STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CONSOLIDATED RAIL CORPORATION	:	DECISION DTA No. 811400 & 811402
for Redetermination of Deficiencies or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Years Ended December 31, 1987, December 31, 1988, December 31, 1989 and August 31, 1990 and for the Period September 1, 1990 through December 31, 1990.	:	

Petitioner Consolidated Rail Corporation, 2001 Market Street - 25A, P. O. Box 41425, Philadelphia, Pennsylvania 19101-1425, filed exceptions to the determination of the Administrative Law Judge issued on June 23, 1994. Petitioner appeared by Loselle, Greenawalt, Kaplan, Blair and Adler (James N. Blair, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt and John E. Matthews, Esqs., of counsel).

Petitioner filed a brief in support of its exceptions. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on March 16, 1995, which date began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs. Commissioner DeWitt took no part in deciding the case herein.

ISSUES

I. Whether the Division of Taxation is estopped from assessing a tax deficiency against petitioner for its failure to file and pay tax under Article 13-A for the period January 1, 1987 through August 31, 1990.

II. Whether petitioner correctly computed its tax liability under Article 13-A for the period September 1, 1990 through December 31, 1990 with respect to out-of-state purchases of diesel fuel.

III. Whether there is reasonable cause to abate the penalties imposed under Article 13-A for the period September 1, 1990 through December 31, 1990.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The parties stipulated to proposed findings of fact which have been incorporated in the following Findings of Fact.[1]

Petitioner, Consolidated Rail Corporation ("Conrail"), is the owner and operator of a railroad system which operates in New York and at least 13 other states. Conrail purchased substantial quantities of diesel fuel oil from out-of-state suppliers to be used in diesel locomotives that travel both in and outside of New York State.

In 1981, the U.S. Congress enacted the Northeast Rail Service Act ("NERSA") (45 USC § 727[c]), effective August 13, 1981, exempting Federal entities from state taxes.

In response to an inquiry by Conrail, the Commissioner of the Division of Taxation ("Division") sent a letter, dated September 29, 1981, advising Conrail that it was exempt from all New York State tax with certain exceptions. The Commissioner stated as follows:

> "My Counsel has reviewed section 1140(a) of the Northeast Rail Service Act of 1981 and agrees with the interpretation of this provision stated in your letter. On, and after, August 13, 1981, the effective date of this law, Conrail is exempt from all New York State taxes, with the exception of taxes imposed by political subdivisions of New York State. It should be noted that the sales tax imposed in

[1]At the hearing, the parties filed the stipulation with respect to three petitions filed by petitioner (DTA Nos. 811400, 811401 and 811402). Since the September 8, 1993 hearing, the Division of Taxation cancelled a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1989 through August 31, 1990 (DTA No. 811401). Thus, the stipulation of facts concerning DTA No. 811401 has not been incorporated into the Findings of Fact inasmuch as it is not relevant to the issues that are contested in DTA Nos. 811400 and 811402.

New York City under section 1107 of the Tax Law is a State tax for purposes of the Federal exemption provision. Conrail is therefore exempt from this tax, in addition to all other State taxes. Conrail is still liable for the local sales and use taxes imposed pursuant to Article 29 of the Tax Law including such taxes imposed by New York City under section 1212-A(b) of the Tax Law.

> Section 301(b) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 741(b)) states that Conrail is not 'an agency or instrumentaility [sic] of the Federal Government'. Federal legislation, however, provided for the establishment of Conrail and specified Conrail's powers and duties. Conrail is subsidized by the Federal government and has certain duties with respect to the Federal government. Supreme Court decisions indicate that this degree of involvement between the Federal government and an organization permits Congress to exempt the organization from state taxation, despite the fact that the organization is not a Federal agency or instrumentality. Agricultural National Bank v Tax Commission, 392 US 339; Thompson v Union Pacific Railroad Company, 76 US 579. In the opinion of Department Counsel, therefore, Congress has acted constitutionally to exempt Conrail from State taxation imposed on and after August 13, 1981."

Thereafter, petitioner did not pay any sales tax, although it filed State sales tax returns.

The Division sent a letter, dated December 2, 1985, to Conrail informing it that Article 13-A of the Tax Law, effective July 1, 1983, imposes a privilege tax on "petroleum businesses" which import petroleum into the State for sale in the State. The Division further noted that Article 13-A was amended as of April 1, 1984 to include under the definition of "petroleum businesses" those businesses which import petroleum, or cause petroleum to be imported, into the State for "consumption or use" within the State. The Division enclosed with the letter a questionnaire for Conrail to complete and return stating that it needed this information in order to determine whether Conrail was subject to tax under Article 13-A.

Petitioner returned the questionnaire along with a copy of the September 29, 1981 letter from the Commissioner. Petitioner stated in its cover letter, dated January 29, 1986, that it attached a copy of the letter relative to its exemption from tax under Article 13-A. The completed questionnaire indicated that petitioner imported into the State via the Buckeye Pipeline 2,850,000 gallons of fuel to DeWitt, New York. Title to the fuel passed from the out-

of-state suppliers to petitioner at the Buckeye Pipeline in Linden, New Jersey. The largest fuel storage facilities were its DeWitt yard (6,000,000 gallons) and Selkirk yard (3,000,000 gallons).

In response to the completed questionnaire, William H. Frank, Chief of the Division's Oil Tax Unit, opined in a letter, dated March 14, 1986, that Conrail was not subject to tax under Article 13-A. In the letter, the Division stated the following:

> "Based upon the responses in the questionnaire, you recently completed and returned to us, it appears that you are not subject to tax as a 'Petroleum Business' as defined under Article 13A of the Tax Law. Your exemption is based on the fact that you claim not to be importing petroleum, or causing petroleum to be imported into New York State for sale in the State.
>
> "If in any fiscal period you import 20,000 gallons or more of petroleum, or cause 20,000 gallons or more of petroleum to be imported into the State for sale in the State, you will be subject to tax under Article 13A of the Tax Law. As soon as you meet or exceed the 20,000 gallon threshold, you should contact the Oil Tax Unit for instructions as to filing requirements, payments and use of resale certificates, etc., under Article 13A of the Tax Law, which are also contained in TSB-M-83(22)C which was previously forwarded to you.
>
> "Any questions you may have should be directed to:
>
> New York State Department of Taxation and Finance
> District Office Audit Bureau
> Oil Tax Section
> Room 402A, Building #9, State Campus
> Albany, New York 12227
>
> The telephone number is: (518) 457-4397."

On January 1, 1987, petitioner's NERSA exemption expired. At that time, Conrail went "public" and was no longer a government-subsidized corporation and, therefore, could no longer retain its tax-exempt status for State taxes. Thereafter, Conrail attached checks to its State sales tax returns. As noted above, petitioner had been filing State sales tax returns, but had not paid taxes due to the NERSA exemption.

On August 29, 1988, Conrail filed with the Division an Application for Registration as a Distributor of Diesel Motor Fuel (Form TP-600) disclosing that it was purchasing diesel fuel

from seven out-of-state suppliers[2] and expected to use 3,800,000 gallons of diesel fuel each month in New York State.

Between the time of the March 14, 1986 letter and the Division's audit of petitioner, which commenced on January 28, 1991 and concerned the Article 13-A tax liability in question, the Division never informed petitioner that Conrail had any Article 13-A tax liability or that it was cancelling, rescinding or otherwise modifying its letter of March 14, 1986. In that interim period between the March 14, 1986 letter and the audit in question, the Division conducted two other audits.

In April of 1989, the Division conducted an audit of sales and use tax returns filed by petitioner for the period March 1986 through February 1989. From the audit, the Division determined that additional tax was due. In computing the amount of sales tax due on the gross receipts portion of the price paid by Conrail to in-state suppliers of diesel fuel, the Division took into account the amount of sales tax for all fuel purchased for consumption in the State and then subtracted the amount of sales tax which would have been attributable to fuel purchased from out-of-state suppliers. In the stipulation of facts, the parties stated that the Division then "applied the Article 13A tax to the sales tax for fuel purchased from in-state suppliers to arrive at the sales tax attributable to Article 13A tax." At no time during the April 1989 audit did the Division inform petitioner that it had any liability for Article 13-A tax on fuel purchased from out-of-state suppliers.

In October of 1989, the Division commenced an audit of petitioner concerning its tax liability under Article 12-A (floor tax) as of September 1, 1988. Tax Law § 284 imposes an excise tax on motor fuel "imported into or caused to be imported into the state by a distributor for use, distribution, storage or sale in the state." The floor tax audit could not have been conducted without the disclosure that substantial amounts of diesel fuel were imported. An

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[2]The stipulation states that the application disclosed that petitioner was purchasing diesel fuel "for" seven out-of-state suppliers. This statement obviously contained a typographical error in its substitution of the word "for" instead of "from."

inventory sheet for petitioner's Selkirk facility showed an inventory of 989,447 gallons of diesel fuel substantially all of which was imported. Petitioner also submitted into the record floor tax returns, dated October 19, 1988 and May 11, 1989, indicating a total of 5,050 taxable gallons and 408,598 taxable gallons, respectively, as of September 1, 1988. In connection with the floor audit, petitioner's director of tax compliance wrote a letter, dated September 29, 1988, to the Division describing the procedures that were put into place to account for the use of imported diesel fuel in its locomotives at the Selkirk facility.

In January of 1991, the Division commenced an audit of petitioner's Article 13-A tax liabilities. The Division determined that as of January 1, 1987 Conrail was no longer tax exempt under NERSA and therefore should have been paying tax under Article 13-A on the fuel imported into New York State for consumption in New York State for the period January 1, 1987 through August 31, 1990.

The Division issued four notices of deficiency, dated July 11, 1991, asserting tax due under Article 13-A in the following amounts:

Period Ended	Deficiency	Interest	Other Charge	Total
12/31/87	$450,581.42	$179,656.24	$193,750.01	$823,987.67
12/31/88	411,505.25	114,769.32	148,141.89	674,416.46
12/31/89	407,830.49	60,760.91	122,349.15	590,940.55
8/31/90	491,196.88	33,018.42	127,711.19	651,926.49

After a conciliation conference, the conferee cancelled the penalties but sustained the tax deficiencies in a Conciliation Order dated August 28, 1992.

Petitioner filed a petition (DTA No. 811400), dated November 24, 1992, challenging the tax deficiencies. Petitioner claimed that it relied in good faith on the Division's March 14, 1986 letter exempting petitioner from paying tax under Article 13-A and that at no time prior to the Consent to the Field Audit Adjustment, dated April 9, 1991, did the Division inform petitioner that it had any obligation to pay taxes under Article 13-A or that the March 16, 1986 letter was not in full force and effect. Petitioner further claimed that in this interim period the Division conducted both a sales tax audit under Articles 28 and 29 and a floor tax audit under Article 12-A and that during these audits the Division was aware that petitioner was importing large quantities of diesel fuel into the State for use but did not raise an issue with respect to petitioner's failure to pay tax under Article 13-A. Petitioner asserted that based on its good faith reliance it did not take any steps to minimize its tax liabilities under Article 13-A. Petitioner further raised a statute of limitations defense with respect to the year 1987 arguing that at the time of the April 9, 1991 Consent to Field Audit Adjustments, more than three years expired from the date the tax was due for 1987.

The Division filed an answer and amended answer, dated April 19, 1993 and August 26, 1993, respectively.

In September of 1990, Conrail concluded that, as a result of amendments to Article 13-A, effective September 1, 1990, it was no longer exempt from tax under Article 13-A and therefore could not rely on the March 14, 1986 letter for its tax-exempt status.[3] Prior to the 1990 amendments, the definition of a petroleum business subject to tax under Article 13-A included:

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[3] In its brief, petitioner does not specify which amendments to Article 13-A led it to conclude that it was no longer tax exempt under the statute. Absent a specific reference, it is assumed that petitioner was referring to the definitional section concerning "petroleum businesses" (see, Tax Law § 301[b][2]). At hearing, Richard Kondan, Conrail's Assistant Treasurer of Taxes, testified that because of the 1990 amendments as well as "other matters," Conrail re-examined its Article 13-A tax liability. He noted that as a result of that examination and communications with the Division, Conrail concluded that it was subject to tax beginning September 1, 1990.

"every corporation and unincorporated business formed for, engaged in or conducting the business, trade or occupation of importing or causing to be imported . . . into this state for sale in this state . . . petroleum and every corporation and unincorporated business importing or causing to be imported . . . petroleum into this state for consumption by it in this state . . ." (Tax Law former § 300[c]; emphasis added).

The 1990 amendment changed this definition as follows:

"The term 'petroleum business' means: . . . (2) [w]ith respect to diesel motor fuel, every corporation and unincorporated business (i) importing diesel motor fuel or causing diesel motor fuel to be imported into the state for use, distribution, storage, or sale in the state, . . . (iv) making a sale or use of diesel motor fuel in the state . . ." (Tax Law § 300[b][2]; emphasis added).

Petitioner filed, under the amended statute, its first monthly return on October 22, 1990 for the month of September 1990. Petitioner also filed a letter, dated October 22, 1990, with the return explaining the method it used to compute the amount of tax owed under Article 13-A. In that letter, Conrail stated that Tax Law § 301, which provides that tax shall be imposed on amounts of fuel sold or used in the State, imposes tax on imported fuel that has been transported into the State via the Buckeye Pipeline and then loaded into locomotives for use in New York State. Petitioner determined the amount of tax owed by excluding that portion of the fuel loaded into the locomotives that was actually consumed outside the State. Petitioner calculated this amount by multiplying the number of miles travelled by locomotives in the State by the average use of gallons per mile (2 gallons per mile) plus the amount resulting from multiplying the number of switching locomotives by the number of hours in use times the number of gallons used per hour (5 gallons per hour).

After an audit, the Division issued a Notice of Determination, dated September 17, 1991, for tax due for the four months from September 1, 1990 to December 31, 1990 in the total amount of $376,988.63, plus $74,373.98 in penalty and $33,905.01 in interest, for the total amount of $485,267.62.

In the stipulated facts, the parties state that petitioner

"does not dispute $42,531.20 of the amount determined to be due by the [Division], which is not attributable to the dispute between the [Division] and Petitioner as to computation of the amount due under Article 13A of the Tax Law [for the period of September 1, 1990 through December 31, 1990] . . . [and that i]f the method of computation set forth [in the October 22, 1990 letter] were accepted by the [Division], there would be no additional tax due other than [the $42,531.20]."

In sum, the amount in dispute is attributable to diesel fuel purchased by petitioner from outside the State, loaded into its locomotives in the State and then consumed by Conrail in its locomotive operations outside the State.

After a conciliation conference, the conferee issued a Conciliation Order, dated August 28, 1992, sustaining the statutory notice.

Conrail filed a petition (DTA No. 811402), dated November 24, 1992, challenging the amount of tax asserted by the Division. Petitioner claimed that it properly computed the amount of tax under Article 13-A for the period September 1, 1990 through December 31, 1990 by excluding in its calculations imported fuel that Conrail used in its locomotive operations outside the State. Petitioner also alleged that, in the event it is found liable for the tax, then its failure to pay the deficiency was due to reasonable cause and not due to willful neglect.

The Division filed an answer, dated April 19, 1993, alleging that, for the period in question, petitioner was liable under Tax Law § 301-a as a petroleum business and that petitioner has the burden of proving that the Notice of Determination was erroneous.

Opinion

We deal first with the issue of whether the Administrative Law Judge properly determined that the doctrine of estoppel was not applicable against the Division (petition, DTA 811400).

As a general proposition, the doctrine of estoppel is not applicable to governmental acts absent a showing of exceptional facts which require its application to avoid a manifest injustice (Matter of Sheppard-Pollack v. Tully, 64 AD2d 296, 409 NYS2d 847; Matter of Turner Constr. Co. v. State Tax Commn., 57 AD2d 201, 394 NYS2d 78). The doctrine as it applies to tax matters was concisely stated in Schuster v. Commissioner (312 F2d 311). There, the court, after recognizing that estoppel should be applied against the government with utmost caution and restraint, stated:

> "It is conceivable that a person might sustain such a profound and unconscionable injury in reliance on the Commissioner's action as to require, in accordance with any sense of justice and fair play, that the Commissioner not be allowed to inflict injury. It is to be emphasized that such situations must necessarily be rare, for the policy in favor of an efficient collection of the public revenue outweighs the policy of the estoppel doctrine in its usual and customary context" (Schuster v. Commissioner, supra, at 317).

As we noted in Matter of Harry's Exxon Serv. Sta. (Tax Appeals Tribunal, December 6, 1988), "[e]xceptions to the doctrine have indeed been rare and limited to unusual fact situations."

This Tribunal has embraced a three-part test to determine applicability of the doctrine to specific cases. We ask if petitioner had the right to rely on the Division's representation; whether, in fact, there was such reliance; and whether such reliance was to the detriment of petitioner (Matter of AGL Welding Supply Co., Tax Appeals Tribunal, May 11, 1995; Matter of Harry's Exxon Serv. Sta., supra).

The Administrative Law Judge determined that petitioner did not have the right to rely on the March 14, 1986 letter from the Division and that even if petitioner had the right to so rely, it did not do so to its detriment. Thus, the Administrative Law Judge rejected petitioner's assertion that the Division is estopped from asserting a tax liability under Article 13-A for the period 1987 through August 31, 1990.

The first issue is whether petitioner was entitled to rely on the March 14, 1986 letter from the Division.

The core of the Administrative Law Judge's determination on this point is that petitioner was apprised by the Division when it requested petitioner to fill out the questionnaire that the law had been changed in 1984 to extend the Article 13-A tax to businesses which imported petroleum to be consumed in New York as well as sold in New York. Petitioner indicated on the questionnaire that it imported fuel for its own use, thus, "petitioner should have realized that the March 1986 letter was inaccurate to the extent that it implied petitioner was exempt from tax only because it did not sell petroleum in New York State" (Determination, conclusion of law "A"). The Administrative Law Judge, citing Matter of Glover Bottled Gas Corp. (Tax Appeals Tribunal, September 27, 1990), determined that reliance was not reasonable because the information given by the Division was contradicted by the explicit language of the statute.

The Administrative Law Judge also found that it was unreasonable for petitioner to rely on the letter because petitioner understood that its exempt status was based in large part on NERSA. "Once petitioner no longer maintained its exempt status under NERSA, petitioner should have made further inquiries itself inasmuch as petitioner was well aware, as evidenced from its response to the questionnaire [which included the 1981 letter from the Division], that its exempt status under NERSA was relevant" (Determination, conclusion of law "A").

Finally, the Administrative Law Judge determined that "it was not prudent for petitioner to rely on the Division's silence during two subsequent audits, as a sign that no tax was due under Article 13-A inasmuch as those audits concerned taxes only with respect to Articles 12-A, 28 and 29" (Determination, conclusion of law "A").

On exception, petitioner asserts that it was entitled to rely upon the March 14, 1986 letter of the Division. Petitioner asserts that this case is alike in all respects with Matter of Bolkema Fuel Co. (Tax Appeals Tribunal, March 4, 1993). Petitioner buttresses its argument that it relied on the letter in good faith by pointing to the subsequent floor tax audit under Article 12-A and sales tax audit under Articles 28 and 29, both of which indicated to the Division that petitioner imported diesel fuel into New York State but which did not prompt any change by the Division of its statement in the March 14, 1986 letter or in any way lead the Division to apprise petitioner of any tax liability under Article 13-A.

The Division responds by asserting that petitioner knew or should have known that the portion of the Division's letter indicating it was exempt from tax because it did not import petroleum "for sale" was "at the very least incomplete" (Division's brief, p. 6). The Division argues that petitioner was put on notice by the Division's letter requesting petitioner to complete the questionnaire that liability under Article 13-A was not limited to entities which made sales of diesel fuel in New York.

The Division also points to the fact that petitioner enclosed a copy of the 1981 letter dealing with its exemption under NERSA as indicating petitioner's knowledge that, but for the Rail Act, it would be liable for Article 13-A tax. The Division asserts that when the March 14, 1986 letter indicated it was based upon the responses in the questionnaire, those responses included the 1981 letter. The Division reiterates the holding of the Administrative Law Judge that when the NERSA exemption ended, it was incumbent on petitioner to reach out to the Division and inquire as to its taxable statute under Article 13-A.

The Division argues further that, even if petitioner can establish that its reliance upon the March 14, 1986 letter was reasonable at the time NERSA expired:

> "it nevertheless cannot demonstrate that this reliance remained reasonable throughout the audit period. Petitioner was put on notice, at the very latest in August of 1988, that its purported interpretation of the March 1986 letter was erroneous. In that month Petitioner filed an Application for

> Registration as a Distributor of motor fuel under Article 12-A (Exh. 4). At hearing, Petitioner's witness Richard Kondan stated that the Division had required this application (Tr 46). The application made it clear that Article 12-A liability was not limited to sale of diesel fuel, but also attached to its use (Exh. 4). That application also indicated that approval was linked to the applicant's status under Article 13-A (Id.) The following month Petitioner filed a floor tax return with payment for Article 12-A tax (Exh. 6). On this return Petitioner's liability was determined by its use of diesel fuel. (ID.) Thus, both these forms gave notice to Petitioner that liability for New York tax on diesel fuel was not limited to sales but also included use of such fuel"
> (Division's brief, pp. 11-12).

The Division distinguishes this case from Bolkema, asserting that 1) in Bolkema there was no NERSA exemption and 2) the taxpayer in Bolkema

> "was a relatively small entity which delivered home heating oil and serviced furnaces and oil burners. Presumably it did not have the resources to establish an entire tax department . . . as did Petitioner. Therefore, the reasonableness of its reliance upon the letter in question was addressed by the Tribunal in the context of what would be reasonable reliance on the part of a small business. Conversely, the reasonableness of Petitioner's reliance in the case at bar must be judged in the context of what reliance would be reasonable for a large, nationwide corporation.
>
> "Lastly, the Bolkema petitioner demonstrated that it had suffered an actual detriment that was attributable to its reliance. Conversely, in the instant matter, Petitioner has alleged a detriment that is entirely speculative" (Division's brief, pp. 13-14).

We reverse the determination of the Administrative Law Judge.

Here, as in Bolkema, we find no reason for petitioner to believe that the Division did not understand the nature of petitioner's activities. Petitioner was forthright and fully complete in responding to the questionnaire forwarded to it by the Division. The Division had these responses before it when it prepared its letter indicating that petitioner was not subject to the Article 13-A tax because it did not import petroleum or cause petroleum to be imported into New York State for sale. The letter was signed by the chief of oil tax audits. We reject the Division's position that the "responses" on the questionnaire included the 1981 NERSA letter. The fact that petitioner enclosed the 1981 letter in no way was required by the questionnaire nor does it, in any way, relate to the information required from petitioner in filling out the questionnaire. We also find that Matter of Glover Bottled Gas Corp. (supra) is distinguishable. There, estoppel was asserted on the basis of alleged conversation between the taxpayer and the Division concerning the filing of claims for refund which the taxpayer "understood" to waive the statute of limitations. Under the circumstances, we determined that estoppel was not applicable. Here, there was a written request from the Division which was responded to by the taxpayer, the filled in questionnaire, which responses formed the basis for the Division's letter indicating that petitioner was exempt from the 13-A tax.

We also reject the Division's assertion, apparently inferred from our decision in Bolkema, that the size of the taxpayer or its sophistication in tax matters is relevant in deciding the application of the doctrine of estoppel. What is relevant is the nature of the communications between the taxpayer and the Division which give rise to the assertion of the estoppel doctrine

and whether the taxpayer has the right to rely upon the action of the Division and did so rely to its detriment (Matter of Harry's Exxon Serv. Sta., supra).

Finally, we address the subsequent audits of petitioner by the Division and the Division's assertion that because of the audits, petitioner "cannot demonstrate that [its] reliance remained reasonable throughout the audit period" (Division's brief, p. 11). In essence, the Division asserts that petitioner should have been apprised by these audits of the Article 13-A tax liability and taken appropriate action. We cannot agree. The audits indicate that petitioner imported diesel fuel for its own use. Petitioner had already informed the Division of this fact in the questionnaire to which the Division responded that petitioner was exempt from tax under Article 13-A. In short, the audit did not give petitioner any new information which would be the catalyst for it to take any action for the remainder of the audit period inconsistent with its reliance on the March 14, 1986 letter. On the other hand, the audits brought once again to the Division's attention the fact that petitioner did import diesel fuel for its own use.

We deal next with the issue of whether petitioner has shown detrimental reliance on the letter.

The Administrative Law Judge opined that even if it were determined that petitioner reasonably relied on the March 14, 1986 letter for not filing tax returns under Article 13-A after January 1, 1987, such reliance was not to petitioner's detriment. In short, the Administrative Law Judge rejected petitioner's assertion that:

> "if it had known that it was liable for tax under Article 13-A, it would have sought legislation or regulatory action for an exemption similar to the exemption made available to trucks under Tax Law former § 300(c). Petitioner also claims it would have reduced its tax liability by rerouting rail traffic to avoid refueling in New York or by relocating fueling facilities outside of New York. Although any of these actions might have reduced its tax liability, such actions are essentially speculative in nature to the extent that lobbying efforts may not have been successful and petitioner has not demonstrated that rerouting and relocation plans would have been economically or practically feasible. In sum, weighing the nature of the detriment alleged, sophistication of the taxpayer, and petitioner's unreasonable reliance on the March 14, 1986 letter for the period after petitioner was no longer exempt from State taxes under NERSA, it is determined that the doctrine of estoppel does not apply" (Determination, conclusion of law "A").

On exception, petitioner asserts that the Administrative Law Judge erred, stating that:

> "Conrail presented evidence that had it realized the exposure to the Article 13-A tax it could have avoided or reduced that liability by seeking legislative change, relocating its fueling facilities or rerouting its trains to minimize its operations in New York. The Division did not offer any evidence to the contrary, but the ALJ rejected Conrail's evidence because it was 'speculative.' By this the ALJ apparently meant 'qualitative' rather than 'quantitative,' but this is the very nature of reliance which is in the form of not doing that which could have been done, rather than doing that which would have otherwise been avoided. Having been denied the opportunity to explore any of these avenues at the time when it would have been possible to implement them, the only way to establish the level of certainty required by the ALJ that they could have been done would be to use a time machine and revisit the years when those opportunities were

> available, a method of proof unfortunately not available" (Petitioner's brief, pp. 7-8).

In essence, petitioner asserts that it would have changed or altered the way in which it conducted its business to mitigate the tax implications of Article 13-A. We agree with petitioner that the fact that it did not change its business practices may reasonably be related to its reliance on the 1986 letter and that such reliance was detrimental in that petitioner did not, because of such reliance, alter its business practices and pay tax on an Article 13-A basis. The payment of the tax now clearly has an unexpected economic impact on petitioner for which it has not had the opportunity to plan because of its reliance on the letter (see, Matter of AGL Welding Supply Co. supra).

Since petitioner has demonstrated that the Division should be estopped from asserting liability under Article 13-A, it is not necessary for us to deal with the issues raised by petitioner on exception that since it relied on the March 14, 1986 letter and did not file a tax return, the Division should be estopped from challenging petitioner's statute of limitations defense.

We deal next with the issue raised by petition, DTA No. 811402, that for the period September 1, 1990 through December 31, 1990, the calculation of petitioner's Article 13-A tax liability should be calculated only on the amount of fuel "consumed" in New York State, not fuel "used" in New York.

The Administrative Law Judge determined that:

> "Tax Law § 301-a(c)(2) imposes upon a petroleum business a monthly tax determined by multiplying the diesel fuel rate times the number of gallons of diesel fuel sold or 'used' by a petroleum business in this State. Tax Law § 300(g) provides that the term 'use' shall have the same meaning as set forth in Tax Law § 1102(e). Section 1102(e) defines the term 'use' as:
>
> > "'the exercise of any right or power over . . . diesel motor fuel by any person, whether or not a purchaser, including, but not limited to, the receiving, the withdrawal from storage or any consumption of such fuel'" (Determination, conclusion of law "C").

The Administrative Law Judge determined that:

> "the statutory definition makes it clear that the term 'use' is broader than the term 'consume' and includes, but is not limited to, 'the receiving' or 'withdrawal from storage' or 'consumption' of diesel fuel in the State. Here, the diesel fuel in question is the fuel that was delivered via the Buckeye Pipeline to DeWitt, New York, located in the outskirts of Syracuse, and then transported to the various loading facilities across New York State, primarily the Selkirk facility, where the fuel was loaded into locomotives travelling both in and outside of New York State. These activities constitute the exercise of a right or power over the diesel fuel in accordance with the explicit language of the statutory definition -- the receiving or withdrawal from storage. Where the statutory language is clear and unambiguous, the language should be construed so as to give effect to the plain meaning of the words used (Matter of 1605 Book Center v. Tax Appeals Tribunal, 83 NY2d 240, 609 NYS2d 144)" (Determination, conclusion of law "C").

Petitioner, on exception, asserts that consumption of fuel in locomotive operations outside of the State cannot be "use" within the meaning of Article 13-A. Petitioner asserts that the construction of the statute reached by the Administrative Law Judge:

> "results in making fuel subject to tax when the use in the state is limited to loading into a locomotive tank for transport out of the state and consumption elsewhere. Taxation of such a remote use cannot have been the legislative intent, particularly when the obvious result is to compel such 'users' to move their businesses out of the state" (Petitioner's brief, p. 11).

Petitioner asserts for the first time on exception that section 301-A of the Tax Law "facially discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution" (Petitioner's brief, p. 13). Petitioner refers to numerous cases in support of its assertion, including Matter of Tug Buster Bouchard Corp. v. Wetzler (Sup Ct, Albany County, June 9, 1994, Canfield, J., index No. 7649-92). Petitioner asserts that:

> "[a]lthough the court in Tug Buster was considering Section 301 as it existed prior to the 1990 amendments to Article 13-A, Section 301-a, superceeding [sic] Section 301 effective September 1, 1990, have the same economic effect. In fact the current statute is broader and more encompassing. Entities which purchase diesel fuel outside of New York and import such fuel into New York are subject to multiple taxation while those who purchase diesel fuel in New York and use such fuel in New York are not.
>
> "Section 301-a of Article 13-A should be held unconstitutional because it discriminates against interstate commerce by taxing out-of-state purchasers one time more than in-state purchasers" (Petitioner's brief, pp. 17-18).

We affirm the determination of the Administrative Law Judge on this issue.

First, the clear wording of the statute, i.e., section 301-a(c)(2), is to impose tax on diesel fuel "used" in this State. The term "use" is explicitly given the broad definition in Tax Law § 1102(e). The Administrative Law Judge correctly interpreted the statute.

Second, the jurisdiction of this Tribunal, as prescribed in its enabling legislation, does not encompass constitutional challenges to the facial validity of legislation (Matter of Fourth Day Enters., Tax Appeals Tribunal, October 27, 1988). Thus, we cannot rule on the issue raised by petitioner.

We deal finally with the issue of penalty.

The Administrative Law Judge sustained the penalty imposed for the period September 1, 1990 through December 30, 1990 stating that:

> "[p]etitioner's reasons for not paying the tax are not persuasive. If petitioner felt disadvantaged by the lack of Division regulations with respect to Tax Law § 301-a, it could have made inquiries concerning the method for calculating the tax. The fact that petitioner revealed its method for calculating the tax along with the monthly returns does not constitute reasonable cause for not paying the tax at that time. In sum, petitioner's computation method does not conform with the plain reading of the

> statutory language and it has presented no basis for cancelling the penalty" (Determination, conclusion of law "D").

On exception, petitioner asserts that the Administrative Law Judge erred.

> "The ALJ's basis for upholding the penalty appears to be that Conrail should have asked for an affirmative statement that its computation was correct rather than submit in detail its method of computation. Surely to make the imposition of a substantial penalty turn on this distinction is to elevate form over substance to an unacceptable degree.
>
> "Conrail's forthright efforts to comply with the new statute were reasonable and in no way showed willful neglect or disregard of the tax laws; the penalties should be canceled" (Petitioner's brief, p. 13).

The Administrative Law Judge determined this issue properly and we affirm her determination for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Consolidated Rail Corporation with respect to DTA No. 811400 is granted;

2. The exception of Consolidated Rail Corporation with respect to DTA No. 811402 is denied;

3. The determination of the Administrative Law Judge with respect to DTA No. 811400 is reversed;

4. The determination of the Administrative Law Judge with respect to DTA No. 811402 is sustained;

5. The petition of Consolidated Rail Corporation with respect to DTA No. 811400 is granted;

6. The petition of Consolidated Rail Corporation with respect to DTA No. 811402 is denied;

7. The Notice of Deficiency, dated July 11, 1991 is cancelled; and

8. The Notice of Determination, dated September 17, 1991, is sustained.

DATED: Troy, New York
August 24, 1995

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

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