STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:
of	:
MANHATTAN & QUEENS FUEL CORP.	:
	DECISION DTA No. 810457
for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Period April 1, 1982 through May 31, 1983.	:

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on August 24, 1995 with respect to the petition of Manhattan & Queens Fuel Corp., 311 Norman Avenue, Brooklyn, New York 11222. Petitioner appeared by Carl S. Levine & Associates, P.C. (Carl S. Levine, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq. and Patricia L. Brumbaugh, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. Oral argument was heard on May 9, 1996. Thereafter, petitioner filed a motion to dismiss the exception and recuse Commissioners DeWitt and Jenkins. The Division filed a response in opposition. Petitioner filed a reply.

Commissioner Pinto delivered the decision of the Tax Appeals Tribunal. Commissioner Jenkins concurs. Commissioner DeWitt took no part in the consideration of this decision.

ISSUES

I. Whether the Division of Taxation's exception to the Administrative Law Judge's determination should be dismissed because the Tax Appeals Tribunal failed to render a decision within six months of hearing oral argument.

II. Whether petitioner has produced sufficient evidence of bias by Commissioners DeWitt and Jenkins that they should be disqualified from adjudicating this matter and, if so, whether the Division of Taxation's exception to the Administrative Law Judge's determination should be dismissed because the Tax Appeals Tribunal lacks the necessary quorum to issue the decision.

III. Whether petitioner, a registered distributor of motor fuel, purchased and sold motor fuel to an unregistered entity, thus, making it liable for motor fuel tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "12" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

The Division of Taxation ("Division") issued to petitioner, Manhattan & Queens Fuel Corp. ("M&Q" or petitioner), a Notice of Determination dated December 10, 1984, assessing motor fuel tax due under Article 12-A of the Tax Law for the period April 1, 1982 through May 31, 1983 in the amount of $1,321,276.96.

The Division issued to petitioner a certificate of registration as a distributor of motor fuel in June 1980 (the registration is commonly known as an M license and will hereinafter be referred to as such). During the assessment period, petitioner was engaged in the importation, distribution, purchase and sale of gasoline and other petroleum products.

The Notice of Determination was issued as the result of a field audit of petitioner's motor fuel tax returns and business activities. To show how the audit was conducted and the determination of tax due was reached, the Division placed in evidence the Field Audit Report, completed in November 1984.

According to the audit report, M&Q maintained a fuel terminal at 311 Norman Avenue, Brooklyn, New York. Regarding the operation of the terminal, the Field Audit Report states:

> "All gasoline received at the terminal is by pipe-line or barge. Disbursements are under the rack to 3,000 gals. straight trucks.

> "Manhattan and Queens has a number of thru-put arrangements with several different companies. Manhattan and Queens maintains records for all receipts and withdrawals by these companies. A pipe-line and storage fee is charged. These companies may or may not be registered 12A distributors."

Petitioner's purchase records, including purchase invoices, accounts payable ledger, motor fuel tax reports and cancelled checks, were audited. Receipts were checked to inventory sheets. The audit revealed that purchases were correctly reported. The Field Audit Report describes the audit of petitioner's sales records and the results of that audit as follows:

> "Sales are made tax free to registered distributors, and tax is collected on sales to non-registered distributors. Total sales were checked to computer print-out showing all sales and to account receivable ledger, sales were also reconciled to inventory control sheets.
> "All tax free sales reported on schedule 11 to Shoppers Marketing, Inc. are being disallowed. Disallowance was made since sales were not properly substantiated."

Schedule 11 was an attachment to the motor fuel tax return (MT-104) where distributors were required to list the names of registered distributors to whom sales of motor fuel were made, the distributor's registration number and the number of gallons sold. The MT-104 also contained a computation sheet which showed the total number of gallons of motor fuel sold on a taxable and nontaxable basis.

The Division assessed tax on M&Q's reported tax-free sales to Shoppers Marketing, Inc. ("Shoppers Marketing") as follows:

Month	Additional Taxable Gallons	Additional Tax ($.08 per gallon)
November 1982	589,438	$ 47,155.04
December 1982	1,116,802	89,344.16
January 1983	835,508	66,840.64
February 1983	1,230,511	98,440.88
March 1983	3,655,441	292,435.28
April 1983	2,620,987	209,678.96
May 1983	3,385,281	270,822.48
Total	13,433,968	$1,074,717.40

Shoppers Marketing was a registered distributor of motor fuel throughout the period of the assessment.

M&Q placed in evidence copies of portions of its motor fuel tax returns for the assessment period, namely the computation sheets showing total gallonage sold on a monthly basis and the schedules 11 showing sales to registered distributors. These reports reveal the following information:

Month	Total Sales to Registered Distributors	Total Sales to Shoppers Marketing[1]
November 1982	1,108,651	589,432
December 1982	2,419,568	1,116,802
January 1983	1,896,217	835,508
February 1983	2,682,073	1,230,511
March 1983	5,171,373	3,655,441
April 1983	5,127,919	2,620,987
May 1983	4,978,225	3,385,281
Totals	23,384,026	13,433,968

The Field Audit Report does not explain the way in which the sales to Shoppers Marketing were "not properly substantiated" or why no tax was assessed on M&Q's sales to other registered distributors. The Notice of Determination issued to petitioner contains this explanation: "Audit disclosed additional tax due to unsubstantiated tax-free sales." In a letter to the Division, dated January 8, 1985, petitioner's attorney asked for a copy of the workpapers upon which the Division based its assessment. In response, the Division sent him a copy of one page of the Field Audit Report containing the schedule of taxes due reproduced above. On the bottom of that page, someone wrote "ALL OF ABOVE TAX FREE SALES WERE MADE TO SHOPPERS MARKETING INC." No other information relating to the tax assessment was shown on the one-page document.

Petitioner surrendered its registration as a motor fuel distributor, and the Division cancelled the registration as of May 31, 1983.

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[1] The photocopies placed in evidence sometimes cut off the last two or three digits of the figures reported in this category. Enough was readable to show that the numbers were consistent with the auditor's figures. Therefore, where necessary, information was filled in using the audit report.

As the date of the Notice of Determination indicates, almost ten years passed between the issuance of the notice and the holding of a hearing for review of that notice. A summary of the events that occurred in that period is relevant to the issues raised by the parties.

We modify finding of fact "12" of the Administrative Law Judge's determination to read as follows:

> Petitioner filed a timely petition with the former Tax Appeals Bureau in March 1985. Submitted with the petition was the affidavit of Joseph Macchia, Secretary of M&Q. The affidavit stated that M&Q sold 13,433,968 gallons of motor fuel to Shoppers Marketing on a tax free basis during the audit period. The affidavit further stated that New York Fuel Terminal Corporation stored the motor fuel at its terminal and acted as M&Q's billing agent on such sales. The Division filed an answer to the petition dated July 30, 1985. The basis for the Division's determination of tax due was stated in the answer as follows:
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> "2. . . . [T]he Audit Division conducted a field audit of Manhattan & Queens Fuel Corp.'s motor fuel tax returns for the period April 1982 through May 1983.
>
> "3. . . . [T]he field audit disclosed that Manhattan & Queens Fuel Corp. sold 13,433,968 gallons of motor fuel in New York State from April 1982 through May 1983 on which motor fuel tax had not been paid.
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> "4. . . . [T]he 13,433,968 gallons of motor fuel sold by Manhattan & Queens Fuel Corp. was invoiced through Shoppers Marketing, Inc., a registered distributor, to nonregistered distributors.
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> "5. . . . Shoppers Marketing, Inc. did not take delivery of the motor fuel in question and did not otherwise acquire title thereto.
>
> "6. . . . [T]he 13,433,968 gallons of motor fuel sold by Manhattan & Queens Fuel Corp. in New York State in January through May 1983 was in fact purchased by nonregistered distributors.
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> "7. . . . [P]ursuant to Sections 287 and 288 of the Tax Law and State Tax Commission Regulation 20 NYCRR 410.7, motor fuel tax became due and payable by Manhattan & Queens Fuel Corp. at the time of its sale of the 13,433,968 gallons of motor fuel to nonregistered distributors."[2]

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[2] We modified this finding to more accurately reflect the record.

Petitioner's representative served the Division with a Demand for a Bill of Particulars on or about October 17, 1985. The Demand assumed (specifically in paragraphs 3 and 5) that the basis for the Division's assessment was a determination that M&Q made tax-free sales of motor fuel to unregistered distributors of motor fuel which were invoiced through Shoppers Marketing and reported as sales to Shoppers Marketing. The Division's Bill of Particulars does not dispute this assumption or take issue with it in any manner.

The former State Tax Commission was abolished effective September 1, 1987, and the Division of Tax Appeals was established as a separate division within the Department of Taxation and Finance. At that time, the former Tax Appeals Bureau was abolished, and the Bureau of Conciliation and Mediation Services ("BCMS") was established within the Division of Taxation to provide conciliation conferences.

BCMS held a conference on May 23, 1991, and as a result of that conference, issued to petitioner a Conciliation Order, dated November 1, 1991 reducing the amount of tax asserted to be due to $849,342.32. The reduction in tax was based upon the Division's determination that Shoppers Marketing had paid the motor fuel tax on 2,817,189 gallons of motor fuel purchased from petitioner, leaving tax due on 10,616,779 gallons of motor fuel.

Petitioner filed a timely petition with the Division of Tax Appeals on January 31, 1992. The petition alleges that a newly-formed corporation affiliated with M&Q, New York Fuel Terminal Corporation ("NYFT"), sought to be licensed as a motor fuel distributor in 1981 or 1982 and was informed by the Division that no license would be issued since NYFT had no previous history in the gasoline supply business. It further alleges that a representative of the Division stated that the Division would reconsider its decision if NYFT engaged in the gasoline supply business for a period of time. The petition goes on to state that "NYFT and M&Q reached an agreement whereby M&Q would sell gasoline, on a wholesale basis, as a disclosed agent of NYFT." In essence, petitioner alleged that NYFT was the actual seller of the petroleum product which M&Q reported it sold to Shoppers Marketing.

M&Q's petition alleges that it is not liable for taxes on any of its sales of motor fuel to Shoppers Marketing for the following reasons:

"(a) M & Q, as an agent for a disclosed principal, NYFT, is not liable to the Department for any allegedly unpaid excise tax on its sales, as an agent, of gasoline to Shoppers;

"(b) Alternatively, M & Q's sales to Shoppers, a licensed motor fuel distributor, were not subject to the Motor Fuel Tax;

"(c) All sales of gasoline to Shoppers purportedly paid for by third parties were actually sales to Shoppers;

"(d) Shoppers is liable to the Department for any unpaid taxes; and

"(e) M & Q and NYFT had not [sic] duty to determine and did not know whether Shoppers was complying with the Motor Fuel Tax Law."

The Division served its answer to the petition on or about June 29, 1992. The answer states that the motor fuel tax assessment was "based on disallowance [sic] of unsubstantiated reported tax-free sales of motor fuel to Shoppers Marketing, Inc. (SMI)." It explains the Division's position concerning those sales as follows:

"5. . . . [P]etitioner filed motor fuel tax returns with the Division of Taxation on which it claimed to have sold amounts of motor fuel to SMI on a tax-free basis.

"6. . . . [O]n each such return, the petitioner improperly claimed the amounts of fuel allegedly sold to SMI as a deduction from its total taxable distribution of motor fuel.

"7. . . . [N]o such sales of motor fuel were made to SMI by the petitioner during that period.

"8. . . . [T]o the contrary, the petitioner's affiliate, NYFT, which was not registered with the Division as a distributor of motor fuel, made sales of motor fuel to SMI during the applicable period.

"9. . . . [P]etitioner improperly and without legal authority therefor, deducted the sales made by NYFT to SMI from the total taxable distribution of motor fuel on the petitioner's motor fuel tax returns.

"10. . . . [P]etitioner has, by its motor fuel tax returns, demonstrated that it purchased the fuel at issue either from sources outside of New York State or from sources within NY State.

"11. . . . [D]ocumentary evidence submitted by the petitioner in support of its petition amply demonstrates that the fuel at issue was sold not by M & Q but by NYFT.

"12. . . . [S]ince the petitioner purchased such fuel, and such fuel was undeniably sold by NYFT to SMI or other third parties, such fuel was necessarily transferred by M & Q to NYFT in order that it might be sold by NYFT.

"13. . . . [T]here was no authority for the petitioner, a registered distributor, to transfer motor fuel to NYFT, an unregistered distributor, on a tax-free basis.

"14. . . . [S]ince the petitioner did not sell the fuel at issue to a registered distributor, it was not entitled to deduct such fuel from its total taxable distribution of motor fuel."

In a letter to petitioner's attorney, dated June 29, 1992 (responding to an informal discovery request), the Division's representative set forth in detail the Division's position regarding the factual and legal issues in dispute as follows:

"Based on a review of the file, it appears that the basis of the Notice of Determination issued by the Division of Taxation of the Department of Taxation and Finance (Division) is that Manhattan and Queens Fuel Corp. (M & Q), during the period at issue, improperly reported certain sales of motor fuel on Schedule 11 of its motor fuel tax returns as sales by it within New York State to Shoppers Marketing, Inc. (SMI), a registered distributor. In fact, and as borne out by the allegations of and exhibits to the petition, this fuel was sold by New York Fuel Terminal, Inc. (NYFT) to SMI and/or other third parties.

"For the period at issue, M & Q was a distributor of motor fuel and was registered with the Division as such. A registered distributor of motor fuel could, at that time, sell motor fuel tax-free <u>to another registered distributor</u>. The Division's regulations (section 410.7(a) of 20 NYCRR) required that, for such sales, 'the seller must include the quantity so sold tax-free in his aggregate sales but will be permitted to deduct the gallonage so sold in arriving at the gallonage taxable.'. [sic] However, the fuel at issue was sold to SMI by NYFT (not M & Q) and NYFT was <u>not</u> a distributor of motor fuel registered with the Division during the period at issue.

"There is no dispute that the fuel at issue was purchased by M & Q from sources either within or without New York State. However, sales by M & Q were not to SMI but to NYFT, an unregistered distributor. M & Q was not authorized to make tax-free sales to NYFT nor was NYFT authorized to make tax-free sales to another distributor, registered or not.

"Since M & Q was not authorized to sell tax-free to an unregistered distributor, it was likewise not authorized to deduct the gallonage sold by NYFT from its aggregate sales during the month." (Emphasis in original.)

In the June 29, 1992 letter, the Division informed petitioner that the three auditors who participated in the audit of M&Q were no longer employed by the Division.

In a reply to the Division's answer, dated July 8, 1992, petitioner asserted that paragraphs 7 through 14 of the Division's answer contained a new theory of liability never before put forward by the Division and barred by the statute of limitations. In a sur-reply dated July 13, 1992, the Division denied that its position, as described in its answer, constituted a new theory of liability.

A formal hearing was scheduled on August 4, 1992. On July 29, 1992, petitioner's attorney served a subpoena duces tecum on the Commissioner of Taxation and Finance requesting various documents and files concerning the tax liability of M&Q, NYFT and Shoppers Marketing. At the formal hearing, which was commenced as scheduled, the Division stated that it had already provided petitioner with some of the documents subpoenaed and refused to comply with additional requests for documents made in the subpoena. The Administrative Law Judge adjourned the hearing to give petitioner an opportunity to make a formal motion to compel compliance with the subpoena.

Petitioner made a motion for discovery of documents in accordance with section 3000.5(a) of the regulations of the Tax Appeals Tribunal on November 23, 1992. An order was issued on January 28, 1993, partially granting petitioner's motion. Petitioner and the Division took exception to the order of the Administrative Law Judge and, on January 20, 1994, the Tax Appeals Tribunal issued a decision dismissing the exceptions as premature. However, during the exception process, the Division made an offer to resolve the discovery issue by providing petitioner with redacted copies of the motor fuel tax returns of Shoppers Marketing. The Tax Appeals Tribunal remanded the matter to the Administrative Law Judge to determine whether the compromise offered by the Division was satisfactory.

On remand, the Administrative Law Judge ordered the Division to disclose to petitioner the motor fuel tax returns "which were the source for the credit allowed by the Division [as a result of the BCMS conference] against the assessment, for motor fuel tax paid by Shoppers

Marketing, Inc. on certain purchases of motor fuel [redacted as suggested by the Division]" (Order of Administrative Law Judge Barrie, February 10, 1994).

At the continued hearing, the Division offered the Field Audit Report in evidence, but it did not present the testimony of any witness to describe how the audit was conducted or to explain any of the statements made in the audit report. The Division's attorney explained that the three employees who had a direct involvement in the audit no longer work for the Division. The Division further asserted that there are no other Division employees with personal knowledge of the audit.

In his opening statement, petitioner's representative offered his understanding of the issues to be resolved. He stated that on audit and for several years after the Notice of Determination was issued:

> "the Department took the attitude that the basis for this assessment was the sale of gasoline which was paid for by third-party checks; that even though the sales were to Shoppers Marketing, Inc. by Manhattan & Queens -- both of whom were Article 12-A distributors -- because the product was paid for by third-party checks by customers of Shoppers Marketing, that therefore they were sales to the customers" (tr., p. 25).

According to petitioner's representative, this original theory of liability was dropped, and the issue at hearing was whether M&Q made tax-free sales to an entity not registered as a distributor, NYFT, which then sold the petroleum product to Shoppers Marketing.

The Division's representative explained the Division's position as follows:

> "It is the Department's position that the sales to SMI were not in fact made by the petitioner, but made by another entity, NYFT . . . based on information provided by the petitioner. New York Fuel Terminal is an affiliate of Manhattan & Queens . . . . Now, pursuant to the allegations of the petition itself and the affidavits which have been introduced as Exhibit O, the petitioner was acting as an agent of New York Fuel in the sales of motor fuel for Shoppers Marketing. Thus, the sales were not made by M&Q, the petitioner, but in fact were made by the principal in the transactions, New York Fuel. All the invoices supplied by the petitioner which form part of the exhibits in the total petition show that the billings were mailed by New York Fuel Terminal to Shoppers Marketing. There is no indication that Manhattan and Queens had any connection to these transactions.
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> * * *

> "The issue here today is whether the petitioner could validly use sales made by New York Fuel to offset its motor fuel tax liability, and the Division believes it cannot. At the time of these motor sales, only the registered distributor was able to buy motor fuel tax-free; New York Fuel was never registered. Since sales by New York Fuel to Shoppers Marketing could only be on a tax-paid basis, there is no entitlement here to anyone to take a deduction" (tr., pp. 30 and 32-33).

M&Q is a family-owned and operated business. The grandfather of the current corporate president, Lorenzo Macchia, founded the company in 1928 as a supplier of coal and ice. In the mid-1950's, M&Q was converted to a home heating oil business. In 1977, Mr. Macchia's uncle, Lewis M. Macchia, assumed the position of corporate president and held that position until 1985 when Mr. Macchia stepped up to that role.

M&Q was affiliated with a corporation named Vidoge, Inc. during the audit period and before it. Vidoge owned two gasoline service stations and was the supplier for several commercial accounts in the New York City area, including Hertz and Avis.

Cities Service Oil Corporation ("Citgo") was one of M&Q's major suppliers of petroleum product, and M&Q stored heating oil at a Citgo terminal located in Brooklyn, New York. In about 1980, M&Q learned that the Citgo terminal was for sale and sought to purchase it.

M&Q's factor at that time was Intercontinental Credit Corporation ("ICC").[3] When the Citgo terminal became available, M&Q approached ICC for financing. ICC referred M&Q to one of its affiliates, Enterprise Capital Corporation ("Enterprise"). Enterprise agreed to enter into a partnership with M&Q for purchase of the Citgo terminal. A third corporation, NYFT, was formed to own and operate the terminal. Enterprise and M&Q were 50% shareholders of NYFT.

At the time NYFT was formed, it was the intention of the shareholders to have NYFT operate as a wholesaler of petroleum product. M&Q planned to continue operating as a supplier of home heating fuel and other petroleum products but not as a wholesaler of motor fuel. It agreed to purchase its petroleum product from NYFT.

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[3]A "factor" is "one that lends money to producers and dealers (as on the security of accounts receivable)" (Webster's Ninth New Collegiate Dictionary 444 [1987]).

In order to engage in the purchase and sale of petroleum product, it was necessary for NYFT to obtain a Certificate of Registry for tax-free transactions under Chapter 32 of the Internal Revenue Code (known as a 637 license) and a New York State M license. These licenses enabled a distributor to purchase petroleum product tax-free and to sell it to other licensed distributors without collecting taxes. Without such licenses, a distributor would have to pay tax on its purchases of petroleum product, and, in order to recoup its costs, pass the tax on to its customers. This raised the price at which the product could be sold, effectively pricing a non-licensed distributor out of the market.

M&Q's accountant, Abbey Blatt, testified that NYFT applied for a 637 license and was refused because NYFT had no history in the motor fuel business upon which the Federal regulators could base a determination. Mr. Blatt also stated that a Federal employee suggested that M&Q apply for the necessary license, since it did have experience and a record of operation. Accordingly, M&Q applied for a 637 license which it obtained on or about January 28, 1982. M&Q had obtained its New York M license on or about June 1, 1980.

M&Q and NYFT then entered into an arrangement which was intended to enable NYFT to buy and sell motor fuel without payment of Federal or State taxes. In essence, NYFT purchased motor fuel tax-free by using M&Q's license number. The arrangement by which one corporate entity was to "use" the license of another was never clearly explained. In its petition to the Division of Tax Appeals, M&Q alleged that it "sold gasoline, on a wholesale basis, as a disclosed agent of NYFT" (Petition, ¶ 7). Mr. Blatt explained the arrangement as follows:

> "[I]t was made known to all the staff that all purchases of product, initial purchases, wholesale, would be done by New York Fuel, since it was going to be in the business of wholesaling petroleum products. Manhattan & Queens would purchase their product from New York Fuel as well as Vidoge for their customer base. And in reality they would not ever be in the wholesale business" (tr., p. 74 [the punctuation

> shown differs from that in the transcript; the corrections were necessary to accurately reflect the testimony], emphasis added).[4]

Petitioner placed in evidence the source documents which reflect these arrangements. These include the following: (1) NYFT's sales journals for the period January 1, 1983 through June 1984; (2) NYFT's purchase journal for the period April 1, 1982 through December 31, 1983; (3) NYFT's cash receipts journal for the period January 1, 1983 through December 31, 1983; (4) NYFT's cash disbursements journal for the period January 1, 1982 through December 31, 1983; (5) NYFT's general ledger for the 1982 and 1983 fiscal years; (6) a NYFT cash disbursements journal identified as ICC wire transfers; and (7) M&Q's general ledger. Samples of purchase and sales documents were placed in evidence to demonstrate the flow of petroleum product in a typical NYFT/M&Q transaction.

(a) The first step in the transaction was the purchase of motor fuel by M&Q. The sample invoice is dated March 10, 1983 and shows a sale of 252,000 gallons of gasoline from Citgo to M&Q for a total price of $215,712.00. Mr. Blatt was asked why the purchaser was shown as M&Q, and he stated:

> "[B]ecause Manhattan and Queens was the license holder of the licenses, as well as the contract was in Manhattan & Queens' name, and could not be transferred until New York Fuel became licensed" (tr., p. 77).

There are various handwritten notations on the invoice. One notation is "SMI send to General Term". According to Mr. Blatt, this indicated that Shoppers Marketing was to be the ultimate receiver of the product. Another notation is "N.YFT." Mr. Blatt stated that this means that "the invoice is from City Service belonging to New York Fuel" (tr., p. 78). Another notation shows "TCN #11335".

(b) The second sample document is entitled "NY FUEL-- ICC DISBURSEMENTS -- March 1983". This is a single page from NYFT's cash disbursements journal. Line 3 of the

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[4] It is unclear how making these arrangements known to one's staff is the same thing as M&Q's operating as a "disclosed agent" of NYFT.

journal worksheet has a TCN reference number of 11335. It shows an amount due to ICC of $215,712.00. According to Mr. Blatt, this represents payment to Citgo from NYFT through a wire disbursement going out from ICC.

(c) NYFT's purchases journal for March 1983 shows a purchase from Citgo on March 9, 1983 in the amount of $215,712.00.

(d) A computer printout representing a page of NYFT's sales journal shows a sale to Shoppers Marketing on March 9, 1983 of 252,000 gallons of gasoline.

(e) A sales invoice shows a sale by NYFT to Shoppers Marketing of 252,000 gallons of gasoline for $226,442.00. Attached to the invoice is a copy of a cancelled check showing a payment of $76,422.00 from Shoppers Marketing to NYFT. Another document shows a wire transfer of $150,000.00 received by ICC from "Chase" on behalf of Lesez Petroleum Corporation.

(f) NYFT's cash receipts journal for March 1983 shows the receipt on March 9, 1983 of $150,000.00 from Shoppers Marketing via wire transfer.

NYFT's sales to Shoppers Marketing were not shown in M&Q's general ledger. They were, however, reported by M&Q on its motor fuel tax returns as sales made by M&Q.

NYFT's sales journals for the period January 1, 1983 through June 30, 1983 show sales to the registered distributors that M&Q reported having sold to on its schedules 11 (Cibro Petroleum, Tunyng, EFE Oil Co., KAV and Shoppers Marketing, among others). Whether the amounts shown in the sales journals reconcile to the amounts shown on petitioner's motor fuel tax returns is not known.

M&Q's general ledger shows postings to various accounts. Among them are accounts entitled gasoline tax receivable exchange (recording exchanges among M&Q, Vidoge and NYFT), accounts payable, amounts due from NYFT, accounts receivable, amounts due to ICC, advances receivable from NYFT and retail sales. The general ledger does not show any

wholesale sales of gasoline. Mr. Blatt testified that none of M&Q's books and records show wholesale sales of gasoline.

Attached to the petition to the Division of Tax Appeals were the following documents: (1) a copy of Shoppers Marketing's registration as a motor fuel distributor dated July 8, 1982; (2) a copy of a Division document listing newly registered motor fuel distributors as of August 1, 1982, listing Shoppers Marketing; (3) copies of cancelled checks showing payments by various companies primarily to NYFT but also to M&Q; (4) a sample of delivery tickets showing delivery of motor fuel made by NYFT to Shoppers Marketing during the period November 8, 1982 through December 28, 1982; and (5) copies of pertinent pages taken from M&Q's motor fuel tax returns for the period November 1982 through May 1983.

Pursuant to the Order of Tax Judge Barrie, the Division provided to petitioner copies of the motor fuel tax returns of Shoppers Marketing for the assessment period, November 1982 through May 1983. On those returns, Shoppers Marketing reported tax-free purchases of motor fuel from NYFT. According to those returns, Shoppers Marketing purchased 8,523,983 gallons of motor fuel from NYFT.

Mr. Blatt represented M&Q on audit. He testified that all of the journals, books and records described here were made available to the auditors on audit. There is nothing in the audit report to indicate otherwise. In fact, the Field Audit Report indicates that reconciliations were made between various books and records provided by petitioner on audit. Mr. Blatt also stated that Peter Wynn, the audit supervisor, was aware of the arrangement between NYFT and M&Q and stated that it was unusual but that he had no problem with it. Mr. Blatt explained that arrangement as follows:

> "That Manhattan and Queens was using the license for the benefit of New York Fuel and New York Fuel was using the Manhattan and Queens license. He had not experienced that before, but when he left the audit after the explanation, we expected a no-change; he gave us the impression that there was nothing wrong" (tr., p. 103).

NYFT received its 637 license on or about April 21, 1983. It was registered in New York State as a motor fuel distributor on or about June 13, 1983.

OPINION

On January 10, 1997, petitioner filed a motion with the Tax Appeals Tribunal (hereinafter the "Tribunal") seeking a dismissal of the Division's exception in this matter. First, petitioner seeks to have the exception dismissed on the grounds that the Tribunal has failed to issue a decision in this matter within the six-month period specified in Tax Law § 2006.

On August 24, 1995, the Administrative Law Judge issued her determination in this matter. On October 10, 1996, the Division, after receiving an extension of time to serve a notice of exception, filed such notice with the Tribunal. All briefs were filed by January 17, 1996 and oral argument was heard on May 9, 1996 by then Commissioners Dugan and Koenig.[5] Pursuant to Tax Law § 2006(7), May 9, 1996 began the six-month period to issue a decision. Prior to the expiration of six months and the issuance of a decision in this matter, then Commissioner Dugan resigned his office as Commissioner of the Tribunal, effective July 3, 1996, followed by then Commissioner Koenig's retirement on August 3, 1996 from his office as Commissioner of the Tribunal. Thereafter, the Tribunal was left with only one Commissioner, Commissioner DeWitt. Commissioners of the Tribunal are appointed by the Governor with the advice and consent of the New York State Senate (Tax Law § 2004). On December 3, 1996, the Senate confirmed the appointment of Carroll R. Jenkins and Joseph W. Pinto, Jr. as commissioners to fill the vacancies left by Commissioners Dugan and Koenig. Pursuant to Tax Law § 2004, a majority of the Tribunal constitutes a quorum for the purposes of carrying out its duties, including issuing decisions. Therefore, from August 3, 1996 until December 3, 1996, as will be discussed, the Tribunal was statutorily unable to issue decisions in any cases pending before it. Petitioner now seeks to take advantage of this inability.

It is well established that the time limitations imposed upon an administrative agency to act are directory rather than mandatory (Matter of Cortlandt Nursing Home v. Axelrod, 66

[5]Commissioner DeWitt, on his own motion, recused himself from consideration of this matter prior to the May 9, 1996 oral argument.

NY2d 169, 495 NYS2d 927, cert denied 476 US 1115, 90 L Ed 2d 655; Matter of Hopper v. Commissioner of Taxation & Fin., 224 AD2d 733, 637 NYS2d 494, lv denied 88 NY2d 808, 647 NYS2d 713; Matter of Peterson Petroleum of New Hampshire v. Tax Appeals Tribunal, ___ AD2d ___, 654 NYS2d 433). In the absence of a showing of substantial prejudice, the failure to issue a decision within the six-month time period contemplated in Tax Law § 2006 is of no consequence (Matter of Louis Harris & Assocs. v. deLeon, 84 NY2d 698, 622 NYS2d 217; Matter of Peterson Petroleum of New Hampshire v. Tax Appeals Tribunal, supra). In its moving papers, petitioner has not alleged nor proven substantial prejudice arising from the delay in issuing a decision in this matter. Therefore, petitioner's motion to dismiss the Division's exception on these grounds is denied.

Second, petitioner's motion seeks to have Commissioners DeWitt and Jenkins recused from taking part in the consideration of the Division's exception. Petitioner seeks to have Commissioner DeWitt recused because, prior to his appointment to the Tribunal, he was the Division's representative in this matter. Petitioner seeks to have Commissioner Jenkins recused because he previously acted as the Division's representative in a licensing matter also involving petitioner. Accordingly, petitioner argues that with the recusal of both commissioners, the Tribunal would be unable to issue a decision, thus, necessitating the dismissal of the Division's exception.

Petitioner's motion on these grounds is likewise denied. Because Commissioner DeWitt has recused himself on his own motion, that part of petitioner's motion seeking the recusal of Commissioner DeWitt is rendered moot.

In support of its motion seeking to have Commissioner Jenkins recused, petitioner's moving papers allege that the licensing matter (Matter of Manhattan & Queens Fuel Corp., Division of Tax Appeals, April 16, 1996) in which Mr. Jenkins was the representative for the Division is related to the present matter. Petitioner argues that Mr. Jenkins' conduct, when

acting as an advocate on behalf of his then client, the Division of Taxation, expressed animosity towards petitioner that will be carried through to this matter if he is not recused.

First, a review of the Administrative Law Judge's determination in the licensing matter does not support the conclusion that this matter is related.[6] The earlier licensing matter had to do with whether petitioner, its owners and officers, had violated licensing provisions of Articles 12-A and 13-A of the Tax Law relating to diesel motor fuel distributors and residual petroleum businesses. The instant matter relates to whether petitioner is liable for certain motor fuel taxes. The facts of this case are totally unrelated to the earlier matter, except that the petitioner is the same.

Second, in the absence of prejudice or prejudgment, Commissioner Jenkins' former status as the Division's representative in that matter does not automatically disqualify him from adjudicating this matter (Matter of Willett v. Dugan, 161 AD2d 900, 557 NYS2d 465, lv denied 76 NY2d 708, 560 NYS2d 990). Petitioner has not provided any evidence to support its contention that Commissioner Jenkins is biased or cannot render an impartial decision in this matter. Petitioner makes unsupported, conclusory statements of bias on Commissioner Jenkins' part as allegedly manifested by his conduct as the former attorney for the Division in M&Q's earlier licensing matter. Petitioner has produced nothing by way of evidence to support this allegation. The allegations of petitioner, standing alone, do not establish bias (Matter of Warder v. Board of Regents, 53 NY2d 186, 440 NYS2d 875, cert denied 454 US 1125, 71 L Ed 2d 112). Petitioner refers to instances in which Commissioner Jenkins emphasized, in arguing the licensing case, that certain principal owners of M&Q had been convicted of massive evasion of Federal excise taxes and had committed other acts in violation of the relevant licensing provisions of the Tax Law. However, Mr. Jenkins was engaged only in advocacy for a client in the same manner petitioner's counsel was an advocate for his client. When Mr. Jenkins served

[6]We take official notice of the facts found by the Administrative Law Judge in her determination in Matter of Manhattan & Queens Fuel Corp. (Division of Tax Appeals, April 16, 1996 [DTA #814467]) pursuant to State Administrative Procedure Act § 306(4).

as an attorney in M&Q's prior licensing case, he argued the facts in that record as an advocate on behalf of his client. This did not demonstrate an animus or bias against M&Q, only his skills as an advocate. In sum, petitioner has failed to show how Commissioner Jenkins' former duties as an attorney in the earlier, unrelated licensing matter would impair his ability to render an impartial decision in this case.

Commissioners of the Tribunal are under a duty to reach a decision by applying the law to the facts presented without prejudgment or prejudice. We are firm in our conviction that this elemental fairness be maintained in all matters that come before us and we believe that petitioner has received the same fair and impartial treatment herein.

Although not the primary basis for denying petitioner's motion to recuse, we note that, in most cases, a commissioner should recuse himself sua sponte from any matter in which he has had previous involvement or where there is any possibility of an appearance of impropriety. However, in certain circumstances, that luxury is not available.

In the instant matter, even if petitioner had made a bona fide showing of bias, we would not have granted the motion to recuse Commissioner Jenkins from this case since doing so would have rendered the Tribunal incapable of issuing a decision. We recognize that the participation of an independent, unbiased adjudicator in the resolution of disputes is an essential element of due process of law. However, there is a Rule of Necessity which provides a narrow exception to this principle. This rule provides that even a biased adjudicator should decide a case if the dispute cannot otherwise be heard.

> "Thus, where all members of the adjudicative body are disqualified and no other body exists to which the appeal might be referred for disposition, the Rule of Necessity ensures that neither the parties nor the Legislature will be left without the remedy provided by law (see, Trade Commn. v. Cement Inst., 333 US 683, 700-703, 68 S Ct 793, 803-804 . . .)" (Matter of General Motors v. Rosa, 82 NY2d 183, 604 NYS2d 14, 16).

Underlying this rule is the premise that a biased adjudicator is better than none at all. However, this rule is to be strictly construed (Matter of General Motors v. Rosa, supra, 604 NYS2d, at

17). Thus, where another body or a quorum of members are available, excluding those so disqualified, to adjudicate the dispute, the Rule of Necessity is inapplicable (Id.). Here, there is no other body or forum which could decide the Division's exception, nor could the Tribunal issue a decision with the recusal of both Commissioners DeWitt and Jenkins.

Further, the existing enabling statute does not authorize the Tribunal to designate a deputy to act in the place and stead of a Commissioner in the event of a Commissioner's absence or inability to act (cf., Matter of General Motors v. Rosa, supra).

Pursuant to Tax Law § 2002, the Division of Tax Appeals is operated and administered by the Tribunal. The Tribunal consists of three commissioners who are appointed by the Governor with the advice and consent of the Senate (Tax Law § 2004). Section 2006 of the Tax Law prescribes the powers, functions and duties of the Tribunal. Tax Law § 2006 provides, in pertinent part, as follows:

> "The Tribunal shall have the following functions, powers and duties:
>
> "2. To appoint, remove or transfer officers, assistants, administrative law judges, and other employees as it may deem necessary for the exercise of the powers and performance of the duties of the division of tax appeals . . . to appoint a secretary to the tax appeals tribunal . . ." (emphasis added).

While there is no doubt that the Tribunal is empowered to appoint subordinates for the functioning of the agency as a whole, Tax Law § 2006 makes no provision for a commissioner to designate a deputy to act in a particular case in his stead in adjudicating a matter. Given the fact that commissioners are appointed by the Governor with the advice and consent of the Senate, it is counterintuitive to construe the Division of Tax Appeals' enabling legislation as empowering the Tribunal to appoint deputies to exercise the same powers held by Tribunal commissioners.

Thus, even if petitioner had demonstrated bias in this case, and it has not, the Rule of Necessity would apply and petitioner's motion to recuse and to dismiss the Division's exception for lack of a quorum would be denied.

We now turn to the merits.

In the determination below, the Administrative Law Judge held that NYFT was the actual purchaser and seller of the motor fuel in question. The Administrative Law Judge determined that petitioner merely arranged for NYFT's purchase of motor fuel by providing sellers with its license number. The Administrative Law Judge held that although this arrangement served to defeat the purpose of the motor fuel registration provisions, she had no jurisdiction to sanction petitioner for misuse of its license.

The Administrative Law Judge also held that the Division was not estopped from raising any other theory of liability as petitioner was not prejudiced when the Division abandoned its original theory of liability and asserted a different one. The Division was, however, estopped from asserting that a portion of the claimed credit for sales to Shoppers Marketing should be disallowed because gallons of motor fuel that Shoppers Marketing reported purchasing from petitioner (or NYFT) was less than the gallonage petitioner reported as having sold to Shoppers Marketing.

Last, the Administrative Law Judge held that the Division was not required to produce a witness to demonstrate the propriety of the assessment.

On exception, the Division argues that petitioner should be estopped from denying its status as the importer of the motor fuel in question. The Division asserts that because petitioner reported the purchases on its motor fuel tax returns and such purchases were invoiced to petitioner, petitioner is estopped from denying its status as the importer. The Division also contends that even if petitioner is not estopped from denying its status as the importer, the record demonstrates that petitioner was, in fact, the actual importer of the fuel in question. The Division further contends that petitioner is liable for the tax because petitioner then resold the motor fuel to an unregistered entity, NYFT.

In response, petitioner asserts that the Administrative Law Judge correctly determined that it never purchased or sold the motor fuel in issue and it is not liable for the tax thereon.

Petitioner contends that the record clearly demonstrates that it was NYFT which purchased and then sold the motor fuel in question and who should be liable for any tax as a result.

Next, petitioner argues that the Division's argument that petitioner should be estopped from denying its status of importer is unavailing. Petitioner contends that estoppel is an affirmative defense which must be pleaded and, in any event, the elements of estoppel are not present in this matter. Petitioner also contends that the Division is guilty of laches and should be estopped from asserting different bases of liability than originally asserted.

Finally, petitioner alleges that the Administrative Law Judge erred in concluding that the Division was not required to produce any witnesses to explain the basis of the Division's assessment.

We reverse the determination of the Administrative Law Judge for the reasons set forth below.

Tax Law former § 284 imposed an excise tax on motor fuel sold within New York by a distributor (see also, Tax Law former §§ 284-a, 284-c). Under regulations of the Commissioner, a registered distributor was permitted to sell tax free to other registered distributors (20 NYCRR former 410.7). The amounts sold tax free were to be reported in the distributor's aggregate sales and then deducted in arriving at the taxable gallonage (20 NYCRR former 410.7).

The Division contends that the Administrative Law Judge erred in concluding that petitioner did not import and sell the motor fuel in question. We agree.

The record before us leads us to agree with the Division that petitioner purchased the motor fuel in question and then sold the motor fuel to NYFT which NYFT then resold to other entities, including Shoppers Marketing. In making her determination that petitioner did not purchase or sell the motor fuel in question, the Administrative Law Judge relied entirely on the testimony of Lorenzo Macchia and ignored the motor fuel tax returns and the affidavit of Joseph Macchia which were submitted along with the original petition filed with the former Tax

Appeals Bureau. On the motor fuel tax returns, petitioner reported it had sold the motor fuel on which the tax credit had been disallowed, but now claims that it never purchased or sold the motor fuel in the first place. Further, the affidavit of Joseph Macchia states that petitioner purchased and resold the motor fuel to Shoppers Marketing with NYFT acting as its billing agent. This contradicts Lorenzo Macchia's and Abbey Blatt's testimony at hearing. Although we believe that credibility is best left to the Administrative Law Judge, these inconsistencies lead one to question the veracity of petitioner's witnesses concerning the true nature of the events in question (Matter of Stevens v. Axelrod, 162 AD2d 1025, 557 NYS2d 809). Either the Administrative Law Judge overlooked the aforementioned documents or chose to ignore them. Whichever the case, the motor fuel tax returns and the affidavit of Joseph Macchia coupled with the suppliers' invoices indicating petitioner was the purchaser directly contradict petitioner's assertions that it neither purchased nor sold the motor fuel in question. Regardless of how petitioner and NYFT accounted for these transactions on their books, we are not bound by these bookkeeping entries (Calder v. Graves, 261 App Div 90, 24 NYS2d 797, lv denied 261 App Div 1025, 27 NYS2d 475, affd 286 NY 643). Instead, the record as a whole supports the conclusion that petitioner purchased motor fuel tax free and then transferred the subject motor fuel tax free to NYFT. As a result of these transfers to NYFT, an unregistered entity, petitioner is liable for the tax thereon.

In its brief in opposition to the Division's exception, petitioner argues that the arrangement between itself and NYFT was not the basis for the assessment. Petitioner alleges that, according to the audit report, auditors confirmed the accuracy of purchases it reported on its motor fuel tax returns and contends that credits claimed on sales made by NYFT to registered entities other than Shoppers Marketing were never questioned. Petitioner contends that auditors traced all purchases it reported to NYFT's books and records. While we acknowledge that the audit report does not explain the basis of the assessment in great detail, it does state that the credits were disallowed because the claimed tax free sales to Shoppers

Marketing were unsubstantiated. The record is void of any evidence concerning other sales petitioner reported making on its motor fuel tax returns that it now claims were never made. All that is before us is the status of the transfers which form the basis of the assessment and, as previously discussed, petitioner is liable for tax on such transfers.

As previously noted, petitioner argued that the Division is guilty of laches and should be estopped from asserting that petitioner is liable for tax on a different basis than that previously asserted. Petitioner also argued that the Division was required to produce a witness to explain the basis of its assessment. The Administrative Law Judge ruled against petitioner on both of these issues. In petitioner's brief in opposition to the Division's exception, petitioner reiterates these arguments. However, as petitioner did not file an exception to the Administrative Law Judge's determination on these issues, petitioner's right to have these issues reviewed has not been preserved (Matter of F.W. Woolworth Co., Tax Appeals Tribunal, February 8, 1996).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The motion to dismiss the exception is denied;

2. The exception of the Division of Taxation is granted;

3. The determination of the Administrative Law Judge is reversed;

4. The petition of Manhattan & Queens Fuel Corp. is denied; and

5. The Notice of Determination issued on December 10, 1984, as modified by the November 1, 1991 Conciliation Order, is sustained.

DATED: Troy, New York
May 22, 1997

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

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