 of a refund which had been applied to its assessment number S830815201L with regard to the sale of the customer list. The letter further alleged that Shoreline Oil Co., Inc. "had to pay them for this amount and they then assigned us this amount if and when the case was settled."

It is noted that the refund was applied to the assessment against Northern Hudson in May of 1984 and Northern Hudson's right to that money was not assigned to Shoreline until April 12, 1985. Further, the assignment document does not indicate any consideration paid to Northern Hudson. The only reference to consideration was made in the September 29, 1987 letter to the Central Office Audit Bureau from Ms. Dolores David, vice-president of corporate operations for Shoreline Oil, which stated that Shoreline had paid \$17,000.00 to Northern Hudson ("Northern Westchester", a predecessor corporation).

On December 2, 1987, the Division, by one L. Clark, tax auditor, Central Sales Tax Section, denied petitioner's claim for refund and stated the following explanation:

"With regards to the \$17,000.00 you paid to Northern Oil Co., Inc. This was money that was withheld from Northern Hudson and applied to an assessment against them on May 18, 1984. A claim for refund of such money would have to have been filed with the State on or before May 18, 1987 in order to be within the Statute of Limitation. The law provides for a three year Statute of Limitation from the date taxes are due and payable in which to apply for a refund. In view of the fact that your request for such refund was not filed until September 29, 1987, the Statute had expired and your claim must be denied."

It is this denial of refund which petitioner protests in the instant proceeding.

We make the following additional findings of fact:

The record contains no evidence that petitioner paid sales tax on the sale of the customer lists to Northern Hudson. In Matter of Shoreline Oil Co. (State Tax Commn., January 28, 1986), the former State Tax Commission in Finding of Fact Five stated "[u]pon audit of [Northern] Hudson's records, the Audit Division determined that Shoreline had failed to pay sales tax [to Northern Hudson on the customer lists]"

Other than petitioner's letter dated September 29, 1987, the records contain no requests filed with the Division by any party for a refund of \$17,686.09 applied against assessment number S830815201L.

In September of 1987, the Division of Tax Appeals inherited all protests then pending before the former State Tax Commission's Tax Appeals Bureau. No petitions allegedly filed by Northern Hudson with the former State Tax Commission exist in the Division of Tax Appeals' records.

OPINION

The Administrative Law Judge concluded that: (1) Tax Law § 1139(a) and 20 NYCRR 534.2(b) do not permit petitioner to claim this refund; (2) Northern Hudson's attempt to assign its "claim for reimbursement" is contrary to public policy as an impermissible attempt to give petitioner Northern Hudson's status and grievance, citing Weimer v. Board of Educ. of Smithtown Cent. School Dist. No. 1 (52 NY2d 148, 436 NYS2d 853); (3) assuming that petitioner could make a refund application as an assignee of Northern Hudson, petitioner's application was untimely and, therefore, the refund claim was properly denied by the Division under Tax Law § 1139(a)(ii) and 20 NYCRR 534.2(b); (4) the September 20, 1983 letter from Northern Hudson's president to the Division was not a valid petition; (5) Northern Hudson never filed a petition in response to its assessment (assessment number S830815201L) and, therefore, the period of limitations for claiming a refund of this assessment has expired.

Petitioner asserts on exception that: (1) Tax Law § 1139(a) provides a refund mechanism for taxes paid by the applicant (petitioner) to a person (Northern Hudson) required to collect tax (Tax Law § 1139[a][1]), or for taxes paid by the applicant directly to the Division (Tax Law § 1139[a][ii]); (2) petitioner has standing to claim a refund, since it paid tax to a person required

to collect the tax, i.e., Northern Hudson; (3) Northern Hudson could and did legally assign to petitioner Northern Hudson's claims for a refund of taxes; (4) the September 20, 1983 letter from Northern Hudson's president was a timely protest to assessment number S830815201L; (5) as Northern Hudson timely filed a protest to assessment number S830815201L, the Division erroneously assumed that the taxes assessed in that notice against Northern Hudson were finally determined to be due 90 days from the date of the notice and wrongfully applied a refund of \$17,686.09 due Northern Hudson to pay the taxes assessed in that notice; (6) as the Division knew prior to May 14, 1984 that there was a dispute as to whether the taxes assessed in the four identical notices were due and payable to the Division, and since the Division is permitted to collect a sales tax only once on each transaction, the protests filed by petitioner and Panco to assessment numbers S830815200L and S830815203L, respectively, should have caused the Division to cease enforcing assessment number S830815201L against Northern Hudson; and (7) petitioner is entitled to a refund of the \$17,000.00, plus interest, as Northern Hudson timely protested assessment number S830815201L, and petitioner timely filed a request for a refund of the \$17,000.00 in sales taxes improperly applied by the Division to that notice.

The Division, in response to petitioner's exception, asserts that: (1) standing to file a claim for a tax refund is personal to the taxpayer who paid the tax to the Division and is, therefore, not assignable; (2) to permit a tax refund based on an assignment from the taxpayer who paid the tax would contravene public policy, citing General Obligations Law § 13-101.3; (3) the record does not support the existence of a timely protest by Northern Hudson and therefore, the Division's application of a tax overpayment by Northern Hudson in the amount of \$17,686.09 to assessment number S830815201L was proper, and (4) petitioner's refund claim should be denied.

We affirm the determination of the Administrative Law Judge.

Tax Law § 1139(a) provides, in pertinent part, as follows:

"[i]n the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article, or (iii) in the case of a tax due from the seller, transferor or assignor and paid by the applicant to the tax commission where the applicant is a purchaser, transferee or assignee liable for such tax pursuant to the provisions of subdivision (c) of section eleven hundred forty-one of this chapter, within two years after the giving of notice by the tax commission to such purchaser, transferee or assignee of the total amount of any tax or taxes which the state claims to be due from the seller, transferor or assignor . . ." (emphasis added).

In determining whether Northern Hudson or petitioner made a timely application for a refund, we first determine whether the sales tax assessment issued to Northern Hudson was timely protested as required by Tax Law § 1138(a). Tax Law § 1138(a) states, in pertinent part, that:

"(1) . . . [The notice of] determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing . . ." (emphasis added).

"(2) . . . such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days."

Former Tax Law § 1139(c) provided for the year at issue that:

"[a] person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section eleven hundred thirty-eight where he has had a hearing, or an opportunity for a hearing, as provided in said section, or has failed to avail himself of the remedies therein provided" (emphasis added).

If an assessment has been timely protested and monies are then paid to the Division on the assessment, a taxpayer would not be precluded from receiving a refund if the assessment is later

found to be erroneous, even though a specific application for refund was not filed (see, Matter of Allied Aviation Serv. Co. of N.Y., Tax Appeals Tribunal, June 27, 1991). If, however, the assessment was not timely protested, subsequent payment of the assessment, followed by an application for a refund of that payment, cannot revive an untimely protest to the original assessment (Tax Law §§ 1138, 1139).² The sales tax law does not allow a taxpayer an alternative to the 90-day period of limitations in which to protest an assessment (i.e., a notice of determination).

We agree with the Administrative Law Judge that Northern Hudson did not file a protest to assessment number S830815201L. Under Tax Law § 1138, Northern Hudson could have filed a timely protest to assessment number S830815201L at any time up through November 14, 1983. Petitioner asserts that the September 20, 1983 letter from Northern Hudson's president to the Department of Taxation and Finance (Exhibit "8") was a timely protest of Northern Hudson's assessment. According to petitioner, the September 20, 1983 letter put the Division on notice that Northern Hudson was protesting assessment number S830815201L. We disagree. The September 20, 1983 letter states that Northern Hudson was paying a portion of the tax liability assessed in assessment number S830815201L and that petitioner was protesting its assessment. Nothing in the language of the letter indicates that Northern Hudson was protesting the assessment issued to it. Additionally, Northern Hudson's reference to petitioner's protest does not constitute a protest to Northern Hudson's assessment, as Tax Law § 1138(a)(i) specifically states that the "person" against whom a notice of determination is assessed must petition for a hearing. Petitioner further cites the letters of December 21, 1983 as evidence that a petition was

²In contrast, Tax Law § 689(c), under Article 22 of the Tax Law, permits an individual to protest amounts paid in response to a notice of deficiency even if the taxpayer has not filed a timely petition challenging that notice. Under Tax Law § 689(b), the taxpayer may pay the assessment and make a timely refund claim which, if denied by the Division, may be protested by filing a timely petition to the denial of the refund claim.

filed by Northern Hudson. However, these letters alone do not prove that the petition referred to in the letters was in fact filed.³

No other evidence was introduced by petitioner to support its assertion that Northern Hudson in fact filed a petition protesting assessment number S830815201L. Further, as we noted in the findings of fact, no petitions filed by Northern Hudson exist in the records of the Division of Tax Appeals, which in September 1987 inherited all the protests then pending before the former State Tax Commission's Tax Appeals Bureau.

Petitioner additionally asserts that its protest to related assessment number S830815200L should have put the Division on notice that assessment number S830815201L was under protest. We disagree. As noted above, Tax Law § 1138(a)(1) requires the "person" against whom a notice of determination is assessed to petition for a hearing. While the record indicates that petitioner timely protested the assessment issued to it (assessment number S830815200L), its timely protest cannot effectively serve as a timely protest of another "person's" assessment notice (see, Matter of Halperin v. Chu, 134 Misc 2d 105, 509 NYS2d 692, affd 138 AD2d 915, 526 NYS2d 660, lv denied 72 NY2d 938, 532 NYS2d 845). To allow such a protest would in effect allow related or unrelated parties to stop the period of limitations from running on parties who took no actions on their own behalf.

Northern Hudson's failure to protest its notice caused the tax liability to be irrevocably fixed pursuant to Tax Law § 1138 and, having become irrevocably fixed, neither Northern Hudson nor petitioner could apply for a refund of any monies paid to the Division satisfying this assessment (see, former Tax Law § 1139[c]).

Petitioner additionally asserts that under Tax Law § 1139(a) it is entitled to a refund of funds it asserts it paid to Northern Hudson in Northern Hudson's capacity as a person required to collect tax. Since petitioner has not proven the fact of such payment, a refund under Tax Law

³Even if a petition was in fact filed on December 21, 1983, it would not have been a valid protest of the assessment because it would have been untimely. As noted above, the last day to protest the assessment was November 14, 1983.

§ 1139(a) is not available. Petitioner's counsel asserts that in consideration for Northern Hudson's April 12, 1985 assignment of its "claim for reimbursement" of sales taxes paid to the State of New York (Exhibit "22") petitioner paid Northern Hudson \$17,000.00 in sales taxes (Hearing Tr., p. 17).⁴ Petitioner had the opportunity to submit into evidence at the hearing below testimony or documents that would support its claim that it paid \$17,000.00 in sales taxes to Northern Hudson. No such evidence was produced. Little weight can be ascribed to the assertions of petitioner's counsel that such funds were paid to Northern Hudson (Matter of Cafe Europa, Tax Appeals Tribunal, July 13, 1989). We further note that the State Tax Commission's decision relating to petitioner's protest of its own assessment (assessment number S830815200L) specifically states that petitioner did not pay tax on the customer lists to Northern Hudson (Matter of Shoreline Oil Co., *supra*).

We do not need to address whether Northern Hudson could validly assign its "claim for reimbursement" to petitioner as petitioner has failed to demonstrate that a valid protest to assessment number S830815201L was filed (Tax Law § 1138[a]), or that it had paid sales tax to Northern Hudson as a person required to collect sales tax (Tax Law § 1139[a]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Shoreline Oil Co., Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Shoreline Oil Co., Inc is denied; and

⁴In 1986, when petitioner filed its Article 78 proceeding with respect to assessment number S830815200L, petitioner paid tax and interest due in the sum of \$30,223.32. Petitioner apparently did not assert at that time that its payment should be reduced by \$17,000.00 because it had allegedly paid \$17,000.00 in sales tax to Northern Hudson as consideration for the April 12, 1985 assignment.

4. The Division's denial of Shoreline Oil Co., Inc.'s refund claim is upheld.

DATED: Troy, New York
April 8, 1993

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner