STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition<br>of<br>**SENTRY REFINING, INC.**<br>for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Period October 1, 1984 through September 30, 1986. | : | DECISION<br>DTA Nos. 808199 and 808203 |
| In the Matter of the Petition<br>of<br>**SEN MAR, INC.**<br>for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Period August 1, 1986 through July 31, 1988. | : | |

Petitioners Sentry Refining, Inc. and Sen Mar, Inc., c/o Arnold Y. Kapiloff, Esq., 60 East 42nd Street, New York, New York 10165, filed an exception to the determination of the Administrative Law Judge issued on May 5, 1994. Petitioners appeared by Walker, Walker & Kapiloff, P.C. (Arnold Y. Kapiloff, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James Della Porta, Esq., of counsel).

Petitioners filed a brief in support of their exception and in reply to the Division of Taxation's brief in opposition. Oral argument was heard on March 14, 1996.

The Tax Appeals Tribunal renders the following decision per curiam

***ISSUES***

I. Whether petitioners were petroleum businesses subject to taxation under Article 13-A of the Tax Law.

II. Whether the Division of Taxation properly computed the gross receipts subject to tax in determining petitioners' tax liability under Article 13-A of the Tax Law.

III. Whether Article 13-A of the Tax Law places an unconstitutional burden upon interstate commerce.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except for finding of fact "13" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner Sentry Refining, Inc. ("Sentry") was incorporated in New Jersey in 1974. It operated a small refinery in Corpus Christi, Texas, importing oil from Venezuela and turning it into crude oil, naphtha and diesel fuel. Sentry was the beneficiary of a Federal entitlement program which subsidized small refineries in order to maintain competitiveness between them and larger refineries. The program was terminated shortly after President Ronald Reagan took office in 1980. Sentry found that without the Federal subsidies it was unable to operate profitably, and in 1983 the refinery was closed.

Sentry decided to continue doing business as a seller and marketer of petroleum products, operating out of offices in New York State. According to a questionnaire Sentry filed with the Division of Taxation ("Division") in October 1983, Sentry maintained executive and accounting offices in New York State. It listed its address on that questionnaire as 362 Fifth Avenue, New York, New York. Under article 13-A of the Tax Law, New York imposes a franchise tax on "every petroleum business for the privilege of engaging in business, doing business, employing capital, owning or leasing property, or maintaining an office" in New York (Tax Law § 301[a][1]). A petroleum business includes any business which imports residual petroleum product (essentially, number 5 or number 6 fuel oil) or causes residual petroleum product to be imported into New York for use, distribution, storage or sale (Tax Law § 300[b][3]). There is some confusion in the record on this point; however, it can reasonably be inferred from evidence

in the record that Sentry was registered as a petroleum business from October 1983 through March 1984.[1] Sentry's name appeared on the Division's list of registered petroleum businesses in December 1983, March 1984 and June 1984. The petroleum business tax is imposed on a petroleum business's gross receipts from sales of petroleum where shipments are made to points within the State (Tax Law § 301[a]).

In 1985, Sentry entered into a contract to supply Long Island Lighting Company ("LILCO") with number 6 fuel oil which was to be delivered to LILCO in New York State. Because of Sentry's poor financial condition, it was unable to obtain the bank financing which would have enabled it to purchase the fuel oil that it had contracted to sell to LILCO. In order to fulfill its agreement, Sentry entered into an arrangement with Transoil, Ltd. ("Transoil") of Coral Gables, Florida. Transoil opened a bank account in Switzerland under the name Sentry Refining. LILCO paid for the fuel oil by wiring Federal funds to Chase Manhattan Bank, New York City for the account of Sentry Refining in the Switzerland bank account established by Transoil. Transoil used the funds remitted by LILCO to pay for the fuel oil and expenses relating to the transaction. Sentry earned what it denominated a commission on its arrangement with Transoil, but the exact nature of that fee and how it was calculated cannot be determined from the record.

The contract between Sentry and LILCO contains the following provision:

> "6.5 Taxes and Duties
>
> "Seller shall pay all taxes and duties imposed upon the purchase, sale, use, delivery, export, import, manufacture, storage and, if required, transportation as currently prescribed by law of the Product set forth herein prior to the passage of title pursuant to Section 9.3, except that Buyer shall pay any city, state and county sales or use taxes, New York State Petroleum Business Tax, or other similar taxes imposed by such authorities applicable to deliveries to Buyer hereunder."

Later contracts between Sen Mar and LILCO contained a similar provision.

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[1]Neither the Division nor petitioner had a written record establishing Sentry's registration; however, a notation on the bottom of a copy of Sentry's petroleum business questionnaire indicates that Sentry was registered by the Division for this period.

Sentry prepared the sales invoice to LILCO for the first transaction under its own name and stated one lump-sum price for the sale. LILCO advised Sentry that it required its sellers to separately state the New York gross receipts tax on petroleum businesses on all invoices. In all subsequent billings, Sentry prepared an invoice which showed separate itemizations for sales and for gross receipts tax. Sentry did not pay to the State the amount that it itemized as gross receipts tax on its billing invoices.

On November 28, 1988, Sentry filed a petroleum business tax report (form CT 13-A) for its 1984 tax year (ended September 30, 1985) calculating the minimum tax liability of $250.00. The report contains an attachment explaining the transaction with Transoil, as it is explained above. As relevant here, the attachment contains the following statement:

> "Sentry believes that Transoil regularly engages in business in New York State and that Transoil is a persn [sic] subject to tax under Article 13-A.
>
> "Accordingly, Sentry does not 'import or cause to be imported (by a person other than one which is subject to tax under this article)', as defined in Section 300, Article 13-A, Tax Law, and by reason thereof, Sentry is not a petroleum business."

Sentry requested a refund of prepaid article 13-A tax in the amount of $142,625.00.

Sentry filed a petroleum business tax report for its 1985 tax year (ended September 30, 1986) where it reported the minimum tax liability of $250.00. This report contains an attachment similar to the one that accompanied its 1984 report. In the attachment, Sentry described three more transactions with Transoil under terms similar to those described in the 1984 tax report. It also described two other transactions as follows:

> "In March 1986, Sentry acquired a cargo of crude oil from Vitol S.A., Inc. 66 House Road, Stamford, Connecticut, which was delivered in New York State upon the vessel 'Norse Venture;' and Sentry purchased this cargo, took delivery and title in New York State at the Flange at Lilco's facility in New York. Sentry billed Lilco and the cargo was sold for the price of $5,336,128.92. The New York shipping agent for the benefit of the owner of the vessel and Vitol was Kurz Moran Shipping Agency, Inc., 132 Nassau Street, New York, New York.

> "In June 1986, Sentry acquired a cargo of crude oil from Vanol (USA) Inc., Bridge Plaza North, 2100 North Central Road, Fort Lee, New Jersey, which was delivered upon the vessel 'Mantinia;' and Sentry purchased this cargo, took delivery and title in New York State at the Flange at Lilco's faciity [sic] in New York. Sentry billed Lilco and the cargo was sold for the price of $4,125,346.40. The New York shipping agent used by and for the benefit of the owner of the vessel and Vanol was Bill Black Agency, Inc., 20 North Tyson Avenue, Floral Park, New York.
>
> "Sentry believes that both Vitol and Vanol regularly engage in business in New York State and that each is a person subject to tax under Article 13A."

Sentry requested a refund of $114,050.00 representing the amount of its prepaid petroleum business tax.

Because of Sentry's poor financial condition and its inability to obtain bank financing, a decision was made to continue Sentry's business through a different corporation. Sen Mar was formed in New York in 1984 under the name Trifinery, Inc. and later changed its name to Sen Mar. Sentry assigned its contractual rights with LILCO to Sen Mar. The assignment was approved by LILCO in September 1986. Thereafter, Sen Mar entered into separate contracts with LILCO for the sale of petroleum. Sen Mar continued Sentry's practice of separating the total amount on each LILCO invoice into an amount for sales and an amount for gross receipts tax.

Sen Mar was registered as a New York State petroleum business under article 13-A of the Tax Law for the period October 16, 1986 through January 31, 1988. It was assigned a certificate of taxability, number A-0447-8. Sen Mar's registration was not renewed.

The Division began an audit of Sentry and Sen Mar in February 1989. The auditor reviewed the tax reports filed by Sentry and Sen Mar, Federal income tax reports filed by the corporations, and some purchase invoices and purchase contracts. She discussed the operations of the two corporations with their representative, Mr. Kapiloff. She also reviewed purchase journals, contracts and invoices provided by LILCO. LILCO representatives with whom the

auditor discussed the Sentry and Sen Mar transactions confirmed that LILCO required Sentry and Sen Mar to separately state the gross receipts tax on all invoices.

The auditor contacted Vitol, one of Sentry's suppliers, to determine whether that company was doing business in New York and, in response, she was sent a copy of a letter from the Division to Vitol which states as relevant:

> "After reviewing the answers which you provided on our questionnaire relative to Article 13-A, we have determined, that you are not a 'petroleum business' as defined in such article and are therefore not required to file reports with or to pay the applicable tax under Article 13-A directly to this department.
>
> "Such determination is based upon the fact that your answers indicate that you are not engaging in business, doing business, employing capital, owning or leasing property or maintaining an office in New York, even though it appears you are importing petroleum into New York State for sale in the state" (emphasis added).

The auditor's report states that Vanol, U.S.A. was a registered petroleum business at the time that it sold petroleum product to Sentry in 1986. It apparently filed a 1986 petroleum business tax return reporting its sale to Sentry as a sale for resale.

Based on information obtained in the audit, the Division concluded that Sentry was a petroleum business as defined in the Tax Law, that it caused the importation of petroleum products by suppliers or importers not subject to the petroleum business tax and, as a result, that Sentry was required to pay the petroleum business tax on its gross receipts from all product imported into New York for sale to LILCO.

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

> In its petroleum business tax report for 1984, Sentry reported two transactions involving Transoil. The first involved the importation of a cargo of petroleum product on the vessel Alvega. It was delivered in July 1985 and, according to Sentry's tax report, "sold for the price of $7,157,068.22." The second transaction involved a cargo of petroleum delivered on the vessel Golden Sunray in September 1985 and, according to Sentry's tax report, "sold for the price of $7,667,920.19."

> The auditor's workpapers demonstrate the manner in which she calculated the gross receipts subject to tax on these transactions. Her workpapers show that the Alvega cargo consisted of 320,460.48 barrels of oil sold at a price of 22.3337 dollars per barrel for a total amount of $7,157,068.22. The LILCO invoices listed this amount as the sales price for the product. The invoices also showed a separately stated gross receipts tax of $196,819.38. The auditor took the sum of the amount listed as the price for the petroleum product and the amount shown as gross receipts tax to compute total gross receipts of $7,353,887.60. The tax rate was applied to this amount. The same method was used to compute gross receipts on the second cargo and on sales reported by Sentry for the 1985 tax year.[2]

The Division issued to Sentry two notices of deficiency, each dated March 13, 1990. The first notice was for the tax period October 1, 1984 through September 30, 1985 and asserted a tax deficiency of $276,024.00 plus interest and an additional charge of $69,006.00. The second notice was for the period October 1, 1985 through September 30, 1986 and asserted a tax deficiency of $729,909.00 plus interest and an additional charge of $182,447.00.

In December 1988, Sen Mar filed a petroleum business tax report for its tax year ending July 31, 1987 (its 1986 tax year), showing petroleum business tax due from the sale of petroleum of $297,646.00, prepayments of tax of $229,710.00 and a balance due of $67,936.00. It attached a statement to its report claiming that it was a petroleum business for the purposes of two transactions involving the sale of fuel to LILCO but was not a petroleum business for the purposes of eleven such transactions.

The eleven transactions for which Sen Mar claimed not to have any tax liability under article 13-A of the Tax Law were the following:

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[2]We modified this fact to indicate that the price per barrel was 22.3337 dollars not cents.

| Date | Seller to Sen Mar | Vessel |
|---|---|---|
| 9/19/86 | BP North American Petroleum ("B.P.") | Antipolis |
| 12/10/86 | Sun Oil Trading | Solar Mar |
| 1/16/87 | B.P. | BP Barge |
| 1/30/87 | A. Johnson Petroleum | Interstate #72 |
| 2/2/87 | Scallop Petroleum | Morania |
| 2/4/87 | Transoil | Spring Odessa |
| 3/23/87 | Scallop Petroleum | Freeport Chief |
| 3/31/87 | Vanol USA, Inc. | Dialia |
| 5/27/87 | Vanol USA, Inc. | Amazon Venture |
| 6/17/87 | Chevron International Oil Co. | Chevron Pacific |
| 7/28/87 | B.P. | Nicopoles |

Sen Mar reported itself liable for the petroleum business tax on two purchases of fuel oil outside of New York State. One cargo of fuel oil was purchased from Challenger Petroleum ("Challenger") on or about January 29, 1987 and title was transferred to Sen Mar in Louisiana. The cargo was delivered to LILCO in New York on the vessel Delaware Trader. The second cargo was purchased by Sen Mar from Stinnes Interoil ("Stinnes") on or about April 30, 1987 and title passed to Sen Mar in Trinidad. The cargo was delivered by Sen Mar to LILCO in New York on the vessel Bright Spout. Sen Mar conceded at hearing that a third cargo, purchased from Chevron International Oil Co. ("Chevron") on or about June 17, 1987, was also subject to the petroleum business tax. Sen Mar asserts that the pricing terms negotiated by Chevron and Sen Mar were "outside duty" which contractually obligated Sen Mar to pay all federal, state and local taxes and duties.

In its 1986 tax report, Sen Mar included the following statement:

> "Sen Mar, Inc. does not believe that it has been or will be at any time during the period August 1, 1987 through July 31, 1988, a 'petroleum business' as defined in Article 13-A, Section 300(c) for which tax is imposed upon gross receipts pursuant to Section 301 of the New York Tax Law.
>
> "For the fiscal year ending July 31, 1988, Sen Mar intends to conduct its business regarding shipments to its New York customers so that Sen Mar only purchases and takes title to the fuel oil in New York for delivery in New York.
>
> "Accordingly, Sen Mar will not 'import' or 'cause to be imported (by a person other than one which is subject to tax under

this article)' as defined in Section 300, Article 13-A, Tax Law, and by reason thereof, Sen Mar intends not to be a petroleum business."

Sen Mar did not file an article 13-A tax report for its tax year ending July 31, 1988. On audit, the Division determined that for this period Sen Mar had 17 transactions which involved the sale of petroleum product to LILCO.

| Date | Seller to Sen Mar | Vessel |
|---|---|---|
| 8/5/87 | Vanol | Esso Portland |
| 8/18/87 | Vitol | Fidelity L |
| 9/1/87 | Stinnes | London Spirit |
| 9/27/87 | Vitol | Charter Oak |
| 10/20/87 | Carib Petroleum | Bright Spout |
| 11/22/87 | Wyatt | Anangel Intelligence |
| 12/22/87 | Enjet | Jacinth |
| 1/21/88 | Petro Diamond | Mantinia |
| 2/8/88 | Petro Diamond | Fredericksberg |
| 2/26/88 | Petro Diamond | London Spirit |
| 3/29/88 | Petro Diamond | Myoko Marce |
| 4/21/88 | Enjet | Amazon Venture |
| 5/6/88 | Enjet | Delaware Trader |
| 6/2/88 | Enjet | Charter Oak |
| 6/12/88 | Sun | Omni Wabash |
| 6/19/88 | Enjet | Delaware Trader |
| 7/18/88 | Enjet | Baltimore Trader |

On audit, the Division concluded that Sen Mar was a petroleum business throughout its 1986 and 1987 tax years under article 13-A of the Tax Law, that Sen Mar imported petroleum or caused petroleum to be imported into New York (by persons not subject to the petroleum business tax), that Sen Mar purchased petroleum for resale to LILCO and that Sen Mar failed to pay the gross receipts tax on its sales to LILCO. Based on these findings, the Division determined that Sen Mar was liable for the gross receipts tax from its sales of number 6 fuel oil to LILCO.

The Division calculated Sen Mar's tax liability based on its sales to LILCO as shown on the LILCO invoices. The tax was imposed on the total amount of the invoices including the amount categorized on the invoice as gross receipts tax. Sen Mar's total gross receipts for the period August 1, 1986 through July 31, 1988 were determined to be $150,765,676.58, with a

petroleum business tax due of $4,146,056.07. Sen Mar's payments of $297,646.00 were subtracted from the amount due to calculate a total tax deficiency of $3,848,410.07.

As a result of the audit, the Division issued two notices of deficiency to Sen Mar, each dated March 13, 1990. The first notice was for the period August 1, 1986 through July 31, 1987 and asserted a tax deficiency of $1,336,409.00, plus interest of $341,246.00 and an additional charge of $334,102.00, for a total of $2,011,757.00. The second notice was for the period August 1, 1987 through July 31, 1988 and asserted a tax deficiency of $2,512,001.00, plus interest of $387,913.00 and an additional charge of $628,000.00, for a total amount due of $3,527,914.00.

The Division determined that the following Sen Mar suppliers were registered with the Division as petroleum businesses: B.P., Sun Oil Trading Company ("Sun Oil"), A. Johnson Petroleum ("A. Johnson"), Scallop Corporation ("Scallop"), Vanol, Stinnes, Chevron, Wyatt, Inc. and Petro Diamond. The auditor contacted B.P. in connection with the Sen Mar audit. B.P. provided the Division with copies of letters and documents given to B.P. by Sen Mar. These included a letter dated October 23, 1986 from Sen Mar's Treasurer, John Tomaszewski, indicating that he had enclosed a copy of Sen Mar's Certificate of Taxability under article 13-A of the Tax Law and Sen Mar's Resale Certificate. B.P. provided the Division with a copy of a resale certificate issued by Sen Mar for purchases made during the period August 1, 1986 through July 31, 1987. As relevant, the Certificate states:

> "I, John Tomaszewski, certify that Sen Mar, Inc. was a petroleum business as defined in Article 13-A of the Tax Law for the period above. I further certify that petroleum products were sold to the buyer during this period by BP NORTH AMERICA PETROLEUM, INC. and the products were purchased for resale as defined in Article 13-A of the Tax Law and were not used except for resale purposes."

A second letter from Mr. Tomaszewski to B.P., dated October 6, 1986, indicates that Sen Mar sent a copy of its Certificate of Authority to collect sales tax to B.P. and a copy of that

certificate was provided to the Division by B.P. B.P. was the only supplier who provided the auditor with a resale certificate from either Sentry or Sen Mar.

The auditor reviewed the petroleum business tax reports of B.P. for the years 1986 and 1987, Sun Oil for the year 1986, Scallop for the year 1987 and Wyatt for the year 1987. In each case, the supplier listed sales to Sen Mar as sales for resale and listed Sen Mar's employer identification number (which is required information on the certificate of taxability and the resale certificate) and Sen Mar's certificate of taxability number (A-0447-8).

The auditor testified that she spoke to a representative of Sun Oil regarding its sales to Sen Mar in 1987 and 1988. She stated that she was advised that Sun Oil received a resale certificate from Sen Mar for 1987 and she went on to testify as follows:

> "My recollection is that [Sun Oil] realized that Sen Mar was not -- Sen Mar's name did not appear on the 13-A list in 1988,[3] and they should have paid the tax themselves, and charged it to Sen Mar. Instead they listed it as a resale to Sen Mar and said that they were going to make a correction between the two companies."

As a result of her inquiries, the auditor grouped Sen Mar's purchases into several categories. The first such category was purchases made for resale where the seller was a registered petroleum business which filed a petroleum business tax report listing the transaction with Sen Mar as a sale for resale. The purchases in this category and the approximate date of each purchase were as follows:

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[3]The Division maintains a list of all registered petroleum businesses which it distributed to all such businesses. Sen Mar was registered as a petroleum business on October 16, 1986 and was listed as a petroleum business from December 1986 through December 1987.

| Date | Supplier | Amount of Sale[4] |
|---|---|---|
| 9/12/86 | B.P. | $4,054,544.06 |
| 12/4/86 | Sun Oil | 4,528,241.78 |
| 1/15/87 | B.P. | 1,945,004.33 |
| 1/31/87 | Scallop | 1,251,192.61 |
| 3/18/87 | Scallop | 5,877,893.66 |
| 7/87 | B.P. | 6,994,130.72 |

The second category of purchases included those in which the seller was a registered petroleum business, but, unlike the transactions above, the auditor had no evidence that the seller filed a report or that Sen Mar issued a resale certificate to the seller. It is known that one of the suppliers, Vanol, did not file petroleum business tax returns for 1987 and 1988, although it was a registered petroleum business. The auditor presumed all purchases were for resale, since the petroleum product was purchased by Sen Mar for sale to LILCO.

| Date | Supplier | Amount of Sale |
|---|---|---|
| 1/28/87 | A. Johnson | $1,042,995.28 |
| 3/27/87 | Vanol | 5,550,098.12 |
| 5/20/87 | Vanol | 5,829,062.83 |
| 6/87 | Chevron | 5,247,471.61[5] |
| 8/5/87 | Vanol | 5,975,241.43 |
| 9/1/87 | Stinnes | 5,722,810.59 |
| 11/22/87 | Wyatt | 5,095,029.47 |

The third category consisted of purchases which the auditor determined were from persons or entities not registered as petroleum businesses and not subject to the petroleum business tax.[6]

[4]The amount of each sale is the total amount shown on the LILCO invoice, including the amount categorized as gross receipts tax.

[5]Sen Mar concedes that it is liable for the gross receipts tax on this purchase for resale to LILCO.

[6]It is petitioners' contention that all of these companies were subject to the petroleum business tax.

| Date | Supplier | Amount of Sale |
|---|---|---|
| 1/31/87 | Transoil | $6,023,564.51 |
| 8/18/87 | Vitol | 6,770,445.87 |
| 9/27/87 | Vitol | 6,173,281.64 |
| 10/20/87 | Carib. Petroleum | 5,961,294.65 |
| 12/22/88 | Enjet | 6,146,975.05 |
| 1/21/88 | Petro Diamond[7] | 7,273,556.73 |
| 2/8/88 | Petro Diamond | 3,911,771.71 |
| 2/26/88 | Petro Diamond | 6,090,279.53 |
| 3/29/88 | Petro Diamond | 4,693,748.15 |
| 4/21/88 | Enjet | 5,261,276.20 |
| 5/6/88 | Enjet | 4,213,171.49 |
| 6/1/88 | Enjet | 4,928,024.41 |
| 6/19/88 | Enjet | 4,480,261.07 |
| 7/18/88 | Enjet | 5,072,233.38 |

The fourth category consisted of those purchases where Sen Mar paid the gross receipts tax on its sales to LILCO.

| Date | Supplier | Amount of Sale |
|---|---|---|
| 1/25/87 | Challenger | $5,359,455.37 |
| 4/22/87 | Stinnes | 5,716,530.69 |

There was one transaction which the auditor was unsure of. That was a purchase from Sun Oil on June 12, 1988 in the amount of $3,576,089.64. Apparently, the auditor believed that Sun Oil may have paid the petroleum business tax on its sale to Sen Mar; however, there is no evidence in the record that Sun Oil did so.

Mr. Tomaszewski testified at hearing that Sentry was never issued a certificate of taxability by the Division. He also stated that Sen Mar did not have a record of the resale certificates it may have furnished to its suppliers. Mr. Tomaszewski recalled that Sen Mar issued resale certificates to B.P., Sun Oil, Wyatt and Chevron. He could not recall its having issued resale certificates to any of its other suppliers.

Sen Mar and Sentry assert that all but three of its purchase contracts were negotiated as destination contracts and on an "inside duty" basis. Mr. Tomaszewski testified that an "inside duty" contract is a negotiated contract where the supplier (or seller) agrees to assume and pay, as

[7]Petro Diamond registered as a petroleum business as of March 31, 1988, after these transactions occurred.

part of the agreed selling price, all import duties, fees and taxes, including the petroleum business tax and to deliver the cargo to a designated location. He also stated that Sentry and Sen Mar negotiated a lump-sum price with its suppliers which included the gross receipts tax.

As noted, Sen Mar concedes that it is liable for the petroleum business tax on three cargos of petroleum which it imported into New York for sale to LILCO. Title to two of those cargoes passed outside of New York. The third cargo, purchased from Chevron, included the pricing term "outside duty".

Sentry and Sen Mar purchased the petroleum product sold to LILCO through petroleum brokers. Among the brokers used were Bridgeview Oil and United Fuels International, Inc. Sales were confirmed by telexes stating the contractual terms of the sale. A telex dated August 7, 1987 from Bridgeview Oil to Sen Mar confirms a sale by Vitol to Sen Mar. It contains selling terms typical of the Sen Mar purchase transactions. As relevant, it states:

"DELIVERY: VIA SELLER'S DESIGNATED VESSEL . . . TO LILCO'S NORTHPORT TERMINAL . . . .

* * *

"VITOL TO BE IMPORTER OF RECORD AND PAY DUTY

* * *

"INSPECTION/ MEASUREMENT QUANTITY AND QUALITY OF PRODUCT TO BE INSPECTED AT DISCHARGE BY SAYBOLT. COST SHALL BE SHARED EQUALY BETWEEN BUYER AND SELLER."

A telex from United Fuels International, Inc. to Sen Mar, dated received on December 11, 1987, confirms a sale from Petro Diamond to Sen Mar, with the following terms:

"UNIT PRICE PER BARREL: THE AVERAGE OF OIL BUYER'S GUIDE 1.0 PERCENT SULFUR FUEL OIL CONTRACT POSTINGS EXCLUDING ATLANTIC EFFECTIVE ON COMMENCEMENT OF DISCHARGE LESS 2.65 PER BARREL (INCLUDING CUSTOM DUTIES, SUPERFUND TAX AND CUSTOMS USER FEE) DELIVERED BASIS NORTHPORT, LONG ISLAND . . . .

* * *

"QUANTITY AND QUALITY INSPECTION OF OUTTURN BARRELS BY MUTUALLY AGREED UPON INDEPENDENT INSPECTOR. INSPECTION COSTS SHARED 50/50 BY PRINCIPALS."

Telexes evidencing other transactions between Sen Mar and its suppliers contain terms which are consistent with those quoted above. In general, the contracts were destination contracts, which means that title and risk of loss passed from the seller to the buyer at the point of delivery; inspectors were mutually agreed upon and the inspection costs equally shared by seller and buyer. Each telex contained a statement which indicated that the seller agreed to be the importer of record and pay the duty or the quoted price was "inside duty" or the price included custom duties, superfund tax and customs user fee. In all cases, the supplier owned or chartered the vessel carrying the cargo.

Mr. Tomaszewski testified that Sentry and Sen Mar often telephoned LILCO and asked LILCO to calculate the amount of the gross receipts tax LILCO wanted stated on the invoice.

Petro Diamond threatened to sue Sen Mar to recover any amount of petroleum business tax for which it was determined to be liable as a result of its sales to Sen Mar, but it has not filed such a suit.

Petitioners submitted 47 proposed findings of fact. The following were accepted and incorporated into the Findings of Fact: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 35, 37, 38, 39, 40, 43, 44 and 47. Proposed findings of fact 36 and 46 were rejected as unnecessary to the determination. Proposed findings of fact 22, 32, 33, 34, 41, 42 and 45 were rejected, modified or accepted with explanation as follows:

(a) Proposed findings of fact 22, 32, 33, and 34 describe the contractual arrangements between Sentry or Sen Mar and its suppliers. To more fully and accurately reflect the record, quotations were taken from representative telexes. Petitioners' statement that inspectors were engaged by the sellers is inexact because the telexes establish that in many instances the inspectors were mutually agreed upon. Petitioners' statement that an "inside duty" contract obligated the seller to pay gross receipts tax was rejected because the telexes

offered in evidence do not lend support to this statement and Mr. Tomaszewski's testimony was found not to be reliable on this point.

(b) Proposed finding of fact 41, which states that the Division has a policy "not to impose an Article 13-A tax on an importer of petroleum in New York unless the importer has some accoutrements of doing business in or nexus to New York", is based on the auditor's testimony under cross-examination. The proposed finding of fact was rejected because it inaccurately suggests that this is the entire policy of the Division with regard to whether a business is subject to the gross receipts tax and that the policy is not based on statutory authority.

(c) Proposed finding of fact 42 was modified to delete language which suggests that the auditor's investigation was inadequate; however, the substance of number 42 was incorporated into the Findings of Fact.

(d) Proposed finding of fact 45 asserts that computation of the tax based on total invoice price (including the amount separately stated as gross receipts tax) "results in a tax upon the tax." This is clearly a conclusion of law and is rejected for that reason.

Petitioners submitted six "Ultimate Findings of Fact". Numbers 49, 50 and 51 are repetitive of proposed findings of fact 29, 30 and 31, which were incorporated into the Findings of Fact. Numbers 48, 52 and 53 are conclusions of law and are rejected for that reason.

The Division and petitioners entered into a stipulation to correct certain errors made in the transcript. The transcript was corrected accordingly and their stipulation is made a part of the record of this proceeding.

## *OPINION*

In the determination below, the Administrative Law Judge first reviewed the statutory scheme of Article 13-A of the Tax Law. The Administrative Law Judge held that a corporation or unincorporated business will be subject to Article 13-A if it imports petroleum into New York or causes the importation of petroleum into New York by one not subject to the tax and it

engages in business, does business, employs capital, owns or leases property or maintains an office in New York (Tax Law former § 301[a]). The Administrative Law Judge then held that Sen Mar was an importer of petroleum for the 1986 tax year and, thus, subject to the petroleum business tax based on the Challenger, Stinnes and Chevron transactions. The Administrative Law Judge rejected the argument that a corporation or unincorporated business may be a petroleum business for some transactions but not for others. The Administrative Law Judge held that Sen Mar remained a petroleum business until December 1988 when it notified the Division that it intended not to be a petroleum business. The Administrative Law Judge went on to hold that during the years in question both Sentry and Sen Mar were petroleum businesses under Article 13-A of the Tax Law as they were causing petroleum to be imported into New York by persons other than those subject to tax under Article 13-A. The Administrative Law Judge found that petitioners were causing the importation of petroleum into New York because, either on their own or through brokers, they arranged for suppliers to sell and deliver petroleum in New York.

The Administrative Law Judge rejected the argument that the suppliers were subject to Article 13-A because of their activities in New York in relation to their contracts with petitioners. The Administrative Law Judge held that petitioners' argument, if accepted, "would render meaningless that portion of Tax Law former § 300(c) which defines a petroleum business as every corporation or unincorporated business 'importing or causing to be imported (by a person other than one which is subject to tax under this article)'" (Determination, conclusion of law "B," emphasis supplied).

Next, the Administrative Law Judge held that all of petitioners' gross receipts from sales to LILCO were subject to the gross receipts tax. The Administrative Law Judge rejected petitioners' argument that including amounts petitioners collected as gross receipts tax on their sales invoices to LILCO in their total gross receipts subject to tax imposes a tax upon a tax. The

Administrative Law Judge held that the gross receipts tax is a franchise tax which is the responsibility of the vendor.

The Administrative Law Judge also rejected petitioners' argument that the Division has applied Article 13-A in a manner that violates the Commerce and Due Process clauses of the United States Constitution. The Administrative Law Judge stated that petitioners' argument was flawed due to their misinterpretation of how the Division administers Article 13-A of the Tax Law.

Finally, the Administrative Law Judge refused to abate penalties as petitioners had not offered any reasons for her to do so.

On exception, petitioners make many of the same arguments as made before the Administrative Law Judge. With respect to those issues, we find that they were completely and adequately addressed by the Administrative Law Judge and we affirm her determination with regard to those issues for the reasons stated in the determination below. Petitioners also advance two new arguments which will be addressed hereinafter.

First, petitioners, citing Matter of Tug Buster Bouchard Corp. v. Wetzler (Sup Ct, Albany County, June 9, 1994, Canfield, J., mod 217 AD2d 192, 635 NYS2d 803), assert that Article 13-A of the Tax Law is facially unconstitutional. We reject this argument.

Although the Supreme Court, Albany County, in Matter of Tug Buster Bouchard Corp. v. Wetzler (supra), did declare Tax Law § 301 unconstitutional, the Appellate Division modified the Supreme Court's decision and held that only Tax Law § 301(a)(1)(ii) was invalid. Petitioners herein were not assessed under Tax Law § 301(a)(1)(ii), but rather, under Tax Law § 301(a)(1)(i). Accordingly, Matter of Tug Buster Bouchard Corp. v. Wetzler (supra) does not apply to them. Furthermore, as the Administrative Law Judge noted, our jurisdiction does not allow us to rule on challenges to the facial validity of a statute (Matter of Fourth Day Enters., Tax Appeals Tribunal, October 27, 1988).

Second, petitioners assert that being subject to tax under both Articles 9-A and 13-A results in double taxation in violation of the United States Constitution. Petitioners contend that they are being taxed for the privilege of carrying on business as a corporation under both articles and that this amounts to double taxation in violation of the Constitution. We disagree.

The fact that petitioners were subject to taxation under both Articles 9-A and 13-A does not mean that they were subject to double taxation. Tax pursuant to Article 9-A is imposed upon petitioners, as corporations, for the privilege of doing business in New York regardless of whether petroleum is sold. Under Article 13-A, petitioners, as petroleum businesses, are subject to tax on the gross receipts from sales of petroleum where shipments are made to points within the State. Furthermore, there is no constitutional prohibition against double taxation (Lincoln Serv. v. City of New Rochelle, 27 Misc 2d 144, 209 NYS2d 239, 241 citing People ex rel. New York C. & H. R. R. Co. v. Roberts, 32 AD 113, 52 NYS 859, affd on opinion below 157 NY 677, 51 NE 1093; People v. Home Ins. Co., 92 NY 328, 346, affd 119 US 129; Citizens' Natl. Bank of Cincinnati v. Durr, 257 US 99, 109; St. Louis Southwestern Ry. Co. v. State of Arkansas, 235 US 350, 367-368; Illinois Central R. Co. v. State of Minnesota, 309 US 157, 164).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sentry Refining, Inc. and Sen Mar, Inc. is denied;

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

3. The petitions of Sentry Refining, Inc and Sen Mar, Inc. are denied.

DATED: Troy, New York
January 23, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner