STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BOLKEMA FUEL CO., INC.	:	DETERMINATION DTA NO. 808200
for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Years 1984 through 1988.	:	

Petitioner, Bolkema Fuel Co., Inc., P.O. Box 218, Wyckoff, New Jersey 07481-1000, 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 years 1984 through 1988.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on January 7, 1991 at 1:30 P.M., with all briefs to be submitted by June 17, 1991. Petitioner filed its briefs on April 29, 1991 and May 23, 1991. The Division of Taxation filed its brief on May 13, 1991. Petitioner appeared by Williams & Puglisi, Esqs. (Thomas W. Williams, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner was required to remit the tax imposed by Article 13-A of the Tax Law and, if so, whether the Division of Taxation should be estopped from collecting the tax asserted to be due.

FINDINGS OF FACT

During the years in issue, petitioner, Bolkema Fuel Co., Inc., was a firm which sold gasoline, fuel oil and diesel motor fuel. The firm waslocated in Wyckoff, New Jersey, which is approximately five miles from the New York State border.

Petitioner did not file returns under Article 13-A of the Tax Law during the years in

issue. However, petitioner was registered with New York State for purposes of the New York State motor fuel tax.

On the basis of a field audit, the Division of Taxation concluded that petitioner was subject to tax under Article 13-A of the Tax Law. This conclusion was based on the fact that petitioner was importing petroleum products into New York. The Division also determined that there was a taxable nexus to New York because petitioner's vehicles were making "peddle"[1] deliveries into New York and because petitioner serviced residential oil burners in New York.

In order to determine the amount of tax due, petitioner ran a computer printout of its sales that would have been subject to tax under Article 13-A. The Division used the figures from the computer printout to calculate taxable revenues.

On the basis of the foregoing audit, the Division of Taxation issued five notices of deficiency, dated December 22, 1988, to petitioner which asserted deficiencies of tax under Article 13-A of the Tax Law as follows:

Period Ended	Tax	Interest	Additional Charge	Total
4/30/84	$42,111.58	$22,544.56	$ -0-	$64,656.14
4/30/85	10,766.41	3,997.52	-0-	14,763.93
4/30/86	8,515.18	1,952.81	-0-	10,467.99
4/30/87	6,341.40	801.69	-0-	7,143.09
4/30/88	6,029.55	238.32	-0-	6,267.87

After the enactment of the tax on petroleum businesses, the Division mailed a letter, questionnaire and memorandum to those companies which it thought had a likelihood of being subject to the tax. The letter explained that chapter 400 of the Laws of 1983 imposed a tax under Article 13-A on petroleum businesses importing petroleum or causing petroleum to be imported into the State for sale in the State. The letter then asked the recipient to complete the enclosed questionnaire in order to determine if the respective business was subject to tax.

Petitioner completed and returned the Article 13-A questionnaire wherein it explained

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[1]A peddle delivery occurs when a vehicle makes multiple deliveries from the same vehicle.

that its principal activity was as a supplier of petroleum products. In response to another question, regarding whether a service was provided in New York, petitioner stated that it provided burner service to home heating units only.

Upon receipt of the Article 13-A questionnaire, the Division examined a transcript of petitioner's tax return filings and found that petitioner made a practice of filing the Form CT-245 entitled Maintenance Fee and Activities Report of Foreign Corporations Disclaiming Tax Liability. In connection with this report, petitioner remitted tax in the amount of $200.00.

Upon reviewing the foregoing information, the Division concluded that petitioner was not subject to tax under Article 13-A. Thereafter, the Division mailed petitioner a letter, dated November 9, 1983, which stated as follows:

> "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 that you are importing petroleum into New York State for sale in the state.
>
> We, of course, reserve the right to verify the correctness of the statements made in your questionnaire at some later date.
>
> If the statement above which describes your business activities in New York is not accurate, please contact this office immediately."

The foregoing letter was signed by William H. Frank, Jr. as "Chief, Oil Tax Audits".

During the period in which the Division was reviewing the Article 13-A questionnaires, it was under a great deal of pressure to make rapid determinations. As a result of this pressure, the Division overlooked the fact that petitioner disclosed that it repaired heating units in New York State. According to the Division's witness, if the Division's reviewers had examined the CT-245's which had been filed instead of a computer printout, which only indicated that such reports had been filed, it would have made a different determination.

At the hearing, the Division offered into evidence petitioner's CT-245's for the years 1981 through 1987. Except for the year 1981, petitioner disclosed that it performed services in

New York State. Further, except for the year 1981, petitioner stated that it furnished technical advice to retailers or consumers in New York State. Petitioner also stated that, with the exception of 1981, it did not investigate claims in New York State. During each of the years 1981 through 1987, petitioner reported that it collected accounts in New York, performed services in New York and that it approved or rejected orders in New York State. Except for the year 1981, which was left blank, petitioner stated that it did not perform other activities in New York State. Lastly, except for the year 1984, petitioner reported that it did not coordinate or supervise the activities of a subsidiary which was taxable in New York State.

Mr. Theodore Bolkema served as the president of Bolkema Fuel. In 1983, he completed the Article 13-A questionnaire which requested information about petitioner's activities. In response, Mr. Bolkema received the letter from Mr. Frank dated November 9, 1983. As a result of this letter, it was Mr. Bolkema's understanding that petitioner was not required to remit the tax imposed by Article 13-A. In reaching this conclusion, Mr. Bolkema relied on Mr. Frank's letter.

During the years in issue, petitioner's office was located in New Jersey. When petitioner received a request from a customer in New York for the delivery of a product, the order was accepted in New Jersey.

Petitioner did not purchase fuel from any supplier in New York. In or about 1982, petitioner purchased oil in New York and had it delivered by a third party to a location in New Jersey.

From 1980 until May of 1986, petitioner serviced home heating fuel units in New York. In May of 1986, this portion of petitioner's business was turned over to a new company. After May of 1986, petitioner did not provide any service in New York.

During the years in issue, petitioner did not repair storage tanks, gasoline pumps or other equipment relating to the machinery of the fuel business.

Petitioner did not have an office in New York. It did not have any capital, lease properties or maintain any facilities in New York.

Generally, petitioner received payments from its New York customers through the mail. It was petitioner's practice to send a bill when the product was delivered. Later, it sent a monthly statement. Most of petitioner's customers paid their debts in a timely manner.

On one occasion there was a New York customer who did not pay his bills. As a result, petitioner initiated a lawsuit in New York.

Petitioner relied upon business cards and "word of mouth" for its advertising. It did not use radio or television commercials.

Although one of petitioner's sales representatives resided in New York, petitioner did not solicit sales in New York before 1989.

At the hearing, petitioner presented testimony that when Article 13-A of the Tax Law was enacted, the Division chose to interpret the tax as a franchise tax. Later, the Division interpreted the tax as an excise tax. According to petitioner's witness, the reason the Division chose to assert a deficiency of tax in 1989 and did not do so in 1983 was that there was a change in the interpretation of the law.

CONCLUSIONS OF LAW

A. During the years in issue, Tax Law § 301 imposed a tax "upon 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, for all or any part of its taxable years...."

B. It is petitioner's position that it did not have a sufficient nexus with New York to render it subject to tax under the rules which were promulgated pursuant to Article 13-A or Article 9-A of the Tax Law. With respect to the rules promulgated under Article 13-A of the Tax Law, petitioner has called attention to the following language which appears in a Technical Services Bureau Memorandum released by the Division (TSB-M-83[22]C):

> "The following sellers of petroleum are not subject to tax under Article 13-A:
>
> * * *
>
> 3. A seller of petroleum which only delivers petroleum into the state and does not engage in business, do business, employ capital, own or lease

property or maintain an office in New York State."

Petitioner also contends that its case is exemplified by the following language in TSB-M-83(22.1)C:

"Examples of Transactions Which May or May Not be Taxable in Accordance With Article 13-A

Example 1

'A' Corporation purchases from 'B', an out of state supplier, not taxable in New York, 100,000 gallons of petroleum, to be used in its factory boilers. The seller delivers the petroleum to 'A' Corporation's tanks in New York. 'A' Corporation is now taxable under Article 13-A, because it caused the petroleum to be imported into New York State. 'A' should not issue a Certificate of Consumption to the supplier since such supplier is not an Article 13-A Taxpayer. 'A' Corporation will be responsible to account for the purchase of the 100,000 gallons of petroleum plus all other petroleum it imports or causes to be imported."

C. Petitioner's reliance on the foregoing Division memoranda is unavailing because petitioner's activities with respect to the sale of petroleum are only one portion of the basis for the Division's argument that petitioner was doing business in New York and was therefore responsible for remitting the tax imposed by Article 13-A of the Tax Law. That is, under the Division's published criteria, petitioner is not subject to the tax under Article 13-A of the Tax Law unless it imports petroleum into New York and there is some other fact which creates a taxable nexus.

D. In its brief, petitioner presented a lengthy argument that its activities within New York were not sufficient to create a taxable nexus under the regulations which were promulgated pursuant to Article 9-A of the Tax Law. Petitioner's reliance upon the foregoing regulations for guidance is understandable inasmuch as there were no regulations promulgated pursuant to Article 13-A of the Tax Law concerning what constitutes a sufficient nexus to render an out-of-state petroleum distributor subject to tax. However, since the asserted deficiencies were based on Article 13-A of the Tax Law, the regulations promulgated pursuant to Article 9-A of the Tax Law may be used for guidance, but are not controlling.

E. The Division's brief calls attention to a series of facts which allegedly show that petitioner was doing business in New York. In order to analyze the Division's position, these

facts will be considered individually.

F. The Division points to the fact that petitioner employed a salesman who resided in New York. Standing alone, this fact is irrelevant. The question is whether petitioner was doing business in New York. Since there is no evidence that the salesman was soliciting orders in New York, further discussion of this point is unwarranted.

Secondly, the Division avers that petitioner was doing business in New York because it both purchased petroleum in New York and delivered petroleum into New York for sale. With respect to the purchase of petroleum, the uncontradicted testimony is that on one occasion petitioner purchased oil in New York and had it delivered by another company to an oil terminal in Hackensack, New Jersey. This singular, infrequent act does not support the Division's position that petitioner was doing business in New York (see, North American Car Corp. v. State Tax Commn., 94 AD2d 880, 463 NYS2d 563, 565).

The Division's reliance upon the fact that petitioner delivered petroleum into New York State does not resolve the issue. As noted, the Division's own guidelines state that the following seller of petroleum is not subject to tax:

> "A seller of petroleum which only delivers petroleum into the state and does not engage in business, do business, employ capital, own or lease property or maintain an office in New York State." (TSB-M-83[22]C.)

Therefore, according to the Division's own publications, in order to be subject to the tax a seller must deliver petroleum into New York and be engaged in business in New York.

The Division relies upon the fact that petitioner filed a lawsuit in New York for collection of a debt. The record shows that petitioner's customers generally paid their debts, but that on one occasion petitioner was required to commence a lawsuit in New York against a particular customer. As previously noted, an infrequent act does not support the position that petitioner was doing business in New York (Matter of North American Car Corp. v. State Tax Commn., supra).

According to the Division, the CT-245's filed by petitioner stated that petitioner advertised in New York and solicited sales in New York. However, the CT-245's in evidence

neither solicit this information nor is the information volunteered. Hence, these points are also rejected.

The CT-245's do state that petitioner accepted orders in New York which is in direct conflict with Mr. Bolkema's testimony. Although this conflict is troubling, it is concluded that Mr. Bolkema's testimony was credible and is accepted. Further, this testimony is consistent with the fact that petitioner did not maintain an office or lease space in New York.

In support of its position that petitioner was doing business in New York, the Division relies on the fact that petitioner provided technical assistance to New York customers and that petitioner serviced home heating units in New York until 1986.[2] It is now established that the servicing of a customer's equipment is the type of local, personalized service that constitutes "doing business" (Matter of North American Car Corp. v. State Tax Commn., supra, 463 NYS2d at 565). Therefore, in the absence of any evidence that this activity was sporadic, it is found that petitioner's servicing of home heating units constituted doing business in New York and created a taxable nexus for purposes of Article 13-A of the Tax Law.

G. Petitioner has argued that the servicing of home heating units should not be considered because the activity is not taxable under Article 13-A of the Tax Law. This argument is unpersuasive. An examination of the regulations promulgated pursuant to Article 9-A of the Tax Law shows that many activities may be considered in determining whether a firm is doing business in New York which would not be subject to tax under that particular article.

H. Petitioner has presented extensive argument that the assessment must be cancelled because it is allegedly based on an erroneous interpretation that Article 13-A was governed by excise tax principles. According to petitioner, the Division erroneously relied on the fact that petitioner was registered under Article 12-A of the Tax Law to conclude that petitioner was

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[2]At the hearing, petitioner denied that it provided technical assistance in New York. However, the servicing of home burners may be considered one way of providing technical assistance.

subject to tax under Article 13-A of the Tax Law. Petitioner contends that the Division has repudiated interpreting the tax imposed under

Article 13-A as an excise tax and that this erroneous interpretation cannot be used to sustain the assessment.

I. Petitioner's argument is fallacious. The record is clear that the reason petitioner was not asked to collect tax in 1983 was because the reviewers overlooked the fact that petitioner was repairing furnaces in New York. One may reasonably conclude that if this fact had been noticed and the reviewers had examined the CT-245's, petitioner would have been asked to remit the tax imposed by Article 13-A of the Tax Law. It is noted that this conclusion is consistent with the guidelines that were circulated by the Division in 1983.

J. Petitioner maintains that the Division is estopped from assessing tax. Before proceeding to the merits of this argument, certain general principles should be set forth. Generally, the doctrine of estoppel does not apply to government acts unless there are exceptional facts which require the application of the doctrine in order to avoid a manifest injustice (Matter of Harry's Exxon Service Station, Tax Appeals Tribunal, December 6, 1988). When a taxing authority is involved, this rule is considered particularly applicable because public policy supports enforcement of the Tax Law (Matter of Glover Bottled Gas Corp., Tax Appeals Tribunal, September 27, 1990).

As a general rule, estoppel is unavailable to prevent the government's correction of a mistake of law (see, e.g., Southern Hardwood Traffic Assoc. v. United States, 283 F Supp 1013 [WD Tenn 1968], affd 411 F2d 563 [6th Cir 1969]). This principle is premised on the recognition that a ruling to the contrary may result in the subordination of legislative power to the conduct of a wayward or unknowledgeable governmental official (see, Schuster v. Commr., 312 F2d 311 [9th Cir 1962]).

Although it is generally true that the estoppel doctrine does not prevent the correction of an error of law, it has been held that, in a proper case, the doctrine may be invoked where there

is a representation of law (see, Schuster v. Commr., supra). In order to determine whether there should be an estoppel, the Tax Appeals Tribunal has utilized a test which asks if there was a right to rely on the representation, whether there was such reliance and whether the reliance was to the detriment of the party who relied upon the representation (see, Matter of Harry's Exxon Service Station, supra).

K. In this matter, petitioner received a letter from the chief of oil tax audits which stated that petitioner was not required to file reports or pay tax under Article 13-A. Certainly, it was reasonable for petitioner to rely on this letter. Further, the Division should have expected that taxpayers would rely on such letters.

L. In reaching the foregoing conclusion, the Division's argument that it was unreasonable for petitioner to have relied on this letter is rejected. The fact that the letter stated it was subject to verification does not indicate that it should not be relied upon. Further, since petitioner was forthright in advising the Division that it repaired burners in New York, there was no reason for petitioner to believe that the Division misunderstood the nature of petitioner's activities or that an additional response was necessary.

M. The second requirement for estoppel is that it must be shown that petitioner relied on the representation. Here, the uncontradicted testimony is that petitioner received and relied on the letter from the Division. Accordingly, the second criterion has been satisfied.

N. The last requirement is that the reliance must be to the detriment of the party who relied upon the representation. This requirement has also been met. If petitioner had been correctly advised that it was subject to tax, it would have been in a position to adjust its selling price to factor in the additional expense. This option is no longer available. In addition, petitioner is correct that, unlike a sales tax, it does not have the right to recover the tax from its customers.

O. The Division has argued that estoppel is inappropriate because petitioner did not adequately describe its activities in New York on the Article 13-A questionnaire. According to the Division, petitioner should have stated that it solicited sales in New York or advertised in

New York. These points are rejected because the weight of the evidence is that petitioner did not solicit sales or advertise in New York during the period in issue. Therefore, the failure to list these items cannot be held against petitioner. The Division next argues that petitioner's Article 13-A questionnaire should have revealed that petitioner accepted orders in New York. However, contrary to the Division's argument, the clear weight of the evidence is that petitioner did not accept orders in New York. Therefore, the failure to state this fact cannot be held against petitioner.

P. The Division is correct insofar as it asserts that petitioner did not state that it purchased petroleum products in New York or initiated a lawsuit for collection in New York. However, these events did not take place in the usual course of petitioner's business. Further, there is no question on the form which elicits information about such limited activities. Therefore, petitioner's failure to disclose these facts should not be held against it.

Q. Lastly, the Division argues that estoppel should not be granted because petitioner did not disclose on its Article 13-A questionnaire that it shipped petroleum into New York via its own trucks and that it sent technicians into New York. An examination of the Article 13-A questionnaire shows that it clearly stated that it supplied number 2 fuel oil and gasoline in New York and that it provided burner service to home heating units in New York. These disclosures are sufficient to overcome the Division's objections.

R. In view of the foregoing, the Division is estopped from asserting a deficiency of tax imposed by Article 13-A of the Tax Law during the years in issue. The remaining points in petitioner's brief are rendered academic.

S. The petition of Bolkema Fuel Co., Inc. is granted and the notices of deficiency, dated December 22, 1988, are cancelled.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE