STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BURNSIDE COAL & OIL CO., INC.	:	DECISION
	:	DTA No. 805376
for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Period July 1, 1983 through April 30, 1984.	:	
	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on June 3, 1993 with respect to the petition of Burnside Coal & Oil Co., Inc., 1905 White Plains Road, Bronx, New York 10462. Petitioner appeared by Carl S. Levine & Associates, P.C. (Carl S. Levine, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

The Division of Taxation filed on brief on exception. Petitioner filed a brief in response. The Division of Taxation filed a letter in lieu of a reply brief. Oral argument was heard on April 21, 1994, which date began the six-month period for issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUES

I. Whether petitioner was a "petroleum business" within the meaning of Tax Law § 300(c) during the period at issue and, thus, subject to the gross receipts tax imposed under Article 13-A of the Tax Law.

II. Whether petitioner is estopped from claiming that it was not a petroleum business during the period at issue.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "21" and "49" which have been modified. We have also deleted finding of fact "50" as not relevant to the issue on exception. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

On or about January 15, 1985, petitioner, Burnside Coal & Oil Co., Inc., filed a State of New York Tax Return for Petroleum Businesses Taxable under Article 13-A for the period July 1, 1983 through April 30, 1984.[1]

In petitioner's calculation of adjusted gross receipts shown on line 17 of the return, petitioner had deducted, on line 16(d), the sum of $17,405,736.07 as receipts from exchange sales of petroleum, where shipments were made to points in New York State. An asterisk next to line 16(d) signalled a reference to Schedule F, Details of Exchange Sales. On the return, the caption of Schedule F was expanded to read "Details of Exchange Sales & Misc. Items." The "Name of Exchange Partner" on Schedule F was stated as follows:

> "Product delivered to the City of New York pursuant to contract awarded prior to July 1, 1983."

THE AUDIT

A field audit of petitioner for tax under Article 13-A for the period July 1, 1983 through April 30, 1984 was commenced on September 26, 1985, by a letter from Abraham Denowitz, Tax Audit Administrator, apprising petitioner of the audit and asking when and where petitioner's books and records would be made available. It appears that on October 17, 1985 an appointment was made for an auditor to meet with petitioner's accountant, Steve Schmelkin, at petitioner's offices on December 6, 1985. The auditor conducted his examination at said

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[1]Exhibit "0-6." Petitioner had timely applied for and received extensions permitting filing on said date.

location on December 6 and December 27, 1985 and the audit was completed on or about March 19, 1986.

The audit findings were as follows:

(a) Petitioner was a distributor of fuel oil and coal in New York City and Westchester.

(b) Fuel oil was purchased and imported into New York State by barge, with petitioner taking title outside the State, but with product being pulled from the rack of its suppliers.

(c) Purchases were primarily from West Vernon Petroleum Corp. and occasionally from Amerada Hess and Ultramar Petroleum Corp. The auditor determined that petitioner did not exchange product with other distributors. Cash payments for fuel oil and coal were by check payable directly to the suppliers.

(d) Petitioner's sales of fuel oil were to private homes, apartment houses, churches, schools, the City of New York, Royal Coal & Oil Company and Sheridan Fuel Oil Co., Inc. Where applicable, gross receipts tax was computed and remitted. Petitioner obtained and submitted residential use certificates from Royal Coal & Oil Company and Sheridan Fuel Oil Co., Inc. Cash receipts were usually by check payable directly to petitioner by its customers.

(e) Petitioner's books and records were found to be complete and gross receipts and sales for residential use were found to be correct. The only problem noted by the auditor was as follows:

> "Sales to N.Y. City included gross receipts tax, per invoice, however were never collected or submitted to N.Y. State. Subject is classified as a 'Petroleum Business' based on its operations in N.Y. State. The liability of submitting 13A tax is by law the responsibility of the 'Petroleum Business'. Subject ignored the law and created a new category of deductions 'Sales to N.Y. City where N.Y. City refuses to pay tax'. Since subject ignored the law with no basis for its actions, subject is being assessed on all sales to N.Y. City."

(f) The auditor recommended imposition of penalties for negligence (Tax Law § 1085[b]), substantial understatement of tax (Tax Law § 1085[k]) and underpayment of estimated tax (Tax Law § 1085[c]). The reason for this recommendation was that petitioner had

no basis in law or otherwise for creation of the new category of deductions with respect to the sales to the City of New York where the City refused to pay the tax.

On April 10, 1986, the Division of Taxation ("Division") issued a Statement of Audit Adjustment and a Notice of Deficiency to petitioner asserting a deficiency in tax of $556,965.00, interest of $121,512.00 and an additional charge (penalty) of $120,725.00,[2] for a total of $799,202.00 due for the period ended April 30, 1984.

Petitioner filed a request for a conciliation conference in the Bureau of Conciliation and Mediation Services. A conference was held on October 6, 1987. The conciliation conferee cancelled the penalties[3] asserted in the Notice of Deficiency by a Conciliation Order dated January 22, 1988, but the deficiency in tax, plus interest, was sustained. Petitioner subsequently filed a petition with the Division of Tax Appeals challenging the deficiency in tax and the interest.

BUSINESS OPERATIONS

Petitioner is family-owned corporation which began doing business in New York in 1931. During the period at issue, Harry M. Wiles was president of the corporation and owned 50% of the stock and his wife, Violet Wiles, was a vice-president and owned the remaining 50%. Their son, Harvey R. Wiles, was a vice-president and Samuel Pleshko was treasurer.

Petitioner sold primarily heating oil, number 2 oil, number 4 oil and number 6 oil, to homes, apartment houses, government agencies and businesses. It also sold anthracite coal.

Petitioner did not own a terminal nor did it own or lease barges or oil trucks. It owned service vans and coal trucks.

Petitioner's oil deliveries were made by two independent carriers, Mystic Transportation and Herbert Petroleum Transportation.

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[2]Neither document indicates the type of penalty imposed.

[3]The Report of Tax Conference attached to the Conciliation Order (Exhibit "J") indicates that Tax Law § 1085 (b) and (k) penalties had been asserted.

Petitioner did not import petroleum products into New York State, did not pay (at least directly) for the cost of shipping or transporting petroleum into New York and did not designate an agent for importing petroleum into New York for petitioner's account.

During the period at issue, petitioner purchased its petroleum products from the following suppliers: Amerada Hess Corporation, Cibro Terminals, Inc., West Vernon Petroleum Corp., Commander Oil Corp., Pittston Petroleum Inc., Ultramar Petroleum, Inc., Rainbow Fuel Service, Inc., Reliance Utilities Corp., Econo Oil Company, Merrick Shell Fuel Corp., Carbo Concord Oil Co., Inc., South Shore Petroleum, Royal Petroleum, Public Fuel and Burtha Heat.[4]

Either petitioner's suppliers or said suppliers' own sources of product paid for the barging or other costs of importing petroleum into New York State.

Product purchased from petitioner's major suppliers was purchased FOB at the following petroleum storage terminals:[5]

Terminal	Supplier
Court Street, Brooklyn	Amerada Hess
East River Terminal, Bronx	Ultramar/Pittston
Oyster Bay, Nassau County	Commander
Mt. Vernon, New York	West Vernon
149th Street, Bronx	Cibro

Petroleum purchased from Rainbow, Reliance, Econo, Merrick and Commander was delivered to petitioner's customers from the suppliers' terminals or storage facilities in New York State. It is unclear how product purchased from Carbo Concord, Public Fuel and Burtha Heat was delivered.

WEST VERNON PETROLEUM CORP.

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[4]Petitioner's Exhibit "9."

[5]Petitioner's Exhibit "5."

West Vernon Petroleum Corp. ("West Vernon"), an affiliate of petitioner, was formed in 1981 as an importer and wholesaler of oil products. West Vernon was owned by Harry M. Wiles, Violet Wiles and Harvey R. Wiles. They and Samuel Pleshko were the officers of the corporation.

West Vernon owned a 2,000,000 gallon capacity storage terminal on Eastchester Creek in Mt. Vernon, New York.

Like petitioner, West Vernon owned no barges or trucks, although West Vernon hired barges or trucks from time to time.

While both petitioner and West Vernon were owned by Wiles family members, had common officers and used the address 1905 White Plains Road, Bronx, New York, they maintained separate books and records, different bank accounts and check books and filed separate tax returns. The extent of the interaction of the two entities, however, is unclear. It is noted that the testimony of Harvey R. Wiles on the relationship between the corporations seemed less than candid, as exemplified by the following extract taken from his cross-examination:[6]

> "Q Did Burnside and West Vernon share employees?
> A It is possible
>
> Q Did the same people work for both corporations?
> A It is possible.
>
> Q Would they have drawn paychecks from both corporations?
> A It is possible.
>
> Q But you don't know whether that was the case in this situation?
> A I'm not sure I understand what you are asking me.
>
> Q I believe you indicated that O-1[7] would have been prepared by a Burnside employee.
> A It could have been prepared by somebody in the office.

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[6] Transcript, pages 292-293.

[7] Exhibit "0-1," petitioner's Article 13-A Questionnaire (infra).

Q Do West Vernon and Burnside share the same office?
A They could."

REGISTRATION OF PETITIONER AS A PETROLEUM BUSINESS

Sometime prior to March 1, 1984, a form entitled "Article 13-A Questionnaire (12/83)" was sent to petitioner. The actual cover letter which accompanied the questionnaire is not in the record. A copy of the cover letter which was apparently mailed with an earlier version of the questionnaire, "Article 13-A Questionnaire (7/83),"[8] stated as follows:

> "Chapter 400 of the laws of 1983, which is effective 7/1/83 imposes a privilege tax, at the rate of 3.25% under Article 13-A, on "petroleum businesses" importing petroleum or causing petroleum to be imported into the state for sale in the state.
>
> "In order to make a determination, if your business is subject to tax under Article 13-A, please complete the enclosed questionnaire. Appropriate Taxpayer Services Bulletins are enclosed for references. The questionnaire should be completed and returned in seven (7) days to:
>
> Chief, Oil Tax Audits
> New York State Department of Taxation and Finance
> Building #9, Room 402A, State Office Campus
> Albany, New York 12227
>
> "The telephone number is (518) 457-4397. Any questions you may have should be directed to the above address or telephone number. A duplicate of the questionnaire is enclosed for your records.
>
> "Upon receipt of the completed questionnaire, we will make a determination of your status and advise you of this determination."[9]

Petitioner completed the questionnaire[10] and it was signed by Harvey R. Wiles as vice-president and dated March 1, 1984. It was mailed in an envelope postmarked March 2, 1984 and stamped as received by the Division on March 6, 1984. On the questionnaire, petitioner described its principal activity as "retail sale

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[8]This is the version of the questionnaire filed by West Vernon (Petitioner's Exhibit "8").

[9]It is noted that the copy of the cover letter in the record is undated and is included in the appendix to petitioner's motion for leave to appeal to the Court of Appeals. The cover letter and questionnaire are referred to in paragraph 21 of the affidavit of Kenneth L. Robinson dated January 14, 1988 in support of said motion (See Exhibit "N").

[10]Exhibit "0-1."

of heating fuel oil." Item 4(e) of the questionnaire, pertaining to passage of title, was answered as follows:

"Title Passes. When and where does title to product pass to you.

Supplier	Terminal Location	Method of Transportation	Product Transported By	Location Where Shipped	Title Passes
West Vernon Petroleum Corp.	New York State	Product is usually brought by barge into New York State from outside New York State		Product is transported by tankers into ultimate consumers"	Outside New York State

We modify finding of fact "21" to read as follows:

The questionnaire was treated by the Division as an application for a certificate of registration under Article 13-A, i.e., registration as a petroleum business. Accordingly, on March 8, 1984, petitioner was issued a "Certificate of Taxability Under Article 13-A" by the Division as a petroleum business retroactive to July 1, 1983. The certificate was effective to October 31, 1984.[11]

At the hearing, Harvey R. Wiles testified that the terminal location stated in item 4(e) as "New York State" was intended to show the location of the West Vernon terminal, among

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[11] The Administrative Law Judge's finding of fact "21" read as follows:

> "The questionnaire was treated by the Division as an application for a certificate of registration under Article 13-A, i.e., registration as a petroleum business. Accordingly, on March 8, 1984, petitioner was registered by the Division as a petroleum business retroactively to July 1, 1983. The registration was effective to October 31, 1984.*
>
> *Petitioner's Exhibit '4'."

We modified this fact to state precisely the language of the document forwarded by the Division to petitioner as a result of the questionnaire.

others, and that the method of transportation, i.e., barging, was meant to refer to barging by West Vernon, not petitioner. He did not recall why the questionnaire stated that title passed outside of New York State.[12]

On or about April 23, 1984, the Division received petitioner's first installment payment of estimated gross receipts tax under Article 13-A. The payment was $100,000.00.[13]

Petitioner mailed an application for a three-month extension for filing tax return for gross receipts tax on petroleum businesses (Article 13-A) in an envelope postmarked July 14, 1984.[14] An additional remittance of $162,500.00 was made based on tax of $210,000.00 estimated for the taxable period.

By letter dated October 10, 1984[15] mailed in an envelope postmarked October 12, 1984, petitioner requested an additional extension of time, until January 15, 1985, to file the gross receipts tax return. The letter stated that it was written on the advice of petitioner's new attorney, Carl S. Levine, who is petitioner's current representative. The extension was granted and the return filed, as noted in Finding of Fact "1" hereof.

Petitioner subsequently filed Article 13-A returns for the years ending April 30, 1985 and April 30, 1986 and made installment payments toward its 13-A tax liability for the year ending April 30, 1987.[16]

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[12]Transcript, pages 283-285.

[13]Exhibit "0-3."

[14]Exhibit "0-4."

[15]Exhibit "0-5."

[16]Exhibit "O," affidavit of Earl F. Willis, ¶ 18.

Petitioner filed an "Application for Registration of a Petroleum Business, Article 13 A" dated October 15, 1987[17] (characterized by the Division as petitioner's "renewal application for re-certification under Article 13-A").[18] The October 15, 1987 application stated in item 23 that the following applied with respect to sales for the period May 1, 1986 through April 30, 1987:

Type of Petroleum	Gallons Sold in New York	Gallons use in New York	Gallons Imported Into New York For Sale	Gallons Imported Into New York For Use	Gallons Sold Everywhere
Gasoline	-0-				
Distillates	3,216,400	-0-	-0-	-0-	3,216,400
Aviation	-0-				
Other:					
#4, #6	62,151,900	-0-	75,000	-0-	62,151,900

In item 24, petitioner estimated the following on a monthly basis for the period March 1, 1987 through November 30, 1988:

Type of Petroleum	Gallons to be Sold in New York	Gallons to be Used in New York	Gallons to be Imported Into New York For Sale	Gallons to be Imported Into New York For Use	Gallons to be Sold Everywhere
Gasoline	-0-				-0-
Distillates	250,000	-0-	-0-	-0-	250,000
Aviation	-0-				-0-
Other:					
#4, #6	5,000,000	-0-	-0-	-0-	5,000,000

A new Certificate of Registration Under Article 13-A was issued to petitioner on November 10, 1987.[19]

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[17]Exhibit "O-7."

[18]Exhibit "O," affidavit of Earl F. Willis, ¶ 19.

[19]Exhibit "0-8."

On November 19, 1987, petitioner wrote to a Mr. Greco of the District Office Audit Bureau, Miscellaneous Tax, stating as follows:

> "In accordance with our phone conversation with you on November 12, 1987, we wish to advise you that we have received a new certificate of registration under Article 13-A, valid November 1, 1987.
>
> "As we told you last week, when we completed the questionnaire concerning re-registration under Article 13-A, we indicated that we are not in the business of importing or causing to import petroleum products into New York State. Accordingly, we believe that we should no longer be classified as a taxpayer subject to the Article 13-A requirements.
>
> "Please advise us of your revised determination so that we can adjust our records accordingly. We must have this redetermination as soon as possible so that we can notify our suppliers at once."[20]

Petitioner's registration under Article 13-A was subsequently terminated effective January 15, 1988.

REGISTRATION OF WEST VERNON AS A PETROLEUM BUSINESS

West Vernon filed an Article 13-A questionnaire dated October 21, 1983,[21] stating that its principal business activity was "Wholesale terminal selling heating oils." With respect to passage of title to product, item 4(e) of the questionnaire stated as follows:

"Title Passes. When and where does title to product pass to you.

	Supplier	Location	Method of Transportation	Location Where Shipped	Title Passes
1	Royal Petroleum	New Jersey	Barge	Our Terminal in Mt. Vernon, N.Y.	New Jersey (at Barging)
2	Wyatt	New Jersey	Barge	Our Terminal	New Jersey (at Barging)"

[20] Exhibit "0-9."

[21] Form entitled "Article 13-A Questionnaire (7/83)," Petitioner's Exhibit "8."

While West Vernon was apparently issued a certificate of registration, a copy of same is not in the record.[22]

(a) On June 14, 1984, West Vernon filed a CT-13-A Tax Return for Petroleum Businesses Taxable Under Article 13-A for the period July 1, 1983 through December 31, 1983.[23] It reported $14,139,965.77 in sales for resale, all of which were shown as made to petitioner and also reported $5,427,529.48 in sales to numerous dealers as sales for residential use. Sales for resale and sales for residential use were deducted from total gross receipts of $20,650,929.06 resulting in adjusted gross receipts from sales of petroleum of $1,083,433.81. Tax was computed on said amount at the rate of .0325 resulting in tax of $35,211.59.

(b) On June 14, 1985, West Vernon filed its CT-13-A Tax Report for Petroleum Businesses Taxable Under Article 13-A for the calendar year 1984.[24] It reported $18,848,610.80 in sales for resale to petitioner prior to April 1, 1984 and $15,127,822.20 in sales for resale to petitioner subsequent to March 31, 1984. West Vernon reported that it also made resale sales to two other buyers, Stuyvesant Fuel Service Corp. and Williams Co. Petroleum Marketers, Inc. Total sales for resale to its three resale buyers were $19,126,006.30 prior to April 1, 1984 and $20,918,314.29 subsequent to March 31, 1984. Total sales for residential use to numerous dealers were reported as $6,263,234.39 prior to April 1, 1984 and $4,619,966.93 subsequent to March 31, 1984. The sales for resale and sales for residential use were subtracted from gross receipts of $26,070,161.11 prior to April 1, 1984 and $25,851,456.72 subsequent to March 31, 1984 resulting in adjusted gross receipts from sales of petroleum of $680,920.42 prior to April 1, 1984 and $313,175.50 subsequent to that date. Tax

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[22] It is not Exhibit "0-1" as petitioner's brief suggests on page 11.

[23] Exhibit "Q-1."

[24] Exhibit "Q-2."

was computed at .0325 for the period prior to April 1, 1984 and .0275 subsequent thereto, resulting in total tax of $30,742.24.

Although the West Vernon returns reported sales for resale to petitioner, petitioner did not issue resale certificates to West Vernon during the period at issue. Harvey R. Wiles testified that he did not know why the sales were listed as sales for resale rather than sales for residential use (transcript p. 310). The only resale certificates in the record were issued to West Vernon by petitioner for periods beginning on or after January 1, 1985.

THE CITY OF NEW YORK BIDS

In April of 1983, the Department of General Services of the City of New York solicited bids for contracts to supply fuel oil and kerosene to the City of New York for the period July 1, 1983 through June 30, 1984. With respect to taxes, the contract specifications provided that:

> "[t]he City is exempt from sales and federal excise taxes. The [contract] price is to be net, exclusive of these taxes . . . . In addition, Bid prices must include the N.Y. State Gross Receipts Tax, if applicable, but must not be shown as a seperate [sic] line item. Vendor must also indicate whether or not the Gross Receipts Tax has been included in the bid price."[25]

Petitioner, having bid on New York City contracts for many years, submitted its bid. Bids were opened on May 12, 1983 and on June 21, 1983 petitioner was notified that it would be awarded a contract for approximately 21,000,000 gallons of fuel oil for the year July 1, 1983 through June 30, 1984.[26]

On July 6, 1983, the City of New York Department of General Services issued a Notice of Award to petitioner with respect to the bid. The notice stated as follows:

> "You have been awarded the above items as shown in the attached schedule. This award constitutes your contract, as described in the Standard Form of Contract, Page A-2, Paragraph 8. When goods or services are needed an order or shipping instructions will be issued in accordance with the terms of your bid.

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[25] Exhibit "N," page 63.

[26] Petition, Exhibit "K," ¶ 23.

"You are requested to honor orders and shipping instructions only for the items awarded to you. The City cannot make payment for the delivery of any other items."[27]

In addition to the contract awarded pursuant to its own bid, petitioner acquired, by assignment, an additional contract which had been awarded to Public Fuel Service, Inc. According to petitioner's representative, a written agreement with Public Fuel Service, Inc. dated July 1, 1983 reflected an earlier oral agreement.[28]

It appears that the City and petitioner treated the contracts as effective even prior to the formal award on July 6, 1983. Petitioner claims to have made at least at least a dozen deliveries of fuel oil pursuant to its bid between July 1 and July 6, 1983.[29]

THE ENACTMENT OF ARTICLE 13-A OF THE TAX LAW

On or about June 26, 1983, the New York State Legislature enacted Article 13-A of the Tax Law. It was signed into law and effective on June 30, 1983 commencing with taxable years starting on or after July 1, 1983. The rate of tax was 3¼% for the period July 1, 1983 through March 31, 1984 and 2¾% as of April 1, 1984.

Immediately after the law went into effect, petitioner entered into negotiations with the City of New York in an effort to pass through the tax to the City. On or about July 14, 1983, petitioner wrote to Deputy Commissioner Carla S. Lallatin of the City of New York Department of General Services stating as follows:

"Dear Commissioner Lallatin:

"As per our previous discussions with members of your department, you are no doubt aware that New York State has imposed 3¼% gross receipts tax on

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[27] Petition, Exhibit "K," Sub-exhibit "11."

[28] Exhibit "H," page 2.

[29] Paragraph 14 of the affidavit of H. Richard Wiles (executed as "Harvey Wiles"), included with Exhibit "N," Motion for Leave to Appeal to the Court of Appeals.

'petroleum businesses' as defined under Article 13-A of the New York tax law as of July 1, 1983.

"Inasmuch as this tax was not in effect as of the time that our contract with the City of New York was bid, there was no possibility that we could have included this tax in our price to you.

"Therefore, in our invoicing to the City of New York, Department of General Services locations, we will charge the 3¼% tax on all invoices where use is for non-residential purposes.

Very truly yours,

BURNSIDE COAL & OIL CO., INC.

Samuel Pleshko"[30]

Petitioner continued to deliver fuel to the City of New York as per the contract, adding the 3¼% gross receipts tax to each invoice.

The negotiations were ultimately unsuccessful and the City refused to pay the additional billings for gross receipts tax.

CONFUSION IN THE OIL INDUSTRY

For at least several months after the effective date of Article 13-A there was confusion in the oil industry as to whether governmental agencies would reimburse bidders the amount of the tax. A New York State Office of General Services purchasing memorandum dated July 29, 1983 stated as follows:

"TO ALL STATE AGENCIES, POLITICAL SUBDIVISIONS AND OTHERS AUTHORIZED BY LAW TO PARTICIPATE IN SUBJECT AWARDS:

"For the above commodities, pursuant to provisions of the new Gross Receipts Tax, oil companies are allowed to pass the cost of the tax to their customers, including State Contract participants.

"Therefore, effective July 1, 1983, the 3.25% Gross Receipts Tax will be payable when added to invoices (vouchers) as a separate item.

"Our position regarding deliveries prior to July 1, 1983 is being reviewed. A directive will be issued as soon as a determination is made.

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[30] Exhibit "K," petition, Sub-exhibit "6."

"If you have any questions please consult your agency counsel or contact this office."[31]

Another successful bidder in the bid opening of May 12, 1983, Sinram-Marnis, also continued to deliver fuel and negotiate, but on September 29, 1983 notified the City that it was terminating deliveries. On September 30, 1983, the City found that Sinram-Marnis had defaulted and was therefore barred from City work for three years under section 345 of the City Charter.[32] Approximately one-half of the contract quantities had been delivered at that point.

Petitioner did not terminate deliveries, at least in part due to concern for being barred from bidding on other City contracts and concern for exposure to damages for breach of contract.

PETITIONER'S LITIGATION AGAINST THE CITY

Petitioner commenced a lawsuit in Supreme Court, State of New York, New York County, in an attempt to pass through to the City of New York the obligation to pay $605,000.00 in gross receipts tax. Petitioner was awarded summary judgment by said court which interpreted the contract as intending that the City pay the gross receipts tax if such tax were applicable.[33] The order was entered October 9, 1986.

The order granting summary judgment was unanimously reversed by the Appellate Division, First Department, which granted the City's cross-motion for summary judgment dismissing the complaint without costs. The essence of the holding was that the contract was clear in specifying that the tax could not be passed on to the City unless it was included in the

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[31] Exhibit "K," petition, Sub-exhibit "7."

[32] Exhibit "K," petition, Sub-exhibit "13," § 3.

[33] Exhibit "K," petition, Sub-exhibit "14."

bid price of the lowest responsible bidder and it was not included in petitioner's bid.[34] The order of the Appellate Division was entered December 10, 1987.

Petitioner moved the Court of Appeals for leave to appeal the order of the Appellate Division. Leave to appeal was denied at 71 NY2d 890, 527 NYS2d 771 (1988), rearg den 72 NY2d 841, 530 NYS2d 556 (1988).

MOTION FOR SUMMARY DETERMINATION

We modify finding of fact "49" to read as follows:

> On December 1, 1988, the Administrative Law Judge issued an order denying the Division's motion for summary judgment and denying the Division's motion for a determination imposing penalty against petitioner for a frivolous petition pursuant to 20 NYCRR 3000.15.
>
> With regard to the motion for summary judgment, the Administrative Law Judge found that:
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> > "[i]n its petition dated March 16, 1988, petitioner contended that, during the period at issue, it was not a 'petroleum business' subject to tax under Article 13-A. Petitioner again took this position in papers filed in opposition to the instant motion and at oral argument. Petitioner supported its position by a sworn statement made by its vice-president. The Division responded to petitioner's contention by summarily stating in its motion papers that petitioner was a petroleum business subject to tax under Article 13-A" (Short Form Order, December 1, 1988, pp. 1-2).
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> The Administrative Law Judge concluded that:
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> > "[f]rom the moving papers submitted by both parties and from the oral argument it cannot be determined whether, during the period at issue, petitioner was or was not a petroleum business subject to tax under Article 13-A. Accordingly, this matter shall be scheduled for hearing before an administrative law judge" (Short Form Order, December 1, 1988, p. 2).
>
> With regard to the motion for the imposition of penalty for filing a frivolous petition, the Administrative Law Judge found that "[f]rom the

[34]Exhibit "N," pages 63-64. The Appellate Division noted that the date of enactment of Article 13-A, June 26, 1983, was also the date on which the 45-day binding period of the bids expired and that petitioner and Public Fuel Service, Inc., its assignor, could have withdrawn their bids between June 26 and July 6, 1983, which is when the contracts were finally awarded. Neither, of course, had executed that option.

motion papers it appears that petitioner has raised issues which are clearly not frivolous within the meaning of that regulation" (Short Form Order, December 1, 1988, p. 2).[35]

OPINION

We deal first with the Division's assertion on exception that the Administrative Law Judge erred in not granting the Division's motion for summary judgment. The Division asserts that the crux of petitioner's petition was that the Division may not pursue Burnside because of Burnside's inability to collect the tax from its customer, New York City. The Division asserts that the Administrative Law Judge erred in finding that petitioner raised the issue of whether it was a petroleum business in its March 16, 1988 petition. The Division argues that the Administrative Law Judge's order, in effect, allowed petitioner to amend its petition for the purposes of defeating a motion against its petition, which failed to state a cause for relief.

> "ALJ . . . Order incorrectly found an issue that had not been pleaded, because it in effect amended the petition. The Order is incorrect because, 'No such amended pleading can revive a point of controversy which is barred by the time limitations of the Tax Law, unless the original pleading gave notice of the point of controversy to be proved under the amended pleading . . . As the initial pleading did not plead such an issue, the Order incorrectly amended the petition and should be reversed" (Division's brief, pp. 4-5).

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[35] Finding of fact "49" of the Administrative Law Judge's determination read as follows:

> "The Division brought a motion for summary determination in this matter pursuant to 20 NYCRR 3000.5(c) for a determination dismissing the petition and sustaining the assessment and also moved to impose a penalty of $500.00 for a frivolous petition pursuant to 20 NYCRR 3000.15. The motions were dismissed by a Short Form Order of Timothy J. Alston, Administrative Law Judge, dated December 1, 1988. The motion for summary determination was denied on the basis that a material issue of fact had been presented. The motion to impose the frivolous petition penalty was denied on the basis that the issues were not frivolous within the meaning of the regulation."

Petitioner responds by asserting that the Division lacks standing to appeal the order denying its motion for summary determination citing 20 NYCRR 3000.5(c)(3).[36] Petitioner asserts that the Division's request for Tribunal review not only flies in the face of the regulation:

> "but would render moot the 369 transcript pages of testimony and argument, the thousands of pages of exhibits, and the voluminous briefs, and the decision of [the Administrative Law Judge] finding against the Division. If there is no triable issue of fact, why did the parties spend three days at the World Trade Center trying the case?
>
> "The Division's claim should be denied" (Petitioner's brief, p. 4).

We affirm the order of the Administrative Law Judge denying the Division's motion for summary judgment. We agree with the Administrative Law Judge for the reasons stated in the order that petitioner, in its petition, did raise the issue of its status as an Article 13-A taxpayer.[37]

In so concluding, we also reject petitioner's assertion that it was improper for the Division to challenge the order on exception. Under the regulation, the Division could not appeal the order when issued since it did not finally resolve the issues in the case (20 NYCRR 3000.5[c][3]). The regulation does not prevent the Division, on exception, from asking this Tribunal to review the order denying summary judgment.

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[36]20 NYCRR 3000.5(c)(3) states:

> "[a] determination of an administrative law judge denying the motion for summary determination is not subject to review by the tribunal."

[37]We also point out that, at hearing, the Division's representative stated that "[t]here is an issue as to whether or not Burnside is a 13-A petroleum business subject to tax under Article 13-A" (Tr., p. 72).

We would also note that the Division, in paragraph 3 of its Answer: "AFFIRMATIVELY STATES THAT . . . petitioner was at all relevant times subject to the tax on gross receipts from sales of petroleum, imposed by Article 13-A of the Tax Law" (Exhibit "L"). In its reply to the Answer (Exhibit "M"), petitioner states that it: "3. Neither admits nor denies the truth of the allegations contained in ¶ '3' of the Answer, but refers the tribunal to the statutes referred to therein."

We deal next with the Division's exception to findings of fact "43"[38] and "45"[39] of the determination of the Administrative Law Judge.

We reject the Division's exception. The record supports both findings of fact.

We deal next with the Division's exception to conclusion of law "H," the core of the Administrative Law Judge's determination. In conclusion of law "H," the Administrative Law Judge determined that:

> "[t]he issue as to whether petitioner was a 'petroleum business' within the meaning of Tax Law § 300(c) is complex. Petitioner did not itself import petroleum products and did not cause persons not subject to tax under Article 13-A to import such products (Findings of Fact "11" through "14"). Accordingly, it would appear not to have been a petroleum business subject to the gross receipts tax.

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[38]Finding of fact "43" of the Administrative Law Judge's determination read as follows:

> "[f]or at least several months after the effective date of Article 13-A there was confusion in the oil industry as to whether governmental agencies would reimburse bidders the amount of the tax. A New York State Office of General Services purchasing memorandum dated July 29, 1983 stated as follows:
>
> "'TO ALL STATE AGENCIES, POLITICAL SUBDIVISIONS AND OTHERS AUTHORIZED BY LAW TO PARTICIPATE IN SUBJECT AWARDS:
>
> "'For the above commodities, pursuant to provisions of the new Gross Receipts Tax, oil companies are allowed to pass the cost of the tax to their customers, including State Contract participants.
>
> "'Therefore, effective July 1, 1983, the 3.25% Gross Receipts Tax will be payable when added to invoices (vouchers) as a separate item.
>
> "'Our position regarding deliveries prior to July 1, 1983 is being reviewed. A directive will be issued as soon as a determination is made.
>
> "'If you have any questions please consult your agency counsel or contact this office.'"

[39]Finding of fact "45" read as follows:

> "Petitioner did not terminate deliveries, at least in part due to concern for being barred from bidding on other City contracts and concern for exposure to damages for breach of contract."

"The issue is complicated, however, by the fact that petitioner completed the questionnaire dated March 1, 1984 stating that title to product purchased from West Vernon passed outside New York State (Finding of Fact "20"). This signified that petitioner was importing product and resulted in the registration of petitioner as a petroleum business. Petitioner, in fact, filed Article 13-A returns for the periods at issue (Finding of Fact "1") and for several years thereafter.

"The key question is whether petitioner's actions in representing itself to the Division as a petroleum business and conducting itself as such while attempting to collect the tax at issue from the City of New York estopped petitioner from denying its status as a petroleum business.

"The principal case relied upon by the Division in its memorandum of law, Matter of General Oil Distributors (Tax Appeals Tribunal, March 14, 1991), involves an Article 12-A registration, which while differing in numerous respects from the instant case, is somewhat analogous and generally supports the hypothesis advocated by the Division:

> "'Having accepted the benefit of its joint motor fuel registration as a distributor, and consistently having filed motor fuel tax returns with General Oil, Pride Oil is therefore estopped from denying its status as a distributor.'

"It is noted that Franklin Mint Corp. v. Tully (94 AD2d 877, 463 NYS2d 566, affd 61 NY2d 980, 475 NYS2d 280) also cited by the Division and relied upon by the Tribunal in General Oil, involved a sales and use tax statute which afforded persons notice that if they chose to register, they became, as vendors, responsible for use taxes. Franklin Mint Corp. is thus distinguishable from the instant case.

"The problem with the Division's argument is that the claim of estoppel was not made until it was raised in the Division's post-hearing memorandum. The claim should have been raised in the answer or, at least, at the hearing, so that petitioner could respond to it. In New York, as in most jurisdictions, estoppel is a separate matter which must be pleaded (57 NY Jur 2d, Estoppel, Ratification and Waiver, § 70). Moreover, facts which would give rise to an estoppel or even the basic theory behind the estoppel are not clear from the record. Possibly the Division believes that petitioner's responses to the questionnaire and subsequent acceptance of registration and filing of returns caused the Division to lose taxes which would have otherwise been due from petitioner's affiliate West Vernon or some other supplier. This, however, is conjecture, as the Division's position on this point is not entirely clear. (It is noted that the parties did not discuss the Article 9-A add-back provisions (Conclusion of Law "E") and it is assumed said provisions are not relevant hereto.

"Accordingly, petitioner is not estopped from claiming that it was not a 'petroleum business' during the period at issue" (Determination, conclusion of law "H").

The Division's sole argument on exception is that petitioner should be estopped from denying its status as an Article 13-A taxpayer.[40]

The Division asserts that in suing the City of New York to require it, pursuant to its contract with petitioner, to pay the Article 13-A tax on its purchase of petroleum products from petitioner:

> "Burnside thereby admitted that it had standing to sue to recover the tax, pursuant to its obligations under Article 13-A. Its current attempt to assert that it was not an Article 13-A petroleum business is not alternative pleading, but rather talking out of both sides of its mouth.
>
> "Having asserted its right to collect this tax from the City prior to March 1, 1984, on or about that date Burnside submitted to this Department a completed questionnaire attesting that it was, indeed, importing fuel. In reliance on the information so supplied by Burnside, one week later this Department issued an Article 13-A registration to Burnside, retroactive to the effective date of the statute, July 1, 1983. Burnside accepted this registration, which was effective through October 31, 1984" (Division's memorandum of law at hearing, p. 2).

The Division concludes by arguing that:

> "[t]his is the one true issue before us . . . it does not matter whether Burnside was ever correctly registered as an Article 13-A taxpayer. The fact is that based on its conduct and representations which it made to this department, upon which this department relied, Burnside was registered as an Article 13-A taxpayer, during the period before us, and during which time it exercised and enjoyed the rights and privileges of a 13-A taxpayer. It must now be estopped from denying its status as such" (Division's memorandum of law at hearing, p. 3).

In response, petitioner reiterates its position that:

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[40]In its post-hearing memorandum of law, the Division stated that:

> "[t]he petitioner has wasted 55 perfectly good sheets of paper, (plus those necessary for the addendum), in an effort to convince [the Administrative Law Judge] that it was not a taxpayer under Article 13-A.
>
> * * *
>
> "[petitioner] wastes most of its paper in an attempt to prove that it did not import the subject fuel. Considering the particular facts of this matter, I stated in closing, '. . . frankly I don't give a damn; that is not the question.' In all of its glorious 55 pagers (plus addendum), the petitioner never answers the Division's argument that Burnside is, and must be estopped from denying its status as, an Article 13-A taxpayer" (Division's memorandum of law at hearing, pp. 1-2).

> "[t]he gravamen of this case is whether Burnside should be classified as a 'petroleum business,' as that term is defined in § 300(c) of the New York State Tax Law, and thereby subject to tax under Article 13-A for the period of July 1, 1983 through April 30, 1984 ('relevant period'), where Burnside did not import or cause petroleum products to be imported into New York during or prior to the relevant period" (Petitioner's response brief, p. 2).

On the issue of estoppel, petitioner asserts that the determination of the Administrative Law Judge is correct and that the Division's assertion that petitioner should be estopped from denying its status as an Article 13-A taxpayer "is baseless." Petitioner asserts that: 1) the Division did not plead estoppel as an affirmative defense as required under New York law (citing, New York Rubber Co. v. Rothery, 107 NY 310); 2) the Division had access to all of the information with respect to the applicability of Article 13-A to petitioner, thus, an essential element for estoppel, i.e., non-access to information, was lacking; 3) there was no attempt by petitioner to, in any way, deceive the Division since it was evident from the very return filed by petitioner that it was challenging the tax on the New York City purchases; and 4) the Division did not rely to its detriment on any of the actions of petitioner in this case.

Petitioner asserts that its litigation against the City of New York was reasonable under the circumstances and was not, as asserted by the Division, an admission by Burnside that it was a petroleum business as defined in Article 13-A.[41] Moreover, petitioner asserts that the Division's

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[41]As hearing, petitioner's representative responded to this assertion by the Division by offering the following rationale:

> "In point of fact, what happened was, Burnside was certified by the Department of Taxation and Finance as an Article 13-A taxpayer from 1984 retroactive to July 1, 1983. Burnside had nothing to do with that, with that process. That was a determination by the Department of Taxation.
>
> "Burnside then discovered, based upon its notification from the auditor, apparently, as best we understand it, that potentially they are going to be on line for about $600,000 worth of taxes plus interest plus penalties. What would Mr. Infantino have Burnside do at that point? Should he sit back and wait for the statute of limitations to run out as to the City of New York? That is a possibility. It can also, at the same time, attempt to collect from the City of New York, setting forth a brief that it may be liable for these taxes to the State of New York. It can also continue to contest -- and I will remark, vigorously contest -- the allegation of the State of New York, Department of Taxation and Finance, as to whether or not Burnside was liable in the first instance to the Department of Taxation. That is, in fact, what it did. That is, in fact, what Judge Alston recognized, so to suggest that it is somehow a smoking gun, respectfully, is quite incorrect" (Tr., pp. 41-43).

determination that it was an Article 13-A business during this period was not the result of an application by petitioner but resulted solely from action by the Division based upon the questionnaire filled out by petitioner at the Division's request.

Petitioner states that during the hearing it presented all of its business records for purchase of petroleum product during the relevant period.

> "This evidence showed conclusively that Petitioner did not import or cause petroleum products to be imported into New York State during or before the relevant period . . . .
>
> Significantly the Division utterly failed to introduce any evidence whatsoever to refute Burnside's proof nor otherwise contradict Burnside's assertion" (Petitioner's Response Brief, p. 2).

We affirm the determination of the Administrative Law Judge.

First, we agree with petitioner that the crux of the case is whether petitioner was a petroleum business under Article 13-A, i.e., whether petitioner was "importing or causing to be imported . . . into this state for sale . . . petroleum" (Former Tax Law § 300[c]). On this point, the facts, which are not controverted at hearing or on exception by the Division, are:

> Petitioner did not import petroleum products into New York State, did not pay (at least directly) for the cost of shipping or transporting petroleum into New York and did not designate an agent for importing petroleum into New York for petitioner's account.
>
> During the period at issue, petitioner purchased its petroleum products from the following suppliers: Amerada Hess Corporation, Cibro Terminals, Inc., West Vernon Petroleum Corp., Commander Oil Corp., Pittston Petroleum Inc., Ultramar Petroleum, Inc., Rainbow Fuel Service, Inc., Reliance Utilities Corp., Econo Oil Company, Merrick Shell Fuel Corp., Carbo Concord Oil Co., Inc., South Shore Petroleum, Royal Petroleum, Public Fuel and Burtha Heat.[42]
>
> Either petitioner's suppliers or said suppliers' own sources of product paid for the barging or other costs of importing petroleum into New York State.

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[42] Petitioner's Exhibit "9."

> Product purchased from petitioner's major suppliers was purchased FOB at the following petroleum storage terminals:[43]
>
> | Terminal | Supplier |
> |---|---|
> | Court Street, Brooklyn | Amerada Hess |
> | East River Terminal, Bronx | Ultramar/Pittston |
> | Oyster Bay, Nassau County | Commander |
> | Mt. Vernon, New York | West Vernon |
> | 149th Street, Bronx | Cibro |
>
> Petroleum purchased from Rainbow, Reliance, Econo, Merrick and Commander was delivered to petitioner's customers from the suppliers' terminals or storage facilities in New York State. It is unclear how product purchased from Carbo Concord, Public Fuel and Burtha Heat was delivered.

The Administrative Law Judge, based on these facts, concluded that:

> "[p]etitioner did not itself import petroleum products and did not cause persons not subject to tax under Article 13-A to import such products (Findings of Fact "11" through "14"). Accordingly, [petitioner] would appear not to have been a petroleum business subject to the gross receipts tax" (Determination, conclusion of law "H").

In our view, these uncontroverted facts provide clear support for the conclusion that petitioner was not a petroleum business under Article 13-A for the period at issue.

We deal next with the issue of whether the Division's argument on estoppel fails because it was not pled as an affirmative defense. In our view, the matter was properly raised at hearing. The Administrative Law Judge erred in concluding that "[t]he problem with the Division's argument is that the claim of estoppel was not made until it was raised in the Division's post-hearing memorandum. The claim should have been raised in the answer or, at least, at the hearing, so that petitioner could respond to it" (Determination, conclusion of law "H"). The record shows that at hearing, both parties made motions to conform the pleadings to the proof. The Division, in its closing statement, made a long and detailed argument that the doctrine of estoppel was properly applicable in this case. Petitioner responded, stating that:

> "I am not going to do a lengthy legal argument as to estoppel, although we will talk to it in our brief.

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[43] Petitioner's Exhibit "5."

> "I will just say that one of the considerations of estoppel is prejudice. Counsel may argue all day that the Tax Department was prejudiced. The only problem is that he didn't put any proof that shows prejudice. When we look back at the transcript, he is not going to show in one way that there is any proof here that the Tax Department would be prejudiced by a finding that Burnside was never obligated in the first instance to pay the gross receipts tax" (Tr., p. 364).

We deal next with the substance of the Division's assertion that petitioner should be estopped from denying its status as a petroleum business subject to Article 13-A for the period at issue, i.e., July 1, 1983 through April 30, 1984. We agree with petitioner that the mere fact that it pursued what it perceived to be its right under its contract with New York City to have the City pay the gross receipts tax on its purchases does not estop petitioner from pursuing the issue of whether it was a petroleum business. In short, the doctrine of judicial estoppel is applicable only where a party successfully takes a position in a proceeding and assumes an inconsistent position in a subsequent proceeding (see, Kalikow 78/79 Co. v. State of New York, 174 AD2d 7, 577 NYS2d 624, appeal dismissed 79 NY2d 1040, 584 NYS2d 448; Meyers v. Geller, 194 AD2d 595, 599 NYS2d 72). Here, petitioner lost its suit against New York City. Thus, the doctrine of judicial estoppel is not applicable. With regard to the doctrine of equitable estoppel, we agree with the Administrative Law Judge that:

> "facts which would give rise to an estoppel or even the basic theory behind the estoppel are not clear from the record. Possibly the Division believes that petitioner's responses to the questionnaire and subsequent acceptance of registration and filing of returns caused the Division to lose taxes which would have otherwise been due from petitioner's affiliate West Vernon or some other supplier. This, however, is conjecture, as the Division's position on this point is not entirely clear" (Determination, conclusion of law "H").

We point out that the situation here is different from that in Matter of Franklin Mint Corp. v. Tully (supra) and Matter of General Oil Distribs. (supra) relied upon by the Division. In both of those cases, the taxpayers sought to disavow their voluntary compliance with the registration requirements of the applicable statutes. Specifically, in Franklin, the taxpayer, prior to the audit period at issue, registered as a vendor to collect State use taxes. In rejecting the taxpayer's contention that its "voluntary registration . . . did not establish it as a vendor," the Court noted, among other things, the fact that the statute affords the taxpayer "notice that if they choose to

register, they . . . become responsible for the collection of local use taxes" (Matter of Franklin Mint Corp. v. Tully, supra, 463 NYS2d 566, 568). In General Oil, the taxpayers, prior to the audit period at issue, registered as distributors in order to be able to conduct sales of motor fuel within the State. We rejected the taxpayer's contention that it was not a distributor pointing out that "since Tax Law § 283 authorizes and requires the registration of motor fuel distributors, it is implicit in the statute that one who registers or accepts registration as a 'distributor' is an Article 12-A distributor (see, Matter of Franklin Mint Corp. v. Tully, supra)" (Matter of General Oil Distribs., supra).

The facts of the case do not support the Division's attempt to analogize petitioner's actions here to that of the taxpayers in Franklin Mint and General Oil. First, petitioner responded to a questionnaire, it did not file an application. Second, petitioner did not accept a "registration" because one was not issued, it received a document entitled "Certificate of Taxability Under Article 13-A" -- which was merely the Division's view of petitioner's business. Third, since Article 13-A does not require registration of petroleum businesses, there was no reason for petitioner to think that it was making an application for registration. We would also point out that unlike the taxpayers in Franklin Mint and General Oil, petitioner did not act prior to the commencement of the July 1, 1983 through April 30, 1984 audit period. It filed the questionnaire on March 1, 1984, two months prior to the end of the audit period. The Division does not explain how it relied, to its detriment, on the questionnaire for the entire audit period, i.e., July 1, 1983 through April 30, 1984, when the questionnaire was filed March 1, 1984, two months prior to the end of the period.

We would also add, with regard to the questionnaire, that there was confusion when the law was revamped in 1983. The Division, laudably, sought to clarify the application of the law by forwarding questionnaires to businesses which it thought might be covered under the new law. Quite clearly, this served as an information vehicle which allowed the Division to inform those who responded as to the Division's view of the law applicable to their business operations. However, we doubt that the Division viewed the information on the questionnaire or its

response as finally dispositive on the issue of tax liability under Article 13-A (see, Matter of Bolkema Fuel Co., Tax Appeals Tribunal, March 4, 1993 [where the Division, notwithstanding its initial determination that Bolkema was not subject to Article 13-A, upon audit, subsequently asserted that Bolkema was subject to Article 13-A]). The facts here show that petitioner did not import or cause to be imported any petroleum products and was not a petroleum business under Article 13-A for the period at issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

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

3. The petition of Burnside Coal & Oil Co., Inc. is granted; and

4. The Notice of Deficiency, issued on April 10, 1986, is cancelled.

DATED: Troy, New York
September 29, 1994

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

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