STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

BENAK CORPORATION :

for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Period January 1, 1983 through May 1, 1984. :

In the Matter of the Petition :

of :

BENAK CORPORATION :

for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Period Ended December 31, 1983. :

DETERMINATION
DTA NOS. 808633, 808634, 808638, 808639 AND 809435

In the Matter of the Petition :

of :

BENAK CORPORATION :

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1982 through February 29, 1984. :

In the Matter of the Petition :

of :

EDWARD J. KANEB, OFFICER OF BENAK CORPORATION :

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1982 through February 29, 1984. :

In the Matter of the Petition

of

CATHERINE KANEB,
OFFICER OF BENAK
CORPORATION

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1982 through February 29, 1984.

Petitioner Benak Corporation, Route 2, Highland Road, Massena, New York 13662, filed a petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period January 1, 1983 through May 1, 1984. Benak Corporation also 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 ended December 31, 1983. Finally, petitioners Benak Corporation, Edward J. Kaneb and Catherine Kaneb filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1982 through February 29, 1984.

A consolidated hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 9, 10, and 11, 1993, with all briefs filed by November 29, 1993. Petitioners appeared by Bond, Schoeneck & King (Arthur J. Siegel, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation should be defaulted and all the assessments at issue herein annulled because it failed to file timely answers in each of the matters in issue.

II. Whether petitioner Benak Corporation imported or caused to be imported motor fuel it purchased in Canada thereby subjecting it to tax under Article 12-A of the Tax Law.

III. Whether Benak Corporation was a petroleum business within the meaning and intent of

Article 13-A of the Tax Law and therefore subject to the tax imposed by Tax Law § 301.

IV. Whether Benak Corporation, Edward J. Kaneb and Catherine Kaneb were liable for sales and use taxes for the period September 1, 1982 through February 29, 1984.

V. Whether petitioners' good faith receipt of resale certificates should have precluded the assessment of sales and use taxes and motor fuel tax.

VI. Whether overlapping motor fuel audits, if established, should have precluded the assessment of certain sales and use and excise taxes against petitioners.

VII. Whether the Division of Taxation should be compelled to accept petitioners' amnesty applications, requested at hearing, previously denied pending criminal investigations.

VIII. Whether petitioners Edward J. Kaneb and Catherine Kaneb were persons responsible for the collection of sales and use taxes on behalf of Benak Corporation during the period September 1, 1982 through February 29, 1984.

FINDINGS OF FACT

On June 7, 1993, petitioners and the Division of Taxation ("Division") entered into a stipulation of exhibits and facts. The 36 exhibits were entered as part of the Division's Exhibit "P". The facts, as modified by the parties, have been incorporated into the following Findings of Fact. Additionally, petitioners submitted proposed findings of fact. Proposed findings designated Point I - 1, 2, 5 and 6; Point II - 10, 14, 16, 17, 24, 25, 28, 30 and 32; Point III - 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 and 16; Point IV - 7 and Point V - 1, 2 and 3, have been incorporated into the following Findings of Fact, while all others have been excluded because of the way in which they mischaracterized facts in the record, are conclusory in nature, are irrelevant or immaterial or have been found to have no basis in the record.

On January 31, 1983, petitioner Benak Corporation ("Benak") became registered as a motor fuel distributor under Article 12-A of the Tax Law. It also conducted business under the name Massena Petroleum Terminal ("Massena") as well.

During the audit period, January 1, 1983 through May 1, 1984, Massena's offices were located at the Highland Nursing Home, where there were no tanks, pumps or other facilities

other than offices for conducting a petroleum business. The nursing home employed petitioner Edward J. Kaneb as its administrator, the president of Benak. The nursing home location also housed the Kaneb Realty Corporation, which owned the nursing home property.

Although an Article 12-A motor fuel distributor, Benak owned no tanker trucks, employed no drivers and maintained no petroleum inventories. However, it is uncontroverted that Benak made sales of petroleum during the years in issue.

The parties stipulated that during the calendar years 1982 and 1983, motor fuel distributors continued to use resale certificates and the State of New York Department of Taxation and Finance continued to accept said resale certificates in lieu of Form TP-146.4.[1] The Form TP-146.4 was used to identify distributors exempt from sales tax on the purchases of gasoline, diesel motor fuel and fuel oil. When the resale certificate was in use by distributors, said certificate was routinely used for the sale of all petroleum products including fuel oil, gasoline and diesel fuel.

As a consequence of making these sales, Benak filed certain returns and paid certain taxes. Catherine Kaneb, as officer of Benak, Edward Kaneb, as officer of Benak, and Benak timely filed sales tax and excise tax amnesty applications for the period December 1, 1982 through February 29, 1984 relating to petroleum products. For the tax period January 1, 1983 through December 31, 1983, Benak paid to the State of New York motor fuel excise taxes in the sum of $205,037.68. For the tax period January 1, 1983 through December 31, 1983, Benak paid sales and use tax for motor fuel in the sum of $36,207.70.

Since 1983, Benak imported or caused to be imported gasoline from basically two Canadian suppliers, Sipco Oil, Ltd. and Universal Terminals. For the sake of simplicity, Benak paid all its import duties through a customs broker known as A. N. Derringer of Fort Covington, New York.

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[1]However, the resale certificates were accepted only if the Article 12-A distributor registration of the customer was confirmed by reference to the Division's records.

Because Benak lacked the trucks to bring the gasoline into New York, it created a system whereby certain of its largest customers, to wit, James Vock, Purdy Coal & Oil, Inc. and John Fountain, would pick up the product at the terminals in their trucks and transport it to New York State.

Delivery tickets issued by the terminals clearly indicated that Massena was the party to whom the gasoline was being shipped and that the carrier or transporter was one of Benak's or Massena's customers like James Vock, Purdy Coal & Oil, Inc. and John Fountain. During the period, Canadian terminals only sold to registered New York distributors.

Invoices between Benak and its customers indicated that New York sales tax was included in the purchase price.

Sales invoices between the Canadian terminals like Sipco and Universal and Benak indicated that only Canadian taxes were charged.

The Article 12-A audit was begun by the Division on January 18, 1984. The Division had knowledge of unreported gallons of gasoline imported from a border investigation being conducted by the U.S. Customs Service. Following up on this, the Division contacted A. N. Derringer and received a printout of charges to Benak which showed dates of purchase, invoice numbers and amounts paid. Benak produced corresponding invoices which were matched to the printout as well as available third-party information garnered from Sipco. Tax-paid purchases were also examined as well as tax-free sales to Purdy Coal & Oil, Inc. which were summarized and appropriate credit given. It is noted that Purdy became a registered Article 12-A distributor in its own right in August of 1983 and purchased gasoline from Benak in November and December 1983.

The Division's investigation revealed unreported importation of gasoline in the amount of 2,408,396 gallons which yielded an additional 12-A tax due of $187,517.84. It is noted that Benak did file Article 12-A returns during the audit period, most late filed, which indicated the importation of only 2,563,006 gallons.

On July 27, 1984, the Division issued a Notice of Determination of Tax Due under

Article 12-A to Benak for the audit period January 1983 through May 1984, indicating additional tax due of $187,517.84, plus penalty and interest. At the conciliation conference, the tax was reduced to $175,672.24.

It is noted that a New York State audit of gasoline sales and excise tax was conducted of Purdy Coal & Oil, Inc. for the audit period December 1982 through November 1985. The Division's auditor relied upon and considered documents and information received from his audit of Purdy in conducting Benak's audit. The Division's auditor did not know the whereabouts of any other Purdy audit documents other than the Purdy field audit report in the record. As part of the auditor's audit of Purdy, he examined the gallons of gasoline that Purdy received from Benak and also compared Benak transactions with those transactions he analyzed in the Purdy audit for the same audit period.

Also, an audit was conducted of John Fountain d/b/a Cash Line Fuels for gasoline and diesel fuel sales tax during the period December 1981 through May 1984. As part of the audit, the Division also examined Fountain's operation of a truck stop, particularly with regard to sales tax liability. The Division's analysis of Fountain's wholesale purchases of gasoline from numerous fuel suppliers, including Benak, encompassed the period May 1982 through April 1984. The same auditor, Gerald Cowen, conducted the Fountain audit and the instant matter covering the same audit period. As a result of the Fountain sales tax audit, the Division found additional sales tax liability in the sum of $24,780.73.

The Fountain audit was performed between January 24, 1985 and May of 1985.

It is uncontroverted that, during the applicable audit period, petitioners received resale certificates from Purdy Oil, James B. Vock, Transportation Supplies, Inc., Hurley Brothers, Edgetown Plaza, Inc., Sharlow's Service Station, and Cash Line Cherry Knolls.

As noted above, during the calendar years 1982 and 1983, motor fuel distributors continued to use resale certificates and the State continued to accept them in lieu of Form TP-146.4, if the Article 12-A distributor registration of the customer was confirmed by reference to the Division's records. When used in this manner, the resale certificates were routinely used for

the sale of all petroleum products including fuel oil, gasoline and diesel fuel.

The sales tax audit conducted by the Division was done as a result of the unreported gallons of gasoline discovered during the motor fuel audit, i.e., 2,408,396 gallons. The period covered was September 1, 1982 through February 29, 1984. The Division examined a sample of sales to determine percentages of regular, unleaded and premium gasoline sold. These percentages were then applied to the total unreported gallons to arrive at gallons of each type of gasoline. The regional average retail price charts were used to compute tax per gallon which was then applied to the gallons of unreported gasoline imported by Benak.

Benak remitted sales tax only for the quarter March 1, 1983 through May 31, 1983. However, as indicated on one of its invoices to Purdy Oil during the sales tax audit period, "all state and federal taxes [were] included in [the purchase] price."

The audit also revealed that Benak operated a truckstop in Ogdensburg, New York, the Edgetown Plaza. Sales from Edgetown Plaza were to have been included in the sales tax returns of Benak until March 31, 1983, when Edgetown Plaza was incorporated. Between September 1, 1982 and March 31, 1983, Benak did not remit sales tax collected on diesel sales at the Edgetown Plaza.

Although Benak also sold diesel fuel and heating oil on a wholesale basis during the audit period, it was able to provide exemption certificates for nearly all such sales and no tax was imposed.

As a result of the audit, Benak was issued a Notice and Demand for Payment of Sales and Use Taxes Due on December 4, 1984, which set forth total tax due of $378,981.40, plus fraud penalty and interest. Two officer assessments, notices of determination and demands for payment of sales and use taxes due, were issued for the same tax, penalty and interest to Edward J. Kaneb and Catherine Kaneb on February 1, 1985 for the period September 1, 1982 through February 29, 1984. At a conciliation conference held in the Bureau of Conciliation and Mediation Services on March 22, 1990, the conferee allowed certain exempt sales to Indian

reservations and cancelled the fraud penalty.[2] This resulted in additional sales tax due in the sum of $367,779.90, plus penalty and interest. In its petition, Benak conceded tax liability for certain sales it made in New York State in the sum of $98,254.92 for the period in issue.

Between December of 1990 and March of 1991, the Division performed a desk audit for the purpose of determining Benak's liability for the gross receipts tax under Article 13-A of the Tax Law. The period audited was July 1, 1983 through December 31, 1983.

The Division, having already determined that Benak was importing petroleum products from Canada during that period, discovered that no gross receipts tax was paid by Benak during this period.

The tax was calculated utilizing the audits conducted for motor fuel and sales tax in 1984. Monthly sales for July through December of 1983 totalled $6,737,979.17. When the tax rate of 3.25% was applied to this figure, it yielded tax due of $218,984.33. On March 18, 1991, the Division issued a Notice of Deficiency to Benak for Article 13-A tax in the sum of $218,984.33, plus interest.

Prior to hearing, petitioner Edward J. Kaneb served a subpoena on the New York State Department of Taxation and Finance, requesting sales tax audit information on various businesses, to be examined, in camera, for the purpose of establishing whether these businesses were audited or if taxes were assessed to these businesses.

In response to the subpoena, the Division produced a sales tax field audit report for Purdy Coal & Oil, Inc. covering an audit period from December 1982 through November 1985. The result of the audit was no change, or no tax liability determined. The Division also produced a field audit report of sales tax for John Fountain of Malone, New York. The result of this audit was an additional liability of $16,245.35 for the period December 1981 through May 1984. The third audit produced by the Division included the sales tax audit for the period December 1981

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[2]The modifications also applied to the officer assessments.

through May 1984 and also audits of diesel sales tax, truck mileage tax and fuel use tax. The list of fuel suppliers to John Fountain in the audit report included Massena Petroleum.

In a letter from petitioner Edward J. Kaneb, acting as president of Massena Petroleum Terminal, to Purdy Coal & Oil, Inc., dated January 11, 1984, Mr. Kaneb stated that all Federal and State taxes were included in sales from Massena to Purdy between January 1, 1983 and August 31, 1983. Mr. Kaneb also stated that no sales took place between Massena and Purdy in September and October 1983 and that no taxes were included in sales between the companies in November and December 1983.

Benak filed two returns of tax on motor fuels for the months of January and February 1983. For the month of January 1983, said return indicated a tax due of $7,174.16 and a check, dated February 24, 1983, in that amount and signed by Edward J. Kaneb was attached. The return for February 1983 set forth tax due of $25,269.76 and a check, dated May 18, 1983, in that amount and signed by Mr. Kaneb was attached. The returns also indicated that Benak was a wholesale distributor of motor fuel, that it received its supply by tank truck and that it operated service station outlets.

Benak was registered as a distributor of gasoline and motor fuel by the Department of Taxation and Finance on January 28, 1983. The application for registration filed by Edward J. Kaneb, as president of Benak, stated that Benak was an importer of motor fuel, incorporated on June 2, 1981, with two officers: Edward J. Kaneb, president, and Catherine Kaneb, secretary. The application also stated that Benak received its supply of motor fuel from Sipco Oil Ltd. of Toronto, Canada.

Benak submitted two affidavits into evidence. One was of Philip E. Brown, the owner of One Stop Shoppe. Mr. Brown averred that, to the best of his knowledge, he was audited by the Division for the year 1982 for sales tax. The second was an affidavit of James B. Vock, owner of a business by the same name which was a "petroleum business". Mr. Vock averred that he was audited by the Division for the years 1982 and 1983 for sales and use tax and for excise and gross receipts tax. Neither affiant stated the outcome of their audits or their business

relationship with Benak, if any. Further, both businesses were listed on the subpoena and a search of the Division's records indicated that no audits had been performed of either entity for sales tax purposes. The Division's auditor testified that he did not care if he ever audited Vock.

As stated in Finding of Fact "17" above, petitioner Edward J. Kaneb subpoenaed sales tax audit documents for many businesses which he believed were audited for sales tax for the same audit periods as Benak. However, after searching its records, the Division was able to produce only those files set forth in Finding of Fact "17". Many of the businesses which were listed in the subpoena did not have records in the computer system and a message, "No Audit Record", was the only response to the search of said businesses.

The Division submitted an affidavit of Richard M. McNamara, a calculations clerk in the Policy and Compliance Section, Computer Audit and Systems Bureau. Mr. McNamara had extensive experience in the maintenance of personal computer databases and the utilization of mainframe computer databases for the production of reports. His unit was responsible for processing data entry forms for audit programs on the "Sperry" computer system. The forms were entered by the processing division and then returned to his office for confirmation of correct entry. Mr. McNamara stated that a Form "MIS-3" was used to close files and required the taxpayer's name and vendor identification number. If an audit was conducted and closed, even "no change audits", entry of an "MIS-3" form would have produced an audit record on the computer. Where a search was made and the system reported "no audit record" in response, Mr. McNamara said it meant that no audit information was ever entered into the system for the identified vendor.

A second affidavit submitted by the Division was that of Judi Cavanaugh, Director of the Returns Processing Bureau ("RPB") of the Information Systems Management Division. As Director of RPB, she managed the processing of returns and the development and maintenance of computer programs used in that processing. She explained that records of sales tax returns were kept on the "Sperry" system, placed in service prior to 1980, and on an IBM system, placed in service in 1986. The Sperry system is still used for sales tax return data and sales tax

audit histories, the latter organized by vendor identification number. Since March 1992, audit history data has been entered into the IBM System, which then transfers the information to the Sperry system. Audit history data is not purged from the Sperry system. Ms. Cavanaugh also averred that the message "No Audit Record" meant that no audit history records exist for the identified vendor and that no audit information was ever entered into the system because the audit histories are not purged.

Benak, or its "d/b/a", Massena Petroleum, received resale certificates regarding State and local sales and use taxes on the following dates from the following vendors:

Certificate Dated	Vendor
March 1982	Purdy Oil
December 1982	James B. Vock
4-16-83	Cherry Knolls
7-1-82	Transportations Supplies, Inc.

7-15-82	Ubold Garceau
April 1983	Edgetown Plaza, Inc.
7-20-83	Shallows Service Station
6-28-82	Massena Iron & Metal Co., Inc.

Massena also received a resale certificate for sales tax exemption on certain fuels, Form TP-146.4, from Hurley Brothers, dated September 10, 1984, beyond all audit periods involved herein.

The auditor refused to accept these certificates for the purpose of sales of gasoline, only fuel oil. Further, the auditor checked to see if the vendors were registered distributors and found they were not.

It was the practice of the Department of Taxation and Finance to issue lists of registered distributors to all such distributors so that if they made sales to such registered distributors they would be tax-exempt sales. Benak claimed never to have received this list.

Benak requested a copy of the list of registered distributors for 1985 in 1989 from the Division. By letter dated October 25, 1989, the Division responded that it did not have the list of registered motor fuel distributors as of September 1, 1985 "since this date is beyond the three-year statute." However, the Division did offer to provide information regarding the date of cancellation and/or registration of any current or past motor fuel distributor. A copy of the list of registered distributors as of September 1, 1986 was enclosed with the letter.

By letter dated April 2, 1990, the Division provided Mr. Kaneb with a list of all 12-A motor fuel distributors, which disclosed the status of all 12-A motor fuel distributors commencing February 1, 1982 (an MD-350 printout) and a "Motor Fuel List #8 dated 2/1/83" which disclosed the new registrations, changes and cancellations to the list of registered distributors of motor fuel as of April 1, 1982.

A search of the Division's records was made with regard to Purdy Coal & Oil, Inc. for a sales tax audit history. The search produced one audit for sales and use tax covering the period December 1982 through November 1985 and found no taxes due. The audit was returned September 30, 1986.

Benak also was audited by the Internal Revenue Service and was found liable for

additional tax on gasoline and diesel fuel for the year 1983.

Benak was a registered petroleum business pursuant to Article 13-A of the Tax Law for the period July 1, 1983 through October 31, 1984, holding certificate number J-0336-4.

Benak prepared schedules which set forth the motor fuel tax liability which would be due if the Purdy Oil sales for 1983 were deemed nontaxable. That figure resulted in a refund of $177,520.02. A second schedule prepared by Benak was for excise taxes due if Benak was not deemed an importer. That figure indicated a liability of $13,595.20.

On January 16, 1986, Benak applied for amnesty with regard to assessment 2271, dated July 27, 1984, which set forth motor fuel tax in the sum of $187,517.84, plus penalty and interest.

On February 4, 1986, the Amnesty Project Counsel informed Benak that its application for motor fuel tax amnesty for the period January 1, 1983 through May 30, 1984 had been denied due to "an ongoing criminal investigation relating thereto." All application materials were returned to Benak, including the payment. The letter also provided terms upon which Benak could reapply for amnesty:

> "This notice is the only evidence that your application was filed timely during the Amnesty period. We advise you to keep it for your records. If the investigation does not result in criminal liability (whether through a prosecution not resulting in a conviction or by the investigating agency otherwise terminating the investigation), you may re-submit your application, returns and full payment along with this notice (within 30 days of such result) and be eligible to receive Amnesty for the type of tax, periods and amount rejected herein, provided all other Amnesty criteria are met."

On January 24, 1986, Benak filed three other applications for amnesty covering the sales and use tax assessments issued to it and its two officers, Edward J. Kaneb and Catherine Kaneb, by notices dated December 4, 1984 and February 1, 1985, respectively.[3]

On February 4, 1986, the Amnesty Project Counsel informed Benak and its officers that their applications were denied due to "an ongoing criminal investigation relating thereto." As in

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[3]Catherine Kaneb, as officer of Benak Corporation, signed her own application for amnesty on January 24, 1986.

the case of the motor fuel amnesty application, all materials including payment were returned to the applicants. The same provisions were included in the letters to the sales tax amnesty applicants concerning reapplication as set forth above.

Petitioners did not reapply for amnesty until they did so at hearing on June 9, 1993, some seven years later, claiming at that time that they were not informed by the Division that State criminal proceedings had been terminated.

As stated in the application for motor fuel distributor, Edward J. Kaneb and Catherine Kaneb were the president and secretary of Benak. Although these two individuals were the only officers and stockholders of the corporation, therefore sharing in the profits, they did not actively participate in the daily operations of the business. Instead, they delegated responsibility for all the daily operations and management to an

employee named Jack Casion. They also hired a bookkeeper, Peggy Chase, to keep the books and perform the general secretarial duties associated with the office. These two employees were responsible for customer contracts and relations and the preparation and issuance of invoices. Edward Kaneb signed checks on behalf of the corporation on at least two checking accounts (Bank of Montreal and Key Bank, N.A.) and hired various accountants to assist the business. Peggy Chase also signed checks.

Mr. Kaneb also worked 60 hours a week in the nursing home and operated the Kaneb Realty Corporation. In his petition he stated that he used his contacts in the petroleum industry to establish Benak's petroleum business.

Mr. Kaneb worried about oil spills and his liability for same. He contacted his insurance agent who wrote him a letter on January 23, 1990 in which he stated that it was his understanding that if Benak acted as broker and a distributor picked up and signed for product at a terminal, Benak was absolved from liability because ownership of the product passed to the distributor.

Catherine Kaneb, secretary and one of the two stockholders in Benak, did not appear at

the hearing and, therefore, did not testify in her own behalf. However, she maintained the same passive role in the business as Edward J. Kaneb.

On April 20, 1988, the United States Attorney advised Benak, through its attorneys, that a grand jury investigation had been terminated and that the Internal Revenue Service had been advised to return their records.

No proceedings or actions were brought by the Attorney General of the State of New York against Edward J. Kaneb, as officer of Benak, to impose personal liability upon him for alleged sales and use taxes assessed from September 1, 1982 to February 28, 1984.

No proceedings or actions were brought by the Attorney General of the State of New York against Catherine Kaneb, as officer of Benak, to impose personal liability upon her for alleged sales and use taxes assessed from September 1, 1982 to February 28, 1984.

The State's auditor contacted Peggy Chase and Jack Casion concerning the audit and did not investigate Catherine Kaneb's authority to act for the corporation or her involvement in the motor fuel business. In fact, the auditor did not make the decision to assess her nor did he know if anyone else investigated Catherine Kaneb's involvement with the business.

Edward Kaneb maintained no personal office at Benak, even though its headquarters were located at the Highland Nursing Home, where he worked as administrator for 60 hours per week.

There is no evidence in the record other than sales invoices which document Benak's relationship with the Canadian terminals with which it did business during the years in issue. Likewise, there was no evidence of Benak's relationship with its transporters other than delivery tickets.

CONCLUSIONS OF LAW

A. Petitioners renewed their motions seeking an order that the Division be defaulted and all the assessments at issue herein be annulled because of the Division's failure to timely file answers to the petitions filed herein.

The issue was originally heard by this same forum on motions for default judgments

under 20 NYCRR 3000.4(a)(4), dated May 7, 1991. The Division filed answering affirmations on May 29, 1991, and a short form order was issued by Administrative Law Judge Daniel J. Ranalli on June 13, 1991, wherein petitioners' motions were denied.

The issue will not be redetermined by me, consistent with the doctrine of "law of the case" which was meant to avoid the retrial of issues already determined in the same action in the same court (see, Siegel, NY Prac § 448 [2d ed]). It does not preclude review by an appellate court. Petitioners' attempt to relitigate the issue before two Administrative Law Judges was improper. Therefore, the order of Judge Ranalli will not be disturbed at this level of the proceedings.

B. The second issue was whether Benak imported or caused to be imported into New York State for use, sale, storage or distribution any motor fuel, thereby subjecting it to tax under Tax Law Articles 12-A and 13-A.

It is clear that Benak arranged with customs broker A. N. Deringer for it to collect the duty on fuel imported under its authority. The Division received a printout from Deringer and the sales listed on it were later confirmed with invoices produced by Benak. The fact that Benak was the entity charged for its imports during the audit period creates a strong presumption that Benak was the owner and importer of fuel being imported into New York State from Canada.

Although petitioners argue that they actually sold the petroleum product to their customers at the Canadian terminals, they have not produced any evidence of such transactions. In contrast, the delivery tickets in evidence show Benak as the export customer under the heading "ship to" while listing Benak's customers as the "carriers" or "transporters". Both Purdy Oil and James Vock show up on the delivery tickets in evidence.

The invoices issued by Benak to its customers also were consistent with Benak as importer since they included the words "all state and federal taxes included." No such taxes would have been due if the sales had taken place in Canada.

Further, although petitioners submitted the affidavit of James Vock, with an opportunity

to make a statement of his relationship to Benak and where sales took place between the two companies, no mention appears in said document.

It is also consistent with the Tax Law's definition of distributor that Benak owned no trucks of its own or storage facilities. Tax Law § 282.1 defines a distributor as any corporation that "causes to be imported" any motor fuel. Likewise, Tax Law § 300(c) defines a "petroleum business" for purposes of Article 13-A as every corporation which was formed for the purpose of importing or causing to be imported (by a person other than one which is subject to tax under Article 13-A) petroleum into the State for sale.

Finally, petitioners' contention that Benak was not the importer is further undermined by the fact that none of the transporters which it claims were bringing the motor fuel into New York were licensed to do so by the State of New York as set forth on the list of motor fuel distributors for the period in issue. During the period, Canadian terminals sold only to New York registered motor fuel distributors.

C. Having established that Benak was a distributor of motor fuel under Tax Law § 282.1, it follows that for the period in issue the retail sales tax on motor fuel should have been collected by Benak as distributor on all its retail sales. The only exception to the collection of this tax was provided for in Tax Law § 1101(b)(4)(ii) which stated, in part, as follows:

> "Notwithstanding the provisions of subparagraph (i) of this paragraph, a sale of automotive fuel by a distributor is deemed to be a retail sale, except for a sale of automotive fuel by a distributor to a purchaser duly registered with or licensed by the taxing authorities of another state as a distributor of or dealer in automotive fuel therein, for immediate exportation from the state into such other state, provided the distributor making such sale complies with all regulations of the tax commission relating thereto."

Therefore, there was no provision for the acceptance of resale certificates by a motor fuel distributor which would have removed those sales by Benak from the definition of retail sale provided for in Tax Law § 1101(b)(4). It is further noted that Tax Law former § 1101(b)(4)(ii)(B) defined distributor to be the same as the Article 12-A definition which was previously established above. Benak was therefore liable for both the motor fuel tax under Tax Law § 284 and the retail sales tax on motor fuel under Tax Law § 1105(a) (see also, Matter of

Harbor Petroleum Corp., Tax Appeals Tribunal, September 21, 1989).

The parties stipulated to the fact that, during the calendar years 1982 and 1983, the Division had a policy of accepting resale certificates, notwithstanding the provisions of Tax Law § 1101(b)(4)(ii) and 20 NYCRR 560.10 in lieu of the new form TP-146.4, where the distributor demonstrated that the customer providing the resale certificate was an Article 12-A distributor as confirmed by reference to the Division's records. The latter requirement was incorporated into the new resale certificate TP-146.4. In essence, the Division's requirements were the same under the policy and the law and regulations, i.e., the distributor had to show a properly executed resale certificate and demonstrate that the customers providing the certificates were registered Article 12-A distributors. Only when both of these elements were demonstrated were the exemptions granted. Since Benak did not establish that its customers were Article 12-A distributors, it is not entitled to the exemptions.

Petitioners' argument that they were not provided with a list of registered motor fuel distributors is without merit. It was established that the Division mailed all registered motor fuel distributors these lists every time they were published in the ordinary course of business. If Benak had not received a list during 1982 and 1983, the prudent and appropriate action would have been to request one at that time. The fact that the Division could not produce one in 1990 does not raise a presumption that one was not sent to Benak in 1982 and 1983. Furthermore, Mr. Kaneb admitted that he did not have much, if any, substantive involvement with the business, so his testimony regarding receipt of such a list is without value. In fact, the opposite is true. It is presumed Benak did receive the list and, had it not, it would have requested same to insure compliance with the law and regulations if it expected to claim an exemption based on resale.

Finally, Benak raised the issue of brokerage, i.e., that it was a mere broker for these transactions between the terminals and its customers. But there is nothing in the record to support this theory other than the characterization of the circumstances by an officer who delegated his responsibilities to another and petitioners' representative. What there is in the

record are clear purchases of motor fuel by Benak and unmistakable sales to New York customers, almost all of whom were not registered Article 12-A distributors. It is true that some of these customers were also the transporters of the fuel from the Canadian terminals, but there is no evidence that Benak assumed a broker relationship with the terminal or the customer. When given the opportunity to have one of those transporters, James Vock, confirm the relationship in an affidavit, petitioners chose to remain silent on the issue. The burden of proving a brokerage relationship was on petitioners and they clearly have not carried that burden (Tax Law §§ 315, 1089[e]).

Although petitioners claim that the New York Uniform Commercial Law supports their theory, they have not demonstrated that title to the motor fuel passed to customers other than in New York State and since this first element is missing, the second, risk of loss, is irrelevant.

Petitioners cited Matter of Harbor Petroleum Corp. (supra) in support of their position. However, in that case, there were written contracts from which intent was interpreted and Harbor Petroleum was found to have imported or caused to be imported motor fuel pursuant to destination contracts. Petitioners herein have proffered no such evidence or credible testimony in support of their assertion that they were not importing or causing to be imported the motor fuel in issue. The only evidence in the record were delivery receipts and invoices which proved Benak/Massena Petroleum was importing or causing to import motor fuel.

D. Petitioners contend that overlapping motor fuel audits should have precluded the assessment of certain sales and use and excise taxes against them.

The Division's audit policy, in effect during the audit period, stated, in part, as follows:

"Overlapping Audits - Test Periods

> "If an auditor has knowledge that an item in the audit was already taxed under another audit, this item should be eliminated from any determination. When an audit was conducted by another office, the Section Head should contact his counterpart in the office which conducted that audit to determine if a duplication of tax would occur and to determine the appropriate action.
>
> * * *
>
> "In order for the auditor to verify the vendor's claim that there was an overlapping situation, the following is required.

"A. The other audit case and identification number;

"B. The office which conducted the audit;

"C. Proper identification of the transaction(s) in question;

"D. A statement from the other vendor that there was no agreement that this transaction was to be excluded from that audit." (Department of Taxation and Finance, Sales and Use Tax - Technical and Procedural Guidelines - Test Periods, 9/7/82.)

The subject of overlapping audits arose in Matter of Allied Aviation Service Co. of N.Y. (Tax Appeals Tribunal, June 27, 1991) where that petitioner was able to show that there were overlapping audits with one of its customers, that the audit period of its customer was the same, that the customer agreed to the audit findings and that there was no agreement to exclude the particular transactions in issue from the customer's audit. By doing so it was able to avail itself of an adjustment to its asserted liability.

Since the policy cited by Benak and the Kanebs specifically addresses itself to sales tax audits and not motor fuel audits, its only applicability is to those taxes.

Petitioners subpoenaed sales tax audit records for many of its customers which it suspected had been audited for the same period as Benak. However, that search produced no such records of any audits except Purdy Coal & Oil Co., Inc. and John Fountain. The Purdy audit covered the period December 1982 through November 1985 and resulted in "no change" to Purdy's liability. The audit report specifically states that Purdy properly reported taxable and nontaxable sales of diesel fuel and exemption certificates were on file for all nontaxable sales. Additionally, Purdy properly reported use taxes on diesel fuel used in its trucks. The report said Purdy properly computed the sales taxes and, after deducting sales taxes paid to suppliers, remitted the balance to the Division. Further, Purdy's suppliers were checked and it was found that all suppliers were charging the correct sales taxes on their invoices and Purdy was found to be paying sales taxes as stated on the invoices except those for resale.

The audit of Purdy ended in no change to its tax liability for the audit period, making Purdy's consent to the outcome unnecessary and there was no mention in the audit report of excluding any transactions between Benak and Purdy from Purdy's audit. As the Tribunal

concluded in Matter of Allied Aviation Service Co. of N.Y. (supra):

> "We agree with petitioner that this testimony indicates that it was the Division's policy to eliminate from the vendor's assessment any tax assessed with respect to transactions with a specific customer during periods for which the purchaser was also audited, even where the customer's audit was a test period audit."

Petitioners have demonstrated that there were overlapping audits which met the criteria set forth in the policy of the Division and confirmed by the Tribunal in Allied. The Division is directed to make the appropriate adjustments to petitioners' sales tax liability with regard to Purdy Coal & Oil Co. sales.

However, the John Fountain audit is a wholly different matter. The Fountain audit did find additional sales tax due and the audit report indicated that John Fountain did not agree with the findings, and since the audit report produced by the Division was so abbreviated, it could not be determined if there had been an agreement to exclude the particular transactions at issue from John Fountain's audit. Therefore, no adjustment should be made for the overlapping audit of John Fountain.

There being no other overlapping audits demonstrated through credible documentary evidence or credible testimony, only the Purdy audit warrants an adjustment to petitioners' sales tax liability.[4]

Although not raised by either party at any time during the pendency of this matter, it is worthy of mention that the Division issued the sales tax assessment to Benak on a form called a "Notice and Demand for Payment of Sales and Use Taxes Due," numbered "AU-16.1," not a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due." This was a serious error on the part of the Division since its own regulation, 20 NYCRR 533.2(d), provides that:

> "(i) If a taxpayer, upon being audited, reaches agreement with [the Commissioner] as to the amount of taxes due, together with penalties and interest thereon, if any,

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[4]The affidavits of James B. Vock and Philip E. Brown were not specific regarding their alleged audits and clearly do not meet the criteria set forth in the audit policy or in Matter of Allied Aviation Service Co. of N.Y. (supra).

> [the Commissioner] will mail . . . a notice and demand for payment of the amount due" (emphasis added).

The Tax Appeals Tribunal has spoken to the issue as follows:

> "Where there is no agreement by the taxpayer with regard to the amount of taxes due plus interest and penalty, if any, the Division must proceed by mailing a notice of determination to the taxpayer (Tax Law § 1138[a]; 20 NYCRR 535.2[a], [b]). Here, it is clear that the petitioner did not consent to penalty nor interest beyond the minimum. Accordingly, the Division's use of a Notice and Demand to assess such amount is without statutory basis, contrary to the Division's own regulations and is null and void" (Matter of Kayton Specialty Shop, Tax Appeals Tribunal, January 17, 1991).

In applying the reasoning in Kayton to the instant matter, it is determined that the notice and demand issued to Benak is without a statutory basis, null and void, and is cancelled.

The assessments issued to the officers are not affected by this determination because the liability of Benak was established through a valid audit, the results of which are unaffected by the issuance of the incorrect assessing document by the Division. Further, the Division issued proper assessing documents to Mr. and Mrs. Kaneb (see, Matter of Mustafa, Tax Appeals Tribunal, December 27, 1991 [where Tribunal specifically held that where the assessment of the corporation had been cancelled due to procedural errors by the Division -- errors which did not impact on the petitioner individually -- there was no reason to dismiss the assessment against the petitioner/officer]).

E. The next issue raised was whether petitioners Edward J. Kaneb and Catherine Kaneb were personally liable for the sales and use taxes due from Benak for the audit period September 1, 1982 through February 29, 1984.

The Kanebs have challenged the Division's jurisdiction over them regarding the penalty and interest assessed based on the New York Supreme Court Appellate Division, Fourth Department case of Laks v. Division of Taxation (183 AD2d 316, 590 NYS2d 958), wherein it was held that an employee of a corporation could not be held liable for penalties and interest assessed to the corporation. The court said that Tax Law § 1133(a) only holds persons found to be required to collect any tax imposed by Article 28 personally liable for the tax imposed,

collected or required to be collected. Since the statute was silent as to penalties and interest, petitioners interpreted that to mean that penalties and interest could not be imposed. The court concluded that if the Legislature had intended to obligate persons required to collect tax to also pay penalties and interest, it could have expressly so provided (id., 590 NYS2d at 960). The court relied on Matter of DACS Trucking Corp. (ALJ Determination, February 8, 1990) and Matter of Velez v. Division of Taxation (152 AD2d 87, 547 NYS2d 444).

However, it must be noted that the Fourth Department relied on an Administrative Law Judge's determination (violative of Tax Law § 2010.5) which was reversed by the Tax Appeals Tribunal on March 21, 1991. The Tax Appeals Tribunal held:

> "We reverse the determination of the Administrative Law Judge with regard to this issue. In Matter of Hall (Tax Appeals Tribunal, March 22, 1990), where an identical argument was made with regard to a responsible officer's liability for penalty and interest on a sales tax assessment, the Tribunal held that the language of Tax Law § 1133(a) does not limit the responsible person's liability to tax only, and that the decision in Velez may be distinguished from the facts presented by Hall. The same reasoning and conclusion apply to the facts presented here.
>
> "As in Hall, and unlike the bulk purchaser in Velez, the responsible officers here were in a position to establish that they should not be held personally liable for the penalty and interest due from the corporation. In fact, as the sole owners and officers of the corporation, they were in the best position to present such proof. No legislative intent to limit the liability of such officers is expressed in the Tax Law. As we stated in Hall:
>
> > 'In addition to these bases to distinguish the Velez decision, we find affirmative evidence in the Tax Law that a responsible person can be liable for the penalty and interest assessed against the corporation. As noted above, an officer or employee is held liable because he satisfies the definition of "persons required to collect tax" set forth in § 1131(1) of the Tax Law as an officer or employee who is under a duty to act for the corporation in complying with any provision of the sales tax law. The penalties and interest at issue are imposed, by § 1145(a)(1)(i) of the Tax Law, on any person failing to file a return or to pay over any tax. Since the requirements to file a return and pay over tax are among the most essential to comply with the sales tax law, there is a clear and logical integration between the responsible person provisions of § 1131(1) and the penalty and interest provisions of § 1145(a)(1).'"

For the reasons stated by the Tribunal in their DACS decision, it is determined therein that the Laks decision was in error and that petitioners may be held liable for the penalty and interest assessed to Benak. Further support for this is found in Hall v. Tax Appeals Tribunal

(176 AD2d 1006, 574 NYS2d 862) wherein the court confirmed the Tribunal's decision discussed above. The court explicitly rejected the petitioner's contention that it was not liable for payment of penalties or interest in excess of the minimum, dismissing its reliance upon the bulk sales provisions of Tax Law § 1141(c) and pointing out that the provisions of Tax Law § 1145(a)(1)(i) impose penalties and interest on "any person" who timely fails to pay a tax.

Petitioners' reliance on Stacy v. State of New York (82 Misc 2d 181, 368 NYS2d 448) is also misplaced. That case begins its opinion with the statement:

> "Section 1138 of the Tax Law has no applicability when returns are filed and the computation of the tax liability is not disputed."

That clearly was not the case here and immediately distinguishes the cases.

Given the authority of the Division to assess taxes, penalties and interest against Edward and Catherine Kaneb and the Division's jurisdiction to hear this case, it is necessary to determine the ultimate question of petitioners' liability for same.

In determining whether an individual is personally liable under Tax Law § 1131(1), consideration must be given to all the facts of each case (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990; 20 NYCRR 526.11[b][2]).

In Matter of Iannello (Tax Appeals Tribunal, November 25, 1992), the Tribunal has established various factors indicative of officer responsibility:

> "The pivotal question is whether the individual had or could have had sufficient authority and control over the affairs of the corporation. A variety of factors are considered in resolving this question such as the individual's status as an officer; the individual's knowledge of and control over the financial affairs of the corporation; the authority to write checks on behalf of the corporation; the authority to hire and fire employees; the preparation, filing and signing of tax returns for the corporation; and the individual's economic interest in the corporation (Matter of Cohen v. State Tax Commn., supra, 513 NYS2d 564, 565; Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536; Matter of Constantino, supra). The factual determination demands a consideration of all the surrounding circumstances and involves more than the matching of the traditional indicia of responsibility to an officer's surface acts. Indeed, a person's officer status can be offset by the circumstances, such as where the officer's actions were done under the supervision and control of persons later convicted on criminal racketeering charges (see, Matter of Taylor, Tax Appeals Tribunal, October 24,

> 1991). Further, the lack of an official title in a corporation should not shield an individual from responsibility where that individual in fact controls the corporation. This conclusion is consistent with the Appellate Division's recent statement, in a slightly different context, that 'we should be concerned with "reality and not form [and] with how the corporation operated and the [individual's] relationship to that operation" [citation omitted]' (see, Morris v. Department of Taxation & Fin., 183 AD2d 5, 588 NYS2d 927, rev on other grounds 82 NY2d 135, 603 NYS2d 807)."

In the instant matter, Benak was a corporation with only two shareholders and two officers, i.e., Edward and Catherine Kaneb. Edward Kaneb stated in his petition that he used his contacts in the petroleum industry to establish Benak's petroleum business. Petitioners were president and secretary, respectively, of Benak and hired a manager, Jack Casion, and a bookkeeper, Peggy Chase, to handle the operations of the business for them. In other words, the day-to-day operations of Benak were completely delegated by the shareholders and officers. However, there was never any doubt that they had the power to hire and fire these two employees and, in fact, hired an accountant and an accounting firm to perform various audit functions and tax preparation for the corporation.

Any net profit enjoyed by Benak would have been the property of petitioners as sole shareholders.

The application for registration as a motor fuel distributor was signed by Edward Kaneb and listed himself and Catherine Kaneb as the sole stockholders and officers.

There is no dispute that petitioners had or could have had sufficient authority and control over the affairs of the business due to their ability to hire and fire employees and delegate responsibility for the day-to-day operations of the business.

Mr. Kaneb signed checks on both corporate bank accounts for business expenses and petroleum products. He also signed the two motor fuel returns filed for Benak and the checks accompanying those returns. Petitioners' signatures also appeared as officers on the amnesty withdrawal of petition forms and Mr. Kaneb signed the checks submitted therewith. Although it is not known if Mrs. Kaneb had authority to sign checks since she did not testify, as an officer she was capable of signing returns. Further, there is no real distinction between Edward and Catherine Kaneb since both took the same course of delegating the entire operation to

employees over whom they held the ultimate power to hire and fire. In such a closely-held corporation, where only two shareholders/officers split the profits and delegate all responsibility, said officers cannot escape liability for the corporation's taxes.

In all, the evidence clearly indicated that these individuals created and controlled the corporation, including their delegation of management and bookkeeping duties to employees, over whom they held the power to hire and fire.

For these reasons, it is determined that petitioners were personally liable for the sales taxes due from Benak.

F. The final issue is whether petitioners should be allowed to renew their application for amnesty. Petitioners claim that they were never notified that State criminal investigations of them had terminated so they did not know when to reapply. Petitioners assert that the State (Division) bore the burden of notifying petitioners and its failure to do so prevented them from taking the steps necessary to perfect their applications.

However, the Division's argument was more compelling and under both theories it posits, either that petitioners have not exhausted their administrative remedies or that the applications at hearing are time barred, the Division should prevail.

The State's three-month Amnesty Program, enacted by the Legislature on April 17, 1985, provided, in relevant part, as follows:

> "Section 1 . . . .
>
> "b) Such amnesty program shall provide that upon written application by any taxpayer, and upon evidence of payment to the state of New York by such taxpayer of all designated taxes plus interest, such tax commission shall waive any penalties which may be applicable.
>
> "c) Amnesty shall not be granted to any taxpayer who is a party to any criminal investigation being conducted by an agency of the State . . . in relation to any of the designated taxes plus interest . . . .
>
> * * *
>
> "f) The state tax commission shall formulate such regulations as are necessary . . . to implement the provisions of this act." (L 1985, ch 66.)

The former State Tax Commission thereafter promulgated regulations which, in relevant

part, stated:

"(b) Criminal investigations.

"(1) The Department, in cooperation with investigating agencies, shall prepare a confidential list of those taxpayers who are ineligible because they are under active criminal investigation relating directly to any covered taxes.

"(2) Every application for amnesty shall be compared with the list and any application for a designated tax subject to an active criminal investigation shall be denied . . . .

* * *

"(4)(iii) Upon a subsequent finding of no criminal liability, whether through a prosecution not resulting in a conviction or by the investigating agency otherwise terminating the investigation, the applicant has 30 days to apply for amnesty . . . .

* * *

"(d) Civil litigation.

"(1) A taxpayer is ineligible for amnesty for any designated tax which directly relates to a pending civil litigation . . . .

* * *

"(5) A taxpayer involved in an administrative proceeding should file a full or partial withdrawal for the periods/issues for which amnesty is requested" (20 NYCRR 2500.4).

The February 4, 1986 denials of petitioners' amnesty applications were not final. The letters of the project counsel clearly provided for a reconsideration of the applications "if the investigation does not result in criminal liability." Therefore, petitioners' claim in the present forum is premature and their remedy is to resubmit their applications to the Division. If those applications are subsequently denied, at that point an appeal to the Division of Tax Appeals would be proper.

In any event, those amnesty applications represent an admission by each petitioner of liability for the tax and interest assessed in the present case. Any grant of amnesty would involve only the reduction of penalties. In addition, all tax and interest due must be remitted prior to the grant of amnesty. Furthermore, amnesty cannot be granted unless petitioners withdraw from the instant proceeding (20 NYCRR 2500.4).

Therefore, petitioners' plea for relief on this question should be denied.

In the alternative, if it was determined that petitioners need not exhaust their administrative remedies, their claim should nevertheless be denied as untimely. Petitioners, at hearing and in their petitions and brief, assert that the Division had an affirmative duty to inform them of the termination of the criminal investigation at issue. However, the relevant regulations clearly establish that no such duty exists (20 NYCRR 2500.4[b][iii]). Taxpayers are simply given the right to reapply within 30 days of the criminal investigation's termination (id.). As the regulations are silent regarding any duty to inform on the part of the Division, the taxpayer must bear the responsibility for determining at what date any termination occurs. The letters from the Amnesty Project Counsel likewise indicate no duty on the part of the Division to inform taxpayers of the date of such termination, and suggest no basis for such an interpretation and reliance by petitioners.

In order to show that petitioners' amnesty applications are time barred, the Division must merely establish the date on which the relevant investigation was terminated and demonstrate that petitioners did not reapply for amnesty within the following 30 days. In their petitions and at hearing, petitioners have conceded that no reapplications were made subsequent to the initial 1986 applications. Thus, the Division must merely establish that the investigation terminated more than 30 days prior to the June 9, 1993 hearing in this matter.

At the hearing, no evidence was presented by either side with regard to any termination of the investigation at issue. However, the criminal penalties under the sales tax law and motor fuel tax law are limited to misdemeanors and class E felonies (see, People v. Valenza, 60 NY2d 363, 469 NYS2d 642). Pursuant to Criminal Procedure Law § 30.10, the statute of limitations for a misdemeanor is two years from the date of its commission. According to that same statute, the statute of limitations for a class E felony is five years from the date of its commission.

Any potential crimes which were the subject of the investigation at issue must have occurred within the audit period of this proceeding or, at the very latest, by the date on which

the amnesty applications and supporting documentation were initially filed. These applications were filed on January 31, 1986. Thus, the statute of limitations for potential misdemeanors committed by petitioners expired on January 31, 1988. The statute of limitations for potential class E felonies committed by petitioners expired on January 31, 1991.

Thus, the criminal investigation at issue must, as a matter of law, have terminated no later than January 31, 1991. Accordingly, petitioners could only have properly resubmitted their applications within 30 days of January 31, 1991. As this was more than 30 days prior to the hearing in this matter, any future resubmission was time barred.

G. The petition of Benak Corporation for revision of a determination of motor fuel tax is denied and the Notice of Determination dated, July 27, 1984, is sustained as modified by the Conciliation Order dated June 15, 1990.

The petition of Benak Corporation for a revision of a notice and demand for sales and use taxes due is granted and the notice and demand, dated December 4, 1984, is cancelled.

The petitions of Edward Kaneb and Catherine Kaneb are granted to the extent that there was a modification to the sales tax deficiency assessed to Benak Corporation in Conclusion of Law "D", but in all other respects are denied and the two notices of determination, dated February 1, 1985, are sustained as modified.

The petition of Benak Corporation for redetermination of a deficiency of Article 13-A tax is denied and the Notice of Deficiency, dated March 18, 1991, is sustained.

DATED: Troy, New York
May 5, 1994

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE