

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

EASTCHESTER TRANSPORT CORPORATION :

DECISION
DTA NO. 818723

for Redetermination of a Deficiency or for Refund of Tax :
on Petroleum Businesses under Article 13-A of the Tax :
Law for the Period December 1, 1994 through November :
30, 1995.

Petitioner Eastchester Transport Corporation,¹ c/o Letitia Ragno, 141 West 10th Street, New York, New York 10014, filed an exception to the determination of the Administrative Law Judge issued on September 4, 2003. Petitioner appeared by Jared J. Scharf, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Michael P. McKinley, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the audit method employed by the Division of Taxation was reasonable or whether petitioner has shown error in either the audit method or result.

¹During the period at issue, petitioner conducted business as Brook Fuel Oil Corp.

II. Whether any weight may be given to certain documents submitted by petitioner after the hearing was completed.

III. Whether certain findings of fact and conclusions of law made in a small claims matter concerning petitioner's liability for additional *sales* tax resulting from the same audit of its sales of fuel oil under review herein is binding upon the petroleum business tax liability at issue in this proceeding.

IV. Whether petitioner is entitled to have any overpayments of sales tax credited against its petroleum business tax liability.

FINDINGS OF FACT

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

Petitioner operated a retail heating oil business in the Bronx selling #2 fuel oil to residences and commercial establishments. For the one-year period at issue, December 1, 1994 through November 30, 1995, petitioner reported 8,533,253 "gallons sold or used" of heating oil on reports (forms PT-201 and PT-106) filed with the Division of Taxation ("Division") as follows:

Period	Total gallons sold or used
12/1/94-2/28/95	4,373,745
3/1/95-3/31/95	1,710,082 ²
4/1/95-4/30/95	646,562
5/1/95-5/31/95	417,178

² Next to the amount shown above is a higher amount of 2,773,822 pencilled in. There is no explanation of the meaning of such alternate amount or who was responsible for writing it on the tax report.

6/1/95-6/30/95	433,511
7/1/95-7/31/95	42,733
8/1/95-8/30/95	298,858
9/1/95-9/30/95	486,030
10/1/95-10/31/95	71,725
11/1/95-11/30/95	52,829
Total	8,533,253

Claiming that nearly all of its sales of heating oil were for *residential* heating purposes, petitioner reported only 29,925 gallons as subject to the imposition of petroleum business tax under Article 13-A of the Tax Law as follows:

Period	Gallons Used to Power Petitioner's Vehicles ³	Gallons <i>Not</i> Sold for Residential Heating ⁴
12/1/94-2/28/95	3,050	-0-
3/1/95-3/31/95	1,275	6,694
4/1/95-4/30/95	1,614	3,958
5/1/95-5/31/95	1,287	3,829
6/1/95-6/30/95	1,285	1,174
7/1/95-7/31/95	250	1,134
8/1/95-8/31/95	375	1,149
9/1/95-9/30/95	412	1,020
10/1/95-10/31/95	69	1,275
11/1/95-11/30/95	75	-0-

³ These gallons would be subject to tax under Article 13-A by the imposition of the "automotive-type diesel motor fuel tax."

⁴ These gallons would be subject to tax under Article 13-A by the imposition of the "nonautomotive-type diesel motor fuel tax."

Totals	9,692	20,233
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The Division sought to audit petitioner's claim that nearly all of its sales of heating oil were exempt from Article 13-A tax as part of its audit of petitioner's (i) petroleum business tax returns, (ii) highway use tax returns, and (iii) "on a limited scope basis" sales tax returns.

By a letter dated October 6, 1997, the auditor confirmed a phone conversation with Letitia Ragno, petitioner's president, that he would be in her Bronx office on Monday, November 17, 1997 at approximately 10:00 A.M. to commence his audit. His letter also provided more than a month's notice of the records which should be made available, and with regard to the petroleum business tax portion of the audit, he requested the following records for the period December 1, 1994 to "the present," i.e., late 1997:

- Tax returns (PT series)
- Inventory records and reconciliations
- Sales journals
- Delivery tickets for test periods to be selected
- Exemption certificates and schedules
- Municipality contracts, purchase orders and/or delivery tickets
- Export certificates
- Registered distributors under Article 12A, resale certificates
- Bulk receipts and invoices from suppliers
- Pipeline statements
- Fuel disbursements (sales, self-use)
- 960 and 970 transport vehicle manifest reports
- 943 service station reports (if applicable)
- 941 thruput detail-or monthly statements from terminal operator
- Cash disbursements journals
- Vehicle listing-include internal ID# and VIN numbers
- General ledgers (to examine accrued accounts)

Petitioner produced very few records for the auditor's review in the course of his audit. The only delivery tickets produced were for the period October 1, 1996 through December 31, 1996, which is not part of the period which remains at issue. The nature of petitioner's business

was transformed in late 1995 when it sold its #2 heating oil business and gave up Brook Fuel Oil Corp. as its name to Morningside Fuel Oil, the company which purchased its customer list. In contrast, during the period still at issue, petitioner sold home heating oil to both residential and *commercial* establishments as well as a heavier type of oil to large housing projects. After late 1995, petitioner sold only the heavier type of oil (so-called residual fuel) exclusively to exempt entities such as large public housing projects and other governmental entities. Consequently, the delivery tickets provided by petitioner for a three-month period when petitioner's business had changed were not relevant to the auditor's review of petitioner's petroleum business tax liability for the earlier period at issue herein. The Division has conceded that petitioner is not liable for petroleum business tax for the period subsequent to the sale of its #2 heating oil business in late 1995.

With regard to the period at issue, petitioner in the course of the audit provided no records to substantiate its sales. However, petitioner did provide for the auditor's review of its customer list, a 32-page computer printout containing names, addresses and telephone numbers of petitioner's 1,722 accounts for #2 fuel oil. To determine which of these 1,722 accounts were commercial accounts and thereby taxable, the auditor entered the address of each customer in the Division's Phone Disk system, a computer database of telephone customers by name and address in New York State. When an address is entered, each phone number that is registered at that address will be brought up. Further, the Phone Disk system sorts the telephone numbers brought up into business listings and residential listings. If an individual address in the Phone Disk database had more than one telephone customer listed, the auditor classified it as a commercial

account for audit purposes only if it was 100% commercial. The auditor determined that 166⁵ or 9.64% of petitioner's 1,722 accounts were commercial accounts. The auditor prepared a detailed list of the 166 accounts which he treated as commercial specifying addresses and telephone numbers. For example, included in this list were the following entities with names that begin with the letter "K":

Customer Name	Street Address	City	Telephone
P. Kalamaris	3011 Middletown Rd	Bronx	212 863 9550
H. Kennedy	368 East 169 Street	Bronx	212 293 8001
E. King	3269 Third Ave.	Bronx	718 665 3960
Koger Comp.	635 Morris Park Ave.	Bronx	212 597 5555
Kozy Korner Motel	4119 White Plains Rd.	Bronx	212 881 6272
B. Kramer	554 East 141 Street	Bronx	212 993 1488

In addition, perusing the list of the 166 accounts, it is observed that included are entities such as "B. Spanish Evan. Church," "Christ the King," "G. Tidings Church," "S Day Adventist Church." The auditor explained that he required documentation to prove a particular entity was a non-profit and that the fuel oil was actually sold to the entity that was listed. Since none was provided, he treated these entities as commercial accounts.

Since petitioner had no storage facilities for fuel inventory, the auditor assumed that all gallons of fuel oil purchased by the company during the one year at issue were sold. Petitioner

⁵ Initially, by a manual count, the auditor determined that petitioner had 162 commercial accounts but when he computerized his data, he realized that his manual count was off by 4 accounts with petitioner's commercial accounts actually numbering 166.

reported purchases of 8,533,053 gallons of #2 fuel oil for the year at issue from six different suppliers as follows:

Period	Stuyvesant	Coastal	Mobil	Cibro	Rad Oil	Bayside	Total
2/95	299,687	100,550		1,647,349	2,108,418	219,441	4,375,445
3/95	712,992	72,786		499,364	423,040		1,708,182
4/95	435,282	500		131,322	81,998		649,102
5/95	272,282	11,891		56,727	76,838		417,738
6/95	233,699			13,069	184,843		431,611
7/95	800	2,012	16,517		22,204		41,533
8/95	3,000	25,308	14,912	1,600	256,348		301,168
9/95		69,313	15,826	7,156	396,970		489,265
10/95		3,000	63,555				66,555
11/95		3,005	49,449				52,454
Totals	1,957,742	288,365	160,259	2,356,587	3,550,659	219,441	8,533,053

To verify the above purchases reported by petitioner on its returns, the auditor had other Division staff cross check what three of the suppliers, Stuyvesant, Bayside and Rad Oil, reported on their respective tax returns as the amount of fuel oil sold to petitioner. He also utilized the Tracker database maintained by the Division which tracks sales of petroleum products between registered vendors or “inter distributor sales.” As a result of this review, the auditor determined that petitioner’s six suppliers sold it 8,880,987 gallons of motor fuel during the year at issue, 347,934 gallons more than what were reported by petitioner. This discrepancy is detailed as follows:

Supplier	Gallons reported purchased by petitioner	Gallons reported sold to petitioner by supplier	Discrepancy
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Stuyvesant	1,957,742	2,149,999	192,257
Coastal	288,365	321,200	32,835
Mobil	160,259	160,259	-0-
Cibro	2,356,587	2,356,587	-0-
Rad Oil	3,550,659	3,673,501	122,842
Bayside	219,441	219,441	-0-
Total	8,533,053	8,880,987	347,934

To calculate petitioner's commercial gallons sold of heating oil, the auditor applied 9.64%, the percentage of petitioner's 1,722 accounts which he had determined were commercial accounts, to his audited amount of gallons sold to petitioner by its suppliers of 8,880,987 gallons, and multiplied the resultant product by two to arrive at commercial gallons of #2 fuel oil sold of 1,712,245 for the year at issue. The auditor multiplied by two based upon his estimate, rooted in his nine years of experience auditing petroleum businesses, that petitioner's commercial customers purchased twice as much fuel as residential customers.

Based upon the petroleum business tax rate per gallon of \$.1080 during the period December 1, 1994 through May 31, 1995 and of \$.1032 during the period June 1, 1995 through November 30, 1995, the auditor arrived at audited tax due of \$183,503.37 detailed as follows:

Period	Total Gallons	Commercial %	Commercial Gallons	13-A Tax Rate	Audited Tax Due	Tax Paid	Additional Tax Due
12/1/94-2/95	4,434,266	9.64%	854,922	0.1080	\$ 92,331.58	\$955.89	\$ 91,375.69
3/95	1,412,289	9.64%	272,288	0.1080	29,407.10	-0-	29,407.10
4/95	985,345	9.64%	189,974	0.1080	20,517.19	-0-	20,517.19
5/95	515,542	9.64%	99,396	0.1080	10,734.77	-0-	10,734.77

6/95	528,007	9.64%	101,990	0.1032	10,525.37	-0-	10,525.37
7/95	50,033	9.64%	9,646	0.1032	995.47	-0-	995.47
8/95	346,241	9.64%	66,754	0.1032	6,889.01	-0-	6,889.01
9/95	489,265	9.64%	94,330	0.1032	9,734.86	-0-	9,734.86
10/95	66,555	9.64%	12,832	0.1032	1,324.26	-0-	1,324.26
11/95	52,454	9.64%	10,114	0.1032	1,043.76	-0-	1,043.76
Totals	8,879,997		1,712,246		\$183,503.37		\$182,547.48

Against the audited total tax due shown above of \$182,547.48, the auditor credited petitioner with petroleum business tax previously assessed by the Division of approximately \$10,000.00 under the following three earlier assessments resulting from desk audits:

Period	Additional Tax Due	Previously Assessed L-011279714	Previously Assessed L-011279629	Previously Assessed L-011950438	Additional Tax Due for Assessment
12/1/94-2/95	91,375.69	\$4,978.06	\$ 575.80	-0-	\$ 85,821.83
3/95	29,407.10	1,104.08	127.50	-0-	28,175.52
4/95	20,517.19	777.62	161.40	-0-	19,578.17
5/95	10,734.77	712.46	128.70	-0-	9,893.61
6/95	10,525.37	332.26	128.50	-0-	10,064.61
7/95	995.47	188.46	25.00	-0-	787.01
8/95	6,889.01	202.76	37.50	-0-	6,648.75
9/95	9,734.86		-0-	-0-	9,734.86
10/95	1,324.26		-0-	-0-	1,324.26
11/95	1,043.76		-0-	433.81	609.95
Totals	182,547.48	\$8,290.70	\$1,184.40	\$433.81	\$172,638.57

The Division issued a Notice of Determination dated August 5, 1999 against petitioner asserting petroleum business tax due of \$172,638.57 plus interest and penalty in conformance with the additional tax due shown above. Although the auditor presented Letitia Ragno, petitioner's president, with his audit determination on June 30, 1998, no further evidence was produced by petitioner in the 14-month period leading up to the issuance of the statutory notice.

More than a year later, on November 16, 2000 at a conference held by the Bureau of Conciliation and Mediation Services ("BCMS"), petitioner finally provided a copy of a 297-page document⁶ to substantiate tax exempt sales of #2 fuel oil. After reviewing this document, the auditor determined that petitioner had established that it had sold 5,809,002 gallons of #2 fuel oil which were exempt from petroleum business tax: (i) 119,277 gallons to an emergency repair program operated by a New York City governmental housing program, and (ii) 5,689,002 gallons to what was described as "New York City Housing Authority."⁷ The auditor prepared a detailed schedule, by month,⁸ noting delivery dates and the number of gallons sold for each of the two government related customers. For example, included in the 119,277 gallons sold by petitioner to the emergency repair program and treated by the auditor as exempt from tax were 36,962.5 gallons sold in the month of February of 1995 detailed by the auditor as follows:

⁶ A copy of this document consisting of computer printouts was introduced into evidence but it is of poor quality and many pages are not decipherable. The parties advised the administrative judge that neither would need to reference particular pages.

⁷ It is not known for certain whether this is the same as the New York City *Public* Housing Authority. Except for the hard-to-decipher copies of computer printouts, no invoices, receipts, or delivery tickets related to this governmental entity were introduced into the record.

⁸ Sales to the emergency housing program were made in each of the months December 1994 through June, 1995, and sales to the housing authority were made in each of the months December 1994 through September 1995.

Delivery Date	Gallons Sold
2/2/95	3,500.0
2/3/95	2,987.0
2/4/95	118.0
2/7/95	817.0
2/7/95	4,397.0
2/8/95	7,000.0
2/10/95	2,881.0
2/10/95	1,806.0
2/16/95	3,760.0
2/18/95	3,000.0
2/25/95	3,000.0
2/28/95	3,696.5
Total	36,962.5

Similarly, included in the 5,689,002 gallons sold by petitioner to the housing authority, which the auditor also treated as tax exempt sales, were, as an example, 696,322.4 gallons sold in the month of April of 1995 detailed by the auditor as follows:

Delivery Date	Gallons Sold
4/3/95	25,253.6
4/5/95	82,335.1
4/7/95	84,552.5
4/7/95	19,504.0
4/10/95	58,400.4
4/10/95	6,950.0
4/12/95	3,000.3

4/12/95	54,016.2
4/12/95	37,200.0
4/14/95	81,805.7
4/17/95	33,501.0
4/19/95	58,725.0
4/21/95	39,146.2
4/24/95	46,601.5
4/26/95	34,602.9
4/28/95	30,728.0
Total	696,322.4

As a result of petitioner’s substantiation of additional sales exempt from the imposition of petroleum business tax, as detailed above, the auditor substantially reduced petroleum business tax asserted due from \$172,638.57 to \$52,532.36 as detailed below:

Period	Total Gallons	Commercial Gallons (9.64% of Total Gallons)	Tax Due at Tax Rate of 0.1080 for 2/95- 5/95 and 0.1032 for 6/95-11/95
2/95	1,901,926	366,690	\$ 38,646.63 ((\$39,602.52 less a credit for tax paid of \$955.89)
3/95	272,134	52,468	5,666.54
4/95	279,653	53,916	5,822.93
5/95	3,587	692	74.74
6/95	229,018	44,154	4,556.69
7/95	32,819	6,328	653.05
8/95	57,916	11,166	1,152.33

9/95	175,923	33,918	3,500.34
10/95	66,555	12,832	1,324.26
11/95	52,454	10,114	1,043.76
Totals	3,071,985	592,278	\$62,441.27

The \$62,441.27 was further reduced to \$52,532.36 after the auditor credited petitioner with petroleum business tax previously assessed by the Division as detailed above. In conformance with these adjustments, a Conciliation Order dated June 29, 2001 was issued to petitioner reducing petroleum business tax due to \$52,532.36 plus penalty and interest.

The Final Notice of Hearing dated October 28, 2002 issued to petitioner noted that:

the petitioner has the burden of proof and must establish the facts necessary to show that there is no deficiency or that a refund is due. Such proof may be made by sworn testimony of the petitioner's witnesses or by documentary or other evidence introduced during the course of the hearing.

Furthermore, near the start of the hearing, petitioner was advised by the administrative law judge that:

Administrative Law Judge: [A]nything that either side wants me to consider has to be brought out at today's hearing, or arrangements made for you to submit whatever it is to me.

* * *

My decision will be based only on the record that is being created. I won't go outside the record.

* * *

And also to keep in mind that it's very important that if you want me to consider something, make sure it gets into the record.

Letitia Ragno: Okay.

Administrative Law Judge: I can't emphasize that enough (Tr., pp. 25-26).

Nonetheless, petitioner introduced little evidence to support its case at the hearing. At the very start of the field audit on October 1, 1997, Letitia Ragno had advised the auditor as noted in his log that:

[S]he took over the business when her husband passed away the previous year [1996]. She explained that on the day of the funeral, the office was vandalized and everything was taken from it, including all computers, and records, (hard copies also).

Letitia Ragno also informed the auditor that in the summer of 1997, petitioner's offices were broken into again, "with many records stolen." Petitioner's prehearing memorandum, which was actually prepared by Letitia Ragno at the hearing, reflected this apparent lack of business documents, and listed only one exhibit to be introduced into the record by petitioner: "ck 1023-7/8/96- \$3,133.93." However, in the course of the hearing, petitioner determined not to submit it into evidence because it represented the payment of sales tax, not petroleum business tax, the tax at issue in this matter.

In addition, at the hearing, petitioner obtained permission to submit into the record two additional types of documents to support its case: (i) invoices from the New York City Housing Authority to show delivery of more fuel oil than what the auditor allowed because he had not yet seen such invoices according to Alicia Ragno, and (ii) checks to show payment of petroleum business tax which the auditor had not already accounted for. There was considerable discussion on the record concerning the specific nature of these documents in light of the administrative law judge's statement that the record would not be left open "in a vague fashion" and the need for petitioner to describe with detail the documents which it intended to submit after the completion of the hearing (Tr., p. 130). With regard to the invoices, the administrative law judge advised petitioner that it would not be allowed to merely submit a stack of invoices since their relevancy

would not be clear. The additional invoices must be related to the invoices which the auditor had already reviewed and used as a basis to credit petitioner for the tax exempt delivery of fuel oil to the New York City Housing Authority. Petitioner indicated that the invoices, which it intended to submit after the hearing, had already been submitted in a small claims matter⁹ involving a sales tax assessment and would be resubmitted here with an affidavit. The administrative law judge was explicit about the need to have an affidavit to explain the additional invoices, described by petitioner as a fairly large document, for which the record was going to be left open:

An affidavit without the invoices would not be given too much weight. The invoices without the affidavit would not be given too much weight. An affidavit with the invoices might be given some weight. I cannot say how much weight I would give to it . . . I'd have to see those documents and then hear the objections to it (Tr., p. 137).

With regard to the checks to show payment of additional petroleum business tax not already credited by the auditor, petitioner estimated that it would provide approximately 10 checks.

A due date of December 20, 2002 was established for petitioner to submit the checks and a due date of January 24, 2003 was set for the submission of the affidavit explaining how attached invoices show the delivery of more fuel oil to the New York Housing Authority than what had been allowed by the auditor. Further, the Division was allowed time to review the checks and invoices to be submitted by petitioner and to submit an affidavit of the auditor after such review by March 7, 2003. The administrative law judge emphasized the strict enforcement of the due dates and that the parties should be certain to ask for more time to submit the specified

⁹ The administrative law judge specifically noted that he would not consider documents introduced in the small claims proceeding involving a sales tax assessment against petitioner unless petitioner included them in the record for this matter.

documents before the due date expired. Further, the administrative law judge reiterated the following before allowing the parties to make a closing argument:

Administrative Law Judge: Now, before I turn to Mr. McKinley for his closing argument and then the taxpayer will have last say at today's hearing, I just want to make sure that the parties understand that once the hearing is completed today, I won't accept anything else into the record other than what we have previously discussed.

Letitia Ragno: Very good.

Administrative Law Judge: Nothing further, Mr. McKinley in the nature of additional evidence, other than what's been discussed?

Attorney McKinley: No, your Honor.

Administrative Law Judge: Ms. Ragno, you understand too, that other than what we've discussed, nothing further will be permitted to come into the record.

Letitia Ragno: Correct (Tr., pp. 143-144).

As noted above, the auditor treated deliveries of fuel oil to entities such as Christ the King and G. Tidings Church as taxable because petitioner had not shown any documentation to establish that the entity was nonprofit. Nonetheless, petitioner did not offer any proof at the hearing of such nonprofit status and did not obtain permission to submit any specific evidence after the closing of the hearing to establish that certain accounts should have been treated by the auditor as religious, charitable or nonprofit entities.

By a letter dated December 26, 2002¹⁰ of its current representative, attorney Jared J. Scharf, petitioner submitted 39 pages of confusing documents which the attorney described as follows:

¹⁰ Attorney Scharf was granted an additional week, from December 20, 2002 until December 27, 2002, to submit the checks.

I am enclosing such checks with this letter without having had an opportunity to review them thoroughly with petitioner. In the case of checks that are barely legible, or not legible at all, I am enclosing such checks to demonstrate the printed check number, even though the amount cannot be read. I am also enclosing with such checks the bank statements that indicate the amounts. Petitioner believes that these checks indicate \$101,639,48 [sic] in payments.

Petitioner failed to relate its alleged proof of additional payments of petroleum business tax to the amounts previously allowed by the auditor as detailed in the chart above, which noted that petitioner paid petroleum business tax only in the amount of \$955.89, and the subsequent chart which noted that petitioner was credited with previously assessed petroleum business taxes in the amount of \$8,290.70, \$1,184.40, and \$433.81. Nonetheless the auditor carefully reviewed the 39 pages submitted by petitioner and determined that this document included copies of 14 checks and that petitioner was entitled to a credit of \$595.28:

Marine Midland check number 6027 in the amount of \$595.28 is a payment made by petitioner for petroleum business tax for the period June-August, 1995. This payment was made in response to the Department's Notice and Demand number 1-010674757.

However, the other 12 checks drawn on Marine Midland Bank were applied to petitioner's tax liabilities other than petroleum business tax, and the 14th check for \$25,000.00, drawn from the attorney escrow account of Carl S. Levine and Associates, P.C., was made as a partial payment pursuant to a Deferred Payment Agreement covering six tax notices. Petitioner had already been given credit by the auditor for taxes assessed pursuant to notices L-011279714 and L-011279629, and the auditor noted after his thorough review that petitioner was not entitled to any additional credit. Other notices relate to (i) highway use tax, (ii) sales tax, and (iii) petroleum business tax prior to the period at issue herein.

As noted above, petitioner also obtained permission to submit into the record after the completion of the hearing, by a due date of January 24, 2003, invoices from the New York City Housing Authority to show delivery of more fuel oil than what the auditor allowed. According to petitioner, it would resubmit invoices previously submitted in a sales tax matter previously held before a presiding officer in a small claims proceeding. Further, the administrative law judge encouraged petitioner to submit these invoices with an affidavit which would explain their relevance. By a letter dated January 23, 2003 of petitioner's current representative, "documents proving exempt sales and the tax that results" were transmitted and contended that a refund was due petitioner. The auditor carefully reviewed these documents consisting of adding machine tapes, but *no invoices*, and noted as follows:

[The submission] consists of several pages of photocopied adding machine tapes with unsworn statements that the information represents itemized deliveries to the New York City Housing Authority. I compared the information in Exhibit 2 [the submission] to the detailed printouts previously provided by petitioner (Department's Exhibit U at hearing). There is no documentation in Exhibit 2 to support petitioner's claim that it is entitled to additional credit for tax exempt sales of fuel sold to the Housing Authority during the audit period.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that Tax Law §301-a(a) imposes a monthly tax on petroleum businesses based on the sum of four components, including tax calculated on a per gallon basis on the sale of nonautomotive-type diesel motor fuel. The Administrative Law Judge observed that the heating oil sold by petitioner is properly treated as nonautomotive-type diesel motor fuel.

The Administrative Law Judge found that in order to determine petitioner's petroleum business tax liability, the Division sought to audit its *commercial* sales of heating oil during the

year at issue. While petitioner reported substantial sales of heating oil during the year, the Administrative Law Judge noted that petitioner reported only a “smidgen” (0.35%) of such sales as commercial sales subject to tax.

The Administrative Law Judge recited applicable provisions of law requiring petitioner to keep a complete and accurate record of all its purchases and sales. The Administrative Law Judge found that petitioner did not have complete and accurate records of all its purchases and sales for the auditor’s review, thus allowing the Division to resort to an estimate of sales, as long as the Division selected an audit method reasonably calculated to reflect the taxes due.

The Administrative Law Judge noted that after the Division cross checked petitioner’s reported purchases of heating oil by analyzing the tax returns of petitioner’s suppliers and the Division’s own Tracker database, petitioner did not contest the Division’s determination that petitioner’s six suppliers sold it 347,934 gallons or 4.1% gallons more than the 8,533,053 reported by it. The Administrative Law Judge found that it was reasonable for the auditor to have estimated petitioner’s commercial sales of heating oil by analyzing the customer list provided by petitioner and to have estimated that petitioner’s commercial customers purchased twice as much fuel as residential customers based upon his auditing experience.

The Administrative Law Judge found that petitioner failed to meet its burden of proof to show, by clear and convincing evidence, that the result of this audit of its commercial heating oil sales subject to tax was unreasonably inaccurate or that the amount of tax assessed was erroneous. The Administrative Law Judge accorded no weight to documents which petitioner sought to submit after the record had been closed. The Administrative Law Judge observed that petitioner introduced little evidence at the hearing to support its case. Further, although

petitioner received permission to submit (after the completion of the hearing) invoices from the New York City Housing Authority to show delivery of more fuel oil than what the auditor allowed, it failed to do so or to explain such failure. The Administrative Law Judge concluded that there was no evidence in the record to support any further adjustments to petitioner's petroleum business tax liability on the basis that there were additional sales to either nonprofit or government entities which had not yet been credited by the auditor.

The Administrative Law Judge rejected petitioner's argument that the Division was collaterally estopped by the determination in the small claims matter concerning petitioner's liability for additional sales tax on the same heating oil sales at issue herein. The Administrative Law Judge also refused to accept petitioner's contention that its overpayment of sales tax, if any, may offset its petroleum business tax liability under the doctrine of equitable recoupment.

Finally, the Administrative Law Judge determined that petitioner did not establish that its failure to pay tax was due to reasonable cause and not due to willful neglect.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that it met its burden to prove the total of exempt sales reflected in exhibit "U" was not 5,808,279 gallons as asserted by the Division but 6,372,044 gallons as demonstrated by the adding machine tapes provided in petitioner's exhibit "2." Petitioner asserts that the Division's failure to rebut this evidence allows an adverse inference to be drawn against the Division's total of the exempt sales made by petitioner during the audit period.

Petitioner maintains that the Division is equitably estopped from asserting that certain of petitioner's payments were for sales tax rather than for petroleum business tax. Petitioner claims

that these sales tax payments were overpayments of sales tax that should automatically have been used to offset underpaid petroleum business taxes. Petitioner believes that it was the State's failure to advise petitioner that it had a right to a refund of an "undisputed" overpayment of sales tax which allowed petitioner to believe that the payments had been applied to petroleum business taxes.

Petitioner argues that since the Division was permitted by the Administrative Law Judge to submit a response to petitioner's post-hearing evidence, petitioner was entitled to submit rebuttal evidence. Petitioner maintains that it was an abuse of discretion for the Administrative Law Judge to refuse to accept petitioner's rebuttal evidence after the record was closed.

Petitioner also asserts that no penalty is appropriate even if an underpayment exists, as the cause of the underpayment was petitioner's belief that its overpayments of sales tax had been applied to petroleum business tax.

The Division argues, in opposition to petitioner's exception, that the Administrative Law Judge's findings of fact and conclusions of law are correct. The Division asserts that petitioner was given permission to submit copies of invoices and an affidavit subsequent to the hearing to support its claim for additional credit for exempt sales. Instead, petitioner submitted copies of adding machine tapes and unsworn statements that the tapes represented itemized deliveries to exempt customers. By permission of the Administrative Law Judge, the Division submitted the affidavit of its auditor who found that petitioner's post-hearing exhibits did not support its claim for additional credit. The Division maintains that petitioner is not entitled to have an adverse inference drawn against the Division because it critiqued documents which petitioner had no right to submit into the record in the first instance.

The Division also argues that there is no basis for petitioner's argument that it has proven that it overpaid sales tax. Further, the Division alleges that either under the theory of equitable recoupment or of equitable estoppel, petitioner is not entitled to have its payments of sales tax credited against its petroleum business tax liability.

OPINION

Petitioner and the Division were carefully advised by the Administrative Law Judge at the close of the hearing that the record would remain open only for the submission of evidence by petitioner on certain limited issues. Further, the Division was offered the opportunity to comment by affidavit on any evidence offered. The Administrative Law Judge did not abuse his discretion in keeping the record open on a limited basis nor was petitioner entitled to submit additional evidence either in rebuttal or on issues beyond the scope of that allowed by the Administrative Law Judge. We have held that a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record (*see, Matter of Purvin*, Tax Appeals Tribunal, October 9, 1997; *see also, Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

We have carefully reviewed the evidence presented by petitioner and find, as did the Administrative Law Judge, that there is no credible basis which supports "any further adjustments to petitioner's petroleum business tax liability on the basis that there were additional sales to either nonprofit or government entities which had not yet been credited by the auditor" (conclusion of law "F," determination of the Administrative Law Judge). Further, petitioner has offered no evidence sufficient to establish that its payments of sales tax were overpayments of

that tax intended to have been payments of petroleum business tax or that such payments were improperly applied by the Division.

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him at the hearing and correctly applied the relevant law to the facts of this case. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Eastchester Transport Corporation is denied;
 2. The determination of the Administrative Law Judge is affirmed;
 3. The petition of Eastchester Transport Corporation is granted to the extent indicated in conclusion of law "J" of the Administrative Law Judge's determination, but otherwise is denied;
- and

4. The Notice of Determination dated August 5, 1991 is modified in accordance with paragraph "3" above, but is otherwise sustained.

DATED: Troy, New York
June 17, 2004

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner