STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
USAIR, INC.	:	DETERMINATION
for Revision of a Determination or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Period April 1, 1984 through December 31, 1985.	:	

Petitioner, USAir, Inc., Washington National Airport, Washington, DC 20001, filed a petition for revision of a determination or for refund of tax on petroleum businesses under Article 13-A of the Tax Law for the period April 1, 1984 through December 31, 1985 (File No. 806206).

On April 5, 1990 and April 9, 1990, respectively, petitioner, by its representative, E. Parker Brown, II, Esq., and the Division of Taxation by William F. Collins, Esq. (James Della Porta, Esq. of counsel) consented to have the controversy determined upon a stipulation of fact and submission of documents without hearing, with all briefs to be submitted by August 24, 1990. After due consideration of the record, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is entitled to a refund of tax on petroleum businesses where petitioner's claim is based on a policy statement of the Division of Taxation with an effective date after the refund year.

FINDINGS OF FACT

Petitioner, USAir, Inc., and the Division of Taxation ("Division") entered into a Stipulation of Facts which was adopted in its entirety (withthe deletion of references to exhibit numbers) as Findings of Fact "2" through "10".

On January 20, 1987, petitioner filed with the Division's Audit Bureau a CT-8, Claim for Credit or Refund of Article 13-A tax on petroleum businesses, covering the period April 1

through December 31, 1984, together with an amended CT-13-A, Tax Report for Petroleum Businesses, for the year 1984. The amount of petitioner's claim was $165,909.00.

On January 20, 1987, petitioner also filed with the Division's Audit Bureau a CT-8, Claim for Credit or Refund of Article 13-A tax on petroleum businesses, covering the period January 1 through December 31, 1985, together with an amended CT-13-A, Tax Report for Petroleum Businesses, for the year 1985. The amount of petitioner's claim was $57,863.00.

Petitioner's claims for credit were based on recalculations of tax as provided for in a then recently released Technical Services Bureau Memorandum, TSB-M-83(22.5)C, titled "Computation of Petroleum Subject to Tax under Article 13-A", and dated September 2, 1986. Since petroleum is fungible and aircraft fuel tanks may contain both imported and non-imported fuel, a determination had to be made as to what portion of the fuel consumed in New York was imported and therefore subject to the consumption tax included in Article 13-A. In accordance with prior Technical Services Bureau memoranda, TSB-M-83(22.1)C and TSB-M-83(22.3)C, the portion of fuel subject to the consumption tax was determined by the ratio of fuel imported for consumption to fuel imported for consumption and fuel purchased in New York.

TSB-M-83(22.5)C recognized that this prior method of calculation encouraged purchase of fuel outside New York State to the disadvantage of New York petroleum vendors:

> "An Article 13-A supplier may, in order to recoup the Article 13-A tax imposed on it, increase the price of its product to reflect such tax. Thus, a taxpayer who purchases all or part of its fuel in New York State will ordinarily pay an amount higher than one which purchases all of its fuel outside New York, since the New York purchaser may not give a Certificate of Consumption...for those purchases (only where title and risk of loss pass to the purchaser [outside] New York). A taxpayer which purchases all its fuel outside the state would pay the consumption tax only on the portion of such fuel consumed in the state. On the other hand, a taxpayer which purchases fuel within the state would pay, in addition to the consumption tax on the fuel imported and consumed in New York, an amount reflecting the tax paid by its supplier."

The rationale for the adoption of TSB-M-83(22.5)C can be illustrated by how the prior procedure operated:

Example I: A consuming airline purchases 60,000 gallons of fuel from vendors outside New York State which are Article 13-A taxpayers, with title to the fuel passing

outside New York State. Certificates of Consumption are properly given by the airline to these vendors, allowing the vendors to reduce their taxable gross receipts for Article 13-A purposes. Because of this reduction, no tax is passed through to the airline in the form of higher prices.

The airline purchases 30,000 gallons of fuel from Article 13-A vendors with title passing to the airline within New York State. Certificates of Consumption cannot be given for in-state purchases. Hence, the vendors cannot reduce their taxable gross receipts for Article 13-A purposes, and the tax they are obligated to pay is passed through to the airline in the form of higher prices.

The airline also imports 25,000 gallons of fuel into New York in its fuel tanks. The airline had 40 flights during the year where the flight or a leg of the flight originated in New York and was destined for a point outside New York. There were no intrastate flights. And finally, fuel deemed consumed for the airline's type of aircraft was 1,000 gallons per take-off.

As provided in TSB-M-83(22.1)C the formula to be used in computing the airline's liability was as follows:

a = petroleum deemed consumed in New York
b = petroleum imported for consumption other than in fuel tanks
c = petroleum imported for consumption in fuel tanks
d = petroleum purchased in New York that was neither imported nor caused to be imported
t = petroleum subject to consumption tax

$$t = a \times \frac{b + c}{b + c + d}$$

a = 40,000 gallons (40 flights x 1,000 gallons per take-off)
b = 60,000 gallons
c = 25,000 gallons
d = 30,000 gallons

$$t = 40{,}000 \times \frac{60{,}000 + 25{,}000}{60{,}000 + 25{,}000 + 30{,}000}$$

t = 40,000 x 73.913%
t = 29,565 gallons consumed and subject to consumption tax

Thus, the airline pays tax passed through to it by the vendors of "d", i.e. on the 30,000

gallons purchased in New York, and on "t", the 29,565 gallons subject to consumption tax, for a total tax on 59,565 gallons.

Example II: Next, assume the facts in the preceding example, except that all fuel is imported (i.e. "d" = 0):

a = 40,000 gallons
b = 90,000 gallons
c = 25,000 gallons
d = 0

$$t = 40{,}000 \times \frac{90{,}000 + 25{,}000}{90{,}000 + 25{,}000}$$

t = 40,000 x 100%
t = 40,000 gallons consumed and subject to consumption tax

In this case the airline pays tax on only the 40,000 gallons subject to consumption tax.

Example III: And finally, assume the airline purchases nearly all its fuel in New York:

a = 40,000 gallons
b = 10,000 gallons
c - 25,000 gallons
d = 80,000 gallons

$$t = 40{,}000 \times \frac{10{,}000 + 25{,}000}{10{,}000 + 25{,}000 + 80{,}000}$$

t = 40,000 x 30.43%
t = 12,172 gallons consumed and subject to consumption tax

Thus, the airline in Example III pays tax to vendors of "d", i.e. on the 80,000 gallons purchased in New York, and on "t", the 12,172 gallons subject to consumption tax, for a total tax on 92,172 gallons. This is more than twice the tax paid when the same airline imports all of its fuel.

TSB-M-83(22.5)C revised the Division's policy. Specifically, it provided that, in computing the portion of petroleum consumed which is subject to tax, fuel purchased in New York is subtracted from fuel deemed consumed in New York. Petitioner made this subtraction on its amended returns notwithstanding the fact that TSB-M-83(22.5)C limited this calculation method to taxable periods beginning on or after July 1, 1985.

On July 27, 1987, the Division's District Office Audit Bureau responded to petitioner's

claims for credit that "...this revised policy is effective for taxable periods beginning on or after July 1, 1985. Both of these amended reports begin before the revised policy effective date. Therefore your claims for refund are respectfully denied."

The parties agree that the calculations going into petitioner's claims for credit are accurate.

On August 28, 1987, in response to the denial of its claims for credit, petitioner petitioned the Tax Appeals Bureau of the New York State Tax Commission. These petitions were treated as requests for conciliation conference by the Bureau of Conciliation and Mediation Services. On August 11, 1988 a conciliation conference was held, and subsequently the conciliation conferee sustained the denial of petitioner's claims for credit without explanation. On October 21, 1988 a Conciliation Order was issued; on October 31, 1988 petitioner timely petitioned the Division of Tax Appeals; and on February 23, 1989 the Division served its Answer herein.

CONCLUSIONS OF LAW

A. Chapter 400 of the Laws of 1983 created a new article 13-A of the Tax Law. This article imposes an annual tax upon every petroleum business taxable in New York State. The tax imposed by article 13-A took effect on July 1, 1983 (L 1983, ch 400, § 22). Article 13-A, as originally adopted, defines a petroleum business as every corporation and unincorporated business formed for, engaged in or conducting the business of importing petroleum into New York or causing petroleum to be imported into New York for one of several purposes: sale, extracting, producing, refining, manufacturing or compounding (Tax Law former § 300[c]). The tax rate applies to the petroleum business's "gross receipts from sales of petroleum where shipments are made to points within the state" or $250.00, whichever amount is less.

Businesses which imported petroleum into New York for consumption only, such as USAir, were not subject to the tax on petroleum businesses; however, New York petroleum businesses could be expected to pass through the amount of the tax on petroleum businesses to such customers in the form of higher prices. In order to avoid the higher price, commercial

consumers of petroleum were able to purchase petroleum outside of New York for import into and consumption in New York. Article 13-A was amended in 1984 to avoid this result.

> "Statement in support: This bill eliminates a potential loophole in Article 13-A that could provide a disincentive to petroleum sales in New York and permit avoidance of the tax by purchases from non-New York businesses. That inequitable loophole, if left unremedied, has significant adverse fiscal implications for the State; it also places New York petroleum businesses at a competitive disadvantage vis-a-vis foreign petroleum businesses. Its elimination ensures the receipt of budgeted revenues and enhances the equity of the tax." (Memorandum of State Executive Dept., 1984 McKinney's Session Laws of NY, at 3115).

Chapters 67 and 68 of the Laws of 1984 amended article 13-A to include a tax on petroleum consumed in New York. The definition of a petroleum business was amended to include every business "importing or causing to be imported...petroleum into this state for consumption by it in this state" with certain exceptions not pertinent here (Tax Law § 300[c], as amended by L 1984, ch 67, § 1). The tax rate was imposed on the consideration given or contracted to be given by a petroleum business for petroleum which it imports or causes to be imported into New York for consumption by it in New York (Tax Law § 301[a][ii], as amended by L 1984, ch 67, § 2).

Gross receipts subject to the tax do not include "[r]eceipts from any sale to a purchaser where the consideration given by such purchaser is taxable pursuant to [Tax Law § 301(a)(ii) of article 13-A] and where such consideration is given within one taxable year of the time that such receipts are received." (Tax Law § 303[b][5], as added by L 1984, ch 67, § 5). That is, if a purchaser is liable for payment of the article 13-A tax by virtue of importing petroleum into New York for its own consumption (or causing petroleum to be imported for that purpose), the seller of the petroleum may exclude the amount of the sale from its calculation of gross receipts subject to the article 13-A tax on petroleum businesses. To avoid the statutory presumption that all receipts are subject to the tax, the seller must obtain from the purchaser a consumption certificate in such form as required by the Division of Taxation (Tax Law § 303[b][5]). The statute recognizes that an airline may import petroleum into New York which is then consumed outside of New York, and it explicitly excludes from the tax on petroleum businesses all consideration given (or contracted to be given) for aviation fuel, with the exception of

"consideration given for aviation fuel consumed in this state" (Tax Law § 303[c][3], as added by L 1984, ch 67, § 6). The statute provides a series of presumptions to be used in determining the amount of aviation fuel actually consumed in New York.

(1) Where both the points of departure and arrival of any flight or any leg of any flight are within New York, the amount of aviation fuel consumed in New York is presumed to be all fuel consumed during the flight; (2) where only the point of departure is within New York, the amount of fuel consumed in New York is presumed to be all aviation fuel consumed in takeoff; (3) where only the point of arrival, or where neither the point of arrival or of departure is within New York, none of the aviation fuel consumed on the flight is to be treated as consumed in New York. Where any of these methods prove inadequate, the Commissioner of Taxation and Finance is authorized to prescribe methods of attribution which fairly and equitably reflect aviation fuel consumed in New York (Tax Law § 303[c][3]). The 1984 amendments to article 13-A are applicable to tax years commencing on or after April 1, 1984 (L 1984, ch 67, § 11).

B. The Division issued a Technical Services Memorandum dated June 8, 1984 (TSB-M-83[22.1]C), advising taxpayers of the changes in the tax on petroleum businesses and announcing the procedures adopted by the Division to implement the amendment. Two issues addressed in that memorandum are of concern here. First, the memorandum described the circumstances under which a purchaser is authorized to furnish a Certificate of Consumption to a supplier to avoid double taxation of petroleum imported or caused to be imported into New York.

> "NOTE: A Certificate of Consumption is considered proper only when given to an Article 13-A Taxpayer under the following circumstances. Title to the petroleum must pass outside New York State and the petroleum must be subsequently delivered into New York State by the seller or common or contract carrier, for consumption by the purchaser within New York State. The delivery must be made so that the seller is required to report the sale to New York as a New York sale pursuant to the destination rules under Article 9A, which are applicable to Article 13-A. If the delivery is made where the seller is not required to report the sale to New York as a New York sale pursuant to the destination rules under article 9-A, which are applicable to Article 13-A, the purchaser may not issue a Certificate of Consumption and the seller may not accept such Certificate for such transaction" (TSB-M-83[22.1]C, at 3).

Second, the memorandum specifically addressed the use of a Certificate of Consumption

by a commercial airline and provided a formula to be used in computing an airline's tax liability on its 13-A returns. Essentially, the general rule governing issuance of certificates of consumption quoted above was applied to airlines, with the following results:

(1) Airlines were advised to give a certificate of consumption to a supplier subject to the article 13-A tax where title to the petroleum passed outside New York. The supplier would then reduce its gross receipts subject to the article 13-A tax by the amount of the airline's purchase (Tax Law § 303[b][5]), and the airline would be taxed on the consideration given for that portion of the fuel imported into and consumed by the airline in New York.

(2) An airline purchasing petroleum from an out-of-state supplier not subject to tax under article 13-A was advised not to issue a certificate of consumption to the supplier. The tax would then apply to consideration given for that portion of the purchased fuel imported into and consumed in New York by the airline.

(3) An airline purchasing fuel from a supplier subject to the tax on petroleum businesses was advised not to issue a certificate of consumption to the supplier, if title to the fuel passed in New York. Under these circumstances, 100% of the purchases would be taxable to the 13-A seller of the petroleum. The memorandum assumed that the tax would be passed on by the seller to the airline as an increase in purchase price. "At the same time, the consuming airline will be taxed as an Article 13-A consuming taxpayer on the portion of petroleum imported or caused to be imported into this State for consumption by it in this State" (TSB-M-83 [22.1] C, at 9).

Petroleum fuel is a fungible commodity; therefore, it is not possible to trace fuel consumed in New York to its source, whether in or out of state. Looking back to Example III of the stipulated facts (see Finding of Fact "6"), one can see that it is impossible to state with any exactitude whether the 40,000 gallons of fuel consumed in New York had their source in the 35,000 gallons of fuel imported by the airline (and subject to the consumption tax) or the 80,000 gallons of fuel purchased in New York by the airline (hence, not subject to the consumption tax but taxable to the seller). To resolve this problem, the Division devised a formula which

resulted in a pro rata share of fuel purchased in New York being subject to the consumption provision of the article 13-A tax.[1] As illustrated

by the examples provided in the stipulation of facts, the formula also resulted in disparate economic consequences for the airline, depending on whether it purchased gasoline in or outside of New York.

C. On September 2, 1986, the Division issued a Technical Services Memorandum (TSB-M-83[22.5]C) revising its policy for computing petroleum fuel subject to the consumption provision of article 13-A. As applied to aviation fuel, the new policy required airlines to subtract fuel purchased in New York from fuel deemed consumed in New York (in accordance with the statutory presumptions found in Tax Law § 303[c][3]) to calculate fuel subject to tax. As stated in the memorandum, the change in policy reflects a presumption "that, for purposes of the Article 13-A tax, all non-imported fuel is used first. Thus, a tax in excess of the minimum tax of $250 would be due only when fuel deemed consumed in New York exceeds fuel purchased in New York in an amount that will produce a tax higher than $250.00" (TSB-M-83[22.5]C).

The memorandum provides the following reason for the change in policy:

> "An Article 13-A supplier may, in order to recoup the Article 13-A tax imposed on it, increase the price of its product to reflect such tax. Thus, a taxpayer who purchases all or part of its fuel in New York State will ordinarily pay an amount higher than one which purchases all of its fuel outside New York, since the New York purchaser may not give a Certificate of Consumption (CT-13-AC) for those purchases (only where title and risk of loss pass to the purchaser in New York). A taxpayer which purchases all its fuel outside the state would pay the consumption tax only on the portion of such fuel consumed in the state. On the other hand, a taxpayer which purchases fuel within the state would pay, in addition to the consumption tax on the fuel imported and consumed in New York, an amount reflecting the tax paid by its supplier. This disparity is apparent where fuel consumed by the taxpayer exceeds that which it imports or where fuel is purchased in New York State but is consumed outside the state.
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[1]This proposition was conceded in the Division's brief where it is stated: "The original method resulted in a pro rata share of fuel purchased in New York being subject to Article 13-A."

To ameliorate this disparity, the Tax Commission has revised its policy" (TSB-M-83[22.5]C, at 1).

This statement explicitly acknowledges that the original policy (embodied in TSB-M-83[22.1]C) continued to encourage out-of-state purchases of petroleum to the detriment of New York State and New York petroleum suppliers. Since article 13-A was amended to eliminate the "disincentive to petroleum sales in New York" and avoidance of the tax by purchases from non-New York businesses (Memorandum of State Executive Dept., supra), the original policy was inconsistent with the legislative intent. Moreover, the original method of calculation was inconsistent with the statute itself.

The 1984 amendment of article 13-A imposed a tax on consideration given or contracted to be given by a petroleum business for petroleum which it imports or causes to be imported into New York for consumption by it in New York (Tax Law § 301[a][ii]). Thus, consideration given for petroleum purchased in New York for consumption in New York is excluded from taxation. To the extent that the original formula imposed the consumption tax on a pro rata share of fuel purchased in New York, it brought about a result not intended by the statute. Thus, the second memorandum, by adopting the presumption that the first fuel used is that purchased in New York and subtracting that amount from all fuel deemed consumed in New York, implemented the statutory intention to impose the consumption tax only on fuel both imported into and consumed in New York.

The policy change was made effective for taxable periods beginning on or after July 1, 1985. Taxpayers who had filed final returns for periods beginning on or after July 1, 1985 were advised to file claims for credit or refund where appropriate. USAir filed claims for refund for the period April 1, 1984 through December 31, 1984 and January 1, 1985 through December 31, 1985, calculating its tax liability in accordance with the method set forth in the memorandum of September 2, 1986 (TSB-M-83[22.5]C, at 3-4). The Division's denial of USAir's claims is based upon a simple application of the effective date set forth in the same memorandum.

Petitioner argues that the Division's revised policy correctly reflects the legislative intent

embodied in the 1984 article 13-A amendments and should have been applied from the very beginning. Petitioner therefore takes the position that the Division's refusal to apply the revised policy to periods before July 1, 1985 is arbitrary and unreasonable.

D. In response to petitioner's argument, the Division offered the following comments in its Memorandum of Law:

> "Petitioner argues that the revised TSB-M in question reaches a fairer result than the original rule. That is not the same as arguing that the revised TSB-M is more in harmony with the language of the applicable statute. A good case can be made the Division [sic] prior position presuming ratable consumption is more reasonable than the later position presuming that no fuel purchased in New York will be consumed in New York. The adoption of the presumption was merely an exercise in administrative discretion.
>
> It must be understood that in certain situations there may be several different valid interpretations of a statute. An administrative agency is free to select any of them. See Mobile International Finance Corp v State Tax Commission, 117 AD2d 103; Dental Society of the State of New York v State Tax Commission, 110 AD2d 988; see also Manhattan G. E. Co. v Commissioner, 297 U.S. 129. Thus the Division has the authority to adopt any interpretation which consistent [sic] with the underlying statute. Given this premise, a new ruling cannot be said to invalidate a prior ruling which was reasonable.
>
> In the present case, the revised TSB-M merely represents the Division's use of its discretionary authority to accommodate the needs of a segment of the airline industry. This objective does not invalidate the prior rules. Since the prior rules were consistent with the statute, it was reasonable to protect the State's Treasury by making the revised M prospective only. Thus, the new method should be applied retroactively only if petitioner can establish that this method is the only reasonable interpretation of the law."

It is clear from the prior discussion that the original Technical Services Memorandum (TSB-M-83[22.1]C) was inconsistent with the statute, that it did not give effect to legislative intent, and that the memorandum was revised to conform the policy to the law. To argue that the original policy was also "reasonable" obscures, without addressing, the real issue: whether the Division acted arbitrarily in selecting an effective date of July 1, 1985 for the revised policy.

The Division takes the position that well-accepted rules of statutory construction support its decision to apply the new policy prospectively.

Technical Service Bureau Memoranda are statements of an informational nature issued to advise taxpayers of significant changes in the law, to disseminate the Division's interpretation of the Tax Law and to advise the public of audit policies which will be pursued by the Division

(see, Developing and Communicating Interpretations of the Tax Laws, A report to the Governor and the Legislature reviewing Department of Taxation and Finance Policies and Practices, March 1989, at 20). Technical Services Memoranda are not published in the State Register or filed with the Secretary of State (see, State Administrative Procedure Act §§ 202 and 203) and, thus, do not have the force and effect of law; consequently, rules of statutory construction applicable to a promulgated regulation are not appropriately applied to such memoranda (see, Finger Lakes Racing Assn. v. New York State Racing and Wagering Board, 58 AD2d 285, 397 NYS2d 647, 650, mod 45 NY2d 471).

We are not faced here with a situation in which an administrative agency has merely changed an existing policy. The revision of the mathematical formula set forth in TSB-M-83(22.1)C was necessary because that formula achieved results which were contrary to the statute. Under these circumstances, it was incumbent upon the Division to at least state its reasons for not allowing taxpayers to file claims for refund for all periods not barred by the statute of limitations (Tax Law § 1087), in order that some assessment could be made of the Division's reasons. TSB-M-83(22.5)C gives no reason for limiting its application to periods after July 1, 1985, and the Division's Memorandum of Law suggests that the only reason was to avoid payment of tax refunds. Surely, this is not reason enough.

E. The petition of USAir, Inc. is granted.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE