

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PEOPLE'S OIL CO., INC. : DETERMINATION
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. :

Petitioner, People's Oil Co., Inc., 59 Miner Street, Canton, New York 13617, 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 March 1, 1977 through November 30, 1979 (File No. 31559).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, W.A. Harriman State Office Building Campus, Albany, New York on September 8, 1986 with all briefs and documents to be filed by January 4, 1987. Petitioner appeared by Fischer, Hughes & Bessette (Bryan J. Hughes, Esq., of counsel) and by Dragon Benware & Co., P.C. (Gary Dragon, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. 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.
2. 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.
3. On August 27, 1980, the Audit 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 Audit Division to conclude that sales and use tax was due on three areas which were reviewed.

4. First, the Audit 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.

5. Second, the Audit 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 Audit 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.

6. When calculating the foregoing amount of tax reported during the audit period above, the Audit 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.

7. 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.

8. In order to ascertain the amount of tax due on sales made at Nichol's, the Audit 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.

9. In determining the amount of tax previously paid arising from sales at Nichol's, the Audit 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.

10. 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.

11. 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 seeking a recovery of the underreported gross receipts, which included tax, for the period June 1, 1976 through December 10, 1979. This litigation resulted in a judgment in petitioner's favor in the amount of \$530,601.57 based upon Nichol's having underreported to petitioner sales of 749,778 gallons of gasoline. Petitioner submits that, based upon the judgment, the amount of tax assessed on the sales at Nichol's was excessive.

12. Petitioner has been able to collect only \$54,112.63 in satisfaction of its judgement against Nichols.

13. After the hearing, petitioner moved to strike the Notice of Determination and Demand for Payment of Sales and Use Taxes Due and the field audit report from the hearing record. Petitioner also asserted that the failure to collect the full amount of the judgement constituted a bad debt warranting a reduction in the liability. In addition, petitioner requested that interest be waived.

CONCLUSIONS OF LAW

A. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 27, 1980 was timely with respect to the period ending May 31, 1977 by reason of the consent to extend the period of limitation (Tax Law § 1147[c]). The sales and use tax returns for the following quarterly periods were due within twenty days after the end of the

quarterly period (Tax Law § 1136[b]). The Audit Division then had three years from the date the returns were due to issue an assessment of sales and use taxes (Tax Law § 1147[b]). Therefore, the notice issued August 27, 1980 was not barred by the statute of limitations for the periods ending August 31, 1977 through the remainder of the periods in issue.

B. That petitioner's motion to strike the Notice of Determination and Demand for Payment of Sales and Use Taxes Due and the audit report as being without foundation, authentication and hearsay are denied. These documents are properly considered a part of the hearing record (State Administrative Procedure Act § 306[1],[2]); see Matter of Mira Oil Co. v. Chu, 114 AD2d 619, appeal dismissed 67 NY2d 756, lv denied 68 NY2d 602).

C. That the term "vendor" is defined by Article 28 of the Tax Law to include:

"A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article;..." (Tax Law § 1101[b][8][C]; emphasis added).

D. That Tax Law § 1101(a) defines "person" to include a corporation for purposes of Article 28 of the Tax Law. Accordingly, although petitioner utilized other parties to effect the sales of its product, it was a vendor required to collect sales and use tax (see 20 NYCRR 526.10[a][3]). As such, petitioner was required to collect sales tax on the products it sold (20 NYCRR 526.11[a]).

E. That the bad debt provision set forth in 20 NYCRR former 525.5 is inapplicable because, among other reasons, there has been no showing that petitioner, as a consignor, sold gasoline to Nichol's.

F. That petitioner has failed to sustain its burden of proof of establishing that the assessment of sales and use taxes was erroneous. Although petitioner has established that Nichol's underreported its gasoline sales to petitioner in the amount of \$530,601.57, the amount of tax asserted to be due was premised upon the total sales of Nichol's with certain adjustments. Therefore, the figures presented by petitioner with respect to its judgment against Nichol's are not comparable and provide no basis for an adjustment of the amount of tax assessed. It is also noted

that the Audit Division properly declined to give petitioner credit for the remittance of \$10,517.00 with respect to the tax due arising from Nichol's sales since said remittance was already taken into account when reviewing the sales at Perry's American, Heuvelton Mobil and Adam's Store.

G. That there is no provision in the tax law for the remission of statutory interest.

H. That the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due to take into account the payment described in Finding of Fact "10".

I. That the petition of People's Oil Co., Inc. is granted only to the extent of Conclusion of Law "H" and the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due accordingly, as modified, the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated August 27, 1980, is sustained.

DATED: Albany, New York
October 27, 1987

ADMINISTRATIVE LAW JUDGE