

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MANHATTAN & QUEENS FUEL CORPORATION :ORDER
for Revision of a Determination or for Refund : DTA NO. 810457
of Motor Fuel Tax under Article 12-A of the :
Tax Law for the Period April 1, 1982 through :
May 31, 1983. :

Petitioner Manhattan & Queens Fuel Corporation, 311 Norman Avenue, Brooklyn, New York 11222 by its representative, Kenneth L. Robinson, Esq., has brought a motion dated October 8, 1992 seeking an order for discovery pursuant to section 3000.5(a) of the Tax Appeals Tribunal Rules of Practice and Procedure. Based upon the affidavit dated October 8, 1992 of Kenneth L. Robinson in support of the motion and the affirmation of Donald C. DeWitt dated November 12, 1992 in opposition to the motion and upon the pleadings and proceedings had herein, the following order is rendered. Petitioner submitted a brief in support of its motion on October 16, 1992 and an additional letter brief, in response to Mr. DeWitt's affirmation, on November 30, 1992.

FINDINGS OF FACT

The Division of Taxation ("Division") issued a Notice of Determination of Tax Due Under Motor Fuel Tax Law dated December 10, 1984 asserting additional motor fuel tax due of \$1,074,717.44 (13,433,968 gallons at \$.08 tax per gallon), plus penalty "due to unsubstantiated tax-free sales."

The following schedule, included in the audit report, disclosed the calculation of additional taxable gallons of 13,433,968, which resulted in additional motor fuel tax of \$1,074,717.40:

<u>Month</u> (\$.08 per <u>gallon</u>)	Additional Taxable <u>Gallons</u>	Additional Tax
November 1982	589,438	\$ 47,155.04
December 1982	1,116,802	89,344.16
January 1983	835,508	66,840.64
February 1983	1,230,511	98,440.88
March 1983	3,655,441	292,435.28
April 1983	2,620,987	209,678.96
May 1983	<u>3,385,281</u>	<u>270,822.48</u>
Total	13,433,968	\$1,074,717.40

On the bottom of this schedule was the following handwritten sentence: "All of the above tax free sales were made to Shoppers Marketing Inc."

A Conciliation Order dated November 1, 1991 reduced additional tax asserted as due from \$1,074,717.40 to \$849,342.32 based upon the following allowance against tax due for purchases from petitioner on which Shoppers Marketing, Inc. (hereinafter "SMI") paid tax:

<u>Month</u>	Unconfirmed Purchases on Tax-Free Sales Balance of Tax Due To SMI (\$.08 per gallon)	Which SMI Paid Tax	Balance of Additional Taxable <u>Gallons</u>
November 1982	589,438		346,392
	243,046	\$ 19,443.68	
December 1982	1,116,802		1,116,802
	-0-	-0-	
January 1983	835,508	380,000	455,508
February 1983	1,230,511		36,440.64
	931,561	74,524.88	298,950
March 1983	3,655,441	316,146	3,339,295
April 1983	2,620,987	253,488	2,367,499
May 1983	<u>3,385,281</u>	<u>105,411</u>	<u>3,279,870</u>
	13,433,968	2,817,189	10,616,779
			\$849,342.32

On January 31, 1992, petitioner filed a petition dated January 29, 1992 contesting the remaining tax claimed due of \$849,342.32, plus penalty and interest. Petitioner summarized its position as follows in paragraph 67 of its petition:

"In this Petition protesting the Conciliation Order, M & Q contends that it is not liable for any taxes upon its sales, as an agent of NYFT [New York Fuel Terminal Corp., an affiliate of petitioner which owned and operated a terminal where petitioner stored all gasoline it purchased which was not immediately resold], of gasoline to Shoppers for the following reasons:

"(a) M & Q, as an agent for a disclosed principal, NYFT, is not liable to the Department for any allegedly unpaid excise tax on its sales, as an agent, of gasoline to Shoppers;

"(b) Alternatively, M & Q's sales to Shoppers, a licensed motor fuel distributor, were not subject to the Motor Fuel Tax;

"(c) All sales of gasoline to Shoppers purportedly paid for by third parties were actually sales to Shoppers;

"(d) Shoppers is liable to the Department for any unpaid taxes; and

"(e) M & Q and NYFT had not [sic] duty to determine and did not know whether Shoppers was complying with the Motor Fuel Tax Law."

The Division admitted by its answer dated June 29, 1992 paragraphs one through four of the petition which described the nature of petitioner's business as follows:

"1. . . . Manhattan & Queens Fuel Corp. was a New York Corporation engaged, inter alia, in the importation, distribution, purchase and sale of gasoline and other petroleum products, with its principal place of business located [in Brooklyn].

"2. On or about June 1, 1980, the New York State Department of Taxation and Finance granted M & Q Motor Fuel Distributor License No. M-2136 pursuant to its complete application and the posting of a Fifty

Thousand Dollar bond.

"3. This License authorized M & Q to import motor fuel into New York State and to purchase and sell gasoline in New York State 'ex-tax', that is, without incurring any liability to the Department for the otherwise applicable eight cent per gallon Motor Fuel Tax imposed on sales of gasoline by a distributor to licensed purchasers.

"4. Pursuant to its License, M & Q imported or caused to be imported gasoline into New York State."

The Division summarized its position in the affirmative statements made in paragraphs 5 through 14 of its answer as follows:

"5. . . . [P]etitioner filed motor fuel tax returns with the Division of Taxation on which it claimed to have sold amounts of motor fuel to SMI on a tax-free basis.

"6. . . . [O]n each such return, the petitioner improperly claimed the amounts of fuel allegedly sold to SMI as a deduction from its total taxable distribution of motor fuel.

"7. . . . [N]o such sales of motor fuel were made to SMI by the petitioner during that period.

"8. . . . [T]o the contrary, the petitioner's affiliate, NYFT, which was not registered with the Division as a distributor of motor fuel, made sales of motor fuel to SMI during the applicable period.

"9. . . . [P]etitioner improperly and without legal authority therefor, deducted the sales made by NYFT to SMI from the total taxable distribution of motor fuel on the petitioner's motor fuel tax returns.

"10. . . . [P]etitioner has, by its motor fuel tax returns, demonstrated that it purchased the fuel at issue either from sources outside of New York State or from sources within NY State.

"11. . . . [D]ocumentary evidence submitted by the petitioner in support of its petition amply demonstrates that the fuel at issue was sold not by M & Q but by NYFT.

"12. . . . [S]ince the petitioner purchased such fuel, and such fuel was undeniably sold by NYFT to SMI

or other third parties, such fuel was necessarily transferred by M & Q to NYFT in order that it might be sold by NYFT.

"13. . . . [T]here was no authority for the petitioner, a registered distributor, to transfer motor fuel to NYFT, an unregistered distributor, on a tax-free basis.

"14. . . . [S]ince the petitioner did not sell the fuel at issue to a registered distributor, it was not entitled to deduct such fuel from its total taxable distribution of motor fuel."

In a reply dated July 8, 1992, petitioner protested that the Division's position set forth in the affirmative statements described in Finding of Fact "6" constituted "a new theory of liability never before raised by the Department of Taxation and Finance"¹ which was barred by the statute of limitations. In a sur-reply dated July 13, 1992, the Division denied that its position, as described in its answer, constituted a new theory of liability.

On July 9, 1992, a final² Notice of Hearing was issued by

¹Kenneth L. Robinson, in his affidavit dated October 8, 1992, described the original theory of liability as follows:

"The rationale for the disallowance [of 13,433,968 gallons of motor fuel sold to SMI], as understood by the taxpayer, was that M & Q accepted payment for the motor fuel it sold to SMI from third parties, who were not Article 12-A distributors [Therefore,] M & Q really sold the gasoline to these unregistered third parties and should have collected the Article 12-A taxes from them."

²The hearing in this matter had been adjourned twice before at the request of petitioner's representative. Mr. Robinson's letter dated June 26, 1992 set forth the following explanation for the adjournment requests:

"The hearing was originally scheduled for June 18, 1992 and was adjourned due to a conflict in cases we were handling.

"We are requesting a second adjournment for several reasons. First, as of

the Division of Tax Appeals scheduling this matter for formal hearing on August 4, 1992 which provided, in part, as follows:

"Except as otherwise provided by law, the petitioner has the burden of proof and must establish by a preponderance of the evidence the facts necessary to show that there is no deficiency or that a refund is due. Such proof may be made by sworn testimony of the petitioner's witnesses or by documentary or other evidence introduced during the course of the hearing.

"An adjournment may be requested but will be granted only for good cause and only if the request is received in writing at least 15 days prior to the hearing date, and only to such time and place as the Division of Tax Appeals finds appropriate." (Emphasis in original.)

Petitioner, by its attorney, served a subpoena duces tecum dated July 29, 1992 on the Commissioner of Taxation and Finance, which commanded the production of the following at the hearing in this matter:

"(a) All files, records, documents, correspondence, notes, reports and memoranda made or maintained by the New York State Department of Taxation and Finance that are responsive to the following:

"1. Complete work papers and audit report of the New York State Department of Taxation and Finance ('Department') in this matter.

"2. Each Article 12-A and each Article 13-A tax return, and any amendment thereto, filed by Shoppers Marketing, Inc. ('SMI') during the period or [sic] November 1, 1982 through May 31, 1983 ('relevant period').

"3. Identify each audit prepared by the Department in regard to SMI for all or part of the relevant period and provide each such audit file.

this date, we have not received a response to the discovery we served on the Law Bureau on May 27, 1992 Second, no answer has yet been served by the Law Bureau to the Petition. Third, it will take at least a week to prepare for trial."

"4. Identify each audit or investigation prepared by the Department in regard to N.A.I. Enterprises, Inc., Quick Petroleum Corp., and New York Fuel Terminal Corp., for all or part of the relevant period and provide each such audit file.

"5. Identify each payment of motor fuel taxes received by the Department from SMI that is reflected in the worksheet annexed hereto as Exhibit No. '1' and state:

"i) the date each payment was received;

"ii) the identity of the payor;

"iii) the manner of payment (i.e., check, cash, etc.);

"iv) provide a copy of each evidence of payment;

"v) the manner in which the Department credited these tax payments to Petitioner;

"vi) a copy of each correspondence or other document referring or relating to each such payment;

"vii) identify each representative of the Department with knowledge of such payment; and

"viii) Identify all other monies received from SMI in connection with the payment reflected on Exhibit No. '1' and the disposition of all such additional monies.

"6. Identify every tax amnesty application submitted to the Department by SMI for Article 12-A Motor Fuel Taxes and interest during and after the relevant period.

"7. Identify and produce each file the Department possesses or maintains in regard to SMI referring or relating, in whole or in part, to Article 12-A taxes.

"8. Identify each Department employee or agent, past or present, that had any responsibility whatsoever for auditing SMI in regard to Article 12-1 [sic] Motor Fuel Tax liabilities for the relevant period.

"9. Identify and produce all reports, writings or memoranda prepared by or for the Department

referring or relating to any Article 12-A Motor Fuel Tax liability of SMI in regard to the relevant period.

"10. Identify all communication(s) and correspondence that the Department or its auditors received to indicate that the Department had not collected Article 12-A Motor Fuel Taxes on the petroleum products M&Q sold to SMI during the relevant period.

"11. All documents referring or relating to why the Department issued Notice No. 2457 to Petitioner on or about December 10, 1984.

"(b) All other documents, evidences and writings, which you have in your custody or power, concerning the above-captioned matter."

The documents and information requested pursuant to the subpoena duces tecum detailed in Finding of Fact "9" correspond in large measure to "informal discovery requests" made in a letter dated May 27, 1992 of petitioner's representative to opposing counsel. The Division, by a letter dated June 29, 1992 of Mr. DeWitt, responded to the "informal discovery requests." Since the response corresponded to the numbering of the paragraphs in the "informal discovery requests", for clarity the informal discovery requests in the letter of May 27, 1992 were as follows:

"1. Complete workpapers and audit report of the New York State Department of Taxation and Finance ('Department') in this matter.

"2. Name, current business address, and title of each person employed by or for the Department that prepared, supervised, reviewed and/or commented upon the audit report referred to in Request No. '1'.

"3. Each Article 12-A and each Article 13-A tax return, and any amendment thereto, filed by SMI during the relevant period.

"4. Identify each audit prepared by the Department in regard to SMI for all or part of the relevant period and provide each such audit file.

"5. Identify each audit or investigation prepared by the Department in regard to N.A.I. Enterprises, Inc., Quick Petroleum Corp., and New York Fuel Terminal Corp., for all or part of the relevant period and provide each such audit file.

"6. Identify each payment of motor fuel taxes received by the Department from SMI that is reflected in the worksheet annexed hereto as Exhibit No. '1' and state:

"(a) the date each payment was received;

"(b) the identity of the payor;

"(c) the manner of payment (i.e., check, cash, etc.);

"(d) provide a copy of each evidence of payment;

"(e) the manner in which the Department credited these tax payments to Petitioner;

"(f) a copy of each correspondence or other document referring or relating to each such payment;

"(g) identify each representative of the Department with knowledge of such payment; and

"(h) Identify all other monies received from SMI in connection with the payment reflected on Exhibit No. '1' and the disposition of all such additional monies.

"7. Identify every tax amnesty application submitted to the Department by SMI for Motor Fuel Taxes during and after the relevant period.

"8. Identify and produce each file the Department possesses or maintains in regard to SMI referring or relating, in whole or in part, to Article 12-A taxes.

"9. Identify each Department employee or agent, past or present, that had any responsibility whatsoever for auditing SMI in regard to Motor Fuel Tax liabilities for the relevant period.

"10. Identify and produce all reports, writings or memoranda prepared by or for the Department referring or relating to any Motor Fuel Tax liability of SMI in regard to the relevant period.

"11. Identify all communication(s) and correspondence that the Department or its auditors received to indicate that the Department had not collected Motor Fuel Taxes on the petroleum products M&Q sold to SMI during the relevant period.

"12. Explain why the Department issued Notice No. 2457 to Petitioner on or about December 10, 1984.

"13. Was SMI a registered Article 12-A motor fuel distributor during the entire relevant period?

"14. On what date and for what reason was SMI's registration as a distributor of motor fuel cancelled, revoked or suspended?"

The Division's response by its letter of June 29, 1992 was as follows:

"In the first instance, I do not agree with your description of the factual issues in dispute in this matter. Based on a review of the file, it appears that the basis of the Notice of Determination issued by the Division of Taxation of the Department of Taxation and Finance (Division) is that Manhattan and Queens Fuel Corp. (M & Q), during the period at issue, improperly reported certain sales of motor fuel on Schedule 11 of its motor fuel tax returns as sales by it within New York State to Shoppers Marketing, Inc. (SMI), a registered distributor. In fact, and as borne out by the allegations of and exhibits to the petition, this fuel was sold by New York Fuel Terminal, Inc. (NYFT) to SMI and/or other third parties.

"For the period at issue, M & Q was a distributor of motor fuel and was registered with the Division as such. A registered distributor of motor fuel could, at that time, sell motor fuel tax-free to another registered distributor. The Division's regulations (section 410.7(a) of 20 NYCRR) required that, for such sales, 'the seller must include the quantity so sold tax-free in his aggregate sales but will be permitted to deduct the gallonage so sold in arriving at the gallonage taxable.'. [sic] However, the fuel at issue was sold to SMI by NYFT (not M & Q) and NYFT was not a distributor of motor fuel registered with the Division during the period at issue.

"There is no dispute that the fuel at issue was purchased by M & Q from sources either within or without New York State. However, sales by M & Q were not to SMI but to NYFT, an unregistered distributor. M & Q was not authorized to make tax-free sales to NYFT

nor was NYFT authorized to make tax-free sales to another distributor, registered or not.

"Since M & Q was not authorized to sell tax-free to an unregistered distributor, it was likewise not authorized to deduct the gallonage sold by NYFT from its aggregate sales during the month. In response to your demands, therefore, the following information is provided . . . :

"1. A copy of the work papers of the Division and the audit report is included herewith and will be introduced at the hearing on July 9, 1992.

"2. . . .

"(a) The auditor involved in this case was James Farrell, who is no longer employed by the Division.

"(b) The team leader for the auditor at the time the audit was conducted was Michael D'Esposito, who is no longer employed by the Division.

"(c) The supervisor of the team leader and the auditor at the time the audit was conducted was Peter Wynne, who is no longer employed by the Division.

"3, 4, 5. Since SMI, N.A.I. Enterprises, Quick Petroleum Corp. and/or NYFT are not parties to this proceeding, no copies of any tax returns filed by them or audits conducted concerning them will be produced, nor are such documents relevant to a resolution of the proceedings herein.

"6. The document identified as Exhibit '1' annexed to your letter already contains the pertinent data requested insofar as dates, amounts and identity of payor is concerned. The records of the Division do not indicate that any other funds were received from SMI in connection with the payments reflected on said Exhibit '1'.

"7, 8, 9, 10. Since SMI is not a party to this proceeding, amnesty applications, files, reports or other communications of the Division or the identity of personnel who may have been involved in any audit conducted of SMI will not be produced, nor are such documents relevant to a resolution of the proceedings herein.

"11. All communications relevant to this proceeding and on which the Department has relied in issuing the Notice of Determination at issue are

contained in the audit report and workpapers provided herewith.

"12. See second, third and fourth unnumbered paragraphs at the beginning of this letter.

"13. Yes.

"14. SMI's registration as a motor fuel distributor was cancelled on December 28, 1983, and the reasons are not relevant to this proceeding."

At the formal hearing before Administrative Law Judge Brian Friedman on August 4, 1992, the Division was prepared to go forward with its case when petitioner's representative interrupted "to make a motion which pertains to discovery which we had been pursuing and which we had hoped to have resolved prior to the hearing today." The Division's representative indicated that the subpoena (as detailed in Finding of Fact "9") would not be honored for the reasons noted in his letter dated July 31, 1992, which had provided, in relevant part, as follows:

"[T]he information sought is substantially the same as requested in your letter of May 27, 1992, to which the Department responded on June 29, 1992. With that response, the audit report and workpapers relative to the audit of the petitioner were furnished to you. These documents also relate to the information sought in paragraphs 1 and 11 of the subpoena. In its June 29, 1992 letter [which is detailed in Finding of Fact '10'], the Department refused to disclose any information concerning files, tax returns, audits or other data, if such data exists, concerning taxpayers not a party to this proceeding. For the reasons set forth in that letter of June 29, 1992, the Department is unable to comply with paragraphs 2 through 10 of the subpoena you have issued, other than to the extent of the information it has already furnished."

In response, petitioner requested that Judge Friedman "compel" the Division to disclose the records sought by the subpoena duces tecum. Judge Friedman adjourned the hearing scheduled for August 4, 1992 in order to enable petitioner to make a motion

"to compel compliance of a subpoena duces tecum." However, by a letter dated August 18, 1992, Judge Friedman indicated that he lacked the authority to enforce the subpoena and advised petitioner to make "a motion in Supreme Court to compel compliance . . . or . . . to make a motion for discovery of the items sought in the subpoena." As a result, the motion at issue was made by petitioner.

The audit report includes a section entitled "Sales" which provides as follows:

"Sales are made [by petitioner] tax free to registered distributors, and tax is collected on sales to non-registered distributors. Total sales were checked to computer print-out showing all sales and to account receivable ledger, sales were also reconciled to inventory control sheets.

"All tax free sales reported on schedule II to Shoppers Marketing Inc. are being disallowed. Disallowance was made since sales were not properly substantiated."

Petitioner contends that "SMI and its customers [N.A.I. Enterprises and Quick Petroleum] are, upon information and belief, defunct corporations, upon whom service of a subpoena cannot be had" A cursory review of Exhibit "3" attached to the petition dated January 29, 1992, which the petition alleges were photocopies of checks in payment of the motor fuel sales at issue herein, discloses that N.A.I. Enterprises and Quick Petroleum share the same Great Neck, New York address. Further, it appears that a Jerold Skolnik signed checks on behalf of N.A.I. Enterprises and Quick Petroleum. Checks on

behalf of SMI were signed by individuals named Joseph Skolnik,³ Leon Bercoris and Michael Makwaritz.⁴ Petitioner did not indicate whether these individuals could be served with subpoenas to appear at the hearing in this matter.

SUMMARY OF THE PARTIES' POSITIONS

The Division maintains that petitioner made no sales to SMI; rather, petitioner's affiliate, NYFT, which was not a registered motor fuel distributor, made sales of motor fuel to SMI. Petitioner transferred fuel to NYFT in order that the affiliate might sell the fuel to SMI. The Division contends that none of the information sought by petitioner relating to tax returns and/or audit materials concerning SMI are relevant to the above position it has taken concerning the facts of this matter:

"Its only possible relevance is if the Department prevails in this proceeding and if the petitioner doesn't meet its burden of proof, the question then would be, is there any offset because of monies potentially paid by Shoppers Marketing which would offset Manhattan & Queen's liability."

In contrast, petitioner argues that the basis for the liability asserted by the Division in its answer and summarized above should be barred at this late date because it was not the theory used at the time the assessment was issued. Petitioner maintains that "[t]he documents requested . . . are both

³The record does not reveal if Joseph Skolnik is related to Jerold Skolnik.

⁴This is a best guess since the signature is difficult to decipher.

material and relevant to the issues under investigation"

Further, petitioner views the facts differently:

"NYFT and M & Q reached an agreement whereby M & Q would sell gasoline, on a wholesale basis, as a disclosed agent of NYFT. Accordingly, any liability for taxes to the Department or other liability to the purchasers or suppliers of the gasoline M & Q purchased and resold as an agent of NYFT, were and are the liabilities of NYFT."

In short, petitioner maintains that, as agent for NYFT, it "could sell motor fuel to Shopper, ex-tax, without further investigation" because SMI was a licensed distributor.

Therefore, the sole issue, according to petitioner, is:

"whether M & Q's sales of gasoline to Shoppers [during the period at issue], as an agent of NYFT, were non-taxable sales to a licensed distributor or were actually made to unlicensed purchasers."

CONCLUSIONS OF LAW

A. Section 305 of the State Administrative Procedure Act provides as follows with regard to "disclosure":

"Each agency having power to conduct adjudicatory proceedings may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings."

The disclosure devices of the CPLR do not apply to an administrative agency unless they are adopted as a rule by the agency (Matter of Heim v. Regan, 90 AD2d 656, 456 NYS2d 257).

B. The rules adopted by the Tax Appeals Tribunal specifically reject the applicability of the disclosure devices of the CPLR to administrative proceedings in the Division of Tax Appeals and allow for only limited discovery. Section 3000.5(a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides:

"General. To better enable the parties to expeditiously resolve the controversy, this Part permits an application to the tribunal for an order, known as a motion, provided such motion is for an order which is appropriate under the Tax Law and the CPLR, but does not include a motion for costs or disbursements or motions related to discovery procedures as provided for in the CPLR. For good cause shown, the tribunal or an administrative law judge designated by the tribunal may grant a form of discovery by order."

C. Before addressing the fundamental issue of whether petitioner has shown good cause for the granting of its motion for discovery, it is first observed that there is no explicit secrecy provision in Article 12-A (cf., Matter of Petro Enterprises, Tax Appeals Tribunal, September 19, 1991) which prohibits the disclosure of third-party tax records. In Thaler v. Murphy (42 Misc 2d 1, 247 NYS2d 816), which the Division relies upon to oppose the divulging of third-party tax records, the request for disclosure was not from a taxpayer preparing for litigation, but rather a State senator who was attempting to evaluate pending legislation. Furthermore, Judge Koreman emphasized "the various 'secrecy' provisions contained in the Tax Law", which do not pertain to the motor fuel tax (Article 12-A).

D. The issue to be resolved at hearing is an extremely factual one: whether petitioner sold motor fuel to its affiliate, NYFT, which then resold it to SMI (and related purchasers) or whether the sales of motor fuel to SMI (and related purchasers) were made by petitioner. To prepare its case on this factual issue, petitioner has not established sufficient good cause for conducting an examination of records

in addition to those that have already been disclosed by the Division, especially given the overly-broad description of records requested (see, Matter of Rally Oil Co., Tax Appeals Tribunal, January 17, 1991). To permit the type of exhaustive probing of the records of the Division as requested would impede the expeditious resolution of this matter with little benefit to the parties.

E. Furthermore, petitioner's contention that the Division has developed a "johnny-come-lately theory" of liability barred by the statute of limitations is rejected. From the beginning, petitioner has been on notice that its claimed tax-exempt sales to SMI were being questioned, and that it had to substantiate that it did not owe tax on these sales. The Division has merely expanded upon its position as to why petitioner was responsible for remitting tax on these sales. In any event, parties may raise new legal theories (see, Matter of Chamberlin, Tax Appeals Tribunal, January 30, 1992; Matter of MNS Cards and Gifts, Tax Appeals Tribunal, May 7, 1992).

F. However, the Division has credited, against the assessment, motor fuel tax paid by SMI on certain purchases of motor fuel. Fundamental fairness requires the disclosure of the motor fuel tax return(s) which were the source for this credit against the tax assessed.

G. The Division is directed to disclose to petitioner the motor fuel tax return(s) indicated above, and this matter will be set down for hearing on February 25, 1992 commencing at 9:15 A.M.

DATED: Troy, New York
January 28, 1993

/s/ Andrew F. Marchese

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CHIEF ADMINISTRATIVE LAW JUDGE