STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BARRIER MOTOR FUELS, INC.	:	DECISION DTA NO. 816059
for Review of an Increase in the Amount of Bond or Other Security Required to be Filed Under Articles 12-A and 13-A of the Tax Law for the Year 1997.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 19, 1998 with respect to the petition of Barrier Motor Fuels, Inc., P.O. Box 690, 184 West Main Street, Tarrytown, New York 10591. Petitioner appeared by Carl S. Levine & Associates, P.C. (Carl S. Levine, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception and petitioner filed a brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Jenkins dissents for the reasons set forth in a separate decision.

ISSUE

Whether the Division of Taxation properly increased the amount of petitioner's required security from $50,000.00 to $300,000.00, as a condition of maintaining its registration as a New York State diesel motor fuel distributor.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact "3," "7," "10," "11" and "12" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

The Division of Taxation ("Division") issued a notice and demand for an increase in the amount of bond or other security[1] required by Tax Law Articles 12-A and 13-A, in the form of a letter dated August 22, 1997 ("notice") to Barrier Motor Fuels, Inc. The notice increased the amount of petitioner's bond from $50,000.00 to $300,000.00. The explanation of the proposed increase was that an increase was indicated based upon "an analysis of our records and the filing history of Barrier Motor Fuels, Inc." (Division's Exhibit B, Attachment.) The letter also states that the Division had been in contact with a member of petitioner's staff and had been informed by that person that audited financial statements for petitioner would be available around June 9, 1997. The letter states that as of August 22, 1997 no such statements had been received, and that therefore, the amount of the bond required could not be reduced by the net worth of petitioner.

On the second page the notice provides:

> You have a right to protest this decision within seven (7) days of the date of this letter by written petition, (petition form attached). You must specifically indicate what action of the department you are protesting and attach a copy of this notice to your petition. Send or deliver your petition to:

[1]While the Tax Law allows a bond or other security, for purposes of simplification the word bond will be used to refer to bond or other security.

Supervising Administrative Law Judge
Division of Tax Appeals

* * *

> Note: You may not request a Conciliation Conference in this case.
>
> Pursuant to Section 283.6(b)(I)[sic] of the New York State Tax Law, failure to file such increase in the amount of security within such period or to make timely application for a hearing regarding such security increase will result in the cancellation of your diesel motor fuel registration.

On September 2, 1997, the Division of Tax Appeals received the petition of Barrier Motor Fuels, Inc. seeking a review of the increase in its bond set forth in the August 22, 1997 notice. The envelope containing the petition bore an office metered mail postmark of August 30, 1997.

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

> On September 4, 1997, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition which explained that petitioner had seven days from August 22, 1997, the date the notice was issued, to file a petition. Since it appeared the petition was filed on August 30, 1997, or eight days later, the Division of Tax Appeals proposed to dismiss the petition and the parties were given time to respond to the proposed dismissal. Ultimately, an order was issued on November 19, 1997 determining that the petition was timely filed and directing that the matter should be scheduled for hearing not less than five or more than eight days from the issuance of the order. The hearing was scheduled for November 26, 1997, but adjourned at the request of petitioner until December 4, 1997.[2]

The Division's answer in this matter, presumably served on November 21, 1997, stated that petitioner's bond requirement prior to the issuance of the notice was not $50,000.00 as stated in the notice, but was actually $200,000.00. The answer asserted that $150,000.00 of the bond

[2]We modified finding of fact "3" of the Administrative Law Judge's determination to make it more concise.

had been applied to a tax liability of petitioner and that the Division was seeking to replace that amount and increase the amount of petitioner's bond by $100,000.00.

Testifying on behalf of the Division was Ms. Lois DeFreest. Ms. DeFreest is an Excise Tax Technician II with the Registration and Bond Unit of the Transfer Tax Bureau of the Division. She sent the letter to petitioner that served as the notice in this matter. Ms. DeFreest explained that she had done a previous bond computation for this petitioner regarding a different proceeding in 1996. Submitted into evidence was her bond computation worksheet dated June 21, 1996. Ms. DeFreest indicated that the bonds petitioner had on file at that time were a $50,000.00 bond put in place in 1990 and a $150,000.00 bond put in place in 1993. She stated that neither of these bonds was calculated regarding any possible Article 13-A liabilities.

The Division explained how the bond calculations were done in the present case through its answer and the testimony of the tax technician. The diesel motor fuel component of the calculation was done as follows:

> 1) The total gallons of diesel motor fuel from each of the previous six months returns available at the time the computation was done, were taken from petitioner's returns, in particular, PT-102, line 7.
>
> 2) Exempt diesel motor fuel sales from each of the previous six months returns available at the time the computation was done, were taken from petitioner's returns, in particular PT-102, lines 8 through 15. The exempt sales were then deducted from the total gallonage to arrive at total taxable gallonage for each of the six months.
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> 3) The Article 12-A tax rate was applied to the total taxable gallonage from each month to arrive at six separate months worth of Article 12-A potential liability. These figures were added together to arrive at a total anticipated six-month potential liability.
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> 4) The applicable sales tax rate was applied to the total taxable gallonage from each month to arrive at six separate months worth of sales tax

> potential liability. These figures were added together to arrive at a total anticipated six-month potential liability.
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> 5) The Article 13-A automotive tax rate was applied to the total taxable gallonage from each month to arrive at six separate months worth of Article 13-A automotive potential liability. These figures were added together to arrive at a total anticipated six-month potential liability.
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> 6) There were no nonresidential fuel oil sales or Article 13-A nonautomotive gallonage.
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> 7) The calculations done in 1996 had a motor fuel computation done in a similar manner as the diesel motor fuel calculations. The calculations done in July and November 1997 did not contain a motor fuel computation section since petitioner had surrendered its motor fuel license in 1996.

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

> Ms. DeFreest explained that the June 21, 1996 computation included Article 12-A, Article 13-A and Articles 28 and 29 taxes with the following results: a total motor fuel tax of $2,962,067.00; a total diesel motor fuel tax of $338,743.00; and a total due of $3,300,809.00. Certified financial statements were on file with the Division and, based on those statements, 80% of petitioner's equity was computed to be $510,301.00 and this was deducted from the total calculation to arrive at a bond requirement of $2,790,508.00. At the hearing held in the previous matter, petitioner surrendered its motor fuel registration, making this calculation irrelevant.[3]

The tax technician indicated that she had been expecting to receive certified financial statements from petitioner sometime in June of 1997. On July 17, 1997 she was informed that the Division's Tax Compliance Division ("TCD") had completed collection against $150,000.00 of the bond petitioner had previously had on file, leaving petitioner with only a $50,000.00 bond. Therefore, she did another bond calculation dated July 17, 1997. This calculation showed zero

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[3]We modified finding of fact "7" of the Administrative Law Judge's determination to eliminate extraneous matter.

potential liability for motor fuel sales since petitioner had turned in its motor fuel registration. For diesel motor fuel the computation showed the following: 12-A potential liability of $81,044.00; sales tax potential liability of $82,057.00; 13-A automotive liability of $145,372.00; for a total potential liability of $308,473.00. The computation indicated that audited financial statements were not on file and therefore, no deductions were made for petitioner's total equity. The total bond requirement was $308,473.00, and this was the basis for the notice issued in this matter.

The parties stipulated on the record at hearing that petitioner buys all of its product in State and tax-paid. The Division's representative stated that petitioner had a history of having no diesel fuel tax liability because of this, and in fact petitioner often generated credits because of exempt sales. All of the gallonage used in calculating the bond was purchased by petitioner in State and tax-paid.

We modify findings of fact "10," "11" and "12" of the Administrative Law Judge's determination to read as follows:

> Petitioner introduced into evidence various articles of correspondence between petitioner and TCD, together with five unsigned mortgages of five different properties listing the New York State Department of Taxation and Finance as mortgagee. Each mortgage provides that it is to secure an indebtedness to the State of New York in the amount of $2,325,000.00 which the various mortgagors agree to pay in accordance with the terms of a deferred payment agreement between the Division and petitioner. This indebtedness arose from petitioner's gasoline motor fuel sales prior to the surrender of its registration in 1996. The mortgages are for a total amount of $1,400,000.00. Petitioner's representative explained at hearing that the deferred payment agreement had not yet been signed. Petitioner was given until December 19, 1997 to submit a copy of the signed deferred payment agreement. No agreement was submitted. The correspondence submitted by

petitioner indicates that there were discussions and an apparent agreement regarding a deferred payment agreement between petitioner and TCD. A letter dated November 26, 1996 from Mr. Daniel F. Malone, Director, District Office Compliance Bureau, TCD, summarizes such an agreement by indicating that petitioner's liability was approximately $1,500,000.00, prior to applying the $150,000.00 from the security. It further states that petitioner is offering $1,400,000.00 in security for the agreement (the mortgages) and concludes by stating that it is important that the documentation provided by petitioner concerning the securities confirms this.

The Division was allowed until December 29, 1997 to submit its response to any deferred payment agreement submitted by petitioner and to petitioner's exhibits which had not been seen by the Division's representative prior to the hearing. The Division submitted the affidavit of Mr. Theodore Eckler in response to petitioner's exhibits. Mr. Eckler is a Tax Compliance Agent II, employed in TCD, whose duties include reviewing real property mortgages relevant to deferred payment agreements. Mr. Eckler's knowledge of this case is from reviewing the file and his personal involvement in the case. His affidavit confirms the information set forth in petitioner's exhibits that the security supported by the mortgages totaled $1,400,000.00 (i.e., appraised value of the mortgaged properties less liabilities). He also stated that petitioner's outstanding tax liabilities totaled approximately $2,121,940.00 as of the December 23, 1997 execution of his affidavit. The affidavit does not attempt to explain the difference in the amounts of tax liabilities as related by Mr. Malone ($1,500,000.00, prior to applying the $150,000.00 from the bond, and his figure of $2,121,940.00 after applying the $150,000.00 from the bond).[4]

We make the following additional finding of fact:

Without objection from the Division, the evidence in this case includes the sworn testimony of Bonnim Tanzman of the Division's Registration/Bond Unit taken in an earlier, unrelated

[4]We have modified findings of fact "10" and "11" of the Administrative Law Judge's determination by eliminating extraneous material. Finding of fact "12" of the Administrative Law Judge's determination has been deleted as not being an actual finding of fact.

> bond hearing in the Division of Tax Appeals for another diesel motor fuel distributor.
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> Mr. Tanzman was asked whether, in computing the amount of the bond for this other diesel motor fuel distributor, the calculation included the distributor's figures for automotive diesel. Mr. Tanzman replied: "It did not. The taxpayer for the period appears to have been buying his automotive diesel pretty much tax paid. Therefore, we did not use that gallonage in the bond computations" (tr., p. 35).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Initially, the Administrative Law Judge noted that Article 12-A of the Tax Law imposes a tax on gasoline and similar motor fuel. Tax Law § 283(3) requires the registration of motor fuel distributors and requires distributors to file a bond or other security acceptable to the Tax Commission.[5] The amount of the bond may be increased at any time, when in the judgment of the Commissioner of Taxation and Finance it is necessary to protect the revenues due the State under Articles 12-A, 28 and 29 of the Tax Law.

Similarly, Tax Law § 282-a imposes an excise tax upon the sale or use of diesel motor fuel. The procedural provisions regarding determining or increasing the amount of a bond for motor fuel also apply to diesel motor fuel (Tax Law § 282-a[5]).

Finally, the Administrative Law Judge noted that Article 13-A of the Tax Law imposes a tax on petroleum businesses in the State. Tax Law § 302(c) requires petroleum businesses to file a bond or other security:

> in such amount as the commissioner may fix in an amount determined in accordance with rules and regulations prescribed by the commissioner, to secure the payment of any sums due from

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[5]Actually, this subdivision refers to authority of the State Tax Commission. However, pursuant to Tax Law § 2(1), the term "tax commission" is to be interpreted as referring to the Commissioner of Taxation and Finance.

> such petroleum business pursuant to this article. The commissioner may require that . . . the amount thereof may be increased at any time when in the commissioner's judgment the same is necessary as a protection to the revenues under this article (Tax Law § 302[c]; emphasis added).[6]

The Division increased the amount of petitioner's bond and issued a notice and demand for the new amount of $300,000.00. The Administrative Law Judge concluded that, based on the record, it was unreasonable for the Division to calculate the amount of petitioner's bond without taking into consideration the fact that the gallonage used to calculate the amount of the bond was purchased tax-paid.

The Administrative Law Judge noted that the purpose of the bonding requirements is to protect the revenues of the State of New York by securing payment of motor fuel, diesel motor fuel and petroleum business taxes (***citing***, ***Matter of Certified Heating Oils***, Tax Appeals Tribunal, November 15, 1990). The mechanism for determining the amount of bond to be required for distributors of motor fuel under Tax Law Article 12-A, the Administrative Law Judge stated, is found in 20 NYCRR 411.2(b).

The Administrative Law Judge concluded that it was proper for the Division to also utilize 20 NYCRR 411.2 to determine the amount of bond required for diesel motor fuel distributors like petitioner. However, when calculating the amount of a bond for diesel motor fuel distributors:

> the commissioner of taxation and finance . . . shall take into account the volume of heating fuel and other Diesel motor fuel sold for exempt purposes by a distributor of Diesel motor fuel during prior periods as a factor reducing potential tax liability

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[6]The procedural provisions regarding increasing the amount of a bond found in Article 12-A also apply to Article 13-A (***see***, Tax Law §§ 302[c]; 315[a], [b]).

> along with any other relevant factors in determining the amount of security required (Tax Law § 282-a[5]; emphasis added).

The Administrative Law Judge stated that where, as in this case, no certified financial statements were provided to the Division, the Division calculates the amount of a bond by determining a distributor's maximum six-month tax liability. In the case of diesel motor fuel, the Administrative Law Judge stated, any exempt sales are deducted from this number to arrive at the anticipated number of gallons to be sold. This number is multiplied by the appropriate tax rate or rates to determine the anticipated maximum liability. In this case, the gallonage was multiplied by the appropriate rates for diesel motor fuel, sales and petroleum business taxes. The Administrative Law Judge concluded that the Division performed these calculations correctly and in accordance with 20 NYCRR 411.2.

Petitioner argued that since the diesel gallonage utilized by the Division in calculating the amount of its bond was purchased in New York State and tax-paid, those gallons should be subtracted prior to applying the tax rates. The Division conceded that all of petitioner's product was purchased tax-paid.

Ms. DeFreest testified she did not deduct tax-paid product because the statute did not direct her to do so. The Administrative Law Judge agreed that the statute is silent regarding the deduction of tax-paid product when calculating such bonds. The basis for deducting tax-paid product, the Administrative Law Judge concluded, is the Division's motor fuel regulations at 20 NYCRR 411.2 (b)(2).[7]

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[7]The Administrative Law Judge incorrectly cites to 20 NYCRR 411.2(2) here and at later points in her determination.

As noted above, the Administrative Law Judge concluded that 20 NYCRR 411.2 is properly applied in calculating the amount of diesel motor fuel and petroleum business tax bonds. The Administrative Law Judge stated that the Division had not shown that deducting tax-paid product in its bond calculations was inconsistent with the statutory or regulatory scheme and concluded that the provisions of 20 NYCRR 411.2(b)(2) should have been applied so that tax-paid product was deducted in calculating petitioner's bond.

The Administrative Law Judge rejected the Division's argument that petitioner might possibly in the future purchase diesel motor fuel tax-free out of State or purchase product labeled home heating oil and then sell it as diesel motor fuel. These potential actions on the part of petitioner would be a total change from its past business practices, the Administrative Law Judge concluded, and did not justify ignoring the provisions of 20 NYCRR 411.2(b)(2) in calculating petitioner's bond. Furthermore, the Administrative Law Judge noted, the formula utilized in the regulation to calculate anticipated tax liability utilizes the past business experience of the distributor. The past experience with petitioner is that it has not owed any diesel motor fuel tax and has actually generated credits from exempt sales because it purchased its product tax-paid. Therefore, the Administrative Law Judge concluded, it was not reasonable for the Division to ignore the regulation and base the calculation of petitioner's bond on a possible future event contrary to the past business practices of petitioner.

Petitioner did not request that the $50,000.00 bond currently on file with the Division be eliminated. Taking into account petitioner's other current outstanding tax liabilities (***see,*** 20 NYCRR 411.2[b][1][iii]), the Administrative Law Judge concluded it was reasonable to require the bond of $50,000.00.

The petition raised the issue of lack of adequate notice, but petitioner never raised any arguments on this issue. Therefore, the Administrative Law Judge deemed that issue abandoned. Further, the arguments presented by the parties on the issue of whether the mortgages provided to the Division to secure a deferred payment agreement on outstanding tax liabilities could be used as security in a bonding situation were treated as moot by the Administrative Law Judge based on her conclusion that petitioner's bond will not be increased.

ARGUMENTS ON EXCEPTION

The Division argues that the new proposed bond amount of $300,000.00 at issue in this proceeding was properly determined by both a calculation of petitioner's potential six-month liability and a review of those relevant factors listed in 20 NYCRR 411.2. Those factors include independent information concerning the distributor's nature of operations, reliability, overall financial status, liquidity or history of financial solvency and stability, the taxpayer's compliance record and whether there are or were any delinquencies in filing returns and/or payment of any taxes as a distributor of motor fuel or for any other taxes.

Further, the Division points out that, at the time of the hearing in this matter, petitioner had fixed and final liabilities which exceeded $2,000,000.00 in taxes, penalties and interest.

Petitioner responds that the Division's decision to increase the amount of petitioner's required security was unjustified under the law and regulations and was arbitrary, capricious and an abuse of discretion.

Petitioner continues to argue that it was improper for the Division to not take into account its tax-paid purchases when calculating the proposed increase in its bond. In particular, petitioner points out that the calculation, as done by the Division, does not reflect petitioner's

potential tax liability as required by the regulation. Since petitioner purchases all of its product tax-paid, petitioner has no potential tax liability.

On the issue of credit for tax-paid purchases, the Division argues that there is no provision in the statute or regulation that allows the Division to do this. The Division points out that, while the regulations governing motor fuel bonding provide for credit for tax-paid purchases and the statute dealing with diesel motor fuel bonding provides that tax-exempt gallons be subtracted out in calculating bond amounts, there is no provision in the statute or the regulation allowing for the subtracting out of tax-paid product when calculating the amount of a diesel motor fuel bond. The Division asserts that at some time in the future petitioner might purchase product tax-free from out of State, or home heating oil tax-free in State, and sell it as diesel motor fuel. Since either of these actions could result in petitioner's accruing future tax liabilities in an amount equal to the calculation, the Division argues it is entitled to require a $300,000.00 bond.

OPINION

While there are no specific regulations that prescribe how to calculate the amount of a bond for diesel motor fuel distributors under Article 12-A, procedural requirements of Article 12-A relating to motor fuel distributors also apply to Article 12-A diesel motor fuel distributors and Article 13-A petroleum businesses (***see***, Tax Law §§ 282-a[5]; 302[c]; 315[a], [b]). Therefore, we agree with the Administrative Law Judge that it was proper for the Division to utilize 20 NYCRR 411.2 to determine the amount of bond required from petitioner.

20 NYCRR 411.2(b) provides, in pertinent part:

> (b) *Determination of the amount of a bond.* (1) . . . during any subsequent review of a registered distributor, the Department of

Taxation and Finance, in determining the amount or sufficiency of a bond, will:

(i) determine the estimated or representative six-month maximum potential tax liability of the applicant or of the distributor (see paragraph [2] of this subdivision);

(ii) analyze the certified financial statements of the applicant or distributor with particular emphasis on the ratio of current assets to current liabilities and net worth (total assets less total liabilities) as determined in accordance with generally accepted accounting principles;

(iii) evaluate any independent information concerning an applicant's or distributor's nature of operations, reliability, overall financial status, liquidity, or history of financial solvency and stability; and

(iv) review the taxpayer's compliance record to determine whether there are or were any delinquencies in filing returns and/or payment of any taxes as a distributor of motor fuel or for any other taxes due New York State for which the applicant or distributor may be or may have been responsible.

(2) For purposes of this section, maximum potential liability is determined based on . . . a representative total number of gallons of motor fuel imported into the State or . . . sold . . . or otherwise distributed within New York State by the distributor, without any reductions for those gallons subject to tax-free or exempt sales. Generally, in determining the amount of such representative or anticipated total gallonage, the department shall, based on a prior consistent business practice of the applicant or distributor, consider those gallons of motor fuel purchased and/or reasonably expected to be purchased within the State on which the taxes on motor fuel pursuant to Articles 12-A, 28 and 29 of the Tax Law have been or will be assumed or paid by another distributor of motor fuel snd [sic] included in such purchase price, as evidenced by certifications of tax payment. (See sections 412.3 and 412.4 of this Title for certifications.) The number of gallons of motor fuel determined is multiplied by the rate of the motor fuel tax per gallon and by the applicable rate (see section 561.3[b] of this Title) of the prepaid sales tax per gallon. The sum of these taxes shall then be adjusted where necessary to reflect a six-month tax liability.

* * *

> (3)(v)(*a*) . . . generally the amount of a bond required to be filed and maintained pursuant to the provisions of this section shall not be less than $50,000.

* * *

> (*b*) Provided further, generally the amount of a bond shall not exceed the six-month maximum potential tax liability of the applicant or of the distributor except to the extent such six-month maximum potential tax liability is less than $50,000.

* * *

> (vii) . . . the amount of a bond may be adjusted where any information indicates the need for a bond in greater or lesser amount.

However, a caveat exists in the statute when calculating the amount of a bond for diesel motor fuel distributors:

> the commissioner of taxation and finance . . . shall take into account the volume of heating fuel and other Diesel motor fuel sold for exempt purposes by a distributor of Diesel motor fuel during prior periods as a factor reducing potential tax liability along with <u>any other relevant factors</u> in determining the amount of security required (Tax Law § 282-a[5]; emphasis added).

It is undisputed that, based on petitioner's past business practice, it purchases all of its diesel motor fuel in New York tax-paid. In other words, petitioner buys diesel motor fuel at terminals in New York and pays the Article 12-A diesel motor fuel tax, the Article 13-A petroleum business tax and the sales tax under Articles 28 and 29 directly to its suppliers at the time of purchase. The record shows that petitioner records these tax-paid purchases on its PT-102 returns showing these gallons as "[g]allons on which the tax has been passed through to

you." Under this scenario, petitioner's supplier pays the tax to the State of New York and petitioner takes a credit for its tax-paid purchases (Tax Law § 287[1]).

In calculating petitioner's bond, if the Division gave petitioner credit for its tax-paid purchases, petitioner's representative six-month maximum potential tax liability computed under 20 NYCRR 411.2(b)(1) would be zero. The Division argues that, in calculating petitioner's bond, it could not give credit for its tax-paid purchases because neither the law nor regulations authorize such a credit. We disagree. The statute provides, in pertinent part, that "the commissioner of taxation and finance . . . shall take into account . . . any other relevant factors in determining the amount of security required" (Tax Law § 282-a[5]; emphasis added). We believe that the gallonage that a distributor purchases in New York on a tax-paid basis is such a relevant factor.

While petitioner had unpaid tax liabilities arising from its gasoline motor fuel sales, it appears from the record that the parties were, at the time of the hearing, negotiating a payment agreement for these liabilities. While these liabilities were "relevant factors" that the Division could and did consider in determining the amount of petitioner's bond (20 NYCRR 411.2[b]; Tax Law § 282-a[5]), this factor does not outweigh the failure to consider that all gallonage purchased by petitioner was on a tax paid basis and, so long as petitioner continued its current practice, its potential and actual tax liability was zero.

Further, the record in this case shows that in a similar, unrelated case, Bonnim Tanzman of the Division's Registration/Bond Unit testified that the bond of the diesel motor fuel distributor in that case was computed by giving it exactly the kind of credit for its tax-paid purchases as petitioner seeks here. It is incongruous for the Division to now take the position that it cannot

give this petitioner, another diesel motor fuel distributor, the same credit for its tax-paid purchases. We believe that the above statute and regulations permit such a credit.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

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

3. The petition of Barrier Motor Fuels, Inc. is granted; and

4. The Notice and Demand dated August 22, 1997 increasing the amount of petitioner's bond or other security to $300,000.00 is canceled.

DATED: Troy, New York
August 5, 1998

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

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

COMMISSIONER JENKINS dissenting:

I agree that the statute and regulations permit the Division to give credit for tax-paid purchases when calculating the amount of a motor fuel distributor's bond. However, permitting such a credit is not the same thing as requiring it. Tax-paid purchases are only one of the "relevant factors" that the Division was required to consider in arriving at the amount of petitioner's bond. While the Division erred in not giving proper consideration to petitioner's tax-paid purchases, I do not believe, based on the record as a whole, that the Division erred in refusing to give the credit itself. Further, I believe that my colleagues err in focusing on the issue of tax-paid purchases to the exclusion of all other "relevant factors."

At the time of the hearing in this matter, petitioner had fixed and final tax liabilities for a four-month period totaling approximately $1,500,000.00, plus penalties and interest, arising from its gasoline motor fuel sales in 1996. It is true, as the majority states, that the parties were at the time of hearing negotiating an agreement for the payment of this liability. If a signed deferred payment agreement was made part of this record, I would conclude that the State's interests are adequately protected as to that liability. Under those circumstances, I could agree with the majority that the Division is acting unreasonably in refusing to give this petitioner credit for its tax-paid purchases. But those are not the facts here. There is no signed deferred payment agreement in this record, although the record was left open to permit one to be submitted. Based on this record, we cannot know whether an agreement for payment of the above liability was ever secured.

It is in that context that I believe there is sufficient evidence in the record to support the conclusion that petitioner's compliance record, failure to provide a certified financial statement and failure to timely pay outstanding motor fuel tax liabilities were all "relevant factors" that the Division could and did consider in determining the amount of petitioner's bond (20 NYCRR 411.2[b]; Tax Law § 282-a[5]). Even though I agree with the majority that the Division could have, and should have, considered petitioner's tax-paid purchases as a "relevant factor," the amount of the bond asserted here could be justified based on the other "relevant factors" alone. The regulations provide that "the amount of a bond may be adjusted where <u>any information</u> indicates the need for a bond in greater or lesser amount" (20 NYCRR 411.2[b][3][vii], emphasis added). The statute and regulations give the Division great latitude in arriving at a bond amount necessary to protect the State's interest. The question before us is whether the Division, in

setting the amount of petitioner's bond, committed error in failing to follow the statute and regulations. When considering all of the "relevant factors," I do not find that kind of error in this case (20 NYCRR 411.2[b]). In the absence of legal error, we should not substitute our judgment for that of the Division.

DATED: Troy, New York
August 5, 1998

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