STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BURNSIDE COAL & OIL CO., INC.	:	DETERMINATION DTA NO. 805376
for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Period July 1, 1983 through April 30, 1984.	:	

Petitioner, Burnside Coal & Oil Co., Inc., 1905 White Plains Road, Bronx, New York 10462, filed a petition for redetermination of a deficiency or for refund of tax on petroleum businesses under Article 13-A of the Tax Law for the period July 1, 1983 through April 30, 1984.

A hearing was commenced before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on December 3, 1990 at 1:30 P.M., continued on December 4, 1990 at 9:30 A.M., and continued to conclusion on December 5, 1990 at 11:45 A.M., with the final brief received on May 11, 1992. Petitioner appeared by Levine, Robinson & Algios, P.C. (Carl S. Levine, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUES

I. Whether the Administrative Law Judge improperly received "evidence that was hearsay, irrelevant, immaterial, outside of the relevant period and otherwise inadmissible in a court of law".

II. Whether the Notice of Deficiency was invalid because the auditor did not determine whether petitioner imported petroleum products into New York State or caused such products to be so imported.

III. Whether the Division of Taxation failed to provide petitioner with adequate notice setting

forth the basis and rationale for the deficiency.

IV. Whether petitioner was a "petroleum business" within the meaning of Tax Law § 300(c) during the period at issue and thus subject to the gross receipts tax imposed under Article 13-A of the Tax Law.

V. If it should be determined that petitioner was a petroleum business and liable for gross receipts tax, whether petitioner's liability should be limited to the period after March 8, 1984, the date of issuance of a Certificate of Taxability under Article 13-A.

VI. Whether requiring petitioner to pay the gross receipts tax while it is legally barred from passing the tax onto its customer, the City of New York, is an unconstitutional taking, or otherwise violates prior court decisions prohibiting the imposition of a gross receipts tax which could not be passed through to the consumer.

VII. Whether petitioner is estopped from claiming that it was not a petroleum business during the period at issue.

VIII. Whether a penalty for filing a frivolous petition should be imposed.

FINDINGS OF FACT

On or about January 15, 1985, petitioner, Burnside Coal & Oil Co., Inc., filed a State of New York Tax Return for Petroleum Businesses Taxable under Article 13-A for the period July 1, 1983 through April 30, 1984.[1]

In petitioner's calculation of adjusted gross receipts shown on line 17 of the return, petitioner had deducted, on line 16(d), the sum of $17,405,736.07 as receipts from exchange sales of petroleum, where shipments were made to points in New York State. An asterisk next to line 16(d) signalled a reference to Schedule F, Details of Exchange Sales. On the return, the caption of Schedule F was expanded to read "Details of Exchange Sales & Misc. Items". The "Name of Exchange Partner" on Schedule F was stated as follows:

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[1]Exhibit "O-6". Petitioner had timely applied for and received extensions permitting filing on said date.

"Product delivered to the City of New York pursuant to contract awarded prior to July 1, 1983."

The Audit

A field audit of petitioner for tax under Article 13-A for the period July 1, 1983 through April 30, 1984 was commenced on September 26, 1985, by a letter from Abraham Denowitz, Tax Audit Administrator, apprising petitioner of the audit and asking when and where petitioner's books and records would be made available. It appears that on October 17, 1985 an appointment was made for an auditor to meet with petitioner's accountant, Steve Schmelkin, at petitioner's offices on December 6, 1985. The auditor conducted his examination at said location on December 6 and December 27, 1985 and the audit was completed on or about March 19, 1986.

The audit findings were as follows:

(a) Petitioner was a distributor of fuel oil and coal in New York City and Westchester.

(b) Fuel oil was purchased and imported into New York State by barge, with petitioner taking title outside the State, but with product being pulled from the rack of its suppliers.

(c) Purchases were primarily from West Vernon Petroleum Corp. and occasionally from Amerada Hess and Ultramar Petroleum Corp. The auditor determined that petitioner did not exchange product with other distributors. Cash payments for fuel oil and coal were by check payable directly to the suppliers.

(d) Petitioner's sales of fuel oil were to private homes, apartment houses, churches, schools, the City of New York, Royal Coal & Oil Company and Sheridan Fuel Oil Co., Inc. Where applicable, gross receipts tax was computed and remitted. Petitioner obtained and submitted residential use certificates from Royal Coal & Oil Company and Sheridan Fuel Oil Co., Inc. Cash receipts were usually by check payable directly to petitioner by its customers.

(e) Petitioner's books and records were found to be complete and gross receipts and sales for residential use were found to be correct. The only problem noted by the auditor was as follows:

"Sales to N.Y. City included gross receipts tax, per invoice, however were never collected or submitted to N.Y. State. Subject is classified as a 'Petroleum Business' based on its operations in N.Y. State. The liability of submitting 13A tax is by law the responsibility of the 'Petroleum Business'. Subject ignored the law and created a new category of deductions 'Sales to N.Y. City where N.Y. City refuses to pay tax'. Since subject ignored the law with no basis for its actions, subject is being assessed on all sales to N.Y. City."

(f) The auditor recommended imposition of penalties for negligence (Tax Law § 1085[b]), substantial understatement of tax (Tax Law § 1085[k]) and underpayment of estimated tax (Tax Law § 1085[c]). The reason for this recommendation was that petitioner had no basis in law or otherwise for creation of the new category of deductions with respect to the sales to the City of New York where the City refused to pay the tax.

On April 10, 1986, the Division of Taxation ("Division") issued a Statement of Audit Adjustment and a Notice of Deficiency to petitioner asserting a deficiency in tax of $556,965.00, interest of $121,512.00 and an additional charge (penalty) of $120,725.00,[2] for a total of $799,202.00 due for the period ended April 30, 1984.

Petitioner filed a request for a conciliation conference in the Bureau of Conciliation and Mediation Services. A conference was held on October 6, 1987. The conciliation conferee cancelled the penalties[3] asserted in the Notice of Deficiency by a Conciliation Order dated January 22, 1988, but the deficiency in tax, plus interest, was sustained. Petitioner subsequently filed a petition with the Division of Tax Appeals challenging the deficiency in tax and the interest.

Business Operations

Petitioner is family-owned corporation which began doing business in New York in 1931. During the period at issue, Harry M. Wiles was president of the corporation and owned 50% of the stock and his wife, Violet Wiles, was a vice-president and owned the remaining 50%. Their son, Harvey R. Wiles, was a vice-president and Samuel Pleshko was treasurer.

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[2]Neither document indicates the type of penalty imposed.

[3]The Report of Tax Conference attached to the Conciliation Order (Exhibit "J") indicates that Tax Law § 1085 (b) and (k) penalties had been asserted.

Petitioner sold primarily heating oil, number 2 oil, number 4 oil and number 6 oil, to homes, apartment houses, government agencies and businesses. It also sold anthracite coal.

Petitioner did not own a terminal nor did it own or lease barges or oil trucks. It owned service vans and coal trucks.

Petitioner's oil deliveries were made by two independent carriers, Mystic Transportation and Herbert Petroleum Transportation.

Petitioner did not import petroleum products into New York State, did not pay (at least directly) for the cost of shipping or transporting petroleum into New York and did not designate an agent for importing petroleum into New York for petitioner's account.

During the period at issue, petitioner purchased its petroleum products from the following suppliers: Amerada Hess Corporation, Cibro Terminals, Inc., West Vernon Petroleum Corp., Commander Oil Corp., Pittston Petroleum Inc., Ultramar Petroleum, Inc., Rainbow Fuel Service, Inc., Reliance Utilities Corp., Econo Oil Company, Merrick Shell Fuel Corp., Carbo Concord Oil Co., Inc., South Shore Petroleum, Royal Petroleum, Public Fuel and Burtha Heat.[4]

Either petitioner's suppliers or said suppliers' own sources of product paid for the barging or other costs of importing petroleum into New York State.

Product purchased from petitioner's major suppliers was purchased FOB at the following petroleum storage terminals:[5]

Terminal	Supplier
Court Street, Brooklyn	Amerada Hess
East River Terminal, Bronx	Ultramar/Pittston
Oyster Bay, Nassau County	Commander
Mt. Vernon, New York	West Vernon
149th Street, Bronx	Cibro

Petroleum purchased from Rainbow, Reliance, Econo, Merrick and Commander was

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[4]Petitioner's Exhibit "9".

[5]Petitioner's Exhibit "5".

delivered to petitioner's customers from the suppliers' terminals or storage facilities in New York State. It is unclear how

product purchased from Carbo Concord, Public Fuel and Burtha Heat was delivered.

West Vernon Petroleum Corp.

West Vernon Petroleum Corp. ("West Vernon"), an affiliate of petitioner, was formed in 1981 as an importer and wholesaler of oil products. West Vernon was owned by Harry M. Wiles, Violet Wiles and Harvey R. Wiles. They and Samuel Pleshko were the officers of the corporation.

West Vernon owned a 2,000,000 gallon capacity storage terminal on Eastchester Creek in Mt. Vernon, New York.

Like petitioner, West Vernon owned no barges or trucks, although West Vernon hired barges or trucks from time to time.

While both petitioner and West Vernon were owned by Wiles family members, had common officers and used the address 1905 White Plains Road, Bronx, New York, they maintained separate books and records, different bank accounts and check books and filed separate tax returns. The extent of

the interaction of the two entities, however, is unclear. It is noted that the testimony of Harvey R. Wiles on the relationship between the corporations seemed less than candid, as exemplified by the following extract taken from his cross-examination:[6]

"Q Did Burnside and West Vernon share employees?
A It is possible.

Q Did the same people work for both corporations?
A It is possible.

[6]Transcript, pages 292-293.

Q Would they have drawn paychecks from both corporations?
A It is possible.

Q But you don't know whether that was the case in this situation?
A I'm not sure I understand what you are asking me.

Q I believe you indicated that O-1[7] would have been prepared by a Burnside employee.
A It could have been prepared by somebody in the office.

Q Do West Vernon and Burnside share the same office?
A They could."

Registration of Petitioner as a Petroleum Business

Sometime prior to March 1, 1984, a form entitled "Article 13-A Questionnaire (12/83)" was sent to petitioner. The actual cover letter which accompanied the questionnaire is not in the record. A copy of the cover letter which was apparently mailed with an earlier version of the questionnaire, "Article 13-A Questionnaire (7/83)",[8] stated as follows:

"Chapter 400 of the laws of 1983, which is effective 7/1/83 imposes a privilege tax, at the rate of 3.25% under Article 13-A, on "petroleum businesses" importing petroleum or causing petroleum to be imported into the state for sale in the state.

"In order to make a determination, if your business is subject to tax under Article 13-A, please complete the enclosed questionnaire. Appropriate Taxpayer Services Bulletins are enclosed for references. The questionnaire should be completed and returned in seven (7) days to:

Chief, Oil Tax Audits
New York State Department of Taxation and Finance

Building #9, Room 402A, State Office Campus
Albany, New York 12227

"The telephone number is (518) 457-4397. Any questions you may have should be directed to the above address or telephone number. A duplicate of the questionnaire is enclosed for your records.

"Upon receipt of the completed questionnaire, we will make a

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[7] Exhibit "O-1", petitioner's Article 13-A Questionnaire (infra).

[8] This is the version of the questionnaire filed by West Vernon (Petitioner's Exhibit "8").

determination of your status and advise you of this determination."[9]

Petitioner completed the questionnaire[10] and it was signed by Harvey R. Wiles as vice-president and dated March 1, 1984. It was mailed in an envelope postmarked March 2, 1984 and stamped as received by the Division on March 6, 1984. On the questionnaire, petitioner described its principal activity as "retail sale of heating fuel oil." Item 4(e) of the questionnaire, pertaining to passage of title, was answered as follows:

"Title Passes. When and where does title to product pass to you.

Supplier	Terminal Location	Method of Transportation	Product Transported By	Location Where Shipped	Title Passes
West Vernon Petroleum Corp.	New York State	Product is usually brought by barge into New York State from outside New York State		Product is transported by tankers into ultimate consumers"	Outside New York State

The questionnaire was treated by the Division as an application for a certificate of registration under Article 13-A, i.e., registration as a petroleum business. Accordingly, on March 8, 1984, petitioner was registered by the Division as a petroleum business retroactively to July 1, 1983. The registration was effective to October 31, 1984.[11]

At the hearing, Harvey R. Wiles testified that the terminal location stated in item 4(e) as "New York State" was intended to show the location of the West Vernon terminal, among

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[9] It is noted that the copy of the cover letter in the record is undated and is included in the appendix to petitioner's motion for leave to appeal to the Court of Appeals. The cover letter and questionnaire are referred to in paragraph 21 of the affidavit of Kenneth L. Robinson dated January 14, 1988 in support of said motion (See Exhibit "N").

[10] Exhibit "O-1".

[11] Petitioner's Exhibit "4".

others, and that the method of transportation, i.e., barging, was meant to refer to barging by West Vernon, not petitioner. He did not recall why the questionnaire stated that title passed outside of New York State.[12]

On or about April 23, 1984, the Division received petitioner's first installment payment of estimated gross receipts tax under Article 13-A. The payment was $100,000.00.[13]

Petitioner mailed an application for a three-month extension for filing tax return for gross receipts tax on petroleum businesses (Article 13-A) in an envelope postmarked July 14, 1984.[14] An additional remittance of $162,500.00 was made based on tax of $210,000.00 estimated for the taxable period.

By letter dated October 10, 1984[15] mailed in an envelope postmarked October 12, 1984, petitioner requested an additional extension of time, until January 15, 1985, to file the gross receipts tax return. The

letter stated that it was written on the advice of petitioner's new attorney, Carl S. Levine, who is petitioner's current representative. The extension was granted and the return filed, as noted in Finding of Fact "1" hereof.

Petitioner subsequently filed Article 13-A returns for the years ending April 30, 1985 and April 30, 1986 and made installment payments toward its 13-A tax liability for the year ending April 30, 1987.[16]

Petitioner filed an "Application for Registration of a Petroleum Business, Article 13 A"

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[12]Transcript, pages 283-285.

[13]Exhibit "O-3".

[14]Exhibit "O-4".

[15]Exhibit "O-5".

[16]Exhibit "O", affidavit of Earl F. Willis, ¶ 18.

dated October 15, 1987[17] (characterized by the Division as petitioner's "renewal application for re-certification under Article 13-A").[18] The October 15, 1987 application stated in item 23 that the following applied with respect to sales for the period May 1, 1986 through April 30, 1987:

Type of Petroleum	Gallons Sold in New York	Gallons use in New York	Gallons Imported Into New York For Sale	Gallons Imported Into New York For Use	Gallons Sold Everywhere
Gasoline	-0-				
Distillates	3,216,400	-0-	-0-	-0-	3,216,400
Aviation	-0-				
Other:					
#4, #6	62,151,900	-0-	75,000	-0-	62,151,900

In item 24, petitioner estimated the following on a monthly basis for the period March 1, 1987 through November 30, 1988:

Type of Petroleum	Gallons to be Sold in New York	Gallons to be Used in New York	Gallons to be Imported Into New York For Sale	Gallons to be Imported Into New York For Use	Gallons to be Sold Everywhere
Gasoline	-0-				-0-
Distillates	250,000	-0-	-0-	-0-	250,000
Aviation	-0-				-0-
Other:					
#4, #6	5,000,000	-0-	-0-	-0-	5,000,000

A new Certificate of Registration Under Article 13-A was issued to petitioner on November 10, 1987.[19]

On November 19, 1987, petitioner wrote to a Mr. Greco of the District Office Audit Bureau, Miscellaneous Tax, stating as follows:

> "In accordance with our phone conversation with you on November 12, 1987, we wish to advise you that we have received a new certificate of registration under Article 13-A, valid November 1, 1987.

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[17]Exhibit "O-7".

[18]Exhibit "O", affidavit of Earl F. Willis, ¶ 19.

[19]Exhibit "O-8".

"As we told you last week, when we completed the questionnaire concerning re-registration under Article 13-A, we indicated that we are not in the business of importing or causing to import petroleum products into New York State. Accordingly, we believe that we should no longer be classified as a taxpayer subject to the Article 13-A requirements.

"Please advise us of your revised determination so that we can adjust our records accordingly. We must have this redetermination as soon as possible so that we can notify our suppliers at once."[20]

Petitioner's registration under Article 13-A was subsequently terminated effective January 15, 1988.

Registration of West Vernon as a Petroleum Business

West Vernon filed an Article 13-A questionnaire dated October 21, 1983,[21] stating that its principal business activity was "Wholesale terminal selling heating oils". With respect to passage of title to product, item 4(e) of the questionnaire stated as follows:

"Title Passes. When and where does title to product pass to you.

	Supplier	Location	Method of Transportation	Location Where Shipped	Title Passes
1	Royal Petroleum	New Jersey	Barge	Our Terminal in Mt. Vernon, N.Y.	New Jersey (at Barging)
2	Wyatt	New Jersey	Barge	Our Terminal	New Jersey (at Barging)"

While West Vernon was apparently issued a certificate of registration, a copy of same is not in the record[22].

(a) On June 14, 1984, West Vernon filed a CT-13-A Tax Return for Petroleum Businesses Taxable Under Article 13-A for the period July 1, 1983 through December 31,

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[20] Exhibit "O-9".

[21] Form entitled "Article 13-A Questionnaire (7/83)", Petitioner's Exhibit "8".

[22] It is not Exhibit "O-1" as petitioner's brief suggests on page 11.

1983.[23] It reported $14,139,965.77 in sales for resale, all of which were shown as made to petitioner and also reported $5,427,529.48 in sales to numerous dealers as sales for residential use. Sales for resale and sales for residential use were deducted from total gross receipts of $20,650,929.06 resulting in adjusted gross receipts from sales of petroleum of $1,083,433.81. Tax was computed on said amount at the rate of .0325 resulting in tax of $35,211.59.

(b) On June 14, 1985, West Vernon filed its CT-13-A Tax Report for Petroleum Businesses Taxable Under Article 13-A for the calendar year 1984.[24] It reported $18,848,610.80 in sales for resale to petitioner prior to April 1, 1984 and $15,127,822.20 in sales for resale to petitioner subsequent to March 31, 1984. West Vernon reported that it also made resale sales to two other buyers, Stuyvesant Fuel Service Corp. and Williams Co. Petroleum Marketers, Inc. Total sales for resale to its three resale buyers were $19,126,006.30 prior to April 1, 1984 and $20,918,314.29 subsequent to March 31, 1984. Total sales for residential use to numerous dealers were reported as $6,263,234.39 prior to April 1, 1984 and $4,619,966.93 subsequent to March 31, 1984. The sales for resale and sales for residential use were subtracted from gross receipts of $26,070,161.11 prior to April 1, 1984 and $25,851,456.72 subsequent to March 31, 1984 resulting in adjusted gross receipts from sales of petroleum of $680,920.42 prior to April 1, 1984 and $313,175.50 subsequent to that date. Tax was computed at .0325 for the period prior to April 1, 1984 and .0275 subsequent thereto, resulting in total tax of $30,742.24.

Although the West Vernon returns reported sales for resale to petitioner, petitioner did not issue resale certificates to West Vernon during the period at issue. Harvey R. Wiles testified that he did not know why the sales were listed as sales for resale rather than sales for residential use (transcript p. 310). The only resale certificates in the record were issued to West Vernon by petitioner for periods beginning on or after January 1, 1985.

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[23]Exhibit "Q-1".

[24]Exhibit "Q-2".

The City of New York Bids

In April of 1983, the Department of General Services of the City of New York solicited bids for contracts to supply fuel oil and kerosene to the City of New York for the period July 1, 1983 through June 30, 1984. With respect to taxes, the contract specifications provided that:

> "[t]he City is exempt from sales and federal excise taxes. The [contract] price is to be net, exclusive of these taxes . . . . In addition, Bid prices must include the N.Y. State Gross Receipts Tax, if applicable, but must not be shown as a seperate [sic] line item. Vendor must also indicate whether or not the Gross Receipts Tax has been included in the bid price."[25]

Petitioner, having bid on New York City contracts for many years, submitted its bid. Bids were opened on May 12, 1983 and on June 21, 1983 petitioner was notified that it would be awarded a contract for approximately 21,000,000 gallons of fuel oil for the year July 1, 1983 through June 30, 1984.[26]

On July 6, 1983, the City of New York Department of General Services issued a Notice of Award to petitioner with respect to the bid. The notice stated as follows:

> "You have been awarded the above items as shown in the attached schedule. This award constitutes your contract, as described in the Standard Form of Contract, Page A-2, Paragraph 8. When goods or services are needed an order or shipping instructions will be issued in accordance with the terms of your bid.
>
> "You are requested to honor orders and shipping instructions only for the items awarded to you. The City cannot make payment for the delivery of any other items."[27]

In addition to the contract awarded pursuant to its own bid, petitioner acquired, by assignment, an additional contract which had been awarded to Public Fuel Service, Inc. According to petitioner's representative, a written agreement with Public Fuel Service, Inc.

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[25] Exhibit "N", page 63.

[26] Petition, Exhibit "K", paragraph 23.

[27] Petition, Exhibit "K", Sub-exhibit "11".

dated July 1, 1983 reflected an earlier oral agreement.[28]

It appears that the City and petitioner treated the contracts as effective even prior to the formal award on July 6, 1983. Petitioner claims to have made at least at least a dozen deliveries of fuel oil pursuant to its bid between July 1 and July 6, 1983.[29]

The Enactment of Article 13-A of the Tax Law

On or about June 26, 1983, the New York State Legislature enacted Article 13-A of the Tax Law. It was signed into law and effective on June 30, 1983 commencing with taxable years starting on or after July 1, 1983. The rate of tax was 3¼% for the period July 1, 1983 through March 31, 1984 and 2¾% as of April 1, 1984.

Immediately after the law went into effect, petitioner entered into negotiations with the City of New York in an effort to pass through the tax to the City. On or about July 14, 1983, petitioner wrote to Deputy

Commissioner Carla S. Lallatin of the City of New York Department of General Services stating as follows:

> "Dear Commissioner Lallatin:
>
> "As per our previous discussions with members of your department, you are no doubt aware that New York State has imposed 3¼% gross receipts tax on 'petroleum businesses' as defined under Article 13-A of the New York tax law as of July 1, 1983.
>
> "Inasmuch as this tax was not in effect as of the time that our contract with the City of New York was bid, there was no possibility that we could have included this tax in our price to you.
>
> "Therefore, in our invoicing to the City of New York, Department of General Services locations, we will charge the 3¼% tax on all invoices where use is for non-residential purposes.
>
> Very truly yours,

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[28]Exhibit "H", page 2.

[29]Paragraph 14 of the affidavit of H. Richard Wiles (executed as "Harvey Wiles"), included with Exhibit "N", Motion for Leave to Appeal to the Court of Appeals.

BURNSIDE COAL & OIL CO., INC.

Samuel Pleshko"[30]

Petitioner continued to deliver fuel to the City of New York as per the contract, adding the 3¼% gross receipts tax to each invoice.

The negotiations were ultimately unsuccessful and the City refused to pay the additional billings for gross receipts tax.

Confusion in the Oil Industry

For at least several months after the effective date of Article 13-A there was confusion in the oil industry as to whether governmental agencies would reimburse bidders the amount of the tax. A New York State Office of General Services purchasing memorandum dated July 29, 1983 stated as follows:

> "TO ALL STATE AGENCIES, POLITICAL SUBDIVISIONS AND OTHERS AUTHORIZED BY LAW TO PARTICIPATE IN SUBJECT AWARDS:
>
> "For the above commodities, pursuant to provisions of the new Gross Receipts Tax, oil companies are allowed to pass the cost of the tax to their customers, including State Contract participants.
>
> "Therefore, effective July 1, 1983, the 3.25% Gross Receipts Tax will be payable when added to invoices (vouchers) as a separate item.
>
> "Our position regarding deliveries prior to July 1, 1983 is being reviewed. A directive will be issued as soon as a determination is made.
>
> "If you have any questions please consult your agency counsel or contact this office."[31]

Another successful bidder in the bid opening of May 12, 1983, Sinram-Marnis, also continued to deliver fuel and negotiate, but on September 29, 1983 notified the City that it was terminating deliveries. On September 30, 1983, the City found that Sinram-Marnis had defaulted and was therefore barred from City work for three years under section 345 of the City

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[30] Exhibit "K", petition, Sub-exhibit "6".

[31] Exhibit "K", petition, Sub-exhibit "7".

Charter.[32] Approximately one-half of the contract quantities had been delivered at that point.

Petitioner did not terminate deliveries, at least in part due to concern for being barred from bidding on other City contracts and concern for exposure to damages for breach of contract.

Petitioner's Litigation Against the City

Petitioner commenced a lawsuit in Supreme Court, State of New York, New York County, in an attempt to pass through to the City of New

York the obligation to pay $605,000.00 in gross receipts tax. Petitioner was awarded summary judgment by said court which interpreted the contract as intending that the City pay the gross receipts tax if such tax were applicable.[33] The order was entered October 9, 1986.

The order granting summary judgment was unanimously reversed by the Appellate Division, First Department, which granted the City's cross-motion for summary judgment dismissing the complaint without costs. The essence of the holding was that the contract was clear in specifying that the tax could not be passed on to the City unless it was included in the bid price of the lowest responsible bidder and it was not included in petitioner's bid.[34] The order of the Appellate Division was entered December 10, 1987.

Petitioner moved the Court of Appeals for leave to appeal the order of the Appellate Division. Leave to appeal was denied at 71 NY2d 890, 527 NYS2d 771 (1988), rearg den 72 NY2d 841, 530 NYS2d 556 (1988).

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[32]Exhibit "K", petition, Sub-exhibit "13", § 3.

[33]Exhibit "K", petition, Sub-exhibit "14".

[34]Exhibit "N", pages 63-64. The Appellate Division noted that the date of enactment of Article 13-A, June 26, 1983, was also the date on which the 45-day binding period of the bids expired and that petitioner and Public Fuel Service, Inc., its assignor, could have withdrawn their bids between June 26 and July 6, 1983, which is when the contracts were finally awarded. Neither, of course, had executed that option.

Motion for Summary Determination

The Division brought a motion for summary determination in this matter pursuant to 20 NYCRR 3000.5(c) for a determination dismissing the petition and sustaining the assessment and also moved to impose a penalty of $500.00 for a frivolous petition pursuant to 20 NYCRR 3000.15. The motions

were dismissed by a Short Form Order of Timothy J. Alston, Administrative Law Judge, dated December 1, 1988. The motion for summary determination was denied on the basis that a material issue of fact had been presented. The motion to impose the frivolous petition penalty was denied on the basis that the issues were not frivolous within the meaning of the regulation.

Petitioner contends that the following documents were improperly allowed into evidence at the hearing:

(a) November 27, 1990 affidavit of Earl T. Willis and attachments (Exhibit "O" and "O-1" through "O-9");

(b) Resale certificates issued by petitioner to West Vernon for 1985, 1986 and 1987 (Exhibit "R");

(c) January 10, 1988 cover letter from Carl S. Levine, Esq. to petitioner, regarding the submission of petitioner's fiscal 1984 gross receipts tax return (Exhibit "D");

(d) Memorandum from Kenneth L. Robinson, Esq. to the auditor (Exhibit "E"); and

(e) Correspondence between Schmelkin & Schmelkin and Evan Davis of the Governor's Office (Exhibits "I" and "G").

CONCLUSIONS OF LAW

A. Petitioner's contention that certain documents were improperly allowed into evidence at the hearing (Issue I) is without merit. The rules of evidence observed by courts are not generally observed by administrative agencies (State Administrative Procedure Act § 306.1) and, in fact, hearsay evidence is admissible at administrative hearings. During the course of a hearing, it is sometimes difficult to determine if certain evidence is relevant, without reviewing

the complete record. When that is the case, the administrative law judge will admit the evidence, and, if it should prove to be irrelevant after review of the record, accord such evidence little or no weight. The Findings of Fact herein were based only upon evidence deemed relevant by the administrative law judge.

B. Issue II is resolved in favor of the Division. As set forth in Finding of Fact "4(b)", the auditor had concluded that petitioner imported fuel oil into New York State.

C. Issue III is resolved in favor of the Division. The Statement of Audit Adjustment which was issued with the Notice of Deficiency referred to the field audit. Petitioner's accountant and attorneys participated in the audit and clearly were aware of the basis for the deficiency (see, memorandum of petitioner's representative to the auditor, a copy of which is attached to Exhibit "E" and a copy of which is included in the Field Audit Report [Exhibit "P"]).

D. In order to see Article 13-A of the Tax Law in its proper perspective, a brief historical review of New York's petroleum-related gross receipts tax legislation may be helpful.

Tax Law § 182, providing for an additional franchise tax on certain oil companies, was enacted by Laws of 1980 (ch 271). In essence, section 182 imposed a 2% gross receipts tax on every oil company[35] operating in New York State. Subdivision 12(a) contained an anti-passthrough provision which prevented the oil company from including the tax, either directly or indirectly, in the selling price of its products (subdivision 12[a] was renumbered subdivision 11[a] by L 1981, ch 103, § 75). Section 182,

particularly the anti-passthrough provision, was the subject of considerable litigation in State and Federal courts for the next three years.[36]

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[35]The term "oil company" was redefined by L 1981, ch 1043, as meaning vertically integrated petroleum corporations or their affiliates.

[36]See, Tully v Mobil Oil Corp., 455 US 245, on remand 689 F2d 186; Shell Oil Co. v New York State Tax Commn., 91 AD2d 81, 458 NYS2d 938, motion denied 60 NY2d 632, 467

Tax Law § 182-a was added by Laws of 1981 (ch 481), imposing a franchise tax on certain oil companies. The tax was at the rate of ¾% of gross receipts from sales of petroleum allocated to New York and was imposed for the privilege of the corporation "exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state . . ." (Tax Law § 182-a[1]). The law was approved July 11, 1981 and was effective as of July 1, 1981.

The section 182-a tax was not limited in applicability to the large, vertically integrated firms which were subject to the tax under section 182. Tax Law § 182-a(2) (as amended by L 1981, ch 482) defined the term "oil company" as "every corporation formed for or engaged in the business of importing or causing to be imported . . . into this state for sale in this state, extracting, producing, refining, manufacturing, compounding or selling petroleum." However, a corporation which was principally engaged in selling fuel oil (excluding diesel motor fuel) used for residential purposes was not to be considered an oil company.[37]

Laws of 1981 (ch 1043, § 62) provided that the term "gross receipts from sales of petroleum" excluded receipts from sales made or delivered on or after July 1, 1981 between an oil company and the State of New York or any of its agencies, instrumentalities or subdivisions, if the sales were pursuant to a contract awarded or entered into prior to July 11, 1981, or awarded or entered into after said date if pursuant to a bid submitted prior to said date where the contract did not allow increases in cost or price attributable to the tax.

Laws of 1983 (ch 18) which was approved March 28, 1983, repealed the anti-passthrough

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NYS2d 355.

[37]The amendment made by Laws of 1981 (ch 482) which was approved and effective the same day as chapter 481, deleted a sentence which provided that a corporation which engaged only in selling petroleum (imported or not), which sold 60,000,000 gallons or less per year was not to be considered an oil company.

provisions of section 182(11) (formerly section 182 [12]) and also created a new additional franchise tax on certain oil companies, a similar 2% gross receipts tax enacted as section 182-b.

On June 26, 1983, the Legislature enacted Laws of 1983 (ch 400) which was approved June 30, 1983. This law, which was the result of combined efforts of the Legislature, the Division and industry representatives, made three important changes with respect to the petroleum gross receipts tax:

(1) the ¾% tax imposed by Tax Law § 182-a was effectively limited to the period July 1, 1981 through June 30, 1983;

(2) section 182-b, which had been approved only a few months earlier, was repealed; and

(3) a new Article 13-A "Tax on Petroleum Businesses" was added to the Tax Law as section 300 et seq to replace the 182-a and 182-b taxes.[38]

E. Tax Law § 301(a) imposed a tax, effective July 1, 1983, on every "petroleum business, for the privilege of engaging in business, doing business, employing capital, owning or leasing property, or maintaining an office in this state . . . ." The initial rate of tax was 3¼%[39] of gross receipts from sales of petroleum where shipments were made to points within New York. The minimum tax was $250.00. The rate was to fall to 2¾% effective April 1, 1984[40] and to ¾% effective July 1, 1985.[41]

It is noted that the taxes imposed under Article 13-A were to be added back in the

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[38]Repeal note, CLS Session Laws (L 1983, ch 400).

[39]The initial rate of 3¼% was established by Laws of 1983 (ch 400, § 8).

[40]L 1983, ch 400, § 13.

[41]L 1983, ch 400, § 15.

calculation of entire net income for purposes of a corporation's business corporation franchise tax under Article 9-A of the Tax Law.[42]

F. Tax Law former § 300(c), as originally enacted, defined the term "petroleum business" as meaning:

> "every corporation and unincorporated business formed for, engaged in or conducting the business, trade or occupation of importing or causing to be imported (by a person other than one which is subject to tax under this article) into this state for sale in this state, extracting, producing, refining, manufacturing, or compounding petroleum."[43]

G. Tax Law former § 303 provided, in pertinent part, as follows:

> "Computation of gross receipts from sales of petroleum.
>
> "(a) General.--Except as otherwise provided in this section, gross receipts from sales of petroleum means all receipts
>
> from sales of petroleum where shipments are made to points within this state, whether in cash, credits or property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services, or other costs, interest or discount paid, or any other expense whatsoever.
>
> "(b) Exclusions.--Gross receipts from sales of petroleum shall not include the following:
>
> "(1) Receipts received by reason of any sale of fuel oil . . . used for residential purposes. Provided, however, it shall be presumed that no receipts are receipts received by reason of any sale of such fuel oil . . . unless the purchaser furnishes the petroleum business with a residential use certificate, in such form, at such times and under such terms and conditions as the tax commission may prescribe, and such certificate is accepted in good faith by such petroleum business . . . .
>
> "(2) Receipts from any sale for resale to a purchaser which is a petroleum business subject to tax under this article. Provided, however, it shall be presumed that no receipts are receipts from a sale for resale to such purchaser unless such purchaser furnishes the petroleum business with a resale certificate in such form and under such terms and conditions as the tax commission may prescribe and such certificate is accepted in good faith by such petroleum business.

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[42]Tax Law § 208.9(b)(4) (L 1983, ch 400, § 5).

[43]This definition was expanded to include corporations and unincorporated businesses importing petroleum for self use by Laws of 1984 (ch 67, § 1) and Laws of 1984 (ch 68, § 1).

"(3) Receipts from any exchange sale of petroleum between petroleum businesses subject to tax under this article to the extent that such exchange sale is not recognized as income or reduction of costs for federal income tax purposes unless the tax commission finds that the primary purpose of such exchange sale is the avoidance or evasion of the tax imposed by this article.

* * *

"(c) No double exclusion allowed.--To the extent that any receipt is excluded from gross receipts from sales of petroleum pursuant to any one paragraph of subdivision (b) of this section, such receipt shall not be allowed as an exclusion pursuant to any other paragraph of such subdivision."

H. The issue as to whether petitioner was a "petroleum business" within the meaning of Tax Law § 300(c) is complex. Petitioner did not itself import petroleum products and did not cause persons not subject to tax under Article 13-A to import such products (Findings of Fact "11" through "14"). Accordingly, it would appear not to have been a petroleum business subject to the gross receipts tax.

The issue is complicated, however, by the fact that petitioner completed the questionnaire dated March 1, 1984 stating that title to product purchased from West Vernon passed outside New York State (Finding of Fact "20"). This signified that petitioner was importing product and resulted in the registration of petitioner as a petroleum business. Petitioner, in fact, filed Article 13-A returns for the periods at issue (Finding of Fact "1") and for several years thereafter.

The key question is whether petitioner's actions in representing itself to the Division as a petroleum business and conducting itself as such while attempting to collect the tax at issue from the City of New York estopped petitioner from denying its status as a petroleum business.

The principal case relied upon by the Division in its memorandum of law, Matter of General Oil Distributors (Tax Appeals Tribunal, March 14, 1991), involves an Article 12-A registration, which while differing in numerous respects from the instant case, is somewhat analogous and generally supports the hypothesis advocated by the Division:

"Having accepted the benefit of its joint motor fuel registration as a distributor, and consistently having filed motor fuel tax returns with General Oil, Pride Oil is therefore estopped from denying its status as a distributor."

It is noted that Franklin Mint Corp. v. Tully (94 AD2d 877, 463 NYS2d 566, affd 61

NY2d 980, 475 NYS2d 280) also cited by the Division and relied upon by the Tribunal in General Oil, involved a sales and use tax statute which afforded persons notice that if they chose to register, they became, as vendors, responsible for use taxes. Franklin Mint Corp. is thus distinguishable from the instant case.

The problem with the Division's argument is that the claim of estoppel was not made until it was raised in the Division's post-hearing memorandum. The claim should have been raised in the answer or, at least, at the hearing, so that petitioner could respond to it. In New York, as in most jurisdictions, estoppel is a separate matter which must be pleaded (57 NY Jur 2d, Estoppel, Ratification and Waiver, § 70). Moreover, facts which would give rise to an estoppel or even the basic theory behind the estoppel are not clear from the record. Possibly the Division believes that petitioner's responses to the questionnaire and subsequent acceptance of registration and filing of returns caused the Division to lose taxes which would have otherwise been due from petitioner's affiliate West Vernon or some other supplier. This, however, is conjecture, as the Division's position on this point is not entirely clear.[44]

Accordingly, petitioner is not estopped from claiming that it was not a "petroleum business" during the period at issue.

I. In view of the foregoing, the remaining issues are moot.

J. The petition of Burnside Coal & Oil Co., Inc. is granted, and the Notice of Deficiency issued April 19, 1986 is cancelled.

DATED: Troy, New York
June 3, 1993

/s/ Robert F. Mulligan
ADMINISTRATIVE LAW JUDGE

[44]It is noted that the parties did not discuss the Article 9-A add-back provisions (Conclusion of Law "E") and it is assumed said provisions are not relevant hereto.