STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of SENTRY REFINING, INC. for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Period October 1, 1984 through September 30, 1986.	:	DETERMINATION DTA NOS. 808199 AND 808203
In the Matter of the Petition of SEN MAR, INC. for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Period August 1, 1986 through July 31, 1988.	:	

Petitioner Sentry Refining, Inc., 39 Lewis Street, Greenwich, Connecticut 06830-5553, 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 October 1, 1984 through September 30, 1986.

Petitioner Sen Mar, Inc., 39 Lewis Street, Greenwich, Connecticut 06830-5553, 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 August 1, 1986 through July 31, 1988.

A consolidated hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 28, 1993 at 1:15 P.M. and continued to completion on July 22, 1993 at 10:30 A.M. Briefs were filed by petitioners and the Division of Taxation. Petitioners informed theAdministrative Law Judge that a reply brief would not be filed by a letter which was received on December 3, 1993; this began the six-month statutory period for issuance of a determination. Petitioners appeared by Walker, Walker & Kapiloff, P.C. (Arnold Y. Kapiloff, Esq., of counsel). The

Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq. of counsel).

ISSUES

I. Whether petitioners were petroleum businesses subject to taxation under article 13-A of the Tax Law.

II. Whether the Division of Taxation properly computed the gross receipts subject to tax in determining petitioners' tax liability under article 13-A of the Tax Law.

III. Whether article 13-A of the Tax Law places an unconstitutional burden upon interstate commerce.

IV. Whether petitioners have established any grounds for cancelling or abating penalties.

FINDINGS OF FACT

Petitioner Sentry Refining, Inc. ("Sentry") was incorporated in New Jersey in 1974. It operated a small refinery in Corpus Christi, Texas, importing oil from Venezuela and turning it into crude oil, naphtha and diesel fuel. Sentry was the beneficiary of a Federal entitlement program which subsidized small refineries in order to maintain competitiveness between them and larger refineries. The program was terminated shortly after President Ronald Reagan took office in 1980. Sentry found that without the Federal subsidies it was unable to operate profitably, and in 1983 the refinery was closed.

Sentry decided to continue doing business as a seller and marketer of petroleum products, operating out of offices in New York State. According to a questionnaire Sentry filed with the Division of Taxation ("Division") in October 1983, Sentry maintained executive and accounting offices in New York State. It listed its address on that questionnaire as 362 Fifth Avenue, New York, New York. Under article 13-A of the Tax Law, New York imposes a franchise tax on "every petroleum business for the privilege of engaging in business, doing business, employing capital, owning or leasing property, or maintaining an office" in New York (Tax Law § 301[a][1]). A petroleum business includes any business which imports residual petroleum product (essentially, number 5 or number 6 fuel oil) or causes residual petroleum product to be imported into New York for use, distribution, storage or sale (Tax Law §

300[b][3]). There is some confusion in the record on this point; however, it can reasonably be inferred from evidence in the record that Sentry was registered as a petroleum business from October 1983 through March 1984.[1] Sentry's name appeared on the Division's list of registered petroleum businesses in December 1983, March 1984 and June 1984. The petroleum business tax is imposed on a petroleum business's gross receipts from sales of petroleum where shipments are made to points within the State (Tax Law § 301[a]).

In 1985, Sentry entered into a contract to supply Long Island Lighting Company ("LILCO") with number 6 fuel oil which was to be delivered

to LILCO in New York State. Because of Sentry's poor financial condition, it was unable to obtain the bank financing which would have enabled it to purchase the fuel oil that it had contracted to sell to LILCO. In order to fulfill its agreement, Sentry entered into an arrangement with Transoil, Ltd. ("Transoil") of Coral Gables, Florida. Transoil opened a bank account in Switzerland under the name Sentry Refining. LILCO paid for the fuel oil by wiring Federal funds to Chase Manhattan Bank, New York City for the account of Sentry Refining in the Switzerland bank account established by Transoil. Transoil used the funds remitted by LILCO to pay for the fuel oil and expenses relating to the transaction. Sentry earned what it denominated a commission on its arrangement with Transoil, but the exact nature of that fee and how it was calculated cannot be determined from the record.

The contract between Sentry and LILCO contains the following provision:

> "6.5 Taxes and Duties
>
> "Seller shall pay all taxes and duties imposed upon the purchase, sale, use, delivery, export, import, manufacture, storage and, if required, transportation as currently prescribed by law of the Product set forth herein prior to the passage of title pursuant to Section 9.3, except that Buyer shall pay any city, state and county sales or use taxes, New York State Petroleum Business Tax, or other similar taxes imposed by such authorities applicable to deliveries to Buyer hereunder."

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[1]Neither the Division nor petitioner had a written record establishing Sentry's registration; however, a notation on the bottom of a copy of Sentry's petroleum business questionnaire indicates that Sentry was registered by the Division for this period.

Later contracts between Sen Mar and LILCO contained a similar provision.

Sentry prepared the sales invoice to LILCO for the first transaction under its own name and stated one lump-sum price for the sale. LILCO advised Sentry that it required its sellers to separately state the New York gross receipts tax on petroleum businesses on all invoices. In all subsequent billings, Sentry prepared an invoice which showed separate itemizations for sales and for gross receipts tax. Sentry did not pay to the State the amount that it itemized as gross receipts tax on its billing invoices.

On November 28, 1988, Sentry filed a petroleum business tax report (form CT 13-A) for its 1984 tax year (ended September 30, 1985) calculating the minimum tax liability of $250.00. The report contains an attachment explaining the transaction with Transoil, as it is explained above. As relevant here, the attachment contains the following statement:

> "Sentry believes that Transoil regularly engages in business in New York State and that Transoil is a persn [sic] subject to tax under Article 13-A.
>
> "Accordingly, Sentry does not 'import or cause to be imported (by a person other than one which is subject to tax under this article)', as defined in Section 300, Article 13-A, Tax Law, and by reason thereof, Sentry is not a petroleum business."

Sentry requested a refund of prepaid article 13-A tax in the amount of $142,625.00.

Sentry filed a petroleum business tax report for its 1985 tax year (ended September 30, 1986) where it reported the minimum tax liability of $250.00. This report contains an attachment similar to the one that accompanied its 1984 report. In the attachment, Sentry described three more transactions with Transoil under terms similar to those described in the 1984 tax report. It also described two other transactions as follows:

> "In March 1986, Sentry acquired a cargo of crude oil from Vitol S.A., Inc. 66 House Road, Stamford, Connecticut, which was delivered in New York State upon the vessel 'Norse Venture;' and Sentry purchased this cargo, took delivery and title in New York State at the Flange at Lilco's facility in New York. Sentry billed Lilco and the cargo was sold for the price of $5,336,128.92. The New York shipping agent for the benefit of the owner of the vessel and Vitol was Kurz Moran Shipping Agency, Inc., 132 Nassau Street, New York, New York.
>
> "In June 1986, Sentry acquired a cargo of crude oil from Vanol (USA) Inc., Bridge Plaza North, 2100 North Central Road, Fort Lee, New Jersey, which was delivered upon the vessel 'Mantinia;' and Sentry purchased this cargo, took delivery and title in New York State at the Flange at Lilco's faciity [sic] in New York. Sentry billed Lilco and the cargo was sold for the price of $4,125,346.40. The New

York shipping agent used by and for the benefit of the owner of the vessel and Vanol was Bill Black Agency, Inc., 20 North Tyson Avenue, Floral Park, New York.

"Sentry believes that both Vitol and Vanol regularly engage in business in New York State and that each is a person subject to tax under Article 13A."

Sentry requested a refund of $114,050.00 representing the amount of its prepaid petroleum business tax.

Because of Sentry's poor financial condition and its inability to obtain bank financing, a decision was made to continue Sentry's business through a different corporation. Sen Mar was formed in New York in 1984 under the name Trifinery, Inc. and later changed its name to Sen Mar. Sentry assigned its contractual rights with LILCO to Sen Mar. The assignment was approved by LILCO in September 1986. Thereafter, Sen Mar entered into separate contracts with LILCO for the sale of petroleum. Sen Mar continued Sentry's practice of separating the total amount on each LILCO invoice into an amount for sales and an amount for gross receipts tax.

Sen Mar was registered as a New York State petroleum business under article 13-A of the Tax Law for the period October 16, 1986 through January 31, 1988. It was assigned a certificate of taxability, number A-0447-8. Sen Mar's registration was not renewed.

The Division began an audit of Sentry and Sen Mar in February 1989. The auditor reviewed the tax reports filed by Sentry and Sen Mar, Federal income tax reports filed by the corporations, and some purchase invoices and purchase contracts. She discussed the operations of the two corporations with their representative, Mr. Kapiloff. She also reviewed purchase journals, contracts and invoices provided by LILCO. LILCO representatives with whom the auditor discussed the Sentry and Sen Mar transactions confirmed that LILCO required Sentry and Sen Mar to separately state the gross receipts tax on all invoices.

The auditor contacted Vitol, one of Sentry's suppliers, to determine whether that company was doing business in New York and, in response, she was sent a copy of a letter from the Division to Vitol which states as relevant:

"After reviewing the answers which you provided on our questionnaire

> relative to Article 13-A, we have determined, that you are not a 'petroleum business' as defined in such article and are therefore not required to file reports with or to pay the applicable tax under Article 13-A directly to this department.
>
> "Such determination is based upon the fact that your answers indicate that you are not engaging in business, doing business, employing capital, owning or leasing property or maintaining an office in New York, even though it appears you are importing petroleum into New York State for sale in the state" (emphasis added).

The auditor's report states that Vanol, U.S.A. was a registered petroleum business at the time that it sold petroleum product to Sentry in 1986. It apparently filed a 1986 petroleum business tax return reporting its sale to Sentry as a sale for resale.

Based on information obtained in the audit, the Division concluded that Sentry was a petroleum business as defined in the Tax Law, that it caused the importation of petroleum products by suppliers or importers not subject to the petroleum business tax and, as a result, that Sentry was required to pay the petroleum business tax on its gross receipts from all product imported into New York for sale to LILCO.

In its petroleum business tax report for 1984, Sentry reported two transactions involving Transoil. The first involved the importation of a cargo of petroleum product on the vessel Alvega. It was delivered in July 1985 and, according to Sentry's tax report, "sold for the price of $7,157,068.22." The second transaction involved a cargo of petroleum delivered on the vessel Golden Sunray in September 1985 and, according to Sentry's tax report, "sold for the price of $7,667,920.19."

The auditor's workpapers demonstrate the manner in which she calculated the gross receipts subject to tax on these transactions. Her workpapers show that the Alvega cargo consisted of 320,460.48 barrels of oil sold at a price of 22.3337 cents per barrel for a total amount of $7,157,068.22. The LILCO invoices listed this amount as the sales price for the product. The invoices also showed a separately stated gross receipts tax of $196,819.38. The auditor took the sum of the amount listed as the price for the petroleum product and the amount shown as gross receipts tax to compute total gross receipts of $7,353,887.60. The tax rate was applied to this amount. The same method was used to compute gross receipts on the second

cargo and on sales reported by Sentry for the 1985 tax year.

The Division issued to Sentry two notices of deficiency, each dated March 13, 1990. The first notice was for the tax period October 1, 1984 through September 30, 1985 and asserted a tax deficiency of $276,024.00 plus interest and an additional charge of $69,006.00. The second notice was for the period October 1, 1985 through September 30, 1986 and asserted a tax deficiency of $729,909.00 plus interest and an additional charge of $182,447.00.

In December 1988, Sen Mar filed a petroleum business tax report for its tax year ending July 31, 1987 (its 1986 tax year), showing petroleum business tax due from the sale of petroleum of $297,646.00, prepayments of tax of $229,710.00 and a balance due of $67,936.00. It attached a statement to its report claiming that it was a petroleum business for the purposes of two transactions involving the sale of fuel to LILCO but was not a petroleum business for the purposes of eleven such transactions.

The eleven transactions for which Sen Mar claimed not to have any tax liability under article 13-A of the Tax Law were the following:

Date	Seller to Sen Mar	Vessel
9/19/86	BP North American Petroleum ("B.P.")	Antipolis
12/10/86	Sun Oil Trading	Solar Mar
1/16/87	B.P.	BP Barge
1/30/87	A. Johnson Petroleum	Interstate #72
2/2/87	Scallop Petroleum	Morania
2/4/87	Transoil	Spring Odessa
3/23/87	Scallop Petroleum	Freeport Chief
3/31/87	Vanol USA, Inc.	Dialia
5/27/87	Vanol USA, Inc.	Amazon Venture
6/17/87	Chevron International Oil Co.	Chevron Pacific
7/28/87	B.P.	Nicopoles

Sen Mar reported itself liable for the petroleum business tax on two purchases of fuel oil outside of New York State. One cargo of fuel oil was purchased from Challenger Petroleum ("Challenger") on or about January 29, 1987 and title was transferred to Sen Mar in Louisiana. The cargo was delivered to LILCO in New York on the vessel Delaware Trader. The second cargo was purchased by Sen Mar from Stinnes Interoil ("Stinnes") on or about April 30, 1987 and title passed to Sen Mar in Trinidad. The cargo was delivered by Sen Mar to LILCO in New

York on the vessel Bright Spout. Sen Mar conceded at hearing that a third cargo, purchased from Chevron International Oil Co. ("Chevron") on or about June 17, 1987, was also subject to the petroleum business tax. Sen Mar asserts that the pricing terms negotiated by Chevron and Sen Mar were "outside duty" which contractually obligated Sen Mar to pay all federal, state and local taxes and duties.

In its 1986 tax report, Sen Mar included the following statement:

> "Sen Mar, Inc. does not believe that it has been or will be at any time during the period August 1, 1987 through July 31, 1988, a 'petroleum business' as defined in Article 13-A, Section 300(c) for which tax is imposed upon gross receipts pursuant to Section 301 of the New York Tax Law.
>
> "For the fiscal year ending July 31, 1988, Sen Mar intends to conduct its business regarding shipments to its New York customers so that Sen Mar only purchases and takes title to the fuel oil in New York for delivery in New York.
>
> "Accordingly, Sen Mar will not 'import' or 'cause to be imported (by a person other than one which is subject to tax under this article)' as defined in Section 300, Article 13-A, Tax Law, and by reason thereof, Sen Mar intends not to be a petroleum business."

Sen Mar did not file an article 13-A tax report for its tax year ending July 31, 1988. On audit, the Division determined that for this period Sen Mar had 17 transactions which involved the sale of petroleum product to LILCO.

Date	Seller to Sen Mar	Vessel
8/5/87	Vanol	Esso Portland
8/18/87	Vitol	Fidelity L
9/1/87	Stinnes	London Spirit
9/27/87	Vitol	Charter Oak
10/20/87	Carib Petroleum	Bright Spout
11/22/87	Wyatt	Anangel Intelligence
12/22/87	Enjet	Jacinth
1/21/88	Petro Diamond	Mantinia
2/8/88	Petro Diamond	Fredericksberg
2/26/88	Petro Diamond	London Spirit
3/29/88	Petro Diamond	Myoko Marce
4/21/88	Enjet	Amazon Venture
5/6/88	Enjet	Delaware Trader
6/2/88	Enjet	Charter Oak
6/12/88	Sun	Omni Wabash
6/19/88	Enjet	Delaware Trader
7/18/88	Enjet	Baltimore Trader

On audit, the Division concluded that Sen Mar was a petroleum business throughout its

1986 and 1987 tax years under article 13-A of the Tax Law, that Sen Mar imported petroleum or caused petroleum to be imported into New York (by persons not subject to the petroleum business tax), that Sen Mar purchased petroleum for resale to LILCO and that Sen Mar failed to pay the gross receipts tax on its sales to LILCO. Based on these findings, the Division determined that Sen Mar was liable for the gross receipts tax from its sales of number 6 fuel oil to LILCO.

The Division calculated Sen Mar's tax liability based on its sales to LILCO as shown on the LILCO invoices. The tax was imposed on the total amount of the invoices including the amount categorized on the invoice as gross receipts tax. Sen Mar's total gross receipts for the period August 1, 1986 through July 31, 1988 were determined to be $150,765,676.58, with a petroleum business tax due of $4,146,056.07. Sen Mar's payments of $297,646.00 were subtracted from the amount due to calculate a total tax deficiency of $3,848,410.07.

As a result of the audit, the Division issued two notices of deficiency to Sen Mar, each dated March 13, 1990. The first notice was for the period August 1, 1986 through July 31, 1987 and asserted a tax deficiency of $1,336,409.00, plus interest of $341,246.00 and an additional charge of $334,102.00, for a total of $2,011,757.00. The second notice was for the period August 1, 1987 through July 31, 1988 and asserted a tax deficiency of $2,512,001.00, plus interest of $387,913.00 and an additional charge of $628,000.00, for a total amount due of $3,527,914.00.

The Division determined that the following Sen Mar suppliers were registered with the Division as petroleum businesses: B.P., Sun Oil Trading Company ("Sun Oil"), A. Johnson Petroleum ("A. Johnson"), Scallop Corporation ("Scallop"), Vanol, Stinnes, Chevron, Wyatt, Inc. and Petro Diamond. The auditor contacted B.P. in connection with the Sen Mar audit. B.P. provided the Division with copies of letters and documents given to B.P. by Sen Mar. These included a letter dated October 23, 1986 from Sen Mar's Treasurer, John Tomaszewski, indicating that he had enclosed a copy of Sen Mar's Certificate of Taxability under article 13-A of the Tax Law and Sen Mar's Resale Certificate. B.P. provided the Division with a copy of a

resale certificate issued by Sen Mar for purchases made during the period August 1, 1986 through July 31, 1987. As relevant, the Certificate states:

> "I, John Tomaszewski, certify that Sen Mar, Inc. was a petroleum business as defined in Article 13-A of the Tax Law for the period above. I further certify that petroleum products were sold to the buyer during this period by BP NORTH AMERICA PETROLEUM, INC. and the products were purchased for resale as defined in Article 13-A of the Tax Law and were not used except for resale purposes."

A second letter from Mr. Tomaszewski to B.P., dated October 6, 1986, indicates that Sen Mar sent a copy of its Certificate of Authority to collect sales tax to B.P. and a copy of that certificate was provided to the Division by B.P. B.P. was the only supplier who provided the auditor with a resale certificate from either Sentry or Sen Mar.

The auditor reviewed the petroleum business tax reports of B.P. for the years 1986 and 1987, Sun Oil for the year 1986, Scallop for the year 1987 and Wyatt for the year 1987. In each case, the supplier listed sales to Sen Mar as sales for resale and listed Sen Mar's employer identification number (which is required information on the certificate of taxability and the resale certificate) and Sen Mar's certificate of taxability number (A-0447-8).

The auditor testified that she spoke to a representative of Sun Oil regarding its sales to Sen Mar in 1987 and 1988. She stated that she was advised that Sun Oil received a resale certificate from Sen Mar for 1987 and she went on to testify as follows:

> "My recollection is that [Sun Oil] realized that Sen Mar was not -- Sen Mar's name did not appear on the 13-A list in 1988,[2] and they should have paid the tax themselves, and charged it to Sen Mar. Instead they listed it as a resale to Sen Mar and said that they were going to make a correction between the two companies."

As a result of her inquiries, the auditor grouped Sen Mar's purchases into several categories. The first such category was purchases made for resale where the seller was a registered petroleum business which filed a petroleum business tax report listing the transaction with Sen Mar as a sale for resale. The purchases in this category and the approximate date of

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[2] The Division maintains a list of all registered petroleum businesses which it distributed to all such businesses. Sen Mar was registered as a petroleum business on October 16, 1986 and was listed as a petroleum business from December 1986 through December 1987.

each purchase were as follows:

Date	Supplier	Amount of Sale[3]
9/12/86	B.P.	$4,054,544.06
12/4/86	Sun Oil	4,528,241.78
1/15/87	B.P.	1,945,004.33
1/31/87	Scallop	1,251,192.61
3/18/87	Scallop	5,877,893.66
7/87	B.P.	6,994,130.72

The second category of purchases included those in which the seller was a registered petroleum business, but, unlike the transactions above, the auditor had no evidence that the seller filed a report or that Sen Mar issued a resale certificate to the seller. It is known that one of the suppliers, Vanol, did not file petroleum business tax returns for 1987 and 1988, although it was a registered petroleum business. The auditor presumed all purchases were for resale, since the petroleum product was purchased by Sen Mar for sale to LILCO.

Date	Supplier	Amount of Sale
1/28/87	A. Johnson	$1,042,995.28
3/27/87	Vanol	5,550,098.12
5/20/87	Vanol	5,829,062.83
6/87	Chevron	5,247,471.61[4]
8/5/87	Vanol	5,975,241.43
9/1/87	Stinnes	5,722,810.59
11/22/87	Wyatt	5,095,029.47

The third category consisted of purchases which the auditor determined were from persons or entities not registered as petroleum businesses and not subject to the petroleum business tax.[5]

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[3] The amount of each sale is the total amount shown on the LILCO invoice, including the amount categorized as gross receipts tax.

[4] Sen Mar concedes that it is liable for the gross receipts tax on this purchase for resale to LILCO.

[5] It is petitioners' contention that all of these companies were subject to the petroleum business tax.

Date	Supplier	Amount of Sale
1/31/87	Transoil	$6,023,564.51
8/18/87	Vitol	6,770,445.87
9/27/87	Vitol	6,173,281.64
10/20/87	Carib. Petroleum	5,961,294.65
12/22/88	Enjet	6,146,975.05
1/21/88	Petro Diamond[6]	7,273,556.73
2/8/88	Petro Diamond	3,911,771.71
2/26/88	Petro Diamond	6,090,279.53
3/29/88	Petro Diamond	4,693,748.15
4/21/88	Enjet	5,261,276.20
5/6/88	Enjet	4,213,171.49
6/1/88	Enjet	4,928,024.41
6/19/88	Enjet	4,480,261.07
7/18/88	Enjet	5,072,233.38

The fourth category consisted of those purchases where Sen Mar paid the gross receipts tax on its sales to LILCO.

Date	Supplier	Amount of Sale
1/25/87	Challenger	$5,359,455.37
4/22/87	Stinnes	5,716,530.69

There was one transaction which the auditor was unsure of. That was a purchase from Sun Oil on June 12, 1988 in the amount of $3,576,089.64. Apparently, the auditor believed that Sun Oil may have paid the petroleum business tax on its sale to Sen Mar; however, there is no evidence in the record that Sun Oil did so.

Mr. Tomaszewski testified at hearing that Sentry was never issued a certificate of taxability by the Division. He also stated that Sen Mar did not have a record of the resale certificates it may have furnished to its suppliers. Mr. Tomaszewski recalled that Sen Mar issued resale certificates to B.P., Sun Oil, Wyatt and Chevron. He could not recall its having issued resale certificates to any of its other suppliers.

Sen Mar and Sentry assert that all but three of its purchase contracts were negotiated as

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[6] Petro Diamond registered as a petroleum business as of March 31, 1988, after these transactions occurred.

destination contracts and on an "inside duty" basis. Mr. Tomaszewski testified that an "inside duty" contract is a negotiated contract where the supplier (or seller) agrees to assume and pay, as part of the agreed selling price, all import duties, fees and taxes, including the petroleum business tax and to deliver the cargo to a designated location. He also stated that Sentry and Sen Mar negotiated a lump-sum price with its suppliers which included the gross receipts tax.

As noted, Sen Mar concedes that it is liable for the petroleum business tax on three cargos of petroleum which it imported into New York for sale to LILCO. Title to two of those cargoes passed outside of New York. The third cargo, purchased from Chevron, included the pricing term "outside duty".

Sentry and Sen Mar purchased the petroleum product sold to LILCO through petroleum brokers. Among the brokers used were Bridgeview Oil and United Fuels International, Inc. Sales were confirmed by telexes stating the contractual terms of the sale. A telex dated August 7, 1987 from Bridgeview Oil to Sen Mar confirms a sale by Vitol to Sen Mar. It contains selling terms typical of the Sen Mar purchase transactions. As relevant, it states:

> "DELIVERY: VIA SELLER'S DESIGNATED VESSEL . . . TO LILCO'S NORTHPORT TERMINAL . . . .
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> * * *
>
> "VITOL TO BE IMPORTER OF RECORD AND PAY DUTY
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> * * *
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> "INSPECTION/ MEASUREMENT QUANTITY AND QUALITY OF PRODUCT TO BE INSPECTED AT DISCHARGE BY SAYBOLT. COST SHALL BE SHARED EQUALLY BETWEEN BUYER AND SELLER."

A telex from United Fuels International, Inc. to Sen Mar, dated received on December 11, 1987, confirms a sale from Petro Diamond to Sen Mar, with the following terms:

> "UNIT PRICE PER BARREL: THE AVERAGE OF OIL BUYER'S GUIDE 1.0 PERCENT SULFUR FUEL OIL CONTRACT POSTINGS EXCLUDING ATLANTIC EFFECTIVE ON COMMENCEMENT OF DISCHARGE LESS 2.65 PER BARREL (INCLUDING CUSTOM DUTIES, SUPERFUND TAX AND CUSTOMS USER FEE) DELIVERED BASIS NORTHPORT, LONG ISLAND . . . .

* * *

"QUANTITY AND QUALITY INSPECTION OF OUTTURN BARRELS BY MUTUALLY AGREED UPON INDEPENDENT INSPECTOR. INSPECTION COSTS SHARED 50/50 BY PRINCIPALS."

Telexes evidencing other transactions between Sen Mar and its suppliers contain terms which are consistent with those quoted above. In general, the contracts were destination contracts, which means that title and risk of loss passed from the seller to the buyer at the point of delivery; inspectors were mutually agreed upon and the inspection costs equally shared by seller and buyer. Each telex contained a statement which indicated that the seller agreed to be the importer of record and pay the duty or the quoted price was "inside duty" or the price included custom duties, superfund tax and customs user fee. In all cases, the supplier owned or chartered the vessel carrying the cargo.

Mr. Tomaszewski testified that Sentry and Sen Mar often telephoned LILCO and asked LILCO to calculate the amount of the gross receipts tax LILCO wanted stated on the invoice.

Petro Diamond threatened to sue Sen Mar to recover any amount of petroleum business tax for which it was determined to be liable as a result of its sales to Sen Mar, but it has not filed such a suit.

Petitioners submitted 47 proposed findings of fact. The following were accepted and incorporated into the Findings of Fact: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 35, 37, 38, 39, 40, 43, 44 and 47. Proposed findings of fact 36 and 46 were rejected as unnecessary to the determination. Proposed findings of fact 22, 32, 33, 34, 41, 42 and 45 were rejected, modified or accepted with explanation as follows:

(a) Proposed findings of fact 22, 32, 33, and 34 describe the contractual arrangements between Sentry or Sen Mar and its suppliers. To more fully and accurately reflect the record, quotations were taken from representative telexes. Petitioners' statement that inspectors were engaged by the sellers is inexact because the telexes establish that in many instances the inspectors were mutually agreed upon. Petitioners' statement that an

"inside duty" contract obligated the seller to pay gross receipts tax was rejected because the telexes offered in evidence do not lend support to this statement and Mr. Tomaszewski's testimony was found not to be reliable on this point.

(b) Proposed finding of fact 41, which states that the Division has a policy "not to impose an Article 13-A tax on an importer of petroleum in New York unless the importer has some accoutrements of doing business in or nexus to New York", is based on the auditor's testimony under cross-examination. The proposed finding of fact was rejected because it inaccurately suggests that this is the entire policy of the Division with regard to whether a business is subject to the gross receipts tax and that the policy is not based on statutory authority.

(c) Proposed finding of fact 42 was modified to delete language which suggests that the auditor's investigation was inadequate; however, the substance of number 42 was incorporated into the Findings of Fact.

(d) Proposed finding of fact 45 asserts that computation of the tax based on total invoice price (including the amount separately stated as gross receipts tax) "results in a tax upon the tax." This is clearly a conclusion of law and is rejected for that reason.

Petitioners submitted six "Ultimate Findings of Fact". Numbers 49, 50 and 51 are repetitive of proposed findings of fact 29, 30 and 31, which were incorporated into the Findings of Fact. Numbers 48, 52 and 53 are conclusions of law and are rejected for that reason.

The Division and petitioners entered into a stipulation to correct certain errors made in the transcript. The transcript was corrected accordingly and their stipulation is made a part of the record of this proceeding.

CONCLUSIONS OF LAW

A. Before addressing the issues raised by the parties, it will be helpful to review the petroleum business tax law as it existed during the years in issue, 1984 through 1988. Article 13-A of the Tax Law was adopted by the Legislature in 1983 (L 1983, ch 400, § 8) and substantially amended in 1990 (L 1990, ch 190) and 1991 (L 1991, ch 166). Tax Law former

§ 301(a) imposes a franchise tax on every petroleum business "for the privilege of engaging in business, doing business, employing capital, owning or leasing property, or maintaining an office in [New York State]" (Tax Law former § 301[a]). For the years in issue, a "petroleum business" is defined in Tax Law former § 300(c) as follows:

> "The term 'petroleum business' means 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 and every corporation and unincorporated business importing or causing to be imported (by a person other than one which is subject to tax under this article) petroleum into this state for consumption by it in this state . . . ."

In accordance with this statutory scheme, a corporation or unincorporated business is subject to the petroleum business tax if it meets two statutory criteria: (1) it imports petroleum into New York or causes petroleum to be imported into New York by one not subject to the tax (Tax Law former § 300[c]) and (2) it engages in business, does business, owns or leases property or maintains an office in New York (Tax Law former § 301[a]).

The tax base upon which the tax rate is imposed consists of a petroleum business's "gross receipts from sales of petroleum where shipments are made to points within the state" and to "the consideration given or contracted to be given by it for petroleum which it imported or caused to be imported (by a person other than one which is subject to tax under [article 13-A]) into this state for consumption by it in [New York]" (Tax Law former § 301[a]).

As pertinent here, Tax Law former § 303 (repealed L 1990, ch 190, § 218, eff May 25, 1990) defines gross receipts as all receipts from the sale of petroleum (Tax Law former § 303[a][1]) and as consideration given or contracted to be given for petroleum (Tax Law former § 303[a][2]). Former section 303(b) provides the following exclusions from gross receipts.

> "(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.

"(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."

B. The Division assessed tax on Sentry's and Sen Mar's gross receipts from sales of petroleum to LILCO where shipment was made to LILCO in New York. Petitioners have challenged the assessments on several grounds, each of which will be considered separately.

Initially, petitioners argue that they were not petroleum businesses as defined by Tax Law former § 300(c). They do not argue that Sentry and Sen Mar were not doing business in New York. They both maintained offices and had employees in New York. Moreover, Sen Mar was a New York corporation. Rather, they assert that they did not import or cause petroleum to be imported "by a person other than one which is subject to tax under [article 13-A]" (Tax Law former § 300[c]). In short, they take the position that each of their suppliers was subject to the petroleum business tax and, as a consequence, that those suppliers, not petitioners, are liable for the petroleum business tax.

The phrase "importing or causing to be imported" is not defined in article 13-A. Where words of ordinary import are used in a statute, they must be given their usual and commonly understood meaning (Fullerton v. General Motors Corp., 46 AD2d 251, 362 NYS2d 581). One dictionary definition of the word "import" is "to bring from a foreign or external source; esp.: to bring (as merchandise) into a place or country from another country" (Webster's Ninth New Collegiate Dictionary 583 [1983]). The Division's interpretation of the term "importing" is consistent with this dictionary definition. In a memorandum which discusses the Division's policies regarding article 13-A (TSB-M-83[22]C), the Division interprets section 300(c) as follows:

"A petroleum business is importing petroleum into New York State if it takes title to petroleum outside New York State and ships or causes to be shipped into New York State 20,000 gallons or more of such petroleum during its taxable year."

TSB-M-83(22)C goes on to state:

"A petroleum business is deemed to be causing petroleum to be imported into the State if it purchases 20,000 gallons or more of petroleum located outside

> New York State for delivery into New York State from a Seller not subject to tax under Article 13-A of the Tax Law."

Examining Sen Mar's status first, it must be found that it imported petroleum into New York in its 1986 tax year and was a petroleum business subject to the petroleum business tax as a result. Sen Mar imported three cargoes of petroleum into New York (the Challenger, Stinnes and Chevron transactions) and concedes that it was subject to the petroleum business tax on these cargoes. Petitioners seem to take the position that a corporation may be a petroleum business under article 13-A for purposes of some transactions and not for others. There is no support in the statutory scheme for this viewpoint. The tax base upon which the tax rate is applied may include some transactions and not others; however, a corporation which satisfies the statutory definition of a petroleum business during any given tax year remains a petroleum business, at least for that tax year. The Division has adopted the following policy on this issue:

> "A petroleum business becomes taxable under Article 13-A on the day it meets the definition of a petroleum business as defined in Article 13-A. A petroleum business engaged in the sale of petroleum would become taxable for purposes of Article 13-A on the day it imports or causes petroleum to be imported into New York State . . . . The petroleum business will remain taxable for the balance of its current taxable year and for all subsequent taxable years[, pending notification to the Division that it no longer operates as a petroleum business]" (Technical Services Bureau Memorandum [TSB-M-83(22)C]).

This is a reasonable interpretation of the statute, and petitioners have not offered any grounds for rejecting it. Moreover, petitioners admit that Sen Mar issued resale certificates to at least four suppliers in its 1986 tax year, where it declared itself to be a petroleum business. Sen Mar was registered as a petroleum business for the period October 16, 1986 through January 31, 1988. It did not inform the Division that it intended to operate in such a way as to not be subject to the petroleum business tax until it filed its petroleum tax report for the 1986 tax year in December 1988 (almost halfway through its 1987 tax year). Accordingly, Sen Mar was a petroleum business subject to the petroleum business tax for at least the period August 1, 1986 through December 1988.

There is no question that both Sentry and Sen Mar either imported or caused petroleum to be imported into New York. They contracted with LILCO for the sale of petroleum to be

delivered to LILCO in New York. On their own, or through petroleum brokers, petitioners located petroleum suppliers who agreed to sell and deliver petroleum product to Sentry or Sen Mar. Title to that petroleum passed to Sentry or Sen Mar in New York. In accordance with any commonly understood definition of the words used in the former section 300(c), Sentry and Sen Mar caused petroleum to be imported into New York during the relevant years.

Petitioners contend, however, that Sentry and Sen Mar did not cause petroleum to be imported into New York "by a person other than one which is subject to tax under [article 13-A]" (Tax Law § 300[c]). That contention will now be examined.

Sentry transacted business with only three companies, Vanol, Vitol and Transoil. It is apparent that all three companies imported petroleum into New York. They would be subject to the petroleum business tax if they engaged in business, did business, employed capital, owned or leased property or maintained an office in New York (Tax Law former § 301[a]).

The Division concedes that Vanol was subject to article 13-A tax during the relevant years. It notes that Vitol was determined by the Division not to be subject to the petroleum business tax and that little is known about Transoil's business activities. Petitioners contend that the evidence in the record establishes that Transoil and Vitol were doing business in New York within the meaning of former section 301(a). The evidence they rely on is Sentry's own transactions with those companies. Petitioners argue that Transoil's and Vitol's activities in New York (the delivery of petroleum product), ownership of property in New York (the petroleum being delivered) and their use of the services of shipping agents and inspectors in New York constitutes doing business in New York for purposes of article 13-A.

Petitioners did not provide telexes or other contractual documents to evidence Sentry's relationship with Vitol. Assuming that the arrangements were the same as those between Sen Mar and Vitol, it cannot be found that Vitol engaged in business in New York so as to subject it to the petroleum business tax. A telex showing the terms of a sale from Vitol to Sen Mar states that the cost of inspection is to be shared equally by buyer and seller. The petroleum broker who arranged the sale was Bridgeview Oil of Fort Lee, New Jersey. In short, the telex reveals

nothing that would establish that Vitol was doing business in New York. Vitol's only contact with New York appears to be the delivery of petroleum product into New York. Petitioners' arguments are grounded on the transitory presence in New York of petroleum owned by Vitol and of the vessels necessary to deliver that petroleum to Sentry in New York. Petitioners' explanation of Sentry's arrangement with Transoil remains murky. Petitioners claim that Sentry was not the importer or seller on this transaction and received only a commission or broker's fee. They produced no documents to prove this contention. The evidence shows only that Sentry contracted with LILCO for the sale and, apparently, fulfilled its contractual obligation by arranging the sale through Transoil. In short, the evidence in the record does not establish that Vitol's or Transoil's activities in New York went beyond the mere delivery of product, including those minimal activities necessary to effect delivery, e.g., payment of custom duties and the use of New York shipping agents and inspectors.

As the Division interprets former section 300(c), "[a] seller of petroleum which only delivers petroleum in the state and does not engage in business, do business, employ capital, own or lease property or maintain an office in New York State" is not subject to the petroleum business tax (Technical Services Bureau Memorandum [TSB-M-83(22)C]). Moreover, the Division argues that there are constitutional barriers to taxing companies which merely import petroleum by delivering it in New York and engage in no other business activities in New York. It is absurd to engage in any prolonged constitutional analysis of Transoil and Vitol's business activities in New York in light of the slim body of evidence available regarding those activities. Pursuant to the Division's interpretation of former section 300(c), a company which merely delivers petroleum in the state is not doing business in New York. This is a reasonable interpretation of the clear wording of the statute.

If, as petitioners suggest, the mere importation and delivery of petroleum in the State subjected one to the petroleum business tax, every business which imported into the State would be subject to the tax. This would render meaningless that portion of Tax Law § 300(c) which defines a petroleum business as every corporation or unincorporated business "importing

or causing to be imported (by a person other than one which is subject to tax under this article)." If all of petitioners' suppliers were petroleum businesses under article 13-A, all importers would be included within the definition of a petroleum business and the phrase "other than one which is subject to tax under this article" would have no effect whatsoever. Petitioner has advanced no argument which calls the Division's interpretation of section 300(c) into question. Sentry was clearly doing business in New York and was in the business of causing petroleum product to be imported into New York, by persons not subject to the tax, and selling that product to LILCO. Accordingly, I conclude that Sentry was a petroleum business for the period October 1, 1984 through September 30, 1986.

Sen Mar caused petroleum to be imported into New York by at least four companies not subject to the petroleum business tax, Transoil, Vitol, Carib Petroleum and Enjet. The evidence in the record, primarily telexes, does not support a finding that any of them were subject to the tax imposed by article 13-A. Consequently, Sen Mar's argument that after July 31, 1987 it purchased only from petroleum businesses subject to the article 13-A tax is without merit.

Petitioners' reliance on Matter of Harbor Petroleum Corporation (Tax Appeals Tribunal, September 21, 1989) is misplaced. In that case, the Tax Appeals Tribunal determined that the taxpayer was a "distributor" as defined in article 12-A of the Tax Law because it imported or caused motor fuel to be imported into New York. The taxpayer, like petitioners' unregistered suppliers, sold motor fuel to New York buyers, delivered the motor fuel in New York and transferred title to the buyers in New York pursuant to destination contracts. These activities were held sufficient to establish that the taxpayer was a motor fuel distributor under article 12-A. Moreover, the Tribunal held that the transaction, the sale and the delivery of motor fuel in New York, provided sufficient nexus with New York to satisfy the constitutional requirements. Petitioners argue that under the decision in Harbor its suppliers had sufficient "nexus" with New York to subject them to the petroleum business tax.

Because of the dissimilarities between the tax imposed under article 12-A of the Tax Law and article 13-A, the decision in Harbor is irrelevant to the issues raised here. Tax Law § 284

imposes an excise tax of four cents per gallon on "motor fuel imported into or caused to be imported into the state by a distributor for use, distribution, storage or sale in the state". A distributor is defined as "any person, firm, association or corporation, who or which imports or causes to be imported into the state, for use, distribution, storage or sale within the state, any motor fuel" (Tax Law § 282). Article 12-A imposes an excise tax. It does not impose a tax for the privilege of "engaging in business, doing business, employing capital, owning or leasing property, or maintaining an office in this state" (Tax Law former § 301[a]). A person or business becomes subject to the excise tax imposed by article 12-A merely by importing or causing motor fuel to be imported into New York. A person or business becomes subject to the franchise tax imposed by article 13-A if that person or business imports or causes petroleum to be imported (by one not subject to the tax) and engages in business, does business, employs capital, owns or leases property or maintains an office in New York. Since the basis for imposing the article 13-A tax differs from the basis for imposing the article 12-A tax, the Harbor decision offers no support for petitioners' claim that all of its suppliers were subject to the petroleum business tax. Whether the imposition of the franchise tax on Transoil and Vitol and companies like them could withstand constitutional scrutiny is not the issue in this case, since the Division has reasonably interpreted article 13-A to preclude the imposition of tax where the importer's only ties with New York involve importing and delivering the product in New York.

C. Sentry and Sen Mar argue that the tax assessed against them is properly the liability of their suppliers. The tax base upon which the petroleum business tax rate is imposed is the petroleum business's gross receipts from sales of petroleum where shipment is made to points within New York (Tax Law former § 301[a]). In this case, the tax was imposed on Sentry's and Sen Mar's gross receipts from their sales to LILCO. It has been concluded that Sentry and Sen Mar were petroleum businesses subject to the petroleum business tax during all periods in issue, and petitioners have not pointed to any statutory provision which would exclude any of their sales to LILCO in the calculation of gross receipts; therefore, all of their gross receipts from

sales of petroleum to LILCO were properly included in gross receipts subject to the petroleum business tax.

Sales to Sentry and Sen Mar by petroleum businesses subject to the petroleum business tax were excludable from the seller's gross receipts as sales for resale (Tax Law former § 303[b][2]). Sen Mar concedes that it is liable for the petroleum business tax in those instances where it provided a resale certificate to its suppliers during those periods it was registered as a petroleum business. Petitioners seem to argue that if it did not supply a resale certificate to a supplier the supplier became liable for the tax and petitioners bore no liability. The statutory scheme, as described above, does not operate in this manner.

Pursuant to Tax Law former § 303(a), each petroleum business must include in its computation of gross receipts "receipts from sales of petroleum where shipments are made to points within this state." The petroleum business may then exclude "[r]eceipts from any sale for resale to a purchaser which is a petroleum business subject to tax under [article 13-A]" (Tax Law former § 303[b][2]). However, there is a statutory presumption that "no receipts are receipts from a sale for resale" unless the purchaser furnishes a properly completed resale certificate to the seller (Tax Law former § 303[b][2]).

Where Sen Mar provided a properly completed resale certificate to a supplier subject to the petroleum business tax, the supplier was authorized to exclude its sales to Sen Mar in its calculation of gross receipts. Where a resale certificate was not provided, the supplier was required to include its sales to Sen Mar in its calculation of gross receipts. The suppliers were free to negotiate a sales price taking these variables into account; however, Sen Mar's liability for the petroleum business tax was unaffected in either case. It was required, in either instance, to include its sales to LILCO in its calculation of gross receipts.

Petitioners' claim that their suppliers contractually agreed to assume liability for the petroleum business tax is not supported by the evidence. None of the telexes placed in evidence contain an explicit provision by which the suppliers agreed to assume such liability. They refer to custom duties, superfund tax and customs user fees. None of the telexes mention the

petroleum business tax by name.

D. Petitioners claim that including the amounts separately stated on the LILCO invoices as gross receipts tax in Sentry's and Sen Mar's gross receipts imposes a tax on a tax. As noted, the contracts between Sentry and LILCO and Sen Mar and LILCO contain an explicit provision by which LILCO agreed to pay the New York State Petroleum Business Tax imposed on deliveries made to LILCO. It is not at all clear what the parties intended by this provision. There is no evidence that LILCO provided petitioners with a consumption certificate pursuant to Tax Law § 303(b)(5), and petitioner has not claimed that LILCO is liable for the petroleum business tax on the sales in question. It is a common practice for a petroleum business to pass on the gross receipts tax to its buyers through a contractual term, as petitioners apparently did here; however, the buyer's duty to reimburse the distributor is solely contractual (see, Matter of Burnside Coal & Oil Co. v. City of New York, 135 AD2d 413, 414, 521 NYS2d 703). If the seller does obtain reimbursement from the buyer, the seller must include the reimbursement in its calculation of gross receipts pursuant to Tax Law former § 301(a). The effective rate of the petroleum business tax thus becomes 2.83 percent (see, Cargill, Inc. v. Charles Kowsky Resources, 949 F2d 51).

Petitioners went to some length to establish that they separately stated the gross receipts tax at LILCO's request and often relied on LILCO to calculate the figure, apparently because they conceptualize the gross receipts tax as a sales tax -- a tax collected from the buyer and remitted to the State by the seller. From this point of view, the petroleum business tax appears to be a tax on a sales tax. The petroleum business tax is not a sales tax. The sales tax is a consumer tax and is collected from the person who purchases at retail, the consumer (20 NYCRR 525.2[a][4]); every person required to collect the sales tax imposed under article 28 of the Tax Law acts as a trustee for the State with respect to the taxes collected (20 NYCRR 532.2 [a]). The petroleum business tax is a franchise tax imposed on the petroleum business's gross receipts from sales of petroleum. The tax paid by the petroleum business is an expense like any other. The petroleum business is free to negotiate a price for the petroleum product it sells

which takes the gross receipts tax into account as one of the costs it incurs as a seller; however, if the seller is reimbursed by the buyer, the seller must include the reimbursement in its calculation of gross receipts. In addition, petitioners did not pay over the gross receipts tax stated on the invoices to the State, and there is no evidence in the record that petitioners' suppliers passed on the gross receipts tax to petitioners either as an element of the purchase price or as a separate reimbursement. In short, there is no correlation between the amount stated on the invoices as gross receipts tax and any amount paid by petitioners to the State as gross receipts tax.

Tax Law § 182, providing for an additional franchise tax on certain oil companies, was enacted by Laws of 1980 (ch 271). Essentially, it imposed a 2% gross receipts tax on every oil company operating in New York. Subdivision 12(a) of that section contained an anti-passthrough provision preventing oil companies from including the additional gross receipts tax on oil companies, either directly or indirectly, in the selling price of its products. This provision was held to be unconstitutional (Shell Oil Co. v. New York State Tax Commn., 110 Misc 2d 71, 441 NYS2d 595, amended by 111 Misc 2d 460, 444 NYS2d 392, mod by 91 AD2d 81, 458 NYS2d 938, mot denied 60 NY2d 632, 467 NYS2d 355). Subdivision 12[a] was renumbered subdivision 11[a] (L 1981, ch 103, § 75) and later repealed (L 1983, ch 18, § 3, eff March 28, 1983).

In their brief, petitioners state:

> "By adopting a policy to impose the gross receipts tax upon the selling price, including the gross receipts tax, the Department of Taxation has defied the legislature, arbitrarily enhanced the tax rate to 2.83 per cent and prohibits the importer from passing through the total gross receipts tax to its customers. Such a policy is constitutionally defective" (Petitioners' Brief, p. 29).

I can see no merit to this argument. The petroleum business tax is imposed by statute on "all receipts from sales of petroleum where shipment is made to points within this state" (Tax Law § 301[a]). The Division's imposition of the tax on all of petitioners' receipts from its sales to LILCO is dictated by the statute. Petitioners have not clearly explained what was intended by placing a separate line itemization characterized as "gross receipts tax" on the LILCO invoices.

As previously noted, the petroleum business tax is not a sales tax; it is not a tax "upon the selling price"; it is not a tax on the ultimate consumer. The petroleum business tax is a business expense of the petroleum business, like any other, and the petroleum business may include the tax in its selling price, as it does other expenses. Article 13-A does not contain an anti-passthrough provision. The tax, however, is on the total sales receipt.

Petitioners assert that the statutory scheme of article 13-A "results in the tax being collected by New York on the same cargo of imported petroleum multiple times" (Petitioners' Brief, p. 31). Petitioners offer the following scenario to explain their argument:

> "For example, a seller (whether registered or not) imports the petroleum into New York to a buyer (i.e., Sen Mar). Such seller, located in another state, may regularly send petroleum to New York State. If the seller does not obtain a 'resale' certificate from the New York buyer, clearly the seller is liable for the tax. This is true whether the selling price to the buyer contractually passes through the tax either as a separate line item or the gross receipts tax is 'buried' into the seller's lump sum price structure to the buyer. The seller is the importer.
>
> "On the other hand, the buyer, i.e. Sen Mar, who has a place of business in New York also is a 'petroleum business' under the New York Tax Department's interpretation and New York says Sen Mar also is liable for the gross receipts tax on its resale to Lilco.
>
> "The single cargo of petroleum becomes taxed twice. The first seller who 'imported' to Sen Mar pays [or should have paid] a gross receipts tax on its sale. Sen Mar then resells to Lilco and, [sic] New York again subjects the same continuous transaction to a gross receipts tax. Furthermore, as to each taxpayer, the gross receipts tax becomes pyramided upon the 2.83 per cent effective rule applied by New York." (Petitioners' Brief, pp. 31-32.)

This scenario contains a number of false assumptions. The seller identified in the first paragraph would be subject to petroleum business tax only if it engaged in business, did business, employed capital, owned or leased property in New York. If it did, it would be subject to the tax, as petitioner states. However, pursuant to Tax Law former § 303(b)(2), the seller would exclude its sales to Sen Mar from its calculation of gross receipts since Sen Mar was purchasing for resale to LILCO. As a result of the exclusion provisions, the tax would not be collected on the sale from the original importer to Sen Mar, whether that importer was

subject to the petroleum business tax or not.[7] The Division is imposing the tax on Sentry and Sen Mar's sales to LILCO, and there is no evidence that the petroleum product sold was subject to the tax in any previous transaction. The most likely scenario is that all article 13-A taxpayers treated their sales to Sen Mar as sales for resale (and excluded the sales from gross receipts) or that Sentry and Sen Mar purchased from nonregistered importers who were not subject to the tax.

In their brief, petitioners totally distort the Division's interpretation of various provisions of article 13-A and the policies adopted to implement that statute. Because of this, their argument that the Division has applied the statute in a manner that violates the commerce clause and due process clause of the United States Constitution is groundless. Also, the Division of Tax Appeals lacks the jurisdiction to consider constitutional challenges to the facial validity of a statute. At the administrative level, the statutes of the State of New York are presumed to be constitutional (Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988).

E. In petitions to the Division of Tax Appeals, both petitioners challenged the imposition of penalties. The Division imposed penalties on the tax due from both Sentry and Sen Mar under section 1085(a)(1) of the Tax Law which provides for imposition of penalties for failure to file a

required return within 60 days of the date prescribed for filing such return (Tax Law § 1085[a][1][B]). The penalty is imposed upon the amount required to be shown as tax on the return.

The evidence establishes that Sentry filed petroleum business tax returns for the fiscal years ending September 30, 1985 and September 30, 1986 on November 28, 1988. Petitioners

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[7]If Sen Mar did not provide a resale certificate to its supplier, the supplier would be required to overcome the statutory presumption that its receipts were not for resale in order to exclude the receipts from its calculation of gross receipts. However, the audit in issue here was of Sentry and Sen Mar and not of their suppliers. Whether the suppliers were, or would be, able to overcome the presumption is not in issue.

offered no reason for late filing of these returns; consequently, there is no basis in the record for cancelling penalties.

Sen Mar filed a petroleum business tax return for the year ended July 31, 1987 in December 1988 and filed no return for the year ended July 31, 1988. It offered no reason for late filing its 1987 return. In its 1987 tax return, Sen Mar stated that it intended to conduct its business in such a way that it would no longer be a petroleum business under article 13-A of the Tax Law. This was not the case, as it has been found here that Sen Mar conducted itself as a petroleum business throughout 1987 and 1988. Sen Mar has offered no reason for failing to comply with the provisions of article 13-A. Petitioners never directly addressed the issue of penalties either at hearing or in their brief. As a consequence, all penalties are sustained.

F. The petitions of Sentry Refining, Inc. and Sen Mar, Inc. are denied, and the notices of deficiency issued on March 13, 1990 are sustained.

DATED: Troy, New York
May 5, 1994

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE