STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
CONSOLIDATED RAIL CORPORATION	:	DETERMINATION DTA NOS. 811400
for Redetermination of Deficiencies or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Years Ended December 31, 1987, December 31, 1988, December 31, 1989 and August 31, 1990 and for the Period September 1, 1990 through December 31, 1990.	:	AND 811402

Petitioner, Consolidated Rail Corporation, Six Penn Center Plaza, Tax Department, Philadelphia, Pennsylvania 19103-2959, filed petitions for redetermination of deficiencies or for refund of tax on petroleum businesses under Article 13-A of the Tax Law for the years ended December 31, 1987, December 31, 1988, December 31, 1989 and August 31, 1990, and for the period September 1, 1990 through December 31, 1990.

A consolidated hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on September 8, 1993 at 1:15 P.M., with all briefs due by January 18, 1994. Petitioner, represented by Chira, Kapp & Loselle (James N. Blair, Esq., of counsel), filed a brief on November 29, 1993. The Division of Taxation, represented by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel), filed a brief on December 29, 1993. Petitioner filed a reply brief on January 18, 1994.

ISSUES

I. Whether the Division of Taxation is estopped from assessing a tax deficiency against petitioner for its failure to file and pay tax under Article 13-A for the period January 1, 1987 through August 31, 1990.

II. Whether petitioner correctly computed its tax liability under Article 13-A for the period

September 1, 1990 through December 31, 1990 with respect to out-of-state purchases of diesel fuel.

III. Whether there is reasonable cause to abate the penalties imposed under Article 13-A for the period September 1, 1990 through December 31, 1990.

FINDINGS OF FACT

The parties stipulated to proposed findings of fact which have been incorporated in the following Findings of Fact.[1]

Petitioner, Consolidated Rail Corporation ("Conrail"), is the owner and operator of a railroad system which operates in New York and at least 13 other states. Conrail purchased substantial quantities of diesel fuel oil from out-of-state suppliers to be used in diesel locomotives that travel both in and outside of New York State.

In 1981, the U.S. Congress enacted the Northeast Rail Service Act ("NERSA") (45 USC § 727[c]), effective August 13, 1981, exempting Federal entities from state taxes.

In response to an inquiry by Conrail, the Commissioner of the Division of Taxation ("Division") sent a letter, dated September 29, 1981, advising Conrail that it was exempt from all New York State tax with certain exceptions. The Commissioner stated as follows:

> "My Counsel has reviewed section 1140(a) of the Northeast Rail Service Act of 1981 and agrees with the interpretation of this provision stated in your letter. On, and after, August 13, 1981, the effective date of this law, Conrail is exempt from all New York State taxes, with the exception of taxes imposed by political subdivisions of New York State. It should be noted that the sales tax imposed in New York City under section 1107 of the Tax Law is a State tax for purposes of the Federal exemption provision. Conrail is therefore exempt from this tax, in addition to all other State taxes. Conrail is still liable for the local sales and use taxes imposed pursuant to Article 29 of the Tax Law including such taxes imposed by

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[1]At the hearing, the parties filed the stipulation with respect to three petitions filed by petitioner (DTA Nos. 811400, 811401 and 811402). Since the September 8, 1993 hearing, the Division of Taxation cancelled a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1989 through August 31, 1990 (DTA No. 811401). Thus, the stipulation of facts concerning DTA No. 811401 has not been incorporated into the Findings of Fact inasmuch as it is not relevant to the issues that are contested in DTA Nos. 811400 and 811402.

New York City under section 1212-A(b) of the Tax Law.

> Section 301(b) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 741(b)) states that Conrail is not 'an agency or instrumentaility [sic] of the Federal Government'. Federal legislation, however, provided for the establishment of Conrail and specified Conrail's powers and duties. Conrail is subsidized by the Federal government and has certain duties with respect to the Federal government. Supreme Court decisions indicate that this degree of involvement between the Federal government and an organization permits Congress to exempt the organization from state taxation, despite the fact that the organization is not a Federal agency or instrumentality. Agricultural National Bank v Tax Commission, 392 US 339; Thompson v Union Pacific Railroad Company, 76 US 579. In the opinion of Department Counsel, therefore, Congress has acted constitutionally to exempt Conrail from State taxation imposed on and after August 13, 1981."

Thereafter, petitioner did not pay any sales tax, although it filed State sales tax returns.

The Division sent a letter, dated December 2, 1985, to Conrail informing it that Article 13-A of the Tax Law, effective July 1, 1983, imposes a privilege tax on "petroleum businesses" which import petroleum into the State for sale in the State. The Division further noted that Article 13-A was amended as of April 1, 1984 to include under the definition of "petroleum businesses" those businesses which import petroleum, or cause petroleum to be imported, into the State for "consumption or use" within the State. The Division enclosed with the letter a questionnaire for Conrail to complete and return stating that it needed this information in order to determine whether Conrail was subject to tax under Article 13-A.

Petitioner returned the questionnaire along with a copy of the September 29, 1981 letter from the Commissioner. Petitioner stated in its cover letter, dated January 29, 1986, that it attached a copy of the letter relative to its exemption from tax under Article 13-A. The completed questionnaire indicated that petitioner imported into the State via the Buckeye Pipeline 2,850,000 gallons of fuel to DeWitt, New York. Title to the fuel passed from the out-of-state suppliers to petitioner at the Buckeye Pipeline in Linden, New Jersey. The largest fuel storage facilities were its DeWitt yard (6,000,000 gallons) and Selkirk yard (3,000,000 gallons).

In response to the completed questionnaire, William H. Frank, Chief of the Division's Oil Tax Unit, opined in a letter, dated March 14, 1986, that Conrail was not subject to tax under Article 13-A. In the letter, the Division stated the following:

"Based upon the responses in the questionnaire, you recently completed and

returned to us, it appears that you are not subject to tax as a 'Petroleum Business' as defined under Article 13A of the Tax Law. Your exemption is based on the fact that you claim not to be importing petroleum, or causing petroleum to be imported into New York State for sale in the State.

"If in any fiscal period you import 20,000 gallons or more of petroleum, or cause 20,000 gallons or more of petroleum to be imported into the State for sale in the State, you will be subject to tax under Article 13A of the Tax Law. As soon as you meet or exceed the 20,000 gallon threshold, you should contact the Oil Tax Unit for instructions as to filing requirements, payments and use of resale certificates, etc., under Article 13A of the Tax Law, which are also contained in TSB-M-83(22)C which was previously forwarded to you.

"Any questions you may have should be directed to:

New York State Department of Taxation and Finance
District Office Audit Bureau
Oil Tax Section
Room 402A, Building #9, State Campus
Albany, New York 12227

The telephone number is: (518) 457-4397."

On January 1, 1987, petitioner's NERSA exemption expired. At that time, Conrail went "public" and was no longer a government-subsidized corporation and, therefore, could no longer retain its tax-exempt status for State taxes. Thereafter, Conrail attached checks to its State sales tax returns. As noted above, petitioner had been filing State sales tax returns, but had not paid taxes due to the NERSA exemption.

On August 29, 1988, Conrail filed with the Division an Application for Registration as a Distributor of Diesel Motor Fuel (Form TP-600) disclosing that it was purchasing diesel fuel from seven out-of-state suppliers[2] and expected to use 3,800,000 gallons of diesel fuel each month in New York State.

Between the time of the March 14, 1986 letter and the Division's audit of petitioner, which commenced on January 28, 1991 and concerned the Article 13-A tax liability in question, the Division never informed petitioner that Conrail had any Article 13-A tax liability or that it was cancelling, rescinding or otherwise modifying its letter of March 14, 1986.

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[2]The stipulation states that the application disclosed that petitioner was purchasing diesel fuel "for" seven out-of-state suppliers. This statement obviously contained a typographical error in its substitution of the word "for" instead of "from".

In that interim period between the March 14, 1986 letter and the audit in question, the Division conducted two other audits.

In April of 1989, the Division conducted an audit of sales and use tax returns filed by petitioner for the period March 1986 through February 1989. From the audit, the Division determined that additional tax was due. In computing the amount of sales tax due on the gross receipts portion of the price paid by Conrail to in-state suppliers of diesel fuel, the Division took into account the amount of sales tax for all fuel purchased for consumption in the State and then subtracted the amount of sales tax which would have been attributable to fuel purchased from out-of-state suppliers. In the stipulation of facts, the parties stated that the Division then "applied the Article 13A tax to the sales tax for fuel purchased from in-state suppliers to arrive at the sales tax attributable to Article 13A tax." At no time during the April 1989 audit did the Division inform petitioner that it had any liability for Article 13-A tax on fuel purchased from out-of-state suppliers.

In October of 1989, the Division commenced an audit of petitioner concerning its tax liability under Article 12-A (floor tax) as of September 1, 1988. Tax Law § 284 imposes an excise tax on motor fuel "imported into or caused to be imported into the state by a distributor for use, distribution, storage or sale in the state." The floor tax audit could not have been conducted without the disclosure that substantial amounts of diesel fuel were imported. An inventory sheet for petitioner's Selkirk facility showed an inventory of 989,447 gallons of diesel fuel substantially all of which was imported. Petitioner also submitted into the record floor tax returns, dated October 19, 1988 and May 11, 1989, indicating a total of 5,050 taxable gallons and 408,598 taxable gallons, respectively, as of September 1, 1988. In connection with the floor audit, petitioner's director of tax compliance wrote a letter, dated September 29, 1988, to the Division describing the procedures that were put into place to account for the use of imported diesel fuel in its locomotives at the Selkirk facility.

In January of 1991, the Division commenced an audit of petitioner's Article 13-A tax liabilities. The Division determined that as of January 1, 1987 Conrail was no longer tax

exempt under NERSA and therefore should have been paying tax under Article 13-A on the fuel imported into New York State for consumption in New York State for the period January 1, 1987 through August 31, 1990.

The Division issued four notices of deficiency, dated July 11, 1991, asserting tax due under Article 13-A in the following amounts:

Period Ended	Deficiency	Interest	Other Charge	Total
12/31/87	$450,581.42	$179,656.24	$193,750.01	$823,987.67
12/31/88	411,505.25	114,769.32	148,141.89	674,416.46
12/31/89	407,830.49	60,760.91	122,349.15	590,940.55
8/31/90	491,196.88	33,018.42	127,711.19	651,926.49

After a conciliation conference, the conferee cancelled the penalties but sustained the tax deficiencies in a Conciliation Order dated August 28, 1992.

Petitioner filed a petition (DTA No. 811400), dated November 24, 1992, challenging the tax deficiencies. Petitioner claimed that it relied in good faith on the Division's March 14, 1986 letter exempting petitioner from paying tax under Article 13-A and that at no time prior to the Consent to the Field Audit Adjustment, dated April 9, 1991, did the Division inform petitioner that it had any obligation to pay taxes under Article 13-A or that the March 16, 1986 letter was not in full force and effect. Petitioner further claimed that in this interim period the Division conducted both a sales tax audit under Articles 28 and 29 and a floor tax audit under Article 12-A and that during these audits the Division was aware that petitioner was importing large quantities of diesel fuel into the State for use but did not raise an issue with respect to petitioner's failure to pay tax under Article 13-A. Petitioner asserted that based on its good faith reliance it did not take any steps to minimize its tax liabilities under Article 13-A. Petitioner further raised a statute of limitations defense with respect to the year 1987 arguing that at the time of the April 9, 1991 Consent to Field Audit Adjustments, more than three years expired from the date the tax was due for 1987.

The Division filed an answer and amended answer, dated April 19, 1993 and August 26, 1993, respectively.

In September of 1990, Conrail concluded that, as a result of amendments to Article 13-

A, effective September 1, 1990, it was no longer exempt from tax under Article 13-A and therefore could not rely on the March 14, 1986 letter for its tax-exempt status.[3] Prior to the 1990 amendments, the definition of a petroleum business subject to tax under Article 13-A included:

> "every corporation and unincorporated business formed for, engaged in or conducting the business, trade or occupation of importing or causing to be imported . . . into this state for sale in this state . . . petroleum and every corporation and unincorporated
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> business importing or causing to be imported . . . petroleum into this state for consumption by it in this state . . ." (Tax Law former § 300[c]; emphasis added).

The 1990 amendment changed this definition as follows:

> "The term 'petroleum business' means: . . . (2) [w]ith respect to diesel motor fuel, every corporation and unincorporated business (i) importing diesel motor fuel or causing diesel motor fuel to be imported into the state for use, distribution, storage, or sale in the state, . . . (iv) making a sale or use of diesel motor fuel in the state . . ." (Tax Law § 300[b][2]; emphasis added).

Petitioner filed, under the amended statute, its first monthly return on October 22, 1990 for the month of September 1990. Petitioner also filed a letter, dated October 22, 1990, with the return explaining the method it used to compute the amount of tax owed under Article 13-A. In that letter, Conrail stated that Tax Law § 301, which provides that tax shall be imposed on amounts of fuel sold or used in the State, imposes tax on imported fuel that has been transported into the State via the Buckeye Pipeline and then loaded into locomotives for use in New York State. Petitioner determined the amount of tax owed by excluding that portion of the fuel loaded into the locomotives that was actually consumed outside the State. Petitioner calculated this amount by multiplying the number of miles travelled by locomotives in the State by the average use of gallons per mile (2 gallons per mile) plus the amount resulting from multiplying

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[3]In its brief, petitioner does not specify which amendments to Article 13-A led it to conclude that it was no longer tax exempt under the statute. Absent a specific reference, it is assumed that petitioner was referring to the definitional section concerning "petroleum businesses" (see, Tax Law § 301[b][2]). At hearing, Richard Kondan, Conrail's Assistant Treasurer of Taxes, testified that because of the 1990 amendments as well as "other matters", Conrail re-examined its Article 13-A tax liability. He noted that as a result of that examination and communications with the Division, Conrail concluded that it was subject to tax beginning September 1, 1990.

the number of switching locomotives by the number of hours in use times the number of gallons used per hour (5 gallons per hour).

After an audit, the Division issued a Notice of Determination, dated September 17, 1991, for tax due for the four months from September 1, 1990 to December 31, 1990 in the total amount of $376,988.63, plus $74,373.98 in penalty and $33,905.01 in interest, for the total amount of $485,267.62.

In the stipulated facts, the parties state that petitioner

> "does not dispute $42,531.20 of the amount determined to be due by the [Division], which is not attributable to the dispute between the [Division] and Petitioner as to computation of the amount due under Article 13A of the Tax Law [for the period of September 1, 1990 through December 31, 1990] . . . [and that i]f the method of computation set forth [in the October 22, 1990 letter] were accepted by the [Division], there would be no additional tax due other than [the $42,531.20]."

In sum, the amount in dispute is attributable to diesel fuel purchased by petitioner from outside the State, loaded into its locomotives in the State and then consumed by Conrail in its locomotive operations outside the State.

After a conciliation conference, the conferee issued a Conciliation Order, dated August 28, 1992, sustaining the statutory notice.

Conrail filed a petition (DTA No. 811402), dated November 24, 1992, challenging the amount of tax asserted by the Division. Petitioner claimed that it properly computed the amount of tax under Article 13-A for the period September 1, 1990 through December 31, 1990 by excluding in its calculations imported fuel that Conrail used in its locomotive operations outside the State. Petitioner also alleged that, in the event it is found liable for the tax, then its failure to pay the deficiency was due to reasonable cause and not due to willful neglect.

The Division filed an answer, dated April 19, 1993, alleging that, for the period in question, petitioner was liable under Tax Law § 301-a as a petroleum business and that petitioner has the burden of proving that the Notice of Determination was erroneous.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that the Division should be estopped from asserting a tax liability under Article 13-A for the years 1987 through August 31, 1990; that petitioner had relied to its

detriment on the Division's March 14, 1986 letter; and that the three-year statute of limitations should be applied to bar the Division's assertion of a tax liability for the year 1987.

With respect to petitioner's tax liability for the period September 1, 1990 through December 31, 1990, Conrail argues that the consumption of fuel in its locomotive operations outside of New York State cannot be a "use" within the meaning of Article 13-A. Petitioner further claims that if it has incurred a tax liability under Article 13-A for diesel fuel consumed outside the State, then the penalty should be abated for reasonable cause.

The Division argues that it is not estopped from enforcing petitioner's tax liability under Article 13-A because petitioner knew or should have known that the March 14, 1986 letter was, at the very least, incomplete or misleading, if not erroneous; that given petitioner's sophistication in tax matters, it was not reasonable to rely on the "for sale" language in the March 14, 1986 letter and instead should have made further inquiries; that petitioner has not demonstrated that the reliance on the March 1986 letter was to its detriment; that petitioner has cited neither case law nor statutes in support of its claim that the Division was obligated to advise petitioner of its Article 13-A tax liability during audits subsequent to the expiration of petitioner's NERSA exemption; and that the Division is not barred by the statute of limitations because petitioner did not file a tax return for 1987.

With respect to petitioner's method of computing its Article 13-A tax liability for 1990, the Division claims that the tax is based on the number of gallons "used" in the State and that for purposes of Article 13-A the term "use" includes the act of receiving fuel or withdrawing fuel from storage; and that petitioner's interpretation of the term "use" clearly conflicted with the statutory definition and, therefore, cannot be viewed as reasonable cause for failure to remit taxes.

CONCLUSIONS OF LAW

A. As a general proposition, "the doctrine of estoppel is not applicable to governmental acts absent a showing of exceptional facts which require its application to avoid a manifest injustice" (Matter of Harry's Exxon Service Station, Tax Appeals Tribunal, December 6, 1988,

citing Matter of Sheppard-Pollack v. Tully, 64 AD2d 296, 298, 409 NYS2d 847; Matter of Turner Construction Co. v. State Tax Commn., 57 AD2d 201, 394 NYS2d 78). In Matter of Harry's Exxon Service Station (supra), the Tax Appeals Tribunal noted that the doctrine of estoppel should be applied to governmental acts with "utmost caution and restraint" and only under exceptional facts and circumstances of the particular case. In Schuster v. Commr. (312 F2d 311, 317 [9th Cir 1962]), the Court emphasized that the situations to which the doctrine of estoppel applies must "necessarily be rare" inasmuch as the policy of the estoppel doctrine is outweighed by a policy in favor of an efficient collection of the public revenue. The doctrine of estoppel is properly invoked against governmental acts in those instances "when it would be unconscionable to allow the government to reverse an earlier position" (Parrish v. Loeb, 558 F Supp 921, 927 [1982]).

In determining whether a manifest injustice or an unconscionable result would be averted by the application of the estoppel doctrine in this case, the question is whether petitioner reasonably relied on the March 14, 1986 letter and whether such reliance was to its detriment (see, Matter of Harry's Exxon Service Station, supra). As noted by petitioner, the March 14, 1986 letter asserts only one ground for petitioner's exemption from tax -- that it did not meet the definition of a "petroleum business" because petitioner was not importing petroleum or causing petroleum to be imported into New York State for "sale" in the State. In the March 14, 1986 letter, the Division also advised petitioner that it would be subject to tax if it imported or caused to be imported more than 20,000 gallons of petroleum for sale in the State.

There is no doubt that the information provided by the Division in that letter was misleading and inaccurate under the law at that time. When Article 13-A was initially enacted in 1983 (L 1983, ch 400), a petroleum business was defined under section 300 as a corporation or unincorporated business importing or causing to be imported petroleum into the State for sale. This definition was amended in 1984 to include petroleum imported for "consumption" in New York State (L 1984, ch 67). The letter which accompanied the questionnaire sent to petitioner informed petitioner of this change in the law. However, the Division's March 14,

1986 letter to petitioner in response to the completed questionnaire not only made no reference to petitioner's exemption under NERSA, but also appeared to ignore the 1984 amendment to the statute.[4]

Although the March 1986 letter incorrectly indicates only one ground for petitioner's exempt status and only one situation for a change in that status, the question is whether petitioner reasonably relied on the March 14, 1986 letter when it did not file Article 13-A returns for the

period after petitioner was no longer exempted from State tax under NERSA. In the circumstances of this case, petitioner should have realized that the March 1986 letter was inaccurate to the extent that it implied petitioner was exempt from tax only because it did not sell petroleum in New York State. Petitioner was advised by the Division, when it requested petitioner to complete the questionnaire, that the law had been amended to extend the tax to businesses which imported petroleum to be consumed in, as well as sold in, the State. Moreover, the language in the amended statute is clear on its face (see, Matter of Glover Bottled Gas Corp., Tax Appeals Tribunal, September 27, 1990 [reliance not reasonable because information given by Division was contradicted by the explicit language of the statute]).

Once petitioner no longer maintained its exempt status under NERSA, petitioner should have made further inquiries itself inasmuch as petitioner was well aware, as evidenced from its response to the questionnaire, that its exempt status under NERSA was relevant. Indeed, it is unclear why the 1990 amendments to Article 13-A, rather than its status under NERSA, were the catalyst for Conrail's re-examination of its tax status inasmuch as the "consumption" of imported fuel was the basis for Conrail's conclusion that it was liable for the tax after the 1990 amendments, as evidenced by its computation method for determining the amount of tax owed.

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[4]At hearing, the auditor opined that the letter was correct because, even under NERSA, a government agency is not exempt from tax if it sells petroleum. This reading of the letter is not evident or reasonably inferred from the language used in the letter inasmuch as NERSA was not even mentioned in that letter (see, Matter of Harry's Exxon Service Station, supra).

Under the statute prior to the 1990 amendments, it was clear that the consumption of imported fuel in the State formed the basis for the imposition of tax as well. Moreover, it was not prudent for petitioner to rely on the Division's silence during two subsequent audits, as a sign that no tax was due under Article 13-A inasmuch as those audits concerned taxes only with respect to Articles 12-A, 28 and 29.

Furthermore, even if it were determined that petitioner reasonably relied on the March 14, 1986 letter for not filing tax returns under Article 13-A after January 1, 1987, such reliance was not to petitioner's detriment. The estoppel doctrine has been applied in cases against government entities when the government's action wrongfully lulled a party into inaction which resulted in a limitations bar preventing the taxpayer from contesting the merits of the case (Haber v. United States, 831 F2d 1051 [Fed Cir 1987]; Belton v. Commr., 562 F Supp 30 [1982] [statute of limitations barring merits of case]; Bender v. NYC Health & Hospitals Corp., 38 NY2d 662, 382 NYS2d 18 [limitations period for notice of claim]) or when a party "changed" its position to its detriment (Parrish v. Loeb, supra [in reliance distributed assets of a trust to its beneficiaries]; Eden v. SUNY, 49 AD2d 277, 374 NYS2d 686 [loss of one year or more in chosen career]; Matter of Harry's Exxon Service Station, supra [destroyed tax records on reliance that case was closed]). Petitioner has not been foreclosed by a limitations period to challenge its taxability under Article 13-A or suffered any other irreparable damage. Its only foreseeable detriment was the imposition of a penalty for failure to file tax returns and pay such tax in a timely manner. However, the conciliation conferee has already dismissed these penalties.

Petitioner argues that if it had known that it was liable for tax under Article 13-A, it would have sought legislation or regulatory action for an exemption similar to the exemption made available to trucks under Tax Law former § 300(c). Petitioner also claims it would have reduced its tax liability by rerouting rail traffic to avoid refueling in New York or by relocating fueling facilities outside of New York. Although any of these actions might have reduced its tax liability, such actions are essentially speculative in nature to the extent that lobbying efforts

may not have been successful and petitioner has not demonstrated that rerouting and relocation plans would have been economically or practically feasible. In sum, weighing the nature of the detriment alleged, sophistication of the taxpayer, and petitioner's unreasonable reliance on the March 14, 1986 letter for the period after petitioner was no longer exempt from State taxes under NERSA, it is determined that the doctrine of estoppel does not apply.

B. Petitioner next argues that the three-year statute of limitations bars the Division from asserting in July of 1991 tax due for the year 1987. Recognizing that the statute of limitations is not a defense to a taxpayer who fails to file a tax return (see, Tax Law §§ 313; 1083[c][1][A]), petitioner claims that because it relied on the March 14, 1986 letter, it did not file the 1987 tax return and, therefore, the Division should be estopped from challenging its statute of limitations defense. However, as noted in Conclusion of Law "A", the doctrine of estoppel does not apply for the period after January 1, 1987. Moreover, although estoppel may apply to prevent a manifest injustice by barring the State from taking "some action" such as asserting a limitations defense (see, Belton v. Commr., supra; Bender v. NYC Health & Hospitals Corp., supra) or collecting a tax owed (Matter of Bolkema Fuel Co., Tax Appeals Tribunal, March 4, 1993), it is not appropriate in the circumstances of this case as a tool to indirectly bar the State from collecting tax owed by allowing a taxpayer to assert a limitations defense that is otherwise unavailable under the statute.

C. With respect to petitioner's Article 13-A tax liability for the period September 1, 1990 through December 31, 1990, the issue is one of statutory interpretation. Tax Law § 300(b)(1) defines a petroleum business with respect to diesel motor fuel as every corporation or unincorporated business importing, or causing to be imported, diesel motor fuel into the State for "use, distribution, storage or sale in the state." Tax Law § 301-a(c)(2) imposes upon a petroleum business a monthly tax determined by multiplying the diesel fuel rate times the number of gallons of diesel fuel sold or "used" by a petroleum business in this State. Tax Law § 300(g) provides that the term "use" shall have the same meaning as set forth in Tax Law § 1102(e). Section 1102(e) defines the term "use" as:

> "the exercise of any right or power over . . . diesel motor fuel by any person, whether or not a purchaser, including, but not limited to, the receiving, the withdrawal from storage or any consumption of such fuel."

Petitioner argues that:

> "it seems unlikely that the legislature could have intended 'use' to apply to such a transient act as taking fuel from a pipeline and putting it into a locomotive, which is the essence of Conrail's activities with imported fuel . . . . [T]he construction placed on the statute by the [Division], turning every incidental exposure to diesel fuel into a petroleum distribution business, can only have the effect of forcing transient users like Conrail into becoming transient businesses carried on elsewhere, a result the legislature is unlikely to have intended" (Pet. Brf., pp. 4-5).

Petitioner, therefore, theorizes that the calculation of tax must be calculated only on the amount of diesel fuel "consumed" in New York State. However, the statutory definition makes it clear that the term "use" is broader than the term "consume" and includes, but is not limited to, "the receiving" or "withdrawal from storage" or "consumption" of diesel fuel in the State. Here, the diesel fuel in question is the fuel that was delivered via the Buckeye Pipeline to DeWitt, New York, located in the outskirts of Syracuse, and then transported to the various loading facilities across New York State, primarily the Selkirk facility, where the fuel was loaded into locomotives travelling both in and outside of New York State. These activities constitute the exercise of a right or power over the diesel fuel in accordance with the explicit language of the statutory definition -- the receiving or withdrawal from storage. Where the statutory language is clear and unambiguous, the language should be construed so as to give effect to the plain meaning of the words used (Matter of 1605 Book Center v. Tax Appeals Tribunal, 83 NY2d 240, 609 NYS2d 144).

D. Finally, petitioner argues that even if it owes tax for the period September 1, 1990 through December 30, 1990, the penalty should be abated because petitioner's failure to pay the tax was due to reasonable cause and not due to willful neglect. Specifically, petitioner notes that there were no Division regulations for guidance and that it fully informed the Division of its method for computing the tax with its first monthly return and did not receive any objection from the Division concerning the computation method or return until the audit.

Tax Law § 315 provides that provisions under Article 12-A relating to penalties shall

apply with respect to tax imposed under Article 13-A. Tax Law § 289-b(2) under Article 12-A provides that penalties may be waived if there is a determination that a taxpayer's failure to pay tax was due to reasonable cause and not due to willful neglect. The Division's regulations set forth situations that exemplify grounds for reasonable cause (20 NYCRR 416.3[c]), none of which apply to the present situation. However, 20 NYCRR 416.3(c)(5) provides that, in addition to the examples, reasonable cause may be found for:

> "[a]ny other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect . . . ."

However, 20 NYCRR 416.3(a) also provides that the "absence of willful neglect alone is not sufficient grounds for . . . cancelling penalties."

Petitioner's reasons for not paying the tax are not persuasive. If petitioner felt disadvantaged by the lack of Division regulations with respect to Tax Law § 301-a, it could have made inquiries concerning the method for calculating the tax. The fact that petitioner revealed its method for calculating the tax along with the monthly returns does not constitute reasonable cause for not paying the tax at that time. In sum, petitioner's computation method does not conform with the plain reading of the statutory language and it has presented no basis for cancelling the penalty.

E. The petition of Consolidated Rail Corporation is denied; the Notice of Deficiency, dated July 11, 1991, is adjusted in accordance with the Conciliation Order, dated August 28, 1992, and is, all other respects, sustained; the Notice of Determination, dated September 17, 1991, is sustained.

DATED: Troy, New York
June 23, 1994

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE