

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALLEGHENY PETROLEUM CORPORATION	:	DECISION
	:	DTA No. 812126
for Redetermination of a Deficiency/Revision	:	
of a Determination or for Refund of Motor Fuel	:	
Tax, Tax on Petroleum Businesses and Sales and	:	
Use Taxes under Articles 12-A, 13-A, 28 and 29	:	
of the Tax Law for the Period November 1, 1992	:	
through November 30, 1992.	:	

Petitioner Allegheny Petroleum Corporation, 2011 Silver Street, Houston, Texas 77007-2801 and the Division of Taxation filed exceptions to the determination of the Administrative Law Judge issued on March 23, 1995. Petitioner appeared by Bleakley, Platt & Schmidt (Janice H. Eiseman and Frederick J. Martin, Esqs., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James P. Connolly, Esq., of counsel).

Both parties filed briefs on exception, in opposition to the other party's exception and reply briefs. Oral argument was heard on February 8, 1996.

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

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to review petitioner's challenge to notices and demands for motor fuel tax and petroleum business tax which were issued by the Division of Taxation based upon information reported by petitioner in its tax returns.

II. Whether petitioner imported or caused to be imported motor fuel into New York State during the month of November 1992 subjecting it to motor fuel tax, petroleum business tax and sales tax on motor fuel.

III. Whether the three Articles of Tax Law in issue as applied are violative of the Commerce Clause of the United States Constitution.

IV. Whether the Administrative Law Judge may address a legal issue not raised by the parties, and, if so, whether petitioner is barred from raising issue "I" on the basis of res judicata because such issue was previously decided in a proceeding in State Supreme Court.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "12" and "16" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Despite the execution of a stipulation of facts by the parties, very little is known about petitioner, Allegheny Petroleum Corporation ("Allegheny Petroleum"). The parties stipulated that it "is a foreign corporation duly organized and existing under the laws of the State of Texas with its headquarters and main office located at 2011 Silver Street, Houston, Texas" (stipulation, ¶ "1"). An individual named Jerome Smith signed the tax returns at issue on behalf of petitioner as president.

The parties also stipulated that petitioner "was the holder of a duly issued Certificate of Registration as a Distributor of Motor Fuel, dated November 29, 1991 and bearing registration No. M2690" (stipulation, ¶ "2").

Petitioner and an entity named Anthony Petroleum, Inc. ("Anthony Petroleum") entered into an arrangement whereby petitioner, in short, served as Anthony Petroleum's front, in relation to the Division of Taxation ("Division"), for purposes of the importing of gasoline into New York. The record contains slight evidence concerning the relationship between petitioner and Anthony Petroleum, although the stipulation incorporated a so-called "Reciprocal Financing Agreement", dated January 31, 1992, to which petitioner, by its president, Jerome R. Smith, and Anthony Petroleum, by its president Jeffrey Pressman, were parties. This agreement, which was attached to the stipulation as Exhibit "A", provided as follows:

"It is mutually agreed . . . that Allegheny is willing to do certain financing for Anthony.

"For Allegheny's willingness to finance Anthony, the company is to receive a fee in addition to the cost of product of sixty points per gallon (\$0.006). It is the responsibility of Anthony to pay Allegheny what is billed by its supplier plus sixty points at the time product is lifted. It is Allegheny's responsibility to allow Anthony to retain all New York State taxes to be used by Anthony to finance future oil transactions. It is fully understood by both parties that the New York State taxes are due by the twentieth of the following month that the product is moved (i.e. a purchase and title transfer made on January 31 taxes must be paid by February 20). Anthony warrants that all taxes due for the previous month will be paid by the 15th of the following month, unless the 15th falls on a weekend at which time the taxes will be paid on the following Monday. Funds will be put in Allegheny's account at National Westminster Bank, 152 North Village Avenue, Rockville Center [sic], NY 11570, Account Number 2056-60-9015. For all that is specified within this agreement, Allegheny warrants that Anthony will be the sole company it finances in New York State, and that Anthony will have the first option to any other state Allegheny becomes licensed in, provided Allegheny can obtain the respective surety through Murray A. Wilson or a mutually agreeable surety company. Furthermore, Anthony or its nominee agrees to provide collateral to Merchants T&F Inc. in order that Allegheny can obtain the respective surety. If in the event the State of New York draws against the letter of credit posted as surety for tax liability, Anthony agrees that they will guarantee any repayment to the issuing bank or applicant. Anthony further agrees to a mutual exclusive in that all product Anthony buys will be purchased through Allegheny.

"This agreement may be cancelled by either party with sixty day written notice to the address contained herein."

But it was not just "financing" that petitioner provided to Anthony Petroleum. Rather, petitioner held itself out to the Division as the "distributor" of the motor fuel which it had agreed to "finance" under the agreement detailed in Finding of Fact "3". Included as part of Exhibit "C" to the stipulation are photocopies of petitioner's forms FT-945, Report of Sales Tax Prepayment on Motor Fuel, which petitioner filed as the distributor of the motor fuel it "financed" for Anthony Petroleum. Petitioner reported and remitted sales tax totalling several million dollars as follows:

<u>Monthly Period</u>	<u>Number of Gallons Reported as Subject to Tax</u>	<u>Sales Tax Prepayment</u>	<u>Date Report Shown Signed by Petitioner's President</u>
January 1992	1,886,734	\$ 169,806.06	February 12, 1992
February 1992	5,726,245	515,362.05	March 14, 1992
March 1992	6,183,091	539,594.73	April 14, 1992
April 1992	5,207,689	447,542.01	May 11, 1992

May 1992	6,517,449	573,055.03	June 17, 1992
June 1992	7,400,479	593,240.07	July 9, 1992
July 1992	6,609,854	542,008.03	August 17, 1992
August 1992	12,051,309	988,207.34	September 14, 1992
September 1992	12,875,278	1,055,772.80	October 13, 1992
October 1992	<u>7,225,178</u>	<u>592,464.60</u>	November 16, 1992
Totals	71,683,306	\$6,017,052.72	

Applying the "sixty points per gallon" fee set forth in the agreement noted in Finding of Fact "3" to the total gallons shown above of 71,683,306 results in a total fee due from Anthony Petroleum to petitioner under such agreement of \$430,099.84. The sketchy record does not establish whether, in fact, such fee was paid to petitioner.

In addition to the reports of sales tax prepayment on motor fuel detailed in Finding of Fact "4", petitioner also filed corresponding forms (i) PT-100, Petroleum Business Tax Return, (ii) PT-101, Tax on Motor Fuels (showing the computation of taxes due under Articles 12-A and 13-A of the Tax Law) and (iii) PT-101.2 (detailing petitioner's direct shipments as a distributor of motor fuel to customers in New York).

On the 10 forms PT-101.2 (one for each month January through October 1992), petitioner reported a total of 146 "direct shipments to customers in this State", with Anthony Petroleum listed under the "sold to" column for all of the shipments. Shipments were disproportionately greater in number during August and September, which was unexplained:

<u>Month</u> <u>During 1992</u>	<u>Number of Direct Shipments</u> <u>to Anthony Petroleum Reported</u>
January	3
February	9
March	15
April	10
May	13
June	15
July	12
August	24
September	31
October	<u>14</u>
Total	146

Petitioner reported no shipments of motor fuel other than the 146 shipments noted above.

A close review of petitioner's Form PT-101.2 for the month of September 1992 (as a representative report) concerning petitioner's direct shipments to Anthony Petroleum is shown in chart form on Appendix A.

Petitioner transferred information reported on the Forms PT-101.2 to corresponding Forms PT-101, Tax on Motor Fuels, on which it computed its tax liability under Tax Law Articles 12-A and 13-A. For example, on its PT-101 report for the month of September 1992, petitioner reported total gallonage shipped to New York of 12,875,278, which it had detailed on the PT-101.2 noted in Finding of Fact "6". It computed New York State motor fuel excise tax due (under Article 12-A) of \$1,030,022.24 (12,875,278 gallons x \$0.08) and tax due under Article 13-A of \$1,910,691.26 (12,875,278 gallons x \$0.1484) representing the "motor fuel component tax" and of \$6,437.64 (12,875,278 gallons x \$0.0005) representing the petroleum testing fee. These amounts were transferred to a Form PT-100, Petroleum Business Tax Return, for the month of September 1992. On this return, petitioner certified that it was "duly licensed or registered to deal in each of the products that are being reported and that this return, including any accompanying riders, is to the best of my¹ knowledge and belief true, correct and complete", and it reported total tax due under Articles 12-A and 13-A as detailed and computed on the other forms.

A review of the petroleum business tax returns shows petitioner reported and paid the following:

<u>Month</u>	<u>Article 12-A Tax</u>	<u>Article 13-A Tax</u>	<u>Total Tax</u>	<u>Gallons Reported Shipped to New York</u>
January 1992	\$ 151,882.09	\$ 279,991.33	\$ 431,873.42	1,886,734
February 1992	460,962.72	849,774.76	1,310,737.48	5,726,245
March 1992	497,738.82	917,570.70	1,415,309.52	6,183,091
April 1992	419,218.96	772,821.05	1,192,040.01	5,207,689
May 1992	524,654.64	967,189.43	1,491,844.07	6,517,449
June 1992	595,738.56	1,098,231.08	1,693,969.64	7,400,479

The copies of the Forms PT-100 attached to the stipulation as Exhibit "C" were unsigned, but apparently the originals were signed by Jerome R. Smith, as president of petitioner.

July 1992	532,093.25	980,902.33	1,512,995.58	6,609,854
August 1992	970,130.37	1,788,414.26	2,758,544.63	12,051,309
September 1992	1,036,459.88	1,910,691.26	2,947,151.14	12,875,278
October 1992	<u>581,626.83</u>	<u>1,072,216.42</u>	<u>1,653,843.25</u>	<u>7,225,178</u>
Totals	\$5,770,506.12	\$10,637,802.62	\$16,408,308.74	71,683,306

Petitioner's Arrangement with Anthony Petroleum In Operation

The parties stipulated how the arrangement between petitioner and Anthony Petroleum operated as follows:

"Generally, Anthony negotiated with the third party suppliers for the purchase of the motor fuel by Petitioner. Anthony in every transaction wire transferred funds to Petitioner, who thereupon wire transferred the funds for the purchase to the supplier of the motor fuel, prior to any transfer of motor fuel" (stipulation, ¶ "7").

* * *

"Petitioner was granted shipper status on the Buckeye Pipeline on April 2, 1992" (stipulation, ¶ "9").

"In each transaction between Anthony and Petitioner, Anthony decided whether the motor fuel purchased by Anthony should be transported by barge or pipeline, and Petitioner was so directed" (stipulation, ¶ "10").

"In each transaction between Anthony and Petitioner, all transportation charges incurred in transporting the motor fuel into New York, whether the transportation was by barge or pipeline, were paid by Anthony" (stipulation, ¶ "11").

As noted in Finding of Fact "8", petitioner was granted shipper status on the Buckeye Pipeline on April 2, 1992. The Division submitted into evidence a cover letter dated February 11, 1993 from Jeffrey C. Seeds, Chief Revenue Accountant of the Buckeye Pipe Line Company ("Buckeye"), which acknowledged that Buckeye invoiced petitioner for transportation charges for certain shipments of gasoline in November 1992, and that "Allegheny was the shipper of record on these movements from Linden, NJ to Long Island City, NY." The record, however, does not explain why the 21 invoices attached to Mr. Seeds' letter (i) reference Manhattan & Queens Fuel Co. as the entity to which the gasoline was delivered (especially when the agreement detailed in Finding of Fact "3" provides for "a mutual exclusive" between petitioner and Anthony Petroleum, and petitioner has maintained that its relationship to gasoline

shipped into New York was as a financing agent of Anthony Petroleum), and (ii) why the invoices fail to correspond to the 13 Buckeye pipeline deliveries listed in Appendix B.

THE ARRANGEMENT DISSOLVES

The parties stipulated that in November 1992, "motor fuel was sold by the Petitioner to Anthony pursuant to purchase and sales contracts", which were attached to the stipulation as Exhibit "B" (stipulation, ¶ "8"). Such exhibit consists of 19 "agreements" showing the sale of the following quantity of gasoline by petitioner to Anthony Petroleum:

<u>Date of Agreement</u>	<u>Brels of Gasoline</u>
(1) October 21, 1992	10,000
(2) October 30, 1992	15,000
(3) October 30, 1992	10,000
(4) November 3, 1992	15,000
(5) November 3, 1992	15,000
(6) November 3, 1992	10,000
(7) November 6, 1992	10,000
(8) November 6, 1992	10,000
(9) November 10, 1992 ²	15,000
(10) October 21, 1992 ³	15,000
(11) November 13, 1992	15,000
(12) November 12, 1992	15,000
(13) November 6, 1992	15,000
(14) November 18, 1992	15,000
(15) November 12, 1992	10,000
(16) November 23, 1992	10,000
(17) November 20, 1992	15,000
(18) November 16, 1992	15,000
(19) November 16, 1992	<u>10,000</u>
Total	245,000

The agreement with the latest date in November 1992 of November 23, 1992 (number "16" in the list above), which may be utilized as

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This agreement is marked "revised," which was unexplained.

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The agreements are listed in the order they were attached to the stipulation. It is unknown whether there was a reason for not submitting the agreements in chronological sequence, and the Administrative Law Judge has left them in the chronological sequence presented.

a representative agreement since they all appear to include similar terms, provided as follows:

"Date: November 23, 1992
Attn: Mr. Jeff Pressman

"This confirms the agreement made on January 31, 1992 between the following parties as described hereinafter:

Seller: Allegheny Petroleum Corporation
2011 Silver Street
Houston, Texas 77007

Buyer: Anthony Petroleum, Inc.
2004 Newbridge Road
Bellmore, NY 11710

Contract Number: 922510157⁴

Batch Number: 359-312-6537

Product: Regular Unleaded Motor Gasoline

Quantity: 10,000 barrels regular unleaded
oxygenated gasoline

Quality: Product shall meet good commercial grade
specifications for regular unleaded oxygenated
gasoline

Delivery:⁵ For New York harbor via Buckeye Pipeline during
the period Nov. 25-28 1992. Via mutually agreeable
scheduling or via mutually acceptable book, stock or
inventory transfer against designated barrels of originator.
Measurement based on pipeline meter tickets.

Inspection: Seller to appoint mutually acceptable independent
inspectors at loading port to ascertain quantity and quality.
Independent inspectors will use the latest petroleum
industry's acceptable test methods and the results to be final

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Each agreement was assigned a different contract number.

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Thirteen of the agreements specified delivery via Buckeye Pipeline. The remaining six (numbered "4," "9," "11," "13," "14," and "17" in Finding of Fact "10") specified delivery as:

"For New York harbor into buyer's barge [during a
specified period] via mutually agreeable scheduling or via
mutually acceptable book, stock or inventory transfer against
designated barrels of originator."

and binding for both parties. Certificate of quantity and quality issued by independent inspector at load port.

Price: Regular unleaded - 0.6280 per US gallon, fixed and firm
Pipeline tariff to be paid at 0.298 per barrel
Terminal thruput to be paid at 0.63 per barrel
Terminal spill tax to be paid at 0.825 per barrel
Said unit price is exclusive of all federal taxes.

Federal taxes are the sole responsibility of the buyer. State and local taxes to be invoiced by seller to buyer.

Payment: Prepayment via wired funds prior to lifting

Title and Risk of Loss: At loading port as the oil passes the intake flange of the vessel/barge or at the time of book, stock or inventory transfer.

Other: This agreement shall be governed by the laws of the State of New York. Anything not specifically covered herein shall be in accordance with industry practice. If any of the above provisions are not in accordance with your understanding of our agreement, please notify this office by TLX/TWX/FAX/mailgram within 24 hours of receipt of this transmission; otherwise, the terms and conditions indicated herein shall be considered binding on both parties.

Please refer to Allegheny's contract number on any future correspondence.

Regards,
Allegheny Petroleum Corporation"

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

As noted in Finding of Fact "3," Anthony Petroleum agreed to pay all taxes due on motor fuel shipments reported by petitioner, as a distributor, by the 15th of the month following the month in which the fuel was shipped to Anthony Petroleum. However, Anthony Petroleum failed to pay such taxes on petitioner's shipments in November 1992, and petitioner filed tax returns for such month which reflected such failure. Attached to the stipulation as Exhibit "D" are photocopies of the November tax returns: Forms FT-945/1045, Report of Sales Tax Prepayment on Motor Fuel/Diesel Motor Fuel, PT-101, Tax on Motor Fuels, and PT-100, Petroleum Business Tax Return, each form dated December 17, 1992. Also included is a

photocopy of Part II - "Direct Shipments to Customers in this State" of Form PT-101.2.⁶

Petitioner reported 21 direct shipments to customers in New York for November 1992, including 19 to Anthony Petroleum and 2 to an entity named Ampetrol Inc. on Part II of Form PT-101.2, which are shown in chart form on Appendix B.

On its Form PT-101, Tax on Motor Fuels, for November 1992, petitioner computed its tax liabilities under Tax Law Articles 12-A and 13-A based upon its shipments of 630,314 gallons of motor fuel to Ampetrol, Inc. only (items "7" and "8" noted on its PT-101.2 for November 1992 detailed in Appendix "B", i.e., 211,269 gallons + 419,045 gallons = 630,314). Consequently, petitioner reported on its Form PT-101, Tax on Motor Fuels, for November 1992, New York State motor fuel excise tax due under Article 12-A of \$50,425.12 (630,314 gallons x \$0.08), an Article 13-A motor fuel component tax of \$93,538.60 (630,314 gallons x \$.1484) and an Article 13-A petroleum testing fee of \$315.16 (630,314 gallons x \$0.0005).⁷ Petitioner then transferred these amounts of tax due to its PT-100, Petroleum Business Tax Return, for November 1992 showing a total amount due of \$144,278.88 (\$50,425.12 + \$93,538.60 + \$315.16).

On its Form FT-945/1045, Report of Sales Tax Prepayment on Motor Fuel/Diesel Motor Fuel, for November 1992, petitioner also computed its sales tax prepayment due of \$51,685.75 based upon its shipment of 630,314 gallons of motor fuel to Ampetrol, Inc.

We modify finding of fact "16" of the Administrative Law Judge's determination to read as follows:

Petitioner's petroleum business tax return for November 1992, as well as the sales tax prepayment report, referenced an attached letter dated December 18, 1992 of attorney Frederick J. Martin. Mr. Martin explained,

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We modified finding of fact "12" of the Administrative Law Judge's determination in order to delete reference to Attorney Martin's letter.

⁷At the bottom of the Form PT-101.2, the instructions direct the taxpayer to enter the total gallonage on the Form PT-101 (which, as noted in Appendix "B," was 10,279,856 gallons). The letter of attorney Martin detailed in Finding of Fact "16" explained petitioner's failure to follow this instruction.

in relevant part, as follows why petitioner did not pay tax on the shipments to Anthony Petroleum which it had reported on the PT-101.2 (as detailed in Finding of Fact "10"):

"Allegheny is in the business of purchasing bulk surplus gasoline and reselling the same to another wholesaler (in this case Anthony Petroleum, Inc., a New Jersey Corporation with an office at 2004 Newbridge Road, Bellmore, New York 11710). We are advised that product is delivered F.O.B. New Jersey and shipped in purchaser's barges or vehicles at purchaser's cost, into New York.

* * *

"Since the inception of its business with Anthony Petroleum Inc., in or about the end of January 1992, Allegheny has regularly collected from Anthony all appropriate excise and sales taxes, in arrears, and paid the same timely to the New York State Department of Taxation and Finance.

"Pursuant to a financing arrangement between Allegheny and Anthony, Anthony is permitted to retain the New York State sales tax until the 15th day of the month following delivery. Since the inception of this agreement between Allegheny and Anthony, Anthony has always paid promptly to Allegheny and Allegheny has remitted timely to the tax authorities.

"In late November of this year, the U.S. Attorney and the F.B.I. seized and froze the bank accounts of a number of companies, Anthony included. Anthony currently owes approximately \$3,000,000.00 to Allegheny under the financing agreement and, as of the 20th of this month, Allegheny will be unable to pay the sales tax due to New York State unless Anthony is permitted to pay Allegheny. Anthony has indicated a willingness to make a partial assignment or other arrangement for payment to Allegheny, if the U.S. Attorney's Office will permit. An application has been made to that office but no response has been received as yet.

"Allegheny is entirely unaware of the reasons for or the nature of the investigation in which the U.S. Attorney seized the assets and froze the accounts of various companies including Anthony. Allegheny is no part of this investigation nor has it had any communications regarding the investigation other than from Anthony. Allegheny is an injured innocent bystander.

* * *

"Even though Allegheny has acted as a conduit for the payment of the New York Sales Tax, it is clear that Allegheny is not liable for the prepaid sales tax or excise tax under the New York Sales and Compensating Use Tax Law and the Tax on Gasoline and Similar Motor Fuel. Since both statutes have similar provisions, reference will be made only to the Sales Tax provisions.

"Section 1102(a)(1) of the Sales Tax Law stated that a distributor of motor fuel must pay a prepaid sales tax on each gallon of motor fuel which it (i) imports or causes to be imported into New York for use, distribution or storage or sale in New York, or (ii) produces, refines, manufactures or compounds in New York. Allegheny does not produce, refine, manufacture or compound motor fuel in New York State or in any other place in the United States. Thus, Allegheny is liable for the prepaid sales tax (and the excise tax) only if it imports or causes to be imported motor fuel into New York.

"The Regulations promulgated under Section 1102 define what constitutes importing motor fuel into New York. In particular, Regulation §561.2(c) states as follows:

A person imports motor fuel or causes it to be imported into this State (i) if such person has ownership of motor fuel at the time the fuel enters New York State's jurisdiction or at any time thereafter up to and including the off-loading of such fuel; (ii) if such person directs or controls importation of motor fuel into New York State; or (iii) if such person purchases motor fuel located outside New York State for delivery into New York State from a seller who is not a registered distributor in New York State under Article 12-A of the Tax Law.

"Under the contractual arrangement between Allegheny and Anthony, the ownership of the motor fuel passed from Allegheny to Anthony at the point where the gasoline was delivered to Anthony. The occurrence of that event has always been at various locations in New Jersey. Allegheny never owned the gasoline when it entered the jurisdiction of New York State Allegheny completed its part of the transaction with Anthony in New Jersey. All risk of loss after the gasoline was delivered to Anthony in New Jersey was borne by Anthony.

"The contractual arrangement between Allegheny and Anthony is analogous to the facts of Example three in Regulation §561.2(c)(2). In that example, D (Anthony) contracts with E (Allegheny), a New York registered distributor under Article 12-A, for the purchase of motor fuel located outside the State (New Jersey). D takes delivery at E's terminal outside the State. (Likewise, Anthony took delivery in New Jersey.) D arranges for the transportation from E's premises to its New York terminal. (Likewise, Anthony arranged for transportation into New York.) D (Anthony) is the importer. E (Allegheny) is not the importer because ownership passed to D (Anthony) at the point of delivery in New Jersey.

"The facts clearly show that Allegheny did not direct or control importation of gasoline into New York. In contrast, the facts show that Anthony performed all the acts necessary to import gasoline into New York. In particular, Anthony placed at least 95% of the orders with out-of-state suppliers, Anthony arranged for all transportation into New York State, Anthony transmitted all funds for the purpose of the gasoline to Allegheny who, in turn, transmitted them to the sellers of

the gasoline (i.e., Allegheny did not use its funds to pay for the gasoline), and the arrangements between Anthony and Allegheny were at arms-length (i.e., Anthony and Allegheny are not related companies). Thus, Allegheny did not direct or control the importation of gasoline into New York State.

"Finally, Allegheny did not purchase gasoline out-of-state for delivery into New York State. By the time that the offloading of gasoline commenced in New York, Anthony was already the owner of the gasoline" ⁸

According to the stipulation of the parties at paragraph "18", the Division, by a letter dated February 4, 1993 (which petitioner included in its petition), questioned "the difference between the tax return and the total volumes reported on . . . Form PT-101.2."

Petitioner responded by another letter of attorney Martin, dated February 19, 1993, which transmitted an additional copy of his letter dated December 18, 1992. Mr. Martin also enclosed (i) a copy of the so-called "Reciprocal Financing Agreement" dated January 31, 1992, as detailed in Finding of Fact "3", and (ii) copies of 19 "contracts" between petitioner and Anthony Petroleum for the respective shipments of gasoline included on the November tax returns, as detailed in Appendix B, and 19 "invoices". Mr. Martin emphasized that the purchase and sales agreements provided that title and risk of loss passed to Anthony Petroleum in New Jersey, in the language of the agreements, at "loading port as the oil passes the intake flange of the vessel/barge or at the time of book, stock or inventory transfer." Attorney Martin interpreted the latter phrase as covering "instances of pipeline delivery where the transfer is evidenced by the meter reading at the point at which the product is first introduced into the pipeline system."

The 19 invoices were on petitioner's letterhead and were addressed to Anthony Petroleum. The invoice in the largest amount was one for a "total invoice amount" of \$630,619.63, ⁹ and, as a representative sample, provided the following information:

"Mode: Barge Hygrade 24

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We modified finding of fact "16" of the Administrative Law Judge's determination in order to delete the reference to finding of fact "12."

⁹This particular invoice was a "revised" invoice, which was not explained in the record.

Load: 11/03/92 - GATX, Carteret, N.J.
Disch.: 11/04/92 - Commander, Oyster Bay, N.Y.
Product: Unleaded Regular: 418,530 gals/ 9,965.00 bbls
Unleaded Premium: 210,053 gals/ 5,001.25 bbls
Total: 628,583 14,966.25
Price UR: \$.6711/gallon . . . \$280,875.48
Price UP: \$.7311/gallon . . . \$153,569.38
Product Total \$434,444.86
NY State Sales Tax \$0.0820./gal 51,543.81
NY State Motor Fuel Tax . . \$0.0805./gal 50,600.93
NY Gross Receipts Tax . . . \$0.1484./gal 93,281.72
Vapor Recovery Fee \$0.05./bbl 748.31
Total Invoice Amount \$630,619.63
Prepaid to Allegheny Petroleum 440,000.00
Amount Due Allegheny Petroleum \$190,619.63
Payment: Via Federal Wire Funds Transfer
To: National Westminster Bank USA
ABA (Routing) #021000322
Credit Funds to: National Westminster Bank
Account: Allegheny Petroleum Corporation
Account #: 2056609015

"The seller certifies that both the motor fuel tax and prepaid sales tax required to be paid for the motor fuel shown on this

document have been or will be paid by the seller or it's [sic] supplier

"Title passes at load port
Quantity and quality based on loaded inspections
Allegheny Petroleum - M2690"

The invoices that reflect delivery by pipeline include similar provisions, except for the provisions concerning the delivery. For example, an invoice dated November 6, 1992 in the "total invoice amount" of \$435,712.15 provided the following delivery information:

"Mode: Buckeye Pipe Line
Batch No.: 359-333-6523
Deliver: 10/23/92 - 5,271 bbls M & Q Terminal, Brooklyn, NY
10/26/92 - 4,004 bbls M & Q Terminal, Bklyn, NY
11/02/92 - 739 bbls M & Q Terminal, Bklyn, NY."

In addition, motor fuel shipped by pipeline in lieu of a "vapor recovery fee", as imposed on the shipment by barge as noted above, imposed the following fees:

"Terminal Spill Tax . . M & Q . . \$0.0825/bbl \$826.16
Terminal Thruput Chg. . M & Q . . \$0.63/bbl 6,308.82
Pipe Line Tariff. \$0.298/bbl 2,984.17"

In his letter of February 19, 1993, attorney Martin minimized his client's role:

"Allegheny's role in these series of transactions has been far less substantive than one would glean from a review of some of the documents. For a fixed fee of \$.006 per gallon, Allegheny offered its services as a financing agent for Anthony's motor fuel business. Allegheny had no established relationship with either Anthony's suppliers (Texport; Northville; BP) or customers for motor fuel in the New York area, and it evidently had no wish to compete for Anthony's business (see the Reciprocal Financing Agreement wherein Allegheny pledged not to deal with anyone other than Anthony). Allegheny's purchases of product were done solely and exclusively as Anthony directed, and Anthony took all risks and costs associated with the transactions

"If it can be said at all that Allegheny was a principal in the ownership, custody or control of the product, it certainly ceased upon the sale to Anthony in New Jersey

"Any services performed by Allegheny following the sale to Anthony in New Jersey were done strictly as Anthony's financing agent No activity was conducted by Allegheny in its own right or for its own account, as it had no substantive interest in the transaction."

The Division, by its Fuel, Alcohol, Cigarette and Carrier Tax Section (F.A.C.C.T.S.) of the Transaction and Transfer Tax Bureau (T.T.T.B.), responded to attorney Martin's letter of February 19, 1993 with the issuance of three notices and demands for payment of tax, each dated March 8, 1993 (Exhibit "F" to the stipulation). One notice asserted tax due under Article 13-A of \$1,431,992.03, plus penalty and interest, based upon a desk audit of petitioner's PT-100, Petroleum Business Tax Return, for the period November 1992. The second asserted tax due under Article 12-A of \$776,788.13, plus penalty and interest, similarly based upon a desk audit of the same PT-100 for November 1992. Finally, the third notice asserted prepaid sales tax due under Articles 28 and 29 of \$791,262.44, plus penalty and interest, based upon a desk audit of petitioner's FT-945/1045, Report of Sales Tax Prepayment on Motor Fuel/Diesel Motor Fuel Return, for November 1992.

By a letter dated March 16, 1993 (Exhibit "G" to the stipulation), attorney Martin responded to the notices and demands by enclosing copies of his earlier letter dated February 19, 1993 (detailed in Finding of Fact "18"), as well as his initial letter dated December 18, 1992 which he had attached to the tax return at issue (quoted at length in Finding of Fact "16"). He repeated petitioner's position that Anthony Petroleum "is the party responsible for the payment of taxes referred to in the Notices."

Division Negotiates Petitioner's Letter of Credit

Pursuant to the "Reciprocal Financing Agreement" detailed in Finding of Fact "3", Anthony Petroleum provided petitioner with the collateral necessary to obtain a letter of credit so that, in the words of the stipulation at paragraph "5", "the effectiveness of the Petitioner's license" could be "secure[d]". In March 1992, a letter of credit in the face amount of \$600,000.00 was issued in favor of the Division by ABN Amro Bank N.V. The Division negotiated this letter of credit on or about March 9, 1993 crediting \$600,000.00 against sales tax owing of \$791,262.44.¹⁰

The Division also sought to collect tax against petitioner by the issuance of two warrants (photocopies of the warrants are attached to the stipulation as Exhibit "H"). One warrant (ID# E-004795814-W001-6), dated April 1, 1993, showing sales tax due under Articles 28 and 29 for the period ending November 30, 1992 of \$192,840.17,¹¹ plus penalty and interest, was docketed in the office of the Albany County Clerk on April 8, 1993. The second warrant dated April 14, 1993 (which is in a different form than the first warrant and does not reference a warrant ID number) showed tax due under Article 13-A¹² consisting of two assessments for the period ending November 30, 1992 of \$776,788.13, plus penalty and interest, and of \$1,431,992.03,

¹⁰According to the affirmation dated June 7, 1994 of attorney DeWitt:

"[s]ince Allegheny did not replace the security required to be maintained in order for it to continue to be registered as a distributor of motor fuel, Allegheny's license as a distributor of motor fuel was revoked."

Mr. DeWitt noted further that petitioner has challenged the revocation of its license in a separate matter before the Division of Tax Appeals (DTA No. 811905).

¹¹As noted in Finding of Fact "21," the Division issued a notice and demand asserting prepaid sales tax due under Articles 28 and 29 of \$791,262.44. As noted in Finding of Fact "23," the Division negotiated the letter of credit in the amount of \$600,000.00 and applied it against sales tax asserted due of \$791,262.44. There is no explanation in the record why the warrant was in the amount of \$192,840.17 instead of \$191,262.44 (\$791,262.44 less \$600,000.00).

¹²As noted in Finding of Fact "21," the sum of \$1,431,992.03 represented tax asserted as due under Article 13-A, and the second amount of \$776,788.13 represented tax asserted as due under Article 12-A. Besides failing to reference Article 12-A, this warrant also incorrectly reversed information under the columns for "taxable period ending" and "assessment number."

plus penalty and interest, and was docketed in the office of the Albany County Clerk on April 19, 1993.

In response to the issuance of the warrant dated April 8, 1993 for unpaid sales tax, petitioner, by its attorney, Frederick J. Martin, wrote to James W. Wetzler, then-Commissioner of Taxation and Finance, in a letter dated May 5, 1993 (attached to the stipulation as Exhibit "I") protesting the issuance of the warrant without "an opportunity to present [petitioner's] reasons for disagreement with the amount of tax assertedly owing at an administrative hearing."

Michael Kalin, Tax Compliance Manager I, in a letter dated May 19, 1993 (attached to the stipulation as Exhibit "J"), responded to this letter of Mr. Martin which requested an administrative hearing. Mr. Kalin advised attorney Martin that taxes asserted as due by the Division resulted from a "liability [that] was self-assessed by the filing of a return reporting the importation of product subject to sales, motor fuel, and petroleum business taxes." According to Mr. Kalin, the tax return constituted the assessment and since "the liability [did] not arise under section 1138 [, no] administrative hearing right was created."

Related Litigation

On August 9, 1993, petitioner filed an Order to Show Cause asking the Supreme Court (Albany County) to vacate and annul (i) the notices and demands and (ii) the warrants on the basis that a notice of determination had not been given to petitioner and an administrative hearing on the validity of the taxes asserted as due was not provided. The warrant filed on April 8, 1993 under Articles 28 and 29 was vacated pursuant to an order issued August 12, 1993 by the Honorable John Turner, Supreme Court (Albany County). However, Honorable Edward S. Conway, Supreme Court (Albany County) refused to vacate the April 19, 1993 warrant pursuant to his order issued November 23, 1993. (A photocopy of Judge Conway's order was attached to the stipulation as Exhibit "K".) Judge Conway decided that the Division's determination that motor fuel and petroleum business taxes were due under Articles 12-A and 13-A had a "rational basis", and he dismissed petitioner's petition to vacate and annul the warrant dated April 19, 1993 and to obtain an administrative hearing. Petitioner has appealed

this decision. It is observed that the Tax Appeals Tribunal was a named respondent (along with Commissioner Wetzler and the Department of Taxation and Finance) in the proceeding before Judge Conway. Furthermore, it is observed that Judge Conway concurred with the Division's argument that petitioner's tax liability under Articles 12-A and 13-A was self-assessed by its filing of the applicable tax return:

"Here, respondents never challenged the sufficiency or the correctness of petitioner's tax return. Petitioner's return set forth all of the necessary information."

Other Miscellaneous Documents Submitted by the Division

The Division submitted into the record an undated form letter from Doris Richardson, Principal Audit Account Clerk of the Motor Fuel Section of the New Jersey Division of Taxation, to the Division's auditor which enclosed copies of New Jersey Motor Fuel Tax Reports, Schedules 10 and 10A for Texport Oil. These schedules show that Texport Oil Company made 17 shipments of gasoline totalling 7,103,928 gallons during the month of November 1992, which were "sales for export outside this State [New Jersey] to the State of New York, where petitioner was listed as the entity to which such shipments were 'sold to'."¹³

The Division also submitted into the record documents obtained from two transporters of gasoline. A cover letter dated March 9, 1993 from Spentonbush/Red Star Companies transmitted a "Uniform Manifest for Interstate Importation/Movement of Automotive Fuel for New York State importing transporter, Spentonbush/Redstar", and its original Diesel Motor Fuel and Motor Fuel Transporter's Monthly Report for November 1992. The manifest shows a shipment of gasoline loaded on November 3, 1992 onto a barge which then departed on November 4, 1992 from Carteret, New Jersey and made delivery on November 5, 1992 in Oyster Bay, New York. Petitioner was shown as the distributor for such gasoline and as the owner of the gasoline after loading. However, Anthony Petroleum was shown as the firm ordering transportation. The monthly report shows delivery to petitioner in New York as well as listing petitioner as the distributor for such gasoline. A similar monthly report for November

¹³The record provides no explanation why Appendix "B" shows only 14 shipments by Texport Oil instead of 17.

1992 of Ekloff Marine Corp. (a second transporter) shows petitioner as the distributor for four shipments of gasoline in November 1992, but identifies Anthony Petroleum as the "owner after fuel is loaded." It is unexplained why the corresponding manifests for interstate movement of the gasoline shows Ampetrol, Inc. ordering transportation of the gasoline in one instance and Anthony Petroleum in the three other instances (and not in all four instances which would correspond with the monthly report). In all four instances, petitioner was shown as the "owner of automotive fuel after loading" on the manifests.

OPINION

The Administrative Law Judge found that the order of the Supreme Court, Albany County, was entitled to res judicata treatment vis-a-vis the issues of Articles 12-A and 13-A taxes for motor fuel and petroleum business taxes, respectively. The Administrative Law Judge said that since the Judge had decided that the Division had a "rational basis" for its determination that motor fuel and petroleum business taxes were due from petitioner, petitioner was barred from contesting the Division's issuance of notices and demands for motor fuel tax and petroleum business tax in the administrative proceeding before the Division of Tax Appeals. As the Administrative Law Judge stated in his determination:

"In short, petitioner previously litigated the Division's authority to proceed against it by the issuance of notices and demands, and to attempt to collect such taxes by issuance of a warrant. As a result, Judge Conway's decision is res judicata to such issues [citation omitted]. Petitioner's remedy is to perfect the appeal of Judge Conway's order noted in Finding of Fact '27'" (Determination, conclusion of law "A").

Although not raised by the parties, the Administrative Law Judge noted that Matter of Chamberlin (Tax Appeals Tribunal, January 30, 1992) stated that an Administrative Law Judge could address relevant legal grounds affecting a matter's resolution even though the parties had not.

Petitioner argues that the Article 78 proceeding commenced by petitioner alleged that a hearing on the issue of the underlying liability for the taxes in question must be held before warrants issued by the Division could be enforced and that no issue concerning the liability of

petitioner for the taxes in question was raised in the Article 78 action. Petitioner conceded that the order of Justice Conway is currently on appeal to the Appellate Division, Third Department.

The Division pointed out that one of the items of relief sought by petitioner in its Order to Show Cause was an order "directing that respondents provide petitioner with an administrative hearing currently pending on the docket (DTA # 812126) of the New York State Division of Tax Appeals" (Division's brief in support, p. 19). The Division argues that since Justice Conway specifically denied this relief and denied petitioner a hearing, the issue is precluded by the doctrine of collateral estoppel. Further, the Division contends that were the Division of Tax Appeals to find a hearing justified herein, it may well find itself contradicting the Appellate Division, the forum to which petitioner has appealed Justice Conway's decision.

In its reply brief, petitioner argued that the case of Matter of Meyers v. Tax Appeals Tribunal (201 AD2d 185, 615 NYS2d 90, lv denied 84 NY2d 810, 621 NYS2d 519), which was decided since Justice Conway's order was issued, governs the instant case and that based on the same rationale it is entitled to a hearing. Petitioner urges that Meyers constitutes a significant change in applicable legal principles and renders collateral estoppel inappropriate in the instant matter, citing Matter of Group Health v. Tax Commn. of City of New York (93 AD2d 730, 461 NYS2d 28). Further, petitioner argues that issues arising in the context of an Article 78 proceeding are rarely given collateral effect due to the limited scope of those proceedings, citing Acevedo v. Brown (195 AD2d 164, 606 NYS2d 691, lv denied 84 NY2d 801, 617 NYS2d 135).

The Division argues that Meyers is distinguishable because the amount of tax due herein was not as stated by petitioner on the returns but was determined from information supplied on the returns. Petitioner miscalculated the taxes due for motor fuel and petroleum business taxes. This argument is obviated by our decision in the issue below.

It cannot be said that the issue of whether petitioner is entitled to a hearing, conceded by petitioner to be in issue before Justice Conway and now on appeal to the Appellate Division, is not in issue herein. An issue involving subject matter jurisdiction is always existent in these matters and may be raised by the Administrative Law Judge, on his own motion, sua sponte

(Matter of Scharff, Tax Appeals Tribunal, October 4, 1990, annulled on other grounds sub nom. New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal, 151 Misc 2d 326, 573 NYS2d 140; United States v. Wright, 658 F Supp 1, 86-1 USTC ¶ 9457).

The Administrative Law Judge noted that Justice Conway had decided that the Division had a "rational basis" for its determination that motor fuel and petroleum business taxes were due from petitioner under Articles 12-A and 13-A and that the order was, therefore, entitled to res judicata treatment. The Administrative Law Judge found that petitioner previously litigated the Division's authority to proceed against it by the issuance of notices and demands and to attempt to collect such taxes by issuance of a warrant. The Administrative Law Judge concluded that petitioner's remedy was to perfect the appeal of Justice Conway's order.

We agree with the determination of the Administrative Law Judge on the issue of whether the principle of res judicata should be applicable herein. Petitioner filed a petition for a hearing in the Division of Tax Appeals on June 7, 1993. Before the case could be scheduled for hearing, petitioner moved for an order to show cause in the Supreme Court, Albany County, in an Article 78 proceeding, seeking to vacate and annul the three notices and demands in issue; having any levy and potential execution on the warrants declared ineffective, since the warrants on which they were issued were null and void; and directing that petitioner be provided with an administrative hearing in the Division of Tax Appeals. Justice Conway dismissed the petition in its entirety and, based upon the record before him, ruled that the Division never challenged the sufficiency or the correctness of petitioner's motor fuel and petroleum tax returns, that said returns set forth all of the necessary information and, as such, were self-assessing. Also, Judge Conway held that the Division's "determination" had a rational basis and dismissed the petition.

The doctrine of res judicata requires a final judgment on the merits. In New York, an order entered on a motion is ordinarily entitled to the same res judicata treatment that a judgment gets, as long as the other requirements are met, like finality, opportunity to contest, and identity of issue (Siegel, NY Prac § 445, at 676 [2d ed]). The scope of Judge Conway's order leaves little doubt that the Judge meant to allow the Division to execute on the warrants,

that the warrants were grounded in valid and rational determinations and that the need for a hearing, specifically sought in the petition, was obviated by his decision.

The parties to that order, including the New York State Tax Appeals Tribunal, must abide by the Judge's decision and await the outcome of petitioner's appeal, as indicated by the Administrative Law Judge below.

Petitioner argued in its reply brief that the Division of Tax Appeals had already taken jurisdiction of the matter because it had filed a petition with the agency prior to making its application for the declaratory judgment, even though no hearing had been scheduled. However, it also realized that there was a possibility that the Division was going to execute on the warrants and that it may never get a chance to exhaust its administrative remedies. By motioning for declaratory judgment in the Supreme Court, petitioner chose to take the matter out of the administrative process and seek the protection of the Court, protection it did not receive, and also gain the time to pursue its remedy on the administrative level. Judge Conway's order effectively precluded this. If, as petitioner argues, Judge Conway did not deal with the merits of the case and effectively precluded petitioner from addressing the merits, that is an issue to be argued on appeal to the Appellate Division, by which this agency is bound.

Petitioner correctly noted that the Appellate Division decision in Matter of Meyers v. Tax Appeals Tribunal (*supra*), and subsequently discussed by the Tribunal in Matter of Jaffe (Tax Appeals Tribunal, September 21, 1995), recognized a taxpayer's right to a hearing where the right to a hearing is not specifically provided for, modified or denied by another provision of the Tax Law. It would appear that, had petitioner not instituted its declaratory judgment action, it may have been entitled to a hearing (Matter of Meyers v. Tax Appeals Tribunal, *supra*). However, petitioner's election to proceed through the courts and not the administrative forum prohibits it from demanding a hearing now while still litigating the issue in the courts. Although Meyers indicates a significant development in applicable legal principals (*see*, Matter of Group Health v. Tax Commn. of City of New York, *supra*), it is a question for the Appellate Division on appeal, not this Tribunal.

Although it has been found that the issues relating to motor fuel and petroleum business taxes have been disposed of by Justice Conway's order, if the Appellate Division finds that petitioner merits a hearing on issues relating to those taxes, the remainder of this decision will address all three taxes in issue, to wit: motor fuel, petroleum business and sales.

The Administrative Law Judge noted that petitioner was a distributor of motor fuel and that it filed returns as such for the period in issue. However, the Administrative Law Judge found that petitioner's arrangement with Anthony Petroleum was "carefully crafted" to avoid the taxes in issue should the financing agreement be breached. The Administrative Law Judge held that petitioner's regulatory analysis established that it was not subject to tax because the person owning motor fuel prior to the person owning it at the time off-loading is commenced is not liable for the tax (20 NYCRR 561.2[c][1]; 20 NYCRR 410.2[c][3]). The Administrative Law Judge held that the off-loading transaction is controlling and that the person who owns the fuel at that time or any person who is directing or controlling the off-loading transaction is liable for the tax. Since the purchase and sale contracts between Anthony Petroleum and petitioner purported to shift title and risk of loss to the motor fuel in New Jersey, the Administrative Law Judge found this Tribunal's decision in Matter of Harbor Petroleum Corp. (Tax Appeals Tribunal, September 21, 1989) distinguishable. In Harbor Petroleum, the contracts involved were destination contracts which, under the Uniform Commercial Code ("UCC"), were interpreted to mean that title did not pass until the fuel was delivered to New York State (UCC 2-503, comment 5). Herein, the contracts specifically provided that title and risk of loss passed in New Jersey. However, the facts indicated that petitioner was not acting consistent with the contract terms, but delivering the product to New York.

Having accepted petitioner's arrangement with Anthony Petroleum as valid and not technically within the taxing authority of New York State, the Administrative Law Judge then held that the entire arrangement did not shield petitioner from tax liability because it chose to act as a New York distributor and, therefore, it was the "importer" of the 9,649,542 gallons of motor fuel into New York in November of 1992, using its status as a registered distributor to

allow Anthony Petroleum, an unregistered distributor, to move motor fuel into the State. The Administrative Law Judge found that petitioner could not accept the benefits of its registration as a distributor and then deny its status as such (citing Matter of General Oil Distribs., Tax Appeals Tribunal, March 14, 1991).

Petitioner argues that its regulatory argument as outlined in the Administrative Law Judge's determination is correct and dispositive of the issue of liability for the taxes in issue. We do not agree.

Tax Law §§ 284(1), 301-a(b) and 1102 each imposes tax (motor fuel, petroleum business and sales) based upon motor fuel "imported or caused to be imported into the State." The term "distributor" is defined in Tax Law § 282(1)(a) as a person who imports or causes to be imported into the State, for use, distribution, storage or sale within the State, any motor fuel. There is no dispute that petitioner was a registered distributor of motor fuel during the period in issue. With this designation comes a responsibility, the gravity of which is easily grasped from a reading of Tax Law § 283 and the regulations at 20 NYCRR Part 411, describing the registration of distributors and bonding requirements. Petitioner, having applied for and received distributor status, was aware of its duties and obligations to the State of New York as a distributor of motor fuel, a person importing or causing to be imported motor fuel into this State. It was aware of the regulations which instructed it to file a return of tax on motor fuel each month, disclosing how many gallons of motor fuel it imported or caused to be imported into this state during the preceding month and the requirement that it would have to execute a certification to the effect that the statements in the return were true, correct and complete (see, 20 NYCRR 413.1). The regulations also state that every distributor of motor fuel must pay the tax imposed by Article 12-A with the filing of the return on each gallon of motor fuel imported or caused to be imported into the State (see, 20 NYCRR 413.2). Petitioner entered into its contracts and financing agreement with Anthony Petroleum with full awareness of its obligations and duties as a New York registered distributor of motor fuel. It was fully cognizant that only it could convince a transporter to move the product from New Jersey into New York

State and that in so doing, and in its financing of the purchase, controlled the importation of motor fuel into New York State (see, 20 NYCRR 410.2[c][1][ii]). Petitioner's allegation that Anthony Petroleum told it how to ship the product, i.e., by barge or pipeline, and paid for the transportation, in no way diminished petitioner's control over the motor fuel brought into New York under its name.

The regulations at 20 NYCRR 410.2(c) defines a person who "imports or causes to be imported" motor fuel into the State as one who directs or controls the importation of motor fuel into New York State (20 NYCRR 410.2[c][1][ii]). The same regulation also states that:

"more than one party in any particular importation transaction may have imported motor fuel or caused it to be imported. The act of importation encompasses the acts of all the parties to any New York sale commencing with the bringing of motor fuel into New York State and continuing to the offloading of such fuel at or into any terminal, facility or land-sited repository for use, distribution, storage or sale in this State" (20 NYCRR 410.2[c][1][iii]).

The regulation recognizes that ownership of the motor fuel is not strictly limited to title, risk of loss and possession, three factors present in the contracts between petitioner and Anthony Petroleum and relied upon by petitioner to demonstrate that it transferred the motor fuel to Anthony Petroleum outside of New York State and beyond the jurisdiction of New York's taxing authority. In fact, the regulation places great significance on factors such as control, and although ownership vests in the buyer when the seller completes his performance under the sales contract with respect to physical delivery, it is the totality of the circumstances of the importation transaction which must be analyzed in determining whether one is actually importing or causing the importing of motor fuel (20 NYCRR 410.2[c]). An analysis of the circumstances in this matter belie the language of petitioner's contracts. Certified statements in its tax returns, manifests from transporters and Anthony Petroleum's status as an unregistered distributor weigh heavily against petitioner's characterization of the facts.

Petitioner argues that the sales contracts and financing agreement between Anthony Petroleum and itself were clear in their terms and that it merely sold and delivered motor fuel to Anthony Petroleum in New Jersey, with Anthony Petroleum arranging for the purchase and

transportation of the fuel into New York. Petitioner argues that there is no difference between its situation and "Example 2" set forth in 20 NYCRR 410.2(c)(2)(v), where a person contracted to purchase motor fuel from a registered New York distributor outside of New York State and took delivery at said distributor's terminal outside of the State and arranged for transportation of the product into the State. The example stated that the purchaser had imported or caused motor fuel to be imported into the State. However, the instant situation is distinguishable by the facts that petitioner dealt directly with the transporters to import the motor fuel into New York and then informed New York that it had in fact imported the motor fuel and paid the motor fuel, petroleum business and sales taxes due thereon. Those facts do not appear in the example cited by petitioner and it is presumed a different result would have obtained had they been present.

Petitioner claims that Anthony Petroleum paid for the transportation of motor fuel into the State and told petitioner how it wanted the product shipped. There is nothing in the record indicating Anthony Petroleum paid or contracted with transporters directly. The fact that it specified a mode of transport does not diminish petitioner's control over the importation of the motor fuel into this state. Consider the regulations which govern transporters of motor fuel. Where motor fuel is being transported for importation for use, distribution, storage or sale in New York, as it was herein, the transporter was mandated to keep a record of the name and address of the distributor which imported the motor fuel or caused it to be imported and the distributor's motor fuel registration number (20 NYCRR 417.1[a][9]). Transporters were mandated to keep manifests containing the name of the person importing or causing fuel to be imported and that said name must be on the current listing of registered distributors prepared by the Division (20 NYCRR 417.2[c]). In addition to making a uniform manifest, the transporter has the responsibility, where motor fuel is being imported for use, distribution, storage or sale in the State, to verify that the name of the person importing or causing such motor fuel to be imported is listed as a registered distributor of motor fuel on the current listing prepared by the Division (20 NYCRR 417.3[b]).

Distributors who failed to comply with these regulations were subject to severe penalties.

The regulation at 20 NYCRR 417.3(b) states, in pertinent part, as follows:

"The transporter is presumed to have knowingly aided and abetted a person who is not registered as a distributor of motor fuel in the importation of motor fuel for the purpose of license cancellation or suspension under section 283-a(4)(iii) of the Tax Law if the name of the person is not so listed. Aside from other sanctions, the importation of motor fuel by other than a registered distributor subjects such motor fuel and the vehicle or other means of transportation used to transport such motor fuel to seizure and forfeiture under section 1848 of the Tax Law" (20 NYCRR 417.3[b]).

This penalty is repeated in 20 NYCRR 417.6(b)(2)(i)(c), where it is provided that a transporter's license may be canceled or suspended if it is determined that the transporter knowingly aided and abetted a person who is not registered as a distributor, in the importation of motor fuel into the State and also aided and abetted in the distribution of motor fuel imported or caused to be imported into New York, by a person who is not registered as a distributor pursuant to Article 12-A of the Tax Law (Tax Law § 283-a[4], [5]; 20 NYCRR 417.6[b][2][i][d]).

Hence, Buckeye, Ekloff Marine and Spentonbush/Redstar, transporters carrying the product described in the contracts between Anthony Petroleum and petitioner during November 1992, as shown in their manifests and documentation, knew the registered distributor with whom they were dealing and understood who it was that was importing or causing to be imported into the state the motor fuel they were transporting. They each listed petitioner and its registration number on their manifests as the shipper of the fuel, and, regardless of who may have paid for the fuel, it was the registered distributor that controlled the importation. The transporters knew the ramifications of dealing with an unregistered motor fuel distributor and would never have done so.

For petitioner to argue that it was not acting as a registered distributor importing or causing the importation of motor fuel into this State is disingenuous at best. Without its active participation and control over the transportation, the motor fuel would never have made its way into New York for use or distribution. It clearly exercised control over the product up until the

time it was deposited at the terminal in New York in Anthony Petroleum's account, regardless of the contract language.

The Administrative Law Judge found that petitioner was not subject to tax under the "regulatory formula." The Administrative Law Judge found that the language in 20 NYCRR 561.2(c)(3) (sales tax) and 20 NYCRR 410.2(c)(3) (motor fuel tax), which use virtually identical language, provided that persons owning motor fuel prior to the person owning it at the time off-loading is commenced are not liable for the tax, i.e., the person liable for the tax is the person who owns the fuel at the time of commencement of off-loading. Further, the Judge found that a person who controls or directs the importation of fuel is jointly and severally liable for the taxes (20 NYCRR 412.1[a][2]). However, the Judge did not consider the language of 20 NYCRR 410.2(c) which defines "imports or causes to be imported," which states that "[r]egardless of the indicia of ownership . . . if the circumstances of an importation transaction indicate that a person or persons other than the person indicated as the owner, is directing or controlling the importation of motor fuel, such person or persons directing or controlling the importation is importing motor fuel or causing it to be imported into New York State." The regulation states that indicia of such direction and control include arranging for the transportation of the motor fuel and financing or paying for the purchase and/or transportation of the motor fuel. Petitioner purchased the motor fuel it imported into New York from the third party suppliers and it arranged for the transport of the motor fuel into New York. The facts indicated that petitioner was paid an amount which included the cost of the motor fuel and its commission, less the New York State taxes retained by Anthony Petroleum for purchase of future product. Petitioner purchased the motor fuel for Anthony Petroleum from third parties out-of-state and shipped it to New York under its name. That petitioner and Anthony Petroleum drafted contracts to give the appearance that title and risk of loss passed outside of New York is of no import given the broader scope of the regulations cited above and the facts adduced herein. Petitioner clearly controlled the importation of the motor fuel, using its distributor status to convince transporters to move the product. Consistent with this interpretation of the

facts, petitioner then reported its importation of motor fuel for purposes of the motor fuel, petroleum business and sales taxes. Indeed, petitioner listed its direct shipments to New York State on its forms PT-101.2, Report of Direct Shipments, attached to the Petroleum Business Tax Returns (PT-100's) it filed.

Since petitioner chose to structure its business dealings in this manner, it must bear the consequences. It is well settled that:

"it is the form chosen by the taxpayer which is controlling and the fact that a taxpayer could have chosen a different form which would have had different tax consequences does not convert a taxable transaction into a nontaxable one" (Matter of Chanry Communications, Tax Appeals Tribunal, March 7, 1991, confirmed sub nom Henry v. Wetzler, 183 AD2d 57, 588 NYS2d 924, affd 82 NY2d 859, 609 NYS2d 160, cert denied US ___, 128 L Ed 2d 863; Sverdlow v. Bates, 283 App Div 487, 129 NYS2d 88).

In Matter of 107 Delaware Assocs. v. New York State Tax Commn. (64 NY2d 935, 488 NYS2d 634, revg 99 AD2d 29, 472 NYS2d 467), the Court of Appeals reversed the Appellate Division and reinstated the determination of the Tax Commission and the dissenting opinion of Justice Casey of the Appellate Division. The dissenting opinion of the Appellate Division stated:

"Having elected to conduct their businesses under this format, and having reaped the benefits thereof, the individual petitioners now seek to avoid any disadvantage arising out of the selected format. There is nothing irrational about the Tax Commission's determination which has the effect of binding the taxpayers to the form of business chosen by them (see, e.g., Matter of Ormsby Haulers v. Tully, 72 AD2d 845, 421 NYS2d 701)" (Matter of 107 Delaware Assocs. v. New York State Tax Commn., 99 AD2d 29, 472 NYS2d 467, 470).

Petitioner and Anthony Petroleum carefully engineered their contractual relationship to enable Anthony Petroleum to distribute fuel in New York State. In order to do this, petitioner volunteered the use of its motor fuel distributor's license to import motor fuel into the State. Regardless of the apparent deceitful nature of the relationship, its structure clearly indicates that petitioner was being paid to purchase and import product into New York State, using its status as a registered motor fuel distributor to do so. Its filing of tax returns certifying the importation of motor fuel confirms this interpretation. Petitioner profited mightily from its status as a

registered motor fuel distributor and to allow it to deny its status now and the fact that it used its status to import or cause fuel to be imported into the State would be in error (Matter of General Oil Distribs., supra).

It is befuddling why petitioner, a New York registered distributor, claimed that it merely made out-of-state sales pursuant to destination contracts, purportedly to Anthony Petroleum f.o.b. New Jersey, and had no nexus with New York, yet consistently collected and paid New York taxes between January and October 1992 and claimed to be importing motor fuel into New York on its returns. Petitioner also made no credible arguments, given the shipping documentation of the transporters, that it did not, as the only registered distributor, direct or control the importation transaction and, therefore, bear the burden of the tax imposition (20 NYCRR 412.1[a][2]). As set forth above, petitioner is determined to have imported or caused motor fuel to have been imported as that term is defined in the regulation and is liable for the taxes due on the motor fuel imported during the month of November 1992.

The Administrative Law Judge believed that petitioner and Anthony Petroleum had "concocted a scheme" to deceive the Department of Taxation and Finance. That was very generous. The pattern of conduct exhibited by this petitioner was contrary to the spirit and intent of the very laws and regulations it cited in its own support.

The Memorandum of the State Executive Department, filed with regard to Chapter 44 of the Laws of 1985, stated that the purpose of the bill was to enhance enforcement of the motor fuel and sales and use taxes and to simplify collection requirements. The bill was meant to deter tax evasion and protect State and local revenue. The bill imposed tax on the first sale in the State to eliminate the "daisy chain" schemes where multiple sales of gasoline were made tax free but the taxable event was a sale by an insolvent distributor. Another problem facing the industry which the bill was designed to solve was the importation and sale of motor fuel without payment of appropriate taxes through either nonreporting or faulty reporting. With this first sale collection requirement also came new comprehensive record keeping requirements. All of these objectives appear to be aimed at the spirit of the contracts and financing agreement

created by petitioner and Anthony Petroleum, and the regulations promulgated pursuant to Tax Law §§ 282, 289-c, 1101(b) and 1102(e) need to be interpreted consistent with these objectives.

One need only look to the actual circumstances to come to this conclusion. The January 31, 1992 "Reciprocal Financing Agreement" between petitioner and Anthony Petroleum called for petitioner to pay its supplier for product purchased on behalf of Anthony Petroleum. Anthony Petroleum was to reimburse petitioner for this amount and also a fee of \$0.006 per gallon of product. Petitioner specifically agreed to not collect taxes from Anthony Petroleum so that Anthony Petroleum could use the tax money to finance subsequent purchases of product. In the agreement, both parties stated their understanding that taxes were due to the State of New York by the twentieth of the following month. As a result of this agreement, although not stated therein, petitioner began filing tax returns which set forth its importation of motor fuel into the State, a tax due thereon and payment of that tax, with the exception of the month of November 1992, the period in issue. Only petitioner had the ability to file those returns as a registered distributor.

The purchase and sales contracts were also indicative of petitioner's true role in its relationship with Anthony Petroleum. Although careful to state where title and risk of loss passed, they did not specify who would ship the motor fuel into New York, but it was there between the lines, as was the designation of who would control the product in transit to the New York destination. Having reaped the benefits of its contractual relationship with Anthony Petroleum for the months of January through October, a relationship it specifically structured, petitioner cannot now expect the State of New York to bear the consequences of Anthony Petroleum's alleged breach of the contract between them. Petitioner's duty and obligation as a registered distributor to the State of New York is greater than the transparent language in the purchase and sales contracts with Anthony Petroleum. Petitioner was not a depository bank, merely accepting funds from Anthony Petroleum on behalf of the State. In fact, the financing agreement specifically acknowledged that both petitioner and Anthony Petroleum knew of the responsibility for the taxes and that if the State moved against the letter of credit posted by

petitioner as surety for any tax liability, indicating an understanding of petitioner's distributor status and obligations to the State of New York, Anthony Petroleum promised that it would guarantee repayment to the issuing bank or petitioner. But, said guaranty did not relieve the primary responsibility of petitioner to the State and the financing agreement confirms this.

Since the act which triggers the respective taxes under Articles 12-A, 13-A, 28 and 29 is the importing or causing to import, the fact that it has been found that petitioner did import or cause the motor fuel in issue to be imported, makes petitioner liable for all three taxes.

Petitioner argues that making it subject to the three importation taxes violates the Commerce Clause of the United States Constitution. Petitioner contends that a State tax must be applied to an activity with a substantial nexus with the taxing state, so as not to burden interstate commerce, citing Quill Corp. v. North Dakota (504 US 298). Petitioner believes that it did not deliver fuel into New York, that it sold fuel to Anthony Petroleum in New Jersey and that the Division is trying to assess taxes against petitioner that it is not authorized to do under its own regulations and that it cannot validly assess because petitioner does not have the required nexus with New York State as required by the Commerce Clause. However, as determined above, petitioner was importing or causing motor fuel to be imported into New York by its direction and control of the product and the transaction, through the transporters, to the terminal in New York.

Petitioner's argument that before New York can extend its taxing power to an out-of-state corporation, a presence nexus must exist as well as a transaction nexus with the state (citing Matter of Orvis Co. v. Tax Appeals Tribunal, 86 NY2d 165, 630 NYS2d 680, cert denied ___US___, 133 L Ed 2d 426), fails because of the finding herein that petitioner was importing fuel into New York. Petitioner applied for and was granted New York motor fuel distributor status, imported motor fuel into New York State and then reported its importation of said product, in detail, on its tax returns. Given these circumstances, nexus was established. Petitioner had a very real and substantial presence in New York, conducting business in the State consistent with its registration as a motor fuel distributor, its actions taken to implement

the contractual relationship with Anthony Petroleum and memorialized by its tax returns filed with the Division.

In fact, given the conclusions reached above concerning the transactions between petitioner and Anthony Petroleum and the fact that petitioner directed and controlled the product to its destination in New York, there was nexus with New York. The use of this State by petitioner created the nexus which provided the basis for the imposition of tax (Matter of Harbor Petroleum Corp., supra).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Allegheny Petroleum Corporation is denied;
2. The exception of the Division of Taxation is granted consistent with the reasoning and conclusions of this decision, but in all other respects is denied;
3. The determination of the Administrative Law Judge is affirmed;
4. The petition of Allegheny Petroleum Corporation is denied; and
5. The three notices and demands, dated March 8, 1993, are sustained.

DATED: Troy, New York
January 2, 1997

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

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

APPENDIX A

<u>Date Shipped</u>	<u>Method of Delivery</u>	<u>Name of Transporter¹⁴</u>	<u>Purchased From</u>	<u>Sold To</u>	<u>Point of Shipment</u>	<u>Point of Delivery</u>	<u>Gallons¹⁵</u>
(1) 9/2/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum ¹⁶	Carteret, NJ	Brooklyn, NY	420,000
(2) 9/2/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(3) 9/5/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,084
(4) 9/1/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Bayonne, NJ	Oyster Bay, NY	417,935
(5) 9/1/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	208,827
(6) 9/5/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(7) 9/5-9/92 ¹⁷	Pipeline	Buckeye	Global Petroleum	Anthony Petroleum	Linden, NJ	Brooklyn, NY	420,000
(8) 9/7-12/92	Pipeline	Buckeye	Global Petroleum	Anthony Petroleum	Linden, NJ	Brooklyn, NY	630,000
(9) 9/14/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(10) 9/14/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(11) 9/4/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	598,869
(12) 9/17/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	422,814

14

A Transporter Number was also listed on the report.

15

Gallons were all reported under a column labelled "Column B" for "All Other Gallons." No gallons were listed under a column labelled "Column A" for "Gallons Purchased on Which the Tax has been Passed Through to You."

16

Petitioner also listed an identification number of 22-259-6161 for Anthony Petroleum. The instructions noted that petitioner should:

"Enter 'M' number if purchaser is a registered motor fuel distributor. If not, enter New York State sales tax vendor identification number. If neither of the above is available, enter federal identification number."

17

The record does not reveal why several shipments were reported as taking place over a few days, since the gallonage for such shipments did not vary noticeably from shipments apparently completed on a single day.

(13) 9/16/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(14) 9/10/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	394,908
(15) 9/11/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Linden, NJ	Oyster Bay, NY	209,035
(16) 9/2/92	Pipeline	Buckeye	Global Petroleum	Anthony Petroleum	Linden, NJ	Brooklyn, NY	20,160

APPENDIX A (cont'd.)

<u>Date Shipped</u>	<u>Method of Delivery</u>	<u>Name of Transporter</u>	<u>Purchased From</u>	<u>Sold To</u>	<u>Point of Shipment</u>	<u>Point of Delivery</u>	<u>Gallons</u>
(17) 9/7/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Perth Amboy, NJ	Brooklyn, NY	18,144
(18) 9/16/92	Pipeline	Buckeye	Meridian Resources	Anthony Petroleum	Westville, NJ	Brooklyn, NY	420,000
(19) 9/18-19/92	Pipeline	Buckeye	Coastal Oil	Anthony Petroleum	Westville, NJ	Brooklyn, NY	419,958
(20) 9/16-19/92	Pipeline	Buckeye	Coastal Oil	Anthony Petroleum	Westville, NJ	Brooklyn, NY	420,588
(21) 9/15-16/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	600,540
(22) 9/21-23/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(23) 9/19-28/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(24) 9/23-26/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(25) 9/22/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	605,117
(26) 9/18/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	609,895
(27) 9/26/92	Barge	Ekloff Marine	Texport Oil	Anthony Petroleum	Perth Amboy, NJ	Oyster Bay, NY	126,758
(28) 9/25/92	Barge	Ekloff Marine	Texport Oil	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	499,138
(29) 9/28-30/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(30) 9/30/92	Barge	Ekloff Marine	Texport Oil	Anthony Petroleum	Perth Amboy, NJ	Oyster Bay, NY	615,520
(31) 9/30/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	<u>596,988</u>
						Total	12,875,278

APPENDIX B

<u>Date Shipped</u>	<u>Method of Delivery</u>	<u>Name of Transporter</u>	<u>Purchased From</u>	<u>Sold To</u>	<u>Point of Shipment</u>	<u>Point of Delivery</u>	<u>Gallons</u>
(1) 10/23-11/2	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,588
(2) 11/2/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	630,168
(3) 11/6/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	423,948
(4) 11/4/92	Barge	Red Star	Texport Oil	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	628,583
(5) 11/11/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	621,348
(6) 11/11/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	394,128
(7) 11/7/92	Barge	Eklhoff Marine	Meridian Resources	Ampetrol	Linden, NJ	Inwood, NY	211,269
(8) 11/8/92	Barge	Eklhoff Marine	Meridian Resources	Ampetrol	Bayonne, NJ	Inwood, NY	419,045
(9) 11/11/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(10) 11/16/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,672
(11) 11/11/92	Barge	Eklhoff Marine	Texport Oil	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	630,120
(12) 11/7/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Perth Amboy, NJ	Brooklyn, NY	71,694
(13) 11/16/92	Barge	Eklhoff Marine	Meridian Resources	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	612,311
(14) 11/16/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	630,294
(15) 11/8/92	Barge	Eklhoff Marine	Northville Ind	Anthony Petroleum	Linden, NJ	Oyster Bay, NY	619,417
(16) 11/19/92	Barge	Eklhoff Marine	Texport Oil	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	616,868
(17) 11/20/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	421,260
(18) 11/21/92	Barge	Eklhoff Marine	Texport Oil	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	633,935
(19) 11/25/92	Pipeline	Buckeye	Northville Ind	Anthony Petroleum	Linden, NJ	Brooklyn, NY	422,100
(20) 11/20/92	Pipeline	Buckeye	BP Oil	Anthony Petroleum	Linden, NJ	Brooklyn, NY	402,990
(21) 11/25/92	Pipeline	Buckeye	Northville Ind	Anthony Petroleum	Linden, NJ	Brooklyn, NY	629,118
					Total		10,279,856