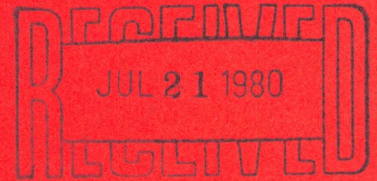


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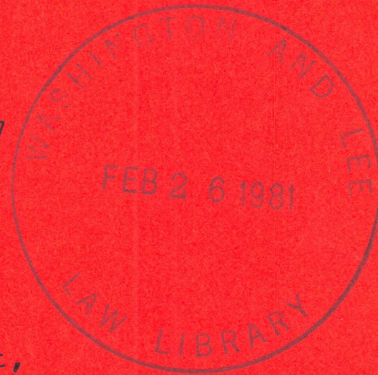
CLERK
SUPREME COURT OF VIRGINIA



IN THE

SUPREME COURT OF VIRGINIA

Record No. 800817



COMMONWEALTH OF VIRGINIA, ex rel.,
ATTORNEY GENERAL OF VIRGINIA,

Appellant,

v.

STATE CORPORATION COMMISSION
and
BALTIMORE TANK LINES, INC.,

Appellees.

JOINT APPENDIX

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Appellant,

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STATE CORPORATION COMMISSION
and
BALTIMORE TANK LINES, INC.,

Appellees.

JOINT APPENDIX



BALTIMORE TANK LINES, INC.

P.O. Box 1028 180 Eighth Avenue
GLEN BURNIE, MARYLAND 21061

August 25, 1978

Mr. Albert Stuart, Jr.
Director
State Corporation Commission
Div. of Motor Carrier Taxation
P. O. Box 1159
Richmond, Virginia 23209

Dear Sir:

On Oct. 13, 1977 and Nov. 13, 1977, File No. 68161, I received from your office copies of Audit Reports for periods July 1, 1975 to Sept. 30, 1976 and Oct. 1, 1976 to Sept. 30, 1977.

In each audit report, the first by Mr. Lee E. Gilbert, Supv. of Refunds, and the second audit by Mr. J. W. Lester, Field Representative, we were denied our applications for refund.

After receiving these letters, I contacted Mr. E. H. Williams, Jr., Executive Vice President, Virginia Highway Users Assn., Inc., on Dec. 9, 1977, to intervene on my behalf to protest this denial and, if necessary, to arrange for a hearing. (Copy of this letter attached.) I was assured by Mr. Williams that your office was investigating our case and was advised that it was not necessary to take further action to request a hearing.

Mr. Williams on June 23, 1978, acting on my behalf, appeared before the three member commission to present my case and to take whatever action necessary to register my disagreement with your denial of my request for refund. Again I was assured that the commission would make a decision in this matter. Therefore, I was certainly surprised to learn that in your letter to Mr. Lowry Brooks, Chief Auditor, Maryland Gasoline Tax Division, that our company "has not responded as to their desires or intents". Mr. Williams certainly represented to your office my disagreement with your findings and had the informal hearing with your commission on June 23, 1978.



Mr. Gilbert denied our claim on the basis of refunds on Maryland quarterly returns and Mr. Lester denied our claim on dissimilarity of laws between the two states. Two completely different approaches with the same result.

Mr. Gilbert failed to take into consideration that our company paid Maryland State diesel taxes at the time of each purchase from the supplier. The fact that part of this tax-paid fuel was used in Pennsylvania made a refund necessary when the quarterly reports were filed.

Mr. Lester satisfied himself that this was the case and that refund from Maryland was due to fuel purchased in Maryland being used in other states. He also found that our credit in Virginia was due to two dedicated tractors, purchasing fuel entirely in Virginia and we consumed approximately 50% of this fuel in Maryland. Mr. Lester recognized in his letter of Nov. 28, 1977 that we applied for refund for certain excess credits "for Virginia Fuel burned over Maryland roads".

You raised the question in your letter to Mr. Brooks that "such excess may be refunded if it appears that the applicant has paid to another State under a lawful requirement of such State a tax, similar in effect to the tax herein provided, on tax use or consumption in said state of gasoline or other motor fuel purchased in Virginia". I submit the Baltimore Tank Lines case rests on this--that Virginia fuel purchases have been used in Maryland and that Maryland has collected for their rightful tax due.

I am enclosing Mr. Lester's Nov. 28, 1977 audit letter which proves this conclusively to be a fact.

Your letter to Mr. Brooks and I quote: "it is my understanding in this case that all taxes paid in Maryland by the carrier was on fuel purchased in your state".

Mr. Lester verified Southern States Cooperative, Fairfax, Va. sales slips traced them through to our driver's daily manifest and was completely satisfied that Virginia fuel was purchased and that Maryland was paid tax on this fuel used in Maryland.

It certainly should be apparent that each auditor used a different approach to deny claim - forcing our company into a position to pay double taxes to Maryland and Virginia. This should be contrary to any doctrine of law.

It seems apparent that Mr. Williams' presentation to your office that he was acting on my behalf has not been accepted as a formal notice of protest and request for hearing.

This letter will serve to request a formal hearing before your commission to resolve this matter.

Mr. Lester and Mr. Gilbert were informed at the time of the audits that I did not agree with their findings and my reasons for my disagreement.

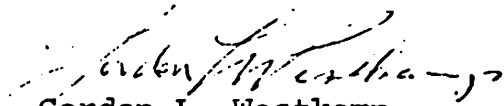
I would like to request that both Mr. Lester and Mr. Gilbert both be present at our hearing.

I would also like to request a copy of what action was taken at the hearing on June 23, 1978.

Thank you in advance for expediting my request for a hearing.

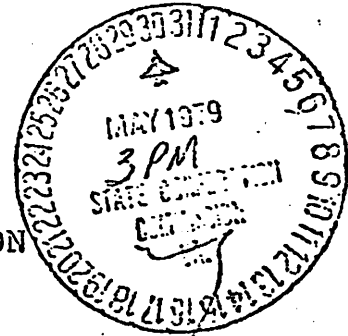
Very truly yours,

BALTIMORE TANK LINES, INC.


Gordon L. Westkamp
President

att:

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND



Application of

BALTIMORE TANK LINES, INC.
180 Eighth Avenue
P. O. Box 1028
Glen Burnie, Maryland 21061

Case No. L-765

For Refund of Motor Fuel Road Taxes

STIPULATION

The following stipulations relevant to this application are agreed to:

Stipulation 1. The amount of the refund at issue, for which applications were timely filed, is \$1,967.43.

Stipulation 2. Baltimore Tank Lines's records for the time period in question have been audited by the Virginia Division of Motor Carrier Taxation.

Stipulation 3. Fuel purchased in Virginia on which the refund is sought was used in identified vehicles (the "dedicated tractors") on identified mileage in the States of Virginia and Maryland as verified by the audits.

Stipulation 4. The State of Maryland charged Baltimore Tank Lines under its Road Tax and Motor Carrier Statute with the mileage traveled in Maryland by the dedicated tractors in computing Baltimore Tank Lines's motor fuel road tax liability to Maryland for the time period in question.

Stipulation 5. The State of Maryland imposes a motor fuel road tax at the rate of nine cents a gallon for mileage traveled on its highways, and the formula used by the State of Maryland for computing miles per gallon is the same as the formula used by the State of Virginia.

Stipulation 6. Total fuel purchases by Baltimore Tank Lines in the State of Maryland for use by vehicles in Maryland and in Pennsylvania resulted in excess fuel purchases by Baltimore Tank Lines in the State of Maryland, and the payment of refunds by the State of Maryland to Baltimore Tank Lines on its overall operations.


Counsel for Applicant


Assistant General Counsel

Dated: May 31, 1979.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, JANUARY 30, 1980

APPLICATION OF

BALTIMORE TANK LINES, INC.
180 Eight Avenue
P.O. Box 1028
Glen Burnie, Maryland 21061

CASE NO. L-765
FINAL ORDER

For Refund of Motor Fuel Road Taxes

On August 29, 1978, came Baltimore Tank Lines, Inc. and presented a petition under §58-529 of the Code of Virginia (1950) for a refund of motor fuel road taxes amounting to the sum of \$2,964.83. On June 4, 1979, a hearing was held before the Commission and by order dated September 10, 1979, the Commission granted a refund amounting to the sum of \$1,967.43. Thereafter, it was discovered that a defect in the order setting said hearing had not provided that adequate service of process be given the Attorney General of Virginia, and by order dated September 18, 1979, the matter was again set for hearing, which was conducted on October 5, 1979, before the full Commission, Commissioner Shannon presiding. Alexander Wellford, Esquire, represented the petitioner. Norman K. Marshall, Esquire, represented the Attorney General of Virginia. Lewis S. Minter, Esquire, and Edward C. Tosh, Esquire, appeared as counsel to the Commission.

By stipulation proffered at the hearing conducted on June 4, 1979, and accepted as part of the record for purposes of the October 5, 1979, hearing, the applicant, by counsel, reduced the amount of the refund sought to the sum of \$1,967.43.

After consideration of the evidence and arguments of counsel, the Commission is of the opinion and finds that the petitioner is entitled to a refund of motor fuel road taxes in the sum of \$1,967.43. Accordingly,

IT IS ORDERED that the petition of Baltimore Tank Lines, Inc. for a refund of \$1,967.43 in motor fuel road taxes be, and the same is, hereby granted.

AND IT IS FURTHER ORDERED that an attested copy of this order be sent to Alexander Wellford, Esquire, 1200 Mutual Building, Richmond, Virginia 23219; to the Honorable J. Marshall Coleman, Attorney General of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219; to Norman K. Marshall, Esquire, Assistant Attorney General of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219; and to the Commission's Division of Motor Carrier Compliance and Services.

IT IS FURTHER ORDERED that an attested copy of this order be sent to the Comptroller of this Commission who shall provide the Comptroller of the Commonwealth of Virginia

with a copy of this order and with the necessary documents for refund.

SHANNON, Commissioner, dissenting: Section 58-629 of the Code of Virginia (1950) does not permit refund under the facts presented.

A True Copy

Teste:

A handwritten signature in cursive script, reading "William C. Young".

Clerk of State Corporation Commission.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
RICHMOND

AT RICHMOND, MAY 30, 1980

APPLICATION OF

BALTIMORE TANK LINES, INC.

CASE NO. L-765

For refund of motor fuel road
taxes

Opinion, Harwood, Commissioner:

On August 29, 1978, Baltimore Tank Lines, Inc. (applicant or carrier) filed a petition with this Commission under the provisions of Article 12 of Chapter 12 of Title 58 of the Code of Virginia (1950) (§58-627, et seq.) seeking refund of "excess" credits under the road tax. After an ore tenus hearing and the entry, on September 10, 1979, of an order granting a refund in the amount of \$1,967.43, it was discovered that the procedural requirements of §58-629 had not been complied with, as the Attorney General of Virginia had not been given proper notice. The order of September 10, 1979, disposing of the matter, was thereupon vacated by an order dated September 18, 1979. The latter order directed that the Attorney General of Virginia be given notice of a rescheduled hearing on October 5, 1979, at which time we heard the matter de novo.

The evidence consisted of the testimony of one Staff witness, a stipulation of facts, and two exhibits.

The applicant requests a refund in the amount of \$1,967.43 which it claims as "excess" road tax credits under Code §58-629. The Virginia road tax, in essence, imposes upon certain motor carriers a tax on the use of the highways of the Commonwealth amounting to 11 cents per gallon of fuel used in their operations within Virginia. The impact of this tax is modified, however, by the terms of Code §58-629. That section permits carriers to claim a credit against their road tax liability, which credit arises out of their purchase of motor fuel in Virginia and the payment of fuel taxes thereon. The credit is 9 cents per gallon of fuel purchased in Virginia for use either in Virginia or elsewhere, provided the attendant tax on gasoline or other motor fuel is paid to the Commonwealth.

Section 58-629 permits, under certain conditions, on a quarterly basis, a carrier who accumulates more credits under §58-629 (from the purchase of fuel in Virginia) than liability under §58-628, (from the use of fuel on the highways of Virginia) to claim either a credit against future road tax liability or a refund of its "excess" credits. The applicant has requested a refund.

Section 58-629 empowers the Commission to grant refunds of such "excess" credits if the applicant so requests within the allowed time limit, and demonstrates that it "...

has paid to another state, under a lawful requirement of such state a tax, similar in effect to the tax herein provided, on the use or consumption in said state of gasoline or other motor fuel purchased in Virginia, to the extent of such payment to said other state, but in no case to exceed the rate of nine cents per gallon."

There is no dispute that the petition was timely filed. The Commission Staff's audit of the carrier's records resulted in a Staff determination that no refund was warranted under the statute, with which conclusion the carrier disagreed, and a hearing was held pursuant to the terms of §58-629.

The central issues for decision in this case are whether the applicant paid a road tax to Maryland arising from the use, in Maryland, of two identified vehicles and whether that tax is "similar in effect" to the Virginia road tax.

The evidence shows, and the Commission finds, that the audit of the applicant's records identified the fuel purchased in Virginia for which relief is sought and that said fuel was used in two identified vehicles on identified mileage in Virginia and Maryland. All the fuel used in these two vehicles was purchased in Virginia, and the motor fuel tax was paid thereon. About half of each vehicle's mileage was accrued in Virginia, and about half was accrued in Maryland. No other mileage was accrued in Virginia by any other vehicle under the authority of the applicant.

These two vehicles, referred to by the applicant as "dedicated" vehicles, constitute part of a larger fleet operated by the carrier in Maryland and elsewhere. Because of "excess" fuel purchases in Maryland arising from operations of the rest of the carrier's fleet (unrelated to the movements of the two "dedicated" vehicles), the carrier accrued net Maryland fuel tax credits in excess of its Maryland road tax liability.

It is stipulated that in determining the carrier's Maryland road tax liability, that state took into account the operations of the two subject vehicles within Maryland and charged the carrier with a motor fuel road tax equal to 9 cents per gallon of fuel used on the Maryland highways. There is no evidence that any credit was allowed the carrier by Maryland for the payment to Virginia of the Virginia fuel tax on the fuel used by these two vehicles.

The Commission Staff takes the position that the application does not meet the requirement of §58-629, in that the carrier did not pay a road tax to Maryland, because the carrier's Maryland fuel tax credits (resulting from its purchases of fuel in Maryland for use in the rest of its fleet and payment of Maryland fuel tax thereon) exceeded its Maryland road tax liability so as to result in a refund of its Maryland "excess credits".

The Commission disagrees with the Staff's position. The operation of only the two "dedicated" vehicles forms the basis of this application, and the Staff's audit shows that all the fuel for these two vehicles was bought in Virginia and that their mileage was about equally divided between Virginia and Maryland. There is no question that Baltimore Tank Lines paid tax to Maryland on fuel purchased in Maryland for its other vehicles. Further, Maryland, in consideration of the mileage traveled by these "dedicated" tractors in Maryland, charged the carrier with a road tax of \$1,967.43.

We agree with the applicant that the word "pay" as used in §58-629 indicates something more than the transfer of cash. We believe that the Commission Staff's construction of "payment" to Maryland to be too restrictive. Had the carrier not been charged by Maryland with \$1,967.43 by reason of the movements of these two vehicles in that state its refund from Maryland would have increased by that amount. The applicant can only be said to have discharged an obligation and paid this amount to Maryland for the use, in Maryland, of fuel which was purchased in Virginia.

The other issue for determination is whether the Maryland road tax is "similar in effect" to the Virginia road tax.

Each state collects motor fuel road taxes on the basis of gallons used within the taxing state, and each offers

an offsetting credit for fuel purchased within the taxing state. Maryland imposes a motor fuel road tax in the amount of 9 cents per gallon of fuel consumed on its highways, and the formulae used by Maryland and Virginia for computing miles per gallon are the same. It appears that Maryland looks to fuel purchases for payment of its road tax exactly as Virginia does, and Maryland law contains provisions for credits against the road tax where fuel purchases in Maryland exceed usage therein. We hold that the Maryland road tax is a tax "similar in effect" to the Virginia road tax for the purposes of §58-629 of the Code of Virginia. The only difference may occur in the administrative application of the tax.

Accordingly, the Commission finds and holds that the applicant has satisfied the requirements of §58-629 of the Code of Virginia and is entitled to a refund in the amount of \$1,967.43.

BRADSHAW, Commissioner, concurs.

SHANNON, Chairman, dissents.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

Application of

February 4, 1980

BALTIMORE TANK LINES, INC.

CASE NO. L-765

For a refund of Motor Fuel Road Taxes.

SHANNON, Commissioner, dissenting:

By letter of application dated August 25, 1978, filed with the Commission on August 29, 1978, Baltimore Tank Lines, Inc., of Glen Burnie, Maryland, pursuant to § 58-629 of the Code of Virginia, as amended, seeks refund of motor fuel road taxes covering the quarterly periods from January 1, 1976, through September 30, 1977, in the aggregate amount of \$2,964.83. After several continuances, the Commission entered an order on May 2, 1979, scheduling the matter for hearing in its Courtroom in Richmond, Virginia, on June 4, 1979. Prior to the hearing, on May 30, 1979, a stipulation was entered into by Counsel for the Applicant and Counsel for the Commission as follows:

1. The amount of the refund at issue, for which applications were timely filed, is \$1,967.43.
2. Baltimore Tank Lines's records for the time period in question have been audited by the Virginia Division of Motor Carrier Taxation.
3. Fuel purchased in Virginia on which the refund is sought was used in identified vehicles (the "dedicated tractors") on identified mileage in the States of Virginia and Maryland as verified by the audits.
4. The State of Maryland charged Baltimore Tank Lines under its Road Tax and Motor Carrier Statute with the mileage traveled in Maryland by the dedicated tractors in computing Baltimore Tank Lines's motor fuel road tax liability to Maryland for the time period in question.
5. The State of Maryland imposes a motor fuel road tax at the rate of nine cents a gallon for mileage traveled on its

highways, and the formula used by the State of Maryland for computing miles per gallon is the same as the formula used by the State of Virginia.

6. Total fuel purchases by Baltimore Tank Lines in the State of Maryland for use by vehicles in Maryland and in Pennsylvania resulted in excess fuel purchases by Baltimore Tank Lines in the State of Maryland, and the payment of refunds by the State of Maryland to Baltimore Tank Lines on its overall operations.

As scheduled, the matter came on for hearing before the Commission on June 4, 1979. The following appearances were entered: Mr. Denton C. Roberts, as Counsel for the Commission; Mr. Alexander Wellford, Counsel for the Petitioner, Baltimore Tank Lines, Inc. The Commission heard oral argument on the applicable law based on the agreed stipulation of facts. On September 10, 1979, the Commission entered an order, to which I dissented, granting the Petition of Baltimore Tank Lines, Inc., for a refund in the amount of \$1,967.43 in motor fuel road taxes. Subsequently, it was brought to the Commission's attention that its order of September 10, 1979, granting the Applicant's petition was jurisdictionally defective since it had not been served on the Attorney General of Virginia as required by § 58-629 of the Code. Thereupon, the Commission entered its September 18, 1979, order setting aside its September 10, 1979, order and docketing the proceeding for rehearing at 10:00 a.m. on October 5, 1979, directing that a copy of the order be served on the Attorney General of Virginia.

The matter came on for hearing before the Commission on October 5, 1979, at which time the Commission received testimony and heard arguments of Counsel. The parties were afforded an opportunity to file legal memoranda on or before October 22, 1979. Briefs have been filed.

Briefly, the pertinent facts are as follows: Baltimore is a transporter of petroleum products. During the period in question, Baltimore owned

approximately forty-three diesel-powered tractors, two of which were used in the transportation of petroleum products between Fairfax, Virginia, and points in Maryland. During the period for which refund is sought, the Baltimore Tank Lines's fleet operated intrastate in Maryland. Two tractors moved black oil between Maryland and Pennsylvania, and one tractor was leased out on a permanent lease to Eastern Motor Transport, Inc., of Richmond, Virginia. One tractor was assigned to a movement of Gulf products between Fairfax, Virginia, and Gulf customers in Maryland until February 7, 1977, at which time an additional tractor was added to the run. These are the two tractors which are referred to in the stipulation of facts as "dedicated tractors." The dedicated tractors were fueled entirely from sources in Virginia and consumed approximately fifty percent of that fuel in Maryland. The dedicated tractors were the only portions of the fleet having Virginia miles under authority of Baltimore Tank Lines and the only portion of the fleet concerned in the application for refund. The audit conducted by the then Division of Motor Carrier Taxation reveals quarterly credits in fuel taxes for the quarters ending March 31, 1976, June 30, 1976, and September 30, 1976; however, the carrier's method of reporting its operations to Maryland indicated a fuel tax credit in Maryland for the same quarters. The Division of Motor Carrier Taxation took the position that since the carrier had not paid an additional tax to Maryland on the reports in question, its request for refund under § 58-629 of the Virginia Code must be denied. Thereupon, the matter was brought before the Commission in the instant proceeding.

Chapter 13, Title 58 of the Code of Virginia, §§ 58-686, et seq., establishes a scheme whereby all motor fuel is taxed at the rate of nine cents per gallon. This tax is levied on all fuel purchased at the pump, regardless of the

use to which the fuel will be put, and is collected by the Division of Motor Vehicles. The State Corporation Commission is not involved with the administration of that chapter of the Code.

Article 12, Chapter 12 of Title 58 of the Code, §§ 58-627, et seq., provides for the taxation of motor carriers for their use of the highways of the Commonwealth. The formula for determining the amount of this tax on road usage is determined by the amount of fuel used within the state, rather than by some other gauge - such as the number of miles traveled. The road use tax is administered by the State Corporation Commission.

The only connection between these two separate taxation schemes is that a motor carrier can be relieved of part of his road use tax obligation to the extent that he can establish the purchase of fuel in Virginia. The amounts paid in fuel tax can be used to offset the liability for the road use tax. The amount of the road tax is equal to the sum of eleven cents per gallon for fuel used in Virginia. Therefore, if a carrier bought one hundred gallons of fuel in Virginia and used all one hundred gallons on Virginia's highways, he would owe a road tax of \$11.00, subject to a credit of \$9.00 for the payment of the fuel tax. Had the carrier purchased one hundred and fifty gallons of fuel in Virginia, but had used only one hundred gallons on Virginia's highways, he would have a fuel tax liability of \$13.50 and a road use tax liability in the amount of \$11.00. He could, therefore, avoid payment of any additional road use tax, because of the credit for his fuel tax paid on his excess purchase of fuel in Virginia. Moreover, pursuant to the provisions of § 58-629, the carrier might even enjoy one of two other possible benefits from this \$2.50 excess. He could be allowed a credit for road use tax for which he otherwise

would be liable for any of the four next succeeding quarters, provided the procedural requirements of the Section are met. Or, if he could show, pursuant to the provisions of § 58-629, that he "... paid to another state under a lawful requirement of such state a tax, similar in effect to tax herein provided, on the use or consumption in said state of gasoline or other motor fuel purchased in Virginia, to the extent of such payment to said other state, but in no case to exceed the rate of nine cents per gallon." (Emphasis added.)

It is important to bear in mind here that we are dealing with two distinct schemes of taxation. The Legislature has provided that payment of one tax may be used to partially, or totally, offset the liability under the other tax. The Legislature has further provided that, in certain narrowly restricted circumstances, the carrier may be granted either a credit against future road taxes or cash refund for a portion of the amount he has paid in motor fuel taxes.

At this point it might be helpful to review the history of the administrative policies of the Commission through its former Division of Motor Carrier Taxation and its current Division of Motor Carrier Compliance and Services concerning monetary refunds of excess credits under the Virginia Road Tax Law since July 1, 1946. For many years there have been industry advocates urging an administrative policy of refunding all excess credits resulting from the overpurchase of tax-paid motor fuel in Virginia, the argument being that the Commonwealth is entitled to only the absolute minimum in tax revenues. The present law and its concept of a statutory formula for determination of tax liability was enacted substantially in its present form, effective July 1, 1942. Amendments throughout the years have broadened the coverage on property carriers, increased the rate of taxation, and recently repealed the tax on passenger carriers. The theory underlying the law

was to encourage or persuade motor carriers to purchase sufficient tax-paid motor fuel under the Fuel Tax Act of Virginia, commensurate with their usage over the highways of the Commonwealth. In the event they did not do so, they were required to pay a road tax on each gallon for fuel used on Virginia highways on which no tax had been paid under the Fuel Tax Act. For many years, to be on the safe side, the carriers overpurchased in Virginia, thus avoiding payments of the road tax in cash on shortages or underpurchases since very few states had a similar law. The Virginia road fuel tax law does not make it mandatory for a carrier to purchase any tax-paid fuel in Virginia. It is a persuasive statute which makes it advantageous for a carrier to do so.

In 1946 the applicable Code section (§ 4097ff, 1946 Cumulative Supp. to the Virginia Code of 1942) read in part as follows:

"When the amount of the credit herein provided to which any motor carrier is entitled for any quarter exceeds the amount of the tax for which such carrier is liable for the same quarter, such excess may under regulations of the Commission be allowed as a credit on the tax for which such carrier would be otherwise liable for another quarter or quarters or upon application within ninety days from the end of any quarter, duly verified and presented, in accordance with regulations promulgated by the Commission and supported by such evidence as may be satisfactory to the Commission, such excess may be refunded if it shall appear that the applicant has paid to another State of the United States or the District of Columbia under a lawful requirement of such jurisdiction a tax, similar in effect to the tax herein provided, on the use or consumption of the same gasoline without this State, to the extent of such payment in such other jurisdiction but in no case to exceed the rate per gallon of the then current Virginia State gasoline tax. Upon receipt of such application the Commission shall proceed in the manner provided in section four hundred eight of the Tax Code of Virginia, as amended, except insofar as such section may be inconsistent with some provision hereof, to grant or deny the same, and whenever

any refund is ordered it shall be paid out of the highway maintenance and construction fund."

Today with amendments, the section reads in part as follows:

"... When the amount of the credit herein provided to which any motor carrier is entitled for any quarter exceeds the amount of the tax for which such carrier is liable for the same quarter, such excess may under regulations of the Commission be allowed as a credit on the tax for which such carrier would be otherwise liable for any of the four succeeding quarters; or upon application within one hundred and eighty days from the end of any quarter, duly verified and presented, in accordance with regulations promulgated by the Commission and supported by such evidence as may be satisfactory to the Commission, such excess may be refunded if it shall appear that the applicant has paid to another state under a lawful requirement of such state a tax, similar in effect to the tax herein provided, on the use or consumption in said state of gasoline or other motor fuel purchased in Virginia, to the extent of such payment to said other state, but in no case to exceed the rate of nine cents per gallon."

From 1946 through 1949 only a few carriers applied for refunds. The administrative interpretation of the statute applied by Commission personnel charged with its administration was to the effect that the Legislature had placed certain restrictions on the Commission in granting monetary refunds of the tax already paid to the Commonwealth under the Fuel Tax Act of Virginia. The administrative interpretation* of the statute and the construction given to it by the officials charged with its administration were as follows:

1. An applicant shall have paid to another state a tax on the use of fuel in that state which was not purchased there.
2. The other state must have a lawful requirement for imposing such tax.
3. The tax must be similar in effect.

*See SCC Chief Auditor A. S. Boatwright's January 28, 1952, Memorandum to Field Auditors.

4. The tax must be on the use or consumption of the same gasoline without this State on which the Virginia tax was paid.
5. The refund is limited to the extent of such additional payment to the other state on fuel purchased in Virginia.
6. The refund in no case could exceed the rate per gallon of the then current gasoline tax of this State.
7. All applications must be filed within the time limitation prescribed by statute.

Insofar as I can determine from July 1, 1946, through July 31, 1978, there was never any feeling on the part of those charged with administering the Road Tax Law that § 58-629 permitted administrative discretion with regard to the limitations imposed by the Legislature on refunds. Recognition of the Commission's adherence to the statutory restrictions on refunds became more obvious as time passed; historically, beginning with a memorandum on the "Enforcement of Road Taxes" signed by Judges Hooker, King and Catterall on July 20, 1949, the Commission directed as follows:

"Refunds.

The requirements for a refund are:

1. The excess credit must have accrued during the quarter preceding the quarter in which application for refund is presented.
2. A use tax must have been paid a sister state on the same gasoline that was purchased in this state. It is not enough that the taxpayer is entitled to a Virginia credit and paid a North Carolina tax; he must prove that the Virginia-taxed gasoline paid a North Carolina tax. He must identify the gasoline that has paid double taxes.

"If the Chief Accountant is satisfied that the taxpayer is entitled to the refund he will notify the taxpayer that he need not appear on the hearing of the application. If the Chief Accountant is doubtful whether

the taxpayer is entitled to the refund or part of it he will notify the taxpayer that he will have to appear on the hearing of the application and support it with common law evidence."

The first carrier to protest the statutory limitations was Lemmon Transport Company, Incorporated. This occurred in 1950 when the Company contested the time restriction as to the filing of applications for refund; however, the Commission, in a unanimous decision, denied the petition and in its opinion reference was made to the restriction that a carrier had to pay a tax to another state, and that it must be on the same gasoline which was purchased in Virginia and used in that state. See Application of Lemmon Transport Company, Incorporated, For Refund of Road Taxes, Case No. 10056, 1950 Report of the State Corporation Commission, 207-211. This Case was appealed to the Supreme Court of Virginia in Lemmon Transport Co. v. Commonwealth, 192 Va. 416, 65 S.E.2d 537 (1951). In affirming the Commission's decision, the Court stated as follows on Page 420:

"The refund dealt with in the statute is not a refund of a road use tax paid the state of North Carolina, but is a refund of the gasoline tax paid to the State of Virginia, and the relief here sought is by reason of a Virginia statute authorizing the refund under the terms and conditions fixed therein. The Legislature provided how, under certain terms and conditions, a motor carrier may secure a refund of the gasoline tax paid, but in order to entitle the taxpayer to the refund there must be a compliance with the terms and conditions of the statute."

Again in 1953 Lemmon Transport Company, Incorporated, filed an application for refund of road taxes in Case No. 11363. The Commission, with Commissioner Hooker dissenting, denied that Application by its Order and Opinion dated March 2, 1953. See 1953 Report of the State Corporation Commission, 76. No appeal was taken from the decision of the Commission in that Case.

Administrative guidance at the Division level in approving or disapproving refunds was influenced to a large extent by the statements set out in

Judge Catterall's majority opinion in the aforementioned Lemmon Case. The pertinent language appears on page 77 and reads as follows:

"The refund provisions of § 58-629 were added to the statute in 1946 because the General Assembly thought it was just, equitable and fair to do so. Now, if § 58-629 had not been thus amended to permit refunds, nobody would suggest that the State Corporation Commission could allow refunds. It seems equally obvious that this Commission has no jurisdiction to allow any refunds except those specifically authorized by the legislature. We have no authority to order the Comptroller to refund taxes lawfully collected merely because we personally believe that it would be just, equitable and fair to do so."

There was no other substantial activity with regard to refunds until 1966, when a bill was introduced in the Virginia General Assembly to amend § 58-629, whereby all excess credits resulting from the overpurchase of tax-paid fuel in Virginia would be refunded. This bill died in Committee.

Although the foregoing recitation of the history of the developments of the refund attempts under § 58-629 is lengthy, it illustrates that the Commission's thirty-three-year administrative policy on refunds has been upheld judicially, as well as legislatively and that the policy was based on purely statutory requirements. The question is now: Can this long-standing administrative interpretation and application of § 58-629 be set aside by administrative action of the Commission? I think not.

Baltimore Tank Lines contends that for the two tractors which traveled identified routes in Virginia and Maryland, it purchased all of its fuel in Fairfax County, Virginia. And that the inescapable fact is that Baltimore Tank Lines has been taxed twenty cents per gallon (nine cents a gallon in Maryland for fuel used on its highways, plus eleven cents per gallon for fuel used on Virginia

highways) on the fuel purchased in Virginia and used in Maryland. It contends that this is precisely the situation which § 58-629 envisions as calling for a credit refund. The Commission's staff, on the other hand, contends, among things, as follows:

- A. That Baltimore here does not fall within the statute because it has not paid to another state a tax on fuel purchased in Virginia and used in another state.
- B. That it would be unlawful for the Commission to allow the carrier to fragment its fleet for tax reporting purposes so as to qualify itself for a refund under Virginia Road Tax provisions.

The staff further contends that its denial of the application of Baltimore is consistent with the history of the administration of this tax, arguing that on Baltimore's entire operations it paid the State of Maryland no road use taxes. In fact, its purchases of fuel in Maryland resulted in a situation whereby the fuel taxes collected from the carrier by Maryland exceeded the amount of the carrier's liability for the road use taxes owing in Maryland. Under Maryland Law, the carrier did in fact receive a cash refund for the excess Maryland credits and paid no road tax whatever. Baltimore did pay a Maryland motor fuel tax. The amount Baltimore paid under the Maryland fuel tax was properly used to offset a liability it might have had under the Maryland road use tax law. It is not disputed that the carrier's liability for the Maryland road tax took into account the use in Maryland of fuel purchased in Virginia; however, it is the staff's position that since the carrier paid no Maryland road tax at all, it does not come within the terms of

§ 58-629 of the Code of Virginia, which allows the State Corporation Commission to grant a refund only if such carrier has paid to another state a road use tax on fuel purchased in Virginia.

It is pertinent to note the language found in Michie's Jurisprudence, Virginia and West Virginia, concerning the rule of practical construction. In 17 Michie's Jurisprudence, 344, the following appears, which I feel is pertinent in this case to the long-standing administrative practice followed by the Commission:

"§ 58. Generally. — The practical construction given to a statute by public officials and acted upon by the people is not only to be considered, but in cases of doubt will be regarded as decisive. It is allowed the same effect as a course of judicial decision. The legislature is presumed to be cognizant of such construction, and, when long continued, in the absence of legislation evincing a dissent, the courts will adopt that construction." (Citations omitted.)

There is no ambiguity in § 58-629 and for thirty-three years the General Assembly has totally acquiesced in the State Corporation Commission's administration of the law, notwithstanding attempts to have this Section amended. Both the language and the long-standing administrative interpretation of the statute make it clear that a positive payment must be made to a sister state of a tax similar to the Virginia Road Use Tax (§ 58-628) before the "excess credits" provision of § 58-629 relating to refunds can be applied. No such payment has been made in the instant case. I, therefore, conclude that it is not within the province of the Commission to grant a refund in the instant case.

IN THE
SUPREME COURT OF VIRGINIA

COMMONWEALTH OF VIRGINIA, ex rel.,
ATTORNEY GENERAL OF VIRGINIA,

Appellant,

v.

Record No. 800817
SCC Case No. L-765

STATE CORPORATION COMMISSION
and
BALTIMORE TANK LINES, INC.,

Appellees.

FROM THE STATE CORPORATION COMMISSION

ASSIGNMENT OF ERROR

Comes now the Appellant, Attorney General of Virginia,
pursuant to Supreme Court Rule 5:18(i), and states the following
Assignment of Error from the final order entered in this cause.

To wit:

1. The State Corporation Commission erred, as a matter
of law and fact, in holding that Baltimore Tank Lines, Inc. met
the conditions of and was entitled to a refund of "excess" credits
for payment of Virginia motor fuel tax (§ 58-711) as such condi-
tions for refund are defined and provided in § 58-629 of the
Code of Virginia (1950), as amended.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General of Virginia

By: Norman K. Marshall
Counsel

Marshall Coleman
Attorney General of Virginia

Norman K. Marshall
John G. MacConnell
Kenneth W. Thorson
Assistant Attorneys General
P. O. Box 6-L
Richmond, Virginia 23282
(804) 257-8090

CERTIFICATE

I hereby certify that the original of the foregoing
was hand delivered to the Clerk of this Court and a true
copy was mailed, postage prepaid, to all counsel for the
Appellees this 12th day of June, 1980.

Norman K. Marshall

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
RICHMOND

October 11, 1977

REPORT OF AUDIT
TO: THE COMMISSION

Re: Baltimore Tank Lines, Inc.
P.O. Box 1028
Glen Burnie, Maryland 21061
Motor Fuel Road Tax - July 1, 1975 - September 30, 1976

Gentlemen:

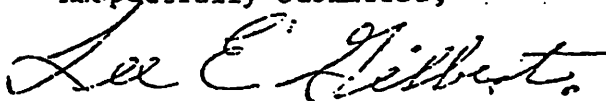
Attached is an exhibit of an audit completed by the undersigned. The carrier was first contacted in November, 1976 but at that time the audit could not be completed due to additional information being needed in a lease out operation. The additional information needed to complete the audit was received in this office on August 30, 1977.

The captioned carrier is a transporter of petroleum products. During the period under audit the carrier owned approximately forty diesel powered tractors which were used in the transportation of the petroleum products from the Baltimore, Maryland and Fairfax, Virginia areas to points in Maryland, District of Columbia and Virginia. The lease out operation involves the picking up of petroleum products in the Manassas, Virginia area and delivering them to points in Northern Virginia. The leased out operations involves the operations of one tractor and are not included in the attached exhibit.

The carrier's tractors fuel primarily from bulk fuel sources in Maryland but they also fuel, to a lesser extent, from a bulk fuel tank at Fairfax, Virginia. The leased out tractor is fueled from bulk tank facilities in Maryland.

The attached exhibit reveals quarterly credits in fuel tax and the carrier has submitted timely applications for the refund of these credits under Section 58-629 of the Code of Virginia for the quarters ending March 31, 1976, June 30, 1976 and September 30, 1976. However, the carrier's method of reporting the above hauling operations to Maryland indicates a fuel tax credit in Maryland for the same quarters. Since the carrier has not paid an additional tax to Maryland on the reports in question the requests for refund under Section 58-629 must be denied. I have informed Mr. Gordon L. Westkamp, President, that the refunds were not in order on several occasions.

Respectfully submitted,



Lee E. Gilbert, Supervisor of Refunds
DIVISION OF MOTOR CARRIER TAXATION

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
RICHMOND

November 28, 1977

REPORT OF AUDIT
TO: THE COMMISSION

Re: Baltimore Tank Lines, Inc.
P. O. Box 1028, Glen Burnie, Maryland 21061
Motor Fuel Road Tax - Oct. 1, 1976 - Sept. 30, 1977

Gentlemen:

Please find attached an exhibit of an audit completed between the dates of November 10 and 15, 1977.

The carrier owns 43 tractors transporting petroleum products. The bulk of this fleet (39 tractors) operates intrastate Maryland. Two tractors move black oil between Maryland and Pennsylvania. One tractor is leased out on a permanent lease to Eastern Motor Transport, Inc., Richmond, Virginia. During third quarter, 1977, one tractor was leased out to another carrier. One tractor was assigned to a movement of Gulf products between Fairfax, Virginia and Gulf customers in Maryland until February 7, 1977; at that time an additional tractor was added to this run and collectively are referred to as the "dedicated tractors."

The dedicated tractors fuel entirely from sources in Virginia and consume approximately 50% of the fuel in Maryland. This being the only portion of the fleet having Virginia miles under the authority of Baltimore Tank Lines, Inc., the exhibit reflects only this fleet.

The carrier having applied for refund under Section 58-629 of the Code of Virginia for certain excess credits in each of the quarters under audit for Virginia fuel burned over Maryland roads, Reports to that state were examined. It was found that the appropriate authority in Maryland determined that, under the state's code, the carrier must file and be liable for all miles traveled by tractors owned by Baltimore Tank Lines, Inc. whether or not such equipment was under lease to and operating under the authority of another carrier. Since the majority of the fleet fueled from sources in Maryland, the carrier reports an excess credit with that state each quarter. For the same reason, Motor Fuel Road Taxes are paid each quarter to the State of Pennsylvania for operations of the black oil movements.

The requirement by the proper authorities in Maryland that the carrier pay taxes upon their fleet fuel consumed while under lease to other carriers departs in principal from the meaning and intent of the Motor Fuel Road Tax laws of Virginia. Then, such taxes so paid are not similar in effect to those paid to Virginia, within the meaning of Sec. 58-629 of the Code of Virginia. Then, it

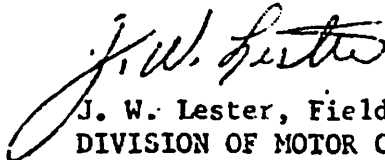
COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
RICHMOND

2

is incumbent upon this auditor that applications for refund be denied.

While denial of the refunds requested is based upon the dissimilarity of laws between two states, it is of interest to note that the carrier continually reports an excess credit to Maryland. Payments made to the State of Pennsylvania are refunded by Maryland. The last prior audit noted a refund denial based upon the absence of payment to Maryland because of these excess credits.

Respectfully submitted,



J. W. Lester, Field Representative
DIVISION OF MOTOR CARRIER TAXATION

JWL/pdm

This section permits the refund of excess credits:

" . . . if it shall appear that the applicant has paid to another state under a lawful requirement of such state a tax, similar in effect to the tax herein provided, on the use or consumption in said state of gasoline or other motor fuel purchased in Virginia, to the extent of such payment to said other state. . . ."

There is no ambiguity in the language of the statute, but it is often hard and sometimes impossible to discover which state the gasoline was used in. Since the taxpayer applying for refund has the burden of proving his claim, he will not be entitled to a refund unless he supports his claim by satisfactory evidence. After proving that he bought in Virginia so much fuel that his tax credits exceed his tax debits, he has to prove how much of his Virginia-purchased fuel was taxed in some other state. This memorandum is limited to a consideration of the possible methods of proving that fact.

The statute is not a statute authorizing the refund of all excess credits; and it is not a statute authorizing a refund of all use taxes paid to other states. Virginia does not give back all payments of taxes on gasoline not used in Virginia. Taxes on gasoline used in farm machinery are refunded because the fuel is not used on Virginia highways, but the legislature has not followed that principle when the gasoline is used on the highways of other states. The only tax relief granted by §58-629

is relief against taxes by two states on the use of the same fuel. Consequently, the applicant for a refund has to prove that "fuel purchased in Virginia" was taxed in some other state. Virginia could not be expected to refund taxes on fuel purchased in Pennsylvania that is used and taxed in Maryland. The word "refund" means to pay back. Virginia could not pay back to the taxpayer money that the taxpayer had not paid to Virginia. Therefore, the applicant for a refund has to prove that the money he wants to get back is money that he paid to Virginia; and that means money paid on "gasoline or other motor fuel purchased in Virginia."

1. Suppose a carrier operates only in Virginia and North Carolina. He buys all his gasoline in Virginia and none in North Carolina. That proves that all the gasoline he used in North Carolina was purchased in Virginia.

2. Suppose a carrier operates only in Virginia and North Carolina. He buys some fuel in both states and has excess credits in Virginia. He would necessarily use some of his North Carolina fuel on the highways of Virginia. Nevertheless, we will assume in the taxpayer's favor that only Virginia-purchased gas was used on Virginia highways and that all North Carolina-purchased gas was used on North Carolina highways.

3. Suppose a carrier operates between Richmond and New York, and buys two-thirds of his fuel in Virginia

and one-third in New Jersey. New York, New Jersey and Pennsylvania have no tax "similar in effect to the tax herein provided." Maryland will impose its tax on fuel used in Maryland. Since the Virginia and the New Jersey gasoline is mixed in the fuel tank, it is impossible to discover how much Virginia fuel has been taxed in Maryland. Nevertheless, in order to help the taxpayer with his burden of proof we are willing to assume that Virginia gas was consumed on the north-bound trip through Maryland. If we assume that Virginia gas was used going north (on the theory of first-in, first out) we will have to assume that New Jersey gas was used coming back south through Maryland, and Virginia could not refund taxes paid to New Jersey.

R.T.C.
September 20, 1961

ALBERT STUART, JR.,

a witness introduced on behalf of the Commonwealth,
being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MINTER

Q Mr. Stuart, for the record state your
full name and your position with the Commission, please?

A Albert Stuart, Jr., Director of the
Commission's Division of Motor Carrier Compliance and
Services.

Q Have your duties in the past involved
the administration of the collection and refund of the
Virginia road tax?

A Yes, sir.

Q Are you familiar with the facts in the
present application?

A I believe I am, sir..

Q Again, for the record, could you outline
very briefly your understanding of the facts, and the
issue or issues which are presented.

A My understanding of the case is that the

Baltimore Tank Lines has made -- application of refund for certain excess credits.

In doing so, applications were filed in accordance with the statute. The Division was required to make an audit examination of the account. As a result of the audit, it was called to my attention that the carrier, although he had indicated certain amounts as being paid to the State of Maryland, in particular for operations in that State, that no payments had been made to Maryland on fuel purchased in excess in Virginia.

The information that I received was that, in fact, the carrier had purchased tax paid fuel in Maryland to the extent that he had purchased in excess in that State, and had received a monetary refund from Maryland. In view of this, I rejected an application or the applications as filed because we had never before considered in the absence of an actual payment for under-purchasing in the State, that any refund was permissible under the Virginia statutes, that had certain restrictive provisions that required a payment, and required that the other State tax the carrier on the excess fuel purchased in Virginia.

In my opinion, this condition did not exist, and consequently I denied the refunds.

Q Mr. Stuart --

A And I would like to add also, excuse me, that in denying refunds, I was not the final answer to it, since Section 58-629 provides that if the Applicant doesn't agree to the action by the Division, that he is entitled as a matter of right, to have a hearing before the Commission. That carrier as well as all others, when I deny a refund in whole or in part, is advised he can appear before the Commission.

Q Mr. Stuart, primarily for clarification, you referred to payments and refunds. Particularly in the State of Maryland. As I understand it, you are really talking about, perhaps, two forms of taxes. You are talking about a fuel tax, and you are talking about a road tax.

Will you explain the relationship of those two, and relate it again to what was paid, and what was refunded in Maryland, as you understand it?

A Well, presumably Maryland, as I understand it, has a similiar tax law to Virginia's, and it is

1
2 probably more illustrative to explain Virginia's view,
3 or the view that has been in effect since the original
4 tax statute came into being.

5 The original statute was referred to
6 and thought of and administered as being a persuasive
7 statute. Persuaded a carrier to buy sufficient tax-paid
8 fuel in this State commensurate with his operations.
9 Tax-paid fuel being fuel that is taxed under the Fuel
10 Tax Act of Virginia.

11 If a carrier purchased sufficient fuel,
12 of which the tax was paid under the Fuel Tax Act, he was
13 allowed credit for it under the road tax. And unless
14 the carrier purchased insufficient amounts of fuel, it
15 was never considered that he was paying road taxes. He
16 had complied with the road tax law, but road taxes came
17 into being only when they were monetary, or cash payments
18 received by the State.

19 Q Mr. Stuart, let me interrupt you just a
20 moment. Is your office concerned at all with the
21 payment of the fuel tax, or the road tax?

22 A We are concerned with the road tax and
23 the fuel tax only to the extent that in any audit procedure
24

1
2 of refunding excess credits, we are refunding taxes
3 collected by another agency, namely the Division of
4 Motor Vehicles.

5 The refunds under the road tax are refunds
6 of the fuel tax, not road taxes. The Commission's
7 collection process of money that is collected, no refunds
8 are refunded out of that source. It is refunded out of
9 collections made by the Division of Motor Vehicles on
10 fuel sold in Virginia on which the tax was imposed, when
11 it was imported into the State.

12 Q Mr. Stuart, will you explain the
13 statutory scheme? How is the road tax determined in
14 Virginia?

15 A The road tax has a statutory formula that
16 basically states that the carrier is liable for a road
17 tax in proportion to the -- to his total use of fuel
18 -- as his Virginia miles pass to his total operation,
19 within and without Virginia. The primary consideration
20 is to get to a percentage. What percentage of your
21 operations or of the motor carrier is on Virginia highways,
22 And the statute assumes that that percentage is the
23 same relationship to miles as it is to total fuel.
24 The percentages applied -- lets say for example fifty

percent of mileage in Virginia, and the statute assumes that fifty percent of fuel used in an entire operation is used on Virginia highways. Once that has been determined, the amount of fuel used, sets up a liability. That liability is credited with all fuel that is purchased in the State, and if it is purchased in excess, then the carrier has excess credits. If it is under-purchased, he owes the road tax, and pays directly to the Commission.

COMMISSIONER SHANNON: How much is the road tax?

WITNESS STUART: The road tax is now eleven cents a gallon. It is referred to quite often as a surtax differential, but it is not a surtax. It is a tax differential. The road tax is at the rate of eleven cents per gallon. The fuel tax on fuel that goes into any motor vehicle is nine cents. So there is a liability generated at the rate of eleven cents a gallon, and a credit offsetting at nine cents a gallon.

And, of course, excess purchases can

offset that differential.

Q Mr. Stuart, again for primarily clarification, would this be a correct statement: That the road tax is determined at the rate of eleven cents per mile, based on the gallonage of gasoline used in Virginia, purchased in Virginia?

A It is, yes, sir. The whole tax is -- the statute is known as a road tax, calculated on fuel used. The road tax doesn't use the term, technically, motor fuel road tax. It is a road tax calculated on fuel used.

Q Well, then, when you speak of a refund in a foreign state, which entitles, or could entitle a carrier to a refund in Virginia, are you speaking of a refund of the road tax in the foreign state?

A You mean as far as refunding of Virginia excess?

Q That is correct. In other words, in order to be eligible for a refund in Virginia, what type of payment must be made in the foreign state? Is it a road tax or a fuel tax that we are talking about?

A Well, in the foreign state, in my view, is that if it is a law similar to Virginia, and what has

1
2 existed in Virginia, he -- that he is only paying a
3 a road tax when he is paying that state or failure
4 to purchase in that State. If he is getting credits
5 for purchasing in the foreign state, and having paid
6 their tax under their fuel tax act, then the element,
7 or the question of road tax, hasn't come into being.

8 Well, now, again I call your attention
9 to that portion of 58-629 which sets -- which appears
10 to set up the refund provision. When it appears that
11 the Applicant has paid to another state, under a lawful
12 requirement of such state a tax similar in effect to the
13 tax herein provided.

14 Now, when we are speaking of a tax
15 similar to the herein provided, we are speaking about
16 payment in the foreign jurisdiction of a road tax, is
17 that correct?

18 A Yes, sir.

19 Q So then in order to be eligible under
20 our statute as administered by your Division, they would
21 have to pay a road tax on fuel purchased in Virginia.
22 In other words, a tax would have been paid twice. A
23 road tax would have been paid twice on the same fuel,
24 is that correct?

A That is correct.

Q Do you understand the facts of this case to establish that the Applicant did, in fact, pay a road tax on the same gallonage purchased in Virginia? Paid it both in Virginia and Maryland?

A I do not consider that he paid Maryland a road tax on excess purchases in Virginia.

COMMISSIONER SHANNON: He paid Maryland the tax he purchased in fuel --

WITNESS STUART: Purchased in fuel. And as a matter of fact, excess purchasing of fuel, and he received a refund from Maryland for those excesses in that State.

BY MR. MINTER (Continuing)

Q It is not the payment of the fuel tax in Maryland that is the criteria in determining refund under our statute, is that correct?

A That is my view, sir.

Q Is it your view, or is it that is what the statute says?

A That is what I feel the statute says.

Q Mr. Stuart, how old is the statute

1 I believe it was probably around 1956 the statute was
2 amended saying that if the Applicant agreed to the
3 amount, that no hearing was necessary. At the same
4 time, it affords him the opportunity if there was any
5 disagreement, that the hearing shall be had.
6

7 As to the so-called restrictions in
8 making refunds, they have not changed, and they are
9 as they were written in the original section in 1946.
10

11 COMMISSIONER SHANNON: Is it your
12 interpretation of the statute, Mr. Stuart,
13 that an applicant for refund has to prove
14 that the fuel purchased in Virginia, for
15 example, has been taxed in another state?

16 WITNESS STUART: That has been our
17 administrative policy. Requiring that before
18 approving any refund. It has to be the same
19 fuel which was purchased in excess in
20 Virginia, and taxed in the other State.

21 COMMISSIONER SHANNON: Suppose you had
22 a situation where you had a carrier operating
23 in Virginia and North Carolina, and they were
24 the only two States in which he operated. He

1 southbound trip, we never would permit that
2 portion of the refund to be made, under the
3 theory that it was not Virginia fuel being
4 taxed in Maryland.

5 And that he did not comply with the
6 provisions of 58-629. And that became what
7 has been referred to and known generally
8 throughout the industry as the identity
9 requirement of fuel.

10 And my Division and I have been
11 guided by a memorandum written by the Commission
12 in 1961, saying that it had to be an inventory
13 approach to identify that it was Virginia fuel
14 actually being taxed in the other State, and
15 in the absence of identity, no refund was ever
16 to be made, and none has been to date.

17 BY MR. MINTER (Continuing)

18 Q Mr. Stuart, again, for clarification,
19 that is not an issue in this particular case, is it?
20 There is no question of identifying fuel or the
21 inventory concept. Is this here not merely a question
22 of whether or not a tax was paid? A road tax was paid
23 in Maryland on both -- it was paid both in Maryland and
24 in Virginia on the same fuel?

1
2 COMMISSIONER BRADSHAW: Take Judge
3 Shannon's question on the reverse. If you
4 bought all your fuel in Carolina, and ran
5 fifty percent of your miles in Virginia,
6 what would be the approach?

7 WITNESS STUART: Well, our approach
8 here would be that Virginia's law was not
9 compulsory. My view is Virginia's law
10 wouldn't be compulsory for the carrier to
11 buy any here. It gets back to the persuasive
12 feature.

13 The computation of liability to
14 Virginia would be that he would have had
15 no credits in Virginia and that he would pay
16 eleven cents a gallon on the number of gallons
17 used in his Virginia operation. We would
18 then make a collection that would be road taxes.
19 It would be monies not collected by the Division
20 of Motor Vehicles under the Fuel Tax side. It
21 would be pure road tax.

22 COMMISSIONER SHANNON: Although there
23 would be a nine cent element of fuel tax.

24 WITNESS STUART: Only as a criteria,
in that the road tax statute is calculated on

1
2 fuel used at a rate per gallon of the existing
3 tax in Virginia.

4 COMMISSIONER SHANNON: In the case,
5 Mr. Stuart, fuel -- it was stipulated here, I
6 think Stipulation 3 is fuel purchased in Virginia
7 in which refund is sought, was used in identified
8 vehicles. The dedicated tractors. You have
9 ascertained they did purchase fuel in Virginia.

10 WITNESS STUART: According to my auditors
11 finding, they did purchase fuel. They did use
12 it in Maryland.

13 COMMISSIONER SHANNON: That is right. And
14 it is this difference, the fuel that was actually
15 used in Virginia -- well, wasn't the fuel used
16 in Maryland and Pennsylvania, or do you know.

17 WITNESS STUART: As I understand it,
18 it is a rather unusual operation. The carrier
19 has certain vehicles that generated a credit in
20 Virginia. Other States are very permissive in
21 permitting a lessor or a lessee to report road
22 tax. It is an elective thing which the carrier
23 can decide which way they want to go, and in
24 this particular case, Maryland would permit the

1
2 inclusion of lessee operations in a lessor
3 tax report.

4 Pennsylvania was the third State
5 involved in this operation. I have been told
6 -- I understand from our auditor the operation
7 that went into Pennsylvania was not performed
8 by Baltimore Tank Lines. They had no authority
9 to perform it, but they leased the operation
10 to a carrier holding a certificate to do so.
11 But for tax purposes Maryland and Pennsylvania
12 permitted them to include them in their
13 operations to those states.

14 The actual shortfall, as I see it,
15 occurred in Pennsylvania. The carrier undoubtedly
16 received money back from Maryland to partially
17 pay its Pennsylvania tax. The remaining part
18 of the shortfall represents money that was
19 excess in Virginia. But my view is that
20 Virginia can't refund anything based on what
21 happened in Pennsylvania merely because the
22 carrier reported an operation that he didn't
23 even perform. It wouldn't be similar to Virginia
24 or Federal law in saying -- you are not even the
operator.

1
2 COMMISSIONER SHANNON: Let me ask you
3 a theoretical question. Suppose Baltimore Tank
4 Line had authority to operate in Pennsylvania
5 under its own name and its own right. Would
6 that have made any difference?

7 WITNESS STUART: I don't think that would
8 have made any difference, because the existing
9 situation in Maryland -- in my view, Maryland
10 was not taxing the excess purchases in Virginia,
11 and I don't feel that a State can make refunds
12 of his fuel tax and in any sense of the word
13 take the position that they are collecting road
14 tax on excess purchases in some other state.

15 So when we have a situation where
16 Maryland collected the fuel tax on all of our
17 fuel and then some, I don't think that that
18 state was imposing any tax on the excess in
19 Virginia, whatever the operational set-up was.

20 COMMISSIONER SHANNON: Are the tax
21 laws in Maryland and Pennsylvania similar?

22 WITNESS STUART: It is very difficult
23 to answer that, Judge. Nearly every state --
24 Virginia was the first state to have a road tax
based on fuel used, and virtually every state

BY MR. MINTER (Continuing)

Q Mr. Stuart, I hate to keep going back to the same basic issue, but I can't help but conclude that we are some times, perhaps, drifting from the real issue here. The problem again -- am I correct in saying the problem is not in identifying the fuel, or in determining the gallongage purchased, but rather was a road tax paid in Maryland on gasoline purchased in Virginia. Is that the issue?

A That is the issue..

Q And again, to your understanding, was any road tax paid in Maryland on the fuel paid in Virginia?

A It was not, to my understanding.

Q And is that disputed as far as you are aware by anybody? Is that issue in dispute to the best of your knowledge?

A I assume that that is the basis of this case by Baltimore Tank Lines.

Q Tell me this, sir. Has that issue over whether or not you could get a refund only if you paid a road tax on the same fuel, has that issue arisen before here, before the Commission?

A Specifically as to whether payment was made, that question has not.

Q Tell me this, sir. Has any effort been made to amend 58-629 so as to eliminate the requirement a road tax be paid in a foreign state before a refund could be obtained in Virginia?

A Yes. It was made in the 1966 legislature.

Q And I take it it was not adopted.

A No, sir. It was killed in Committee.

COMMISSIONER SHANNON: Just for the record, would you explain what -- I heard part of Mr. Minter's question, but I didn't hear the whole question.

WITNESS STUART: That was an amendment that was introduced by the sellers of fuel in Virginia in 1966. It eliminated the restricted provisions that were contained, and apparently contained in 58-629, and it merely said: and supported by such evidence as may be satisfactory to the Commission, such excess may be refunded. Period.

It was thought at that time, and perfectly obvious, that the amendment would have made all excess purchases refunded. The word has been used quite frequently, and even on our tax refunds, as mere excesses. If that amendment had gone through, all excess credits would

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2 have been refunded, and there would have been
3 no restrictions as to having had to use this
4 fuel in another state, or to pay another state,
5 or the other state having to have a law similar
6 in effect.

7 COMMISSIONER SHANNON: It would just be
8 a matter of blanket refund of all excess credits.
9 What you don't do now.

10 WITNESS STUART: That was in 1966
11 proposed amendment.

12 COMMISSIONER SHANNON: I see.

13 COMMISSIONER HARWOOD: Did that go before
14 Roads or Finance?

15 WITNESS STUART: It went before the Roads
16 Committee.

17 COMMISSIONER BRADSHAW: How did I vote
18 on it?

19 WITNESS STUART: Oh, it was in the Senate.
20 Roads and Internal Navigation, I think it was at
21 that time.

22 COMMISSIONER BRADSHAW: That is right.

23 WITNESS STUART: And it lost sixteen to
24 one. Patron voted for it.

B 23 BY MR. MINTER (Continuing)

24 Q Have you endeavored to determine what

CROSS EXAMINATION

BY MR. MARSHALL

Q Mr. Stuart, did your audit reveal that a tax was paid to Maryland upon the fuel to which this excess credit is being -- was generated?

A No, in my view.

Q What do you mean by, 'No, in your view?' Did somebody write a check?

A Nobody wrote any check. Nobody made any monetary payment to the State of Maryland.

Q No money changed hands between Baltimore Tank Lines and the State of Maryland?

A In Maryland's administration of its road tax law.

Q So it is your view, then, that the language of the statute has not been complied with to the extent that it says: An excess may be refunded ... to the extent of such payment to said other State.

There was no cash payment made by Baltimore Tank Lines to the State of Maryland.

A It was not according to my information.

Q It was a bookkeeping entry?

A It was a bookkeeping entry so far as credits toward any liability in Maryland were offset by the payment of tax under the Maryland's fuel tax act on gallons purchased in that State.

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2 Q Did your audit reveal that Baltimore Tank
3 Lines paid a tax in Maryland on fuel purchased in
4 Virginia?

5 MR. WELLFORD: He has already answered
6 this question, and he answered it, 'no' in his
7 view.

8 MR. MARSHALL: I am asking for a
9 clarification, 'no, in your view'. That seems
10 like a qualification. What do you mean by,
11 'no in your view.' Was a check written, did money
12 change hands?

13 WITNESS STUART: No money was paid.

14 BY MR. MARSHALL (Continuing)

15 Q Baltimore Tank Line, in effect, received
16 a credit in Maryland as opposed to making any payment
17 whatsoever.

18 A Correct.

19 MR. MARSHALL: I don't have any more
20 questions.

21 COMMISSIONER SHANNON: Mr. Wellford?
22
23
24

CROSS EXAMINATION

BY MR. WELLFORD

Q You don't mean, Mr. Stuart, that it received a credit concerning this Virginia fuel in the miles traveled in Maryland in which this Virginia fuel was used, do you?

A I mean to say it is my understanding that Baltimore Tank Line received a credit in Maryland for a tax it paid on its Maryland Fuel Tax Act.

Q Because of mileage traveled in Pennsylvania by other vehicles, is that correct?

A No. They received the credit for the overall purchase of fuel in Maryland. I don't think that the computation to Maryland, that the question of Pennsylvania entered into it.

Q All right. We have stipulated --

COMMISSIONER SHANNON: Let me clarify one thing. That credit came about as a result of purchasing more fuel than was necessary to cover its mileage, and operation in Maryland.

WITNESS STUART: And you are only considering Maryland. You are not considering Virginia.

WITNESS STUART: Maryland.

BY MR. WELLFORD (Continuing)

Q But that was by vehicles that traveled in Maryland and Pennsylvania, isn't that correct?

A Both, I assume.

Q There is no question as to the accuracy of these stipulations so far as the fuel purchased in Virginia, is there?

A Not to my knowledge.

MR. WELLFORD: That is all the questions I have.

COMMISSIONER SHANNON: All right.

MR. WELLFORD: Excuse me, there is one more.

BY MR. WELLFORD (Continuing)

Q There is a memorandum which was written by Judge Catterall, which Mr. Stuart made reference. Whether or not that should be a part of this record, or whether the Commission takes judicial notice of this --

COMMISSIONER SHANNON: If you desire to make it for the record, we can do so.

MR. WELLFORD: I would think it would be helpful, since he has testified --

COMMISSIONER SHANNON: What is the date of that? Judge Catterall wrote and sent so many

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2 get a credit.

3 COMMISSIONER BRADSHAW: You mean
4 Maryland.

5 MR. WELLFORD: I mean Maryland, beg your
6 pardon, to get a credit. If it had not charged
7 Baltimore Tank Lines with this mileage involving
8 the Virginia fuel, then it would have gotten a
9 credit of another nineteen hundred dollars, the
amount we are applying for here.

10 This is all we are talking about when we
11 are talking about did Baltimore Tank Lines pay
12 Maryland. It did not pay it in cash, as Mr.
Marshall pointed out. No money changed hands.

13 Baltimore Tank Lines was charged with the
14 liability. Now, if the Commonwealth is going back
15 to the barter system, maybe it wasn't paid. But
16 any sort of sensible accounting procedures, there
17 was a payment made by Baltimore Tank Lines on
18 this fuel. It paid eleven cents to Virginia,
19 then it paid nine cents to Maryland, and it cost
20 twenty cents tax.

21 Now, where you talk about road tax and
22 fuel tax, and I must confess that I understood
23 practically nothing said about these theorial
24 differences.

We are talking about a road tax imposed

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2 MR. MINTER: I think it would be,
3 perhaps, essential to make a few observations
4 here. I think we are mixing up camels and
5 giraffes here on at least two or three different
6 occasions.

7 First of all, we are talking about a
8 carrier. We are not talking about two trucks.
9 The statute applies to a carrier operation. It
10 is not broken down on a truck-by-truck basis.
11 It so happens here that the Applicant had two
12 trucks which supposedly were dedicating fifty
13 percent of their time in Virginia, and fifty
14 percent in Maryland.

15 Supposedly all of the gasoline was
16 bought in Virginia. They did not buy any
17 gasoline for those two trucks outside of
18 Virginia. However, the operation of the
19 Applicant here in Maryland involved two taxes,
20 the same as it does in Virginia. It involves
21 a fuel tax which is paid when you go to the pump
22 and buy the fuel. It involves the road tax,
23 which is measured by the fuel purchase used
24 in that state. Essentially, the same formula
that Virginia follows. I think the rate is

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2 different, but that is it. In Virginia you have
3 an eleven cent road tax. You have a nine cent
4 fuel tax. When you buy fuel in Virginia, it is
5 credited to your road tax.

6 If you were operating exclusively in
7 Virginia, you would always owe some road tax
8 because it is greater than the fuel tax. And
9 as the witness has pointed out, the whole scheme
10 was set up to give an incentive to these inter-
11 state truckers to purchase an adequate amount
12 of fuel in Virginia, which helps not only the
13 coffers in the State, but also helps the gasoline
14 supplier.

15 So lets make sure that we understand here
16 we are talking about only one tax here. A road
17 tax. And as far -- the statute, as far as the
18 Staff is concerned, very explicitly states that
19 you get a credit on your road tax for gas -- for
20 a road tax paid outside Virginia on the same
21 fuel.

22 Now, the simple truth of the matter is
23 in Maryland, as I understand the facts, no road
24 tax was paid on any operation by this Applicant.
The reason being they purchased more gasoline,
or more fuel, than was necessary to cover the
liability for the road tax.

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2-^A 2 The administration -- I don't want
3 to call it interpretation, because I think
4 the statute is so obvious it really isn't an
5 interpretation, the application of the statute
6 has been unchanged since 1946. That is a period
7 of about thirty-three years.

8 It would appear that having gone before
9 the General Assembly on some five times for
10 amendment, that if there was any question as to
11 the propriety or legality that has been given the
12 interpretation of the application that has been
13 given by the Commission, it certainly would have
14 been addressed at some point in time. I believe
15 it was amended '46, '52, '56, '60, and '72.

16 You have one other very critical problem
17 here. And that is, if you try to ignore the
18 requirement that they pay a tax on certain
19 gallonage in the foreign state, then you have no
20 measuring stick by which to determine the refund
21 in Virginia. And the reason is very obvious.
22 Because your refund can be made only to the
23 extent of such payment to said other State, but
24 in no case to exceed the rate of nine cents per
gallon.

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2 If you don't pay a tax in the foreign
3 State, you ain't got no gallons. If you
4 don't have any gallons, you got no way to
5 measure it.

6 It would be an administrative impossibility
7 to apply this statute unless you actually had paid
8 a tax on a number, whatever it may be, of gallons
9 purchased outside of Virginia.

10 This record shows that no tax was paid.
11 No road tax was paid in Maryland. Without some
12 payment of some road tax in Maryland, you never
13 even get the -- to the issue of co-mingling or
14 identification. The issue of identification is
totally irrelevant to this case.

15 COMMISSIONER SHANNON: Are you saying,
16 Mr. Minter, that it has to be a cash payment
17 to Maryland?

18 MR. MINTER: Your Honor, you speak of
19 'cash.' There has to be a payment. You have
20 to identify a certain number of gallons. Whether
21 it is paid by cash, or barter, or check or whatever
22 is immaterial. But a tax has to be assessed
23 on a given gallonage, which has to be paid or
24 offset in some way.

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2 COMMISSIONER BRADSHAW: I thought you
3 just told me identification was irrelevant?

4 MR. MINTER: Identification is
5 irrelevant, Judge, as far as the gasoline is
6 concerned. The question of identification comes
7 up when you are trying to determine whether the
8 road tax paid in Maryland was paid on fuel
9 bought in Virginia. But no road tax was paid
10 in Maryland, ergo, there is no issue or question
11 over whether it was bought in Maryland or
Saskatchewan. It is totally immaterial.

12 COMMISSIONER HARWOOD: If the Virginia
13 statute read fuel tax paid in Maryland, then
14 you would agree they were entitled to a refund.

15 MR. MINTER: Your Honor, if they had
16 paid a gross receipts -- I keep being locked
17 up on the RF&P Case -- if they had paid a road
18 tax in Maryland, then your next question would
19 be: Was that tax paid on gasoline or fuel
20 idenfiablely purchased in Virginia? Now, that is
21 a burden, and I would agree with counsel that
that is a burden.

22 Unfortunately, it is not the problem
23 in this case.
24

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2 COMMISSIONER HARWOOD: Suppose
3 Maryland or any other jurisdiction does not
4 have, quote, a road tax at all. Identifiable
5 as that. It doesn't call it that. It calls it
6 fuel tax, or gallonage tax, or something other
7 than the word, 'road.' But it has the same
8 effect. And an overpurchaser in Virginia would
9 then be entitled to no credit. More fuel was
10 used in Virginia, but because the State doesn't
11 have something called specifically a road tax.

12 MR. MINTER: Oh, no. That has
13 nothing to do with this. The stature, Your
14 Honor, says that if it is similar in effect.

15 COMMISSIONER HARWOOD: Does it say
16 a road tax similar in effect, or just a tax
17 similar in effect?

18 MR. MINTER: You are dealing in an
19 article here that is dealing exclusively with
20 the road tax. It says how you determine it,
21 who pays, and this type of thing. So it is
22 obvious from the content that similar in effect
23 means similar in effect to our road tax, and
24 our road tax is determined by a fuel tax.
A clear distinction is made between the two.