STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CERTIFIED HEATING OILS, INC.	:	DECISION DTA No. 801733
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9, Section 182-a of the Tax Law for the Period July 1, 1981 through June 30, 1983.	:	

Petitioner Certified Heating Oils, Inc., 93 Wright Avenue, Staten Island, New York 10303 filed an exception to the determination of the Administrative Law Judge issued on January 25, 1991 with respect to its petition for redetermination of a deficiency or for refund of corporation tax under Article 9, Section 182-a of the Tax Law for the period July 1, 1981 through June 30, 1983. Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq. and Glen P. Doherty, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Patricia Brumbaugh, Esq. and Peter J. Martinelli, Esq., of counsel).

Petitioner filed a brief in support of its exception. In reply, the Division of Taxation filed a letter and its brief to the Administrative Law Judge. Oral argument, at the request of petitioner, was heard on July 18, 1991.

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

ISSUES

I. Whether the Division of Taxation properly concluded that petitioner imported petroleum into New York for sale in New York and, therefore, was subject to tax under Tax Law § 182-a.

II. Whether petitioner was entitled to credits for gross receipts tax allegedly paid by its suppliers.

III. Whether, if petitioner was subject to tax under Tax Law § 182-a, petitioner has established that its failure to file returns and to pay tax required to be shown on such returns was due to reasonable cause and not due to willful neglect so as to justify the abatement of penalties, and whether a penalty imposed for negligence should be cancelled.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "9" which has been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional finding of fact are set forth below.

Petitioner, Certified Heating Oils, Inc., according to the testimony of its officer, Joseph J. Marino, Jr.[1] started selling gasoline in early 1980. During the years at issue, petitioner sold gasoline to three privately-owned gasoline stations on Staten Island, New York. Although these three stations were branded "Certified", i.e., the stations sold gasoline under the name Certified, petitioner and/or Joseph J. Marino, Jr., did not have an ownership interest in any of the gasoline stations. However, it is not known whether Joseph J. Marino, Sr. had an ownership interest in them.

Petitioner serviced the three gasoline stations with two trucks that transported gasoline from two terminals in New Jersey and from one in Inwood, Long Island, New York. Petitioner had no storage tanks in New York and deliveries were made within one day to the Staten Island gas stations. Petitioner introduced into evidence, as petitioner's Exhibit "1", photocopies of

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[1]The audit report, the Division of Taxation's Exhibit "F", noted that Joseph Marino, Sr. was the sole owner of petitioner. The particular corporate office held by Joseph J. Marino, Jr. was not specifically noted in the record. The powers of attorney introduced into evidence, as part of the Division of Taxation's Exhibit "B", were executed by a Joseph J. Marino (without junior or senior specified), who was described therein as vice-president of petitioner. Mr. Marino, Jr. was the only witness produced by petitioner. The Division of Taxation did not present any witnesses.

some invoices from Ashland Petroleum Company (hereinafter "Ashland") and BP Oil, Inc. (hereinafter "BP") which show that petitioner purchased gasoline from Ashland and BP at their Linden, New Jersey[2] and Tremley Point, New Jersey terminals, respectively. Petitioner also purchased gasoline from Crown Central Petroleum Corp. (hereinafter "Crown Petroleum"), taking product at Wechter Brothers' delivery plant in Inwood, New York.

On the Ashland invoices, "various N.Y. destinations 11000" is shown in the box labeled "consignee", "Linden NJ" in the box labeled "Shipped From", and "XXXX 000001" in the box labeled "Shipped Via". On the BP invoices, "transport" is shown in the box labeled "Shipped Via".

Mr. Marino first testified that BP was his principal supplier of gasoline and then backpedaled, testifying that:

> "During this period, Ashland may have been my principal supplier, I don't recall. I really don't know."[3]

The photocopies of invoices introduced into evidence by petitioner were extremely limited in number showing the purchase of 26,700 gallons of gasoline from Ashland pursuant to three invoices dated July 7, 1981, July 9, 1981 and July 13, 1981, respectively; 14,977 gallons of gasoline from BP pursuant to three invoices dated March 27, 1982 and two dated March 30, 1982; and 9,000 gallons of gasoline from Crown Petroleum pursuant to three invoices[4] with "ship/issue dates" of January 4, 1981, December 25, 1981 and February 1, 1982, respectively.

On March 30, 1983, the Division of Taxation's Oil Tax Task Force received from petitioner a response to its inquiry concerning petitioner's potential liability for gross receipts tax under Tax Law § 182-a. Petitioner noted in its response that: it was taxable under Article 9-A

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[2]Mr. Marino testified that because his trucks were top loading trucks they could not draw product at Ashland's terminal in Linden, New Jersey. Instead, "[t]his Ashland product came out of Citgo's terminal" in New Jersey, although Mr. Marino did not specify the location of Citgo's terminal in New Jersey.

[3]Included in petitioner's Exhibit "2" is a schedule showing Ashland's refinery sales to petitioner for the period July 1, 1981 through June 30, 1983. Such sales amounted to approximately $700,000.00.

[4]These three invoices were introduced after the hearing pursuant to permission granted at the hearing for their later submission. A few invoices for fuel oil purchased by petitioner in New Jersey from Crown Petroleum and Mobil Oil Corp. were also included in petitioner's Exhibit "1".

of the Corporation Franchise Tax Law; it sold petroleum; petroleum was purchased by it or delivered to it from a location outside New York occurring more than once or twice a year; the petroleum purchased outside New York was picked up by petitioner's trucks;[5] and petitioner was not principally engaged in selling fuel used for residential purposes.

According to the field audit report dated December 20, 1984, a New York State miscellaneous tax audit completed on March 27, 1983 corroborated that:

> "(A)ll of Certified purchases are made from New Jersey sources and picked up in New Jersey by Certified's own trucks for importation and sale in New York State."

The audit procedure was described, in relevant part, in the audit report as follows:

> "The auditor reviewed purchase invoices and found that Certified imported petroleum into New York State via its own trucks as early as July 1, 1981. Based on this and on Mr. Shall's [petitioner's accountant at the time of the audit] statement that less than 50 percent of Certified's gross sales were residential fuel oil, the auditor deemed Certified to be liable for the 182-a tax for the entire two year period 7/1/81 to 6/30/83.
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> The auditor requested Mr. Shall to supply him with an analysis of resales to 182-a taxpayers and residential fuel oil sales, however, Mr. Shall claimed that due to the poor condition of the books and records this data would take a long time to prepare. Subsequently, on June 29, 1984, Mr. Shall wrote the auditor a letter disclaiming his client's liability for the 182-a tax based on his belief that his client is not importing and that his client's supplier's [sic] are collecting the 182-a tax anyway. The auditor's efforts, through both correspondence and conversations, to convince Mr. Shall of his erroneous contentions proved futile, and the analysis of 182-a resales and residential fuel oil sales were never provided.
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> Using Federal 1120 returns and NYS CT-3 reports the auditor calculated Certified's 182-a tax liability for the two year period without regard to any exclusions and with a NYS allocation of 100 percent."

[5]Mr. Marino testified that the handwriting on the response, which noted this fact, was not his writing. It is not known whether it was his father's.

The auditor determined petitioner's gross receipts as follows:

	7/1/81 - 12/31/81	1982	1/1/83 - 6/30/83
Gross receipts per audit	$2,871,006.00[6]	$5,742,011.00	$2,324,130.00[7]

The auditor then applied the .75% gross receipts tax rate against 100% of the above amounts and determined tax due of $21,533.00, $43,065.00 and $17,431.00 for July 1, 1981 through December 31, 1981, for 1982 and for January 1, 1983 through June 30, 1983, respectively. The auditor also calculated penalties for failure to file returns, failure to pay tax, and for negligence.

The Division of Taxation then issued statements of audit adjustment and notices of deficiency, all dated January 10, 1985, showing tax due of $21,533.00, $43,065.00 and $17,431.00 for July 1, 1981 through December 31, 1981, for 1982 and for January 1, 1983 through June 30, 1983, respectively, plus penalty and interest. Each of the statements of audit adjustment explained that the deficiency for the respective period was "based on recent field audit".

During the period at issue, petitioner could not purchase gasoline without paying its suppliers New York motor fuel tax, because it was not a licensed importer. Petitioner also claims that it paid its suppliers the gross receipts tax at issue. It is observed that the Ashland, BP and Crown Petroleum invoices introduced into evidence by petitioner, although limited in number, separately state the New York motor fuel tax. However, the gross receipts tax at issue herein is not separately stated on any of the invoices. Further, there is pre-printed language on Ashland's invoices that provides as follows:

> "All products are sold tax-free and Ashland Petroleum Company has not assumed the responsibility to pay any federal diesel fuel tax, and other federal tax, or any state or local tax except those taxes in the amounts itemized on this invoice."

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[6]The auditor took 50% of petitioner's gross receipts reported on its 1982 Federal corporate tax return. The record does not include an explanation why 1981 receipts were not utilized.

[7]The auditor took 50% of petitioner's gross receipts reported on its 1983 Federal corporate tax return.

We make the following additional finding of fact:

> Attached to the audit report (Division of Taxation's Exhibit "F") are two letters, one from Ashland, dated May 24, 1984 and one from BP, dated June ll, 1984, which state that the gross receipts tax was included in the price of the product purchased by petitioner.

Approximately four years after the issuance of the notices of deficiency, pursuant to a schedule dated April 20, 1989 which was introduced into evidence as the Division of Taxation's Exhibit "G", the Division reduced the tax alleged due after determining that 7.157% of petitioner's sales during 1981 were residential fuel oil sales. This same percentage was then applied to gross receipts for 1982 and the period January 1 through June 30, 1983. As a result, the revised gross receipts tax asserted as due by the Division is $19,991.00, $39,983.00, and $16,183.00 for July 1, 1981 through December 31, 1981, 1982 and January 1, 1983 through June 30, 1983, respectively, plus penalty and interest.

It is observed that petitioner introduced no evidence to challenge the percentage of residential fuel oil sales used in this revision.

We modify finding of fact "9" to read as follows:

> Mr. Marino testified that Ashland, BP and Crown Petroleum (petitioner's gasoline suppliers) provided a reduced price because petitioner transported the gasoline from their terminals to the gasoline stations. But other than Mr. Marino's testimony, no other evidence was presented to corroborate this allegation. Petitioner also alleges that its gasoline suppliers, all major oil companies, determined that they would take responsibility for paying the gross receipts tax at issue herein and included this tax in the price of the product. In support of this allegation, petitioner introduced the following evidence:
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> 1. A letter dated January 16, 1985 from Robyn M. Ruppersberger of Crown Petroleum's Corporate Tax Department to petitioner stating that Crown Petroleum "has paid the New York Gross Receipts Tax from January 1, 1981[8] to June 30, 1983 which is the period of time that you purchased product from us";
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> 2. An affidavit dated February 18, 1986 of James A. Franklin, Ashland's supervisor of oil franchise taxes, which stated that for the periods ending September 30, 1981, September 30, 1982 and June 30, 1983, Ashland had filed returns which included "certain products" sold to petitioner which were subject to the "New York oil franchise tax because Certified Heating

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[8] The gross receipts tax did not become effective until July 1, 1981.

> Oils, Inc., did not provide Ashland with the proper exemption certificates as provided for by New York Law"; that Ashland's returns included the sales to petitioner and the "appropriate amount of tax due under the law" had been paid; that the New York State Department of Taxation and Finance "verified upon audit that all oil franchise taxes due on Ashland's sales, including sales to Certified Heating Oil [sic], Inc. were properly reported and paid to New York"; and a schedule attached to the affidavit which the affidavit states contains all the sales included in Ashland's tax returns for the stated periods; and
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> 3. An affidavit dated December 14, 1988 of Robert R. Nunnelley, Sohio Oil Company's [the successor corporation to BP] audit coordinator in its corporate excise and sales tax department, which stated that during the period July 2, 1981 to June 30, 1983 BP "sold petroleum products to Certified Heating Oils, Inc., which were subject to the New York oil franchise tax because Certified Heating Oils, Inc. did not provide BP Oil, Inc. with the proper exemption certificates as provided for by New York Law"; that BP included these sales in the returns filed by it and "paid the appropriate amount of tax due under the law"; and that "the New York State Department of Taxation and Finance verified upon audit that all oil franchise taxes due on BP Oil's sales, including sales to Certified Heating Oils, Inc. were properly reported and paid to New York".

Attached to the affidavit is a letter from Robert R. Nunnelley, dated December 13, 1988 to James H. Tully, Jr. [petitioner's representative] which transmits the affidavit and states that:

> "The attached affidavit states that the sales made to Certified Heating Oils, Inc. by BP Oil, Inc. during the period July 1, 1981 to June 30, 1983 included the 3/4% New York Gross Receipts tax in the sales price and was remitted to the state."

The affidavit does not contain this statement. [9]

Petitioner asserts that its gasoline suppliers sold gasoline to it in New York based on the gasoline's destination, not in New Jersey, where most of the gasoline was loaded. It further asserts that it obtained title to the gasoline when it paid for it (which was usually about a week after it was loaded in its trucks and delivered to its three customers). However, other than the testimony of Mr. Marino, a party witness, petitioner did not introduce any evidence in support of these assertions.

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[9] The Administrative Law Judge's finding of fact "9" has been modified to include a more detailed recital of the contents of the affidavits and other documents submitted with the affidavits.

Mr. Marino could not recall the exact name of his accountant, who he testified advised him during the period at issue: "His last name was Find or Frind. I'm not sure."

OPINION

The Administrative Law Judge held that petitioner was an "oil company" for purposes of Tax Law § 182-a and that petitioner's contention that it merely transported gasoline (or petroleum) was without merit. The Administrative Law Judge concluded that petitioner took possession of the gasoline it purchased from Ashland and BP in New Jersey and transported it into New York for sale to its customers and, thus, was engaged in the business of importing petroleum for sale. The Administrative Law Judge also found that the Division of Taxation (hereinafter the "Division") properly estimated petitioner's liability and that petitioner was not entitled to credits for tax allegedly paid by its gasoline suppliers. In addition, the Administrative Law Judge determined that petitioner had not offered sufficient justification to abate penalties.

On exception, petitioner argues that it was not an "oil company" as defined by Tax Law § 182-a because it did not import the gasoline, and because the statute was not intended to apply to "small" petroleum dealers such as petitioner. In addition, petitioner asserts that its suppliers paid all the taxes due under Tax Law § 182-a on the gasoline sold to petitioner and, therefore, petitioner should not be required to pay these taxes a second time. According to petitioner, the gasoline that petitioner picked up in Long Island had been imported into New York by the supplier (Crown Petroleum) which paid the gross receipts tax on it. Petitioner argues that the gasoline picked up by petitioner in New Jersey had a "New York destination" and, therefore, petitioner's suppliers, Ashland and BP, paid the gross receipts tax. Petitioner also argues that penalties should be abated because the statute defining who was subject to the tax was ambiguous, and petitioner made good faith inquiries as to its

obligations to pay tax and was assured by its suppliers that no taxes other than those listed on the invoices were due.

The Division argues that petitioner clearly fell within the Tax Law § 182-a definition of an "oil company" as petitioner purchased and brought petroleum into the State and sold it to its gas station customers. The Division asserts that the tax applied to all receipts from sales within New York State by companies falling within the statutory definition of an oil company. In addition, the Division asserts that petitioner is not entitled to cancellation of the deficiency based on the argument that the taxes have already been paid by its suppliers because petitioner has failed to meet its burden of showing that the taxes have, in fact, been paid on the gasoline purchased by petitioner.

We uphold the determination of the Administrative Law Judge.

Tax Law § 182-a imposed an additional franchise tax on certain oil companies "for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state . . ." (Tax Law § 182-a[1]).[10]

For purposes of this tax, "oil company" was defined as follows:

> "The term 'oil company' means every corporation formed for or engaged in the business of importing or causing to be imported (by a person other than a corporation subject to tax under this section) into this state for sale in this state, extracting, producing, refining, manufacturing, or compounding petroleum. Provided, however, a corporation which is principally engaged in selling fuel oil (excluding diesel motor fuel) used for residential purposes shall not be considered an oil company. For purposes of this section, petroleum shall include, but shall not be limited
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> to, gasoline, aviation fuel, kerosene, diesel motor fuel, benzol, distillate fuels, residual oil, crude oil or any similar product" (Tax Law § 182-a[2][a]).

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[10]L 1983, ch 400, § 3 amended the imposition section of Tax Law § 182-a to provide that liability for the tax would end with the period June 30, 1983. This same chapter enacted a new tax on petroleum business, Tax Law Article 13-A (L 1983, ch 400, § 8).

The tax was imposed on the oil company's gross receipts from sales of petroleum allocated pursuant to section 182-a(3) (Tax Law § 182-a[1]). The term "gross receipts from sales of petroleum" was defined as "all receipts from sales of petroleum, whether from within or without the United States" (Tax Law § 182-a[2][b]). The portion of the gross receipts to be allocated within the State was determined by multiplying total gross receipts by the ratio which the gross receipts from sales of petroleum where shipments were made to points within the State bore to the gross receipts from sales within and without the State (Tax Law § 182-a[3]).

Tax Law § 182-a(2)(b) also stated:

> "However, to prevent the multiple application of the tax imposed by this section, gross receipts shall not include the receipts from any sale for resale to a purchaser which is an oil company subject to tax under this section."

Receipts were presumed not to be from a sale for resale unless the purchaser supplied the oil company with an appropriate resale certificate (Tax Law § 182-a[2][b]).

Petitioner argues first that it was not an importer of gasoline but only the transporter of gasoline imported by the three suppliers (Ashland, BP and Crown Petroleum). We agree with the Administrative Law Judge that the evidence does not support this argument.

The record contains no evidence that the Staten Island gasoline stations purchased the gasoline directly from the three oil company suppliers or that petitioner's relationship with the gasoline stations or the suppliers was limited to transporting the gasoline into the State on their behalf. The testimony of Mr. Marino, an officer of petitioner, is replete with references to the "purchase" of the gasoline by petitioner. The documentary evidence also supports the conclusion that petitioner was purchasing the gasoline on its own behalf. In response to the Division's inquiry concerning petitioner's potential liability for tax under Tax Law § 182-a, petitioner responded that it sold petroleum which it purchased outside of New York and which was delivered to New York in petitioner's trucks (Division's Exhibit "E"). The invoices submitted by petitioner list petitioner as the purchaser; the names of the Staten Island gasoline stations do not appear anywhere on the invoices. Mr. Marino testified that it was petitioner's responsibility to pay the invoices. The letter and affidavits submitted by petitioner in support of

its argument that its suppliers paid the gross receipts tax on this gasoline all state that the sales were made to petitioner.

Petitioner argues that title to the gasoline it purchased from Ashland and BP did not pass to it until payment was due, ten days after the physical delivery to petitioner. Since by then the gasoline had been brought into New York, petitioner argues that it was Ashland and BP who were importing the gasoline, not petitioner. Again, the record does not support this conclusion. There was no evidence of an agreement between petitioner and its suppliers that title to the gasoline passed to petitioner at a time other than at the time petitioner picked up the gasoline in New Jersey. While passage of title can be established by proof of the parties' intent or understanding evidencing a course of dealing or trade practice (Uniform Commercial Code § 1-205), such proof is lacking here where we have only petitioner's officer's testimony that in his view title to the gasoline passed to him when he paid for it. Without proof of an explicit agreement to the contrary, we must conclude that title passed to petitioner at the time the gasoline was picked up by petitioner in New Jersey (Uniform Commercial Code §§ 2-401[1] and [2]). Further, petitioner does not explain how it was able to sell the gasoline within a day of picking it up in New Jersey, if petitioner did not own the gasoline until approximately ten days later.

Alternatively, petitioner argues that even if it was an oil company under Tax Law § 182-a(2)(a), the "gross receipts" tax on the gasoline it purchased has already been paid by its suppliers and, therefore, petitioner is entitled to credits for the tax paid. Petitioner argues that the gasoline it purchased was included in the Tax Law § 182-a tax returns filed by the suppliers and the appropriate tax paid. In support of its position, petitioner submitted a letter from Crown Petroleum and affidavits from Ashland and BP.

We do not agree that petitioner has shown that it is entitled to credits on the deficiencies issued to it.

We accept that the documents submitted by petitioner support that petitioner's purchases were included on the Tax Law § 182-a tax returns of its suppliers.[11] However, petitioner has not shown how this entitles it to credits for its Tax Law § 182-a obligations, or the amount of such credits.

The provisions of Tax Law § 182-a(2)(b) sought to prevent the "multiple application of the tax" by providing a mechanism for the inclusion of the gross receipts from the sale of a particular quantity of gasoline on only one Tax Law § 182-a tax return. By permitting the use of resale certificates between oil companies, the oil company which received the resale certificate was permitted to exclude that sale from its Tax Law § 182-a tax return. This would allow it to reduce the gross receipts it was required to include in calculating the amount subject to tax (see, Tax Law § 182-a[3]). The gasoline thus sold would then be included as gross receipts by the oil company which issued the resale certificate when it sold the gasoline to a purchaser which was not an oil company and would, therefore, not be able to issue a resale certificate (for example, a gas station which did not import its own fuel, or an individual user).

Since petitioner did not provide its suppliers with resale certificates evidencing that the sales to it were sales to another oil company for resale, petitioner's suppliers were required by Tax Law § 182-a(2)(b) to include their sales to petitioner on their Tax Law § 182-a tax returns. Petitioner, in essence, now admits that as an oil company, it could have given resale certificates to its suppliers which would have had the effect of reducing the tax paid by the suppliers. However, this was not the arrangement between the suppliers and petitioner. The suppliers treated the sales to petitioner as gross receipts for purposes of Tax Law § 182-a, filed tax returns and paid appropriate tax. Petitioner now asserts that the tax overpaid by its suppliers because of petitioner's failure to provide resale certificates should be applied to petitioner's benefit. However, petitioner points to nothing in the Tax Law that allows one taxpayer to benefit from another's overpayment.

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[11]We find it unnecessary to decide whether the affidavits from Ashland and BP were defective as to form, as is argued by the Division.

Further, petitioner has not established the amount of the credit it claims it is entitled to, nor is that number ascertainable from the record before us. Clearly, the amount of the credit cannot be ascertained by reference to the number of gallons of gasoline sold to petitioner by its suppliers, since the gross receipts tax is not a per gallon tax but is based on the actual sale price of the gasoline. Further, the documents submitted by petitioner from its suppliers do not establish the amounts of tax paid by the suppliers, if any, on the gasoline sold to petitioner and, therefore, there is no way to calculate the credit petitioner seeks.[12]

Lastly, petitioner argues that it was not an oil company within the meaning of Tax Law former § 182-a because the statute was "not designed to apply to small petroleum dealers" such as petitioner, but only to "large oil companies" (petitioner's brief on exception, p. 8). Petitioner does not explain the distinction between "large" and "small" oil companies. In any case, no support for these size related limitations can be found in the language of the statute.

We agree with the Administrative Law Judge that petitioner has not established reasonable cause for the abatement of penalties. Petitioner offered no evidence to show that it took adequate steps to ensure that it complied with the Tax Law. Petitioner's inquiries to its suppliers as to tax aspects of its transactions with that supplier hardly qualify as a reasonable attempt to determine petitioner's overall tax responsibilities. The suppliers were certainly not in a position to know or to advise if petitioner's activities required petitioner to file a return. While petitioner claims that the tax was ambiguous, petitioner made no inquiries of the Division of Taxation as to its tax reporting responsibilities (Matter of Norwest Bank Intl., Tax Appeals Tribunal, May 3, 1990), and it does not appear that petitioner solicited advice from its accountant or tax advisor on how to comply with the Tax Law. Even though it apparently knew in March of 1983 that it

[12]While the documents state that each of the suppliers included the sales to petitioner on their tax returns and paid the proper gross receipts tax during the periods at issue, none indicate how petitioner's purchases were treated on the returns for purposes of each supplier's allocation percentage under section 182-a(3). Notably, while the letters from Ashland and BP included in the audit report and the letter transmitting the BP affidavit state that the gross receipts tax was included in the purchase price, these statements were not included when these companies provided their statements in affidavit form.

was subject to tax (Division's Exhibit "E"), petitioner did not file a return for the period ending June 30, 1983.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Certified Heating Oils, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Certified Heating Oils, Inc. is denied; and

4. The notices of deficiency dated January 10, 1985 issued to

Certified Heating Oils, Inc. are reduced as indicated in the Administrative Law Judge's finding of fact "8," and, are in all other respects sustained.

DATED: Troy, New York
February 6, 1992

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

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

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