

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALLEGHENY PETROLEUM CORPORATION	:	DETERMINATION
for Redetermination of a Deficiency/Revision	:	DTA NO. 812126
of a Determination or for Refund of Motor Fuel	:	
Tax, Tax on Petroleum Businesses and Sales and	:	
Use Taxes under Articles 12-A, 13-A, 28 and 29	:	
of the Tax Law for the Period November 1, 1992	:	
through November 30, 1992.	:	

Petitioner, Allegheny Petroleum Corporation, 2011 Silver Street, Houston, Texas 77007-2801, filed a petition for redetermination of a deficiency/revision of a determination or for refund of motor fuel tax, tax on petroleum businesses and sales and use taxes under Articles 12-A, 13-A, 28 and 29 of the Tax Law for the period November 1, 1992 through November 30, 1992.

On April 27, 1994 and May 5, 1994, respectively, petitioner by its representative, Janice H. Eiseman, Esq., and the Division of Taxation by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel) signed a consent to have this controversy determined on submission without a hearing. All documents and briefs were to be submitted by September 30, 1994. The Division of Taxation submitted documents on June 7, 1994, including a stipulation of facts, which was executed by petitioner's representative on June 1, 1994 and by the Division of Taxation's representative on June 3, 1994.¹ Petitioner's brief was received on August 1, 1994 and the Division's brief on August 30, 1994. Petitioner's reply brief was filed on September 30, 1994. Subsequently, petitioner submitted, on November 25, 1994, a copy of the decision of Judge James B. Canfield in Tug Buster Bouchard Corp. v. Wetzler (Albany County, Special

¹Relevant portions of this stipulation have been incorporated into the Findings of Fact.

Term, June 9, 1994) with a cover letter explaining its relevance. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to review petitioner's challenge to notices and demands for motor fuel tax and petroleum business tax, which were issued by the Division of Taxation based upon information reported by petitioner in its tax returns.

II. Whether petitioner imported or caused to be imported motor fuel into New York State during the month of November 1992 so that it is properly subject to motor fuel tax, petroleum business tax and sales tax on motor fuel despite the fact that, pursuant to an agreement petitioner had with an entity whose assets were seized by Federal authorities, title to the motor fuel passed to such other entity outside New York.

III. Whether the law imposing petroleum business tax violates the commerce clause of the United States Constitution.

IV. Whether the Administrative Law Judge may address a legal issue not raised by the parties, and, if so, whether petitioner is barred from raising

Issue "I" on the basis of res judicata because such issue was previously decided in a proceeding in State Supreme Court.

FINDINGS OF FACT

Despite the execution of a stipulation of facts by the parties, very little is known about petitioner, Allegheny Petroleum Corporation ("Allegheny Petroleum"). The parties stipulated that it "is a foreign corporation duly organized and existing under the laws of the State of Texas with its headquarters and main office located at 2011 Silver Street, Houston, Texas" (stipulation, ¶ "1"). An individual named Jerome Smith signed the tax returns at issue on behalf of petitioner as president.

The parties also stipulated that petitioner "was the holder of a duly issued Certificate of Registration as a Distributor of Motor Fuel, dated November 29, 1991 and bearing registration

No. M2690" (stipulation, ¶ "2").

Petitioner and an entity named Anthony Petroleum, Inc. ("Anthony Petroleum") entered into an arrangement whereby petitioner, in short, served as Anthony Petroleum's front, in relation to the Division of Taxation ("Division"), for purposes of the importing of gasoline into New York. The record contains slight evidence concerning the relationship between petitioner and Anthony Petroleum, although the stipulation incorporated a so-called "Reciprocal Financing Agreement", dated January 31, 1992, to which petitioner, by its president, Jerome R. Smith, and Anthony Petroleum, by its president Jeffrey Pressman, were parties. This agreement, which was attached to the stipulation as Exhibit "A", provided as follows:

"It is mutually agreed . . . that Allegheny is willing to do certain financing for Anthony.

"For Allegheny's willingness to finance Anthony, the company is to receive a fee in addition to the cost of product of sixty points per gallon (\$0.006). It is the responsibility of Anthony to pay Allegheny what is billed by its supplier plus sixty points at the time product is lifted. It is Allegheny's responsibility to allow Anthony to retain all New York State taxes to be used by Anthony to finance future oil transactions. It is fully understood by both parties that the New York State taxes are due by the twentieth of the following month that the product is moved (i.e. a purchase and title transfer made on January 31 taxes must be paid by February 20). Anthony warrants that all taxes due for the previous month will be paid by the 15th of the following month, unless the 15th falls on a weekend at which time the taxes will be paid on the following Monday. Funds will be put in Allegheny's account at National Westminster Bank, 152 North Village Avenue, Rockville Center [sic], NY 11570, Account Number 2056-60-9015. For all that is specified within this agreement, Allegheny warrants that Anthony will be the sole company it finances in New York State, and that Anthony will have the first option to any other state Allegheny becomes licensed in, provided Allegheny can obtain the respective surety through Murray A. Wilson or a mutually agreeable surety company. Furthermore, Anthony or its nominee agrees to provide collateral to Merchants T&F Inc. in order that Allegheny can obtain the respective surety. If in the event the State of New York draws against the letter of credit posted as surety for tax liability, Anthony agrees that they will guarantee any repayment to the issuing bank or applicant. Anthony further agrees to a mutual exclusive in that all product Anthony buys will be purchased through Allegheny.

"This agreement may be cancelled by either party with sixty day written notice to the address contained herein."

But it was not just "financing" that petitioner provided to Anthony Petroleum. Rather, petitioner held itself out to the Division as the "distributor" of the motor fuel which it had agreed to "finance" under the agreement detailed in Finding of Fact "3". Included as part of

Exhibit "C" to the stipulation are photocopies of petitioner's forms FT-945, Report of Sales Tax Prepayment on Motor Fuel, which petitioner filed as the distributor of the motor fuel it "financed" for Anthony Petroleum. Petitioner reported and remitted sales tax totalling several million dollars as follows:

Monthly Period	Number of Gallons Reported as Subject to <u>Tax</u>	Sales Tax <u>Prepayment</u>	Date Report Shown Signed by Petitioner's President
January 1992	1,886,734	\$ 169,806.06	February 12, 1992
February 1992	5,726,245	515,362.05	March 14, 1992
March 1992	6,183,091	539,594.73	April 14, 1992
April 1992	5,207,689	447,542.01	May 11, 1992
May 1992	6,517,449	573,055.03	June 17, 1992
June 1992	7,400,479	593,240.07	July 9, 1992
July 1992	6,609,854	542,008.03	August 17, 1992
August 1992	12,051,309	988,207.34	September 14, 1992
September 1992	12,875,278	1,055,772.80	October 13, 1992
October 1992	<u>7,225,178</u>	<u>592,464.60</u>	November 16, 1992
Totals	71,683,306	\$6,017,052.72	

Applying the "sixty points per gallon" fee set forth in the agreement noted in Finding of Fact "3" to the total gallons shown above of 71,683,306 results in a total fee due from Anthony Petroleum to petitioner under such agreement of \$430,099.84. The sketchy record does not establish whether, in fact, such fee was paid to petitioner.

In addition to the reports of sales tax prepayment on motor fuel detailed in Finding of Fact "4", petitioner also filed corresponding forms (i) PT-100, Petroleum Business Tax Return, (ii) PT-101, Tax on Motor Fuels (showing the computation of taxes due under Articles 12-A and 13-A of the Tax Law) and (iii) PT-101.2 (detailing petitioner's direct shipments as a distributor of motor fuel to customers in New York).

On the 10 forms PT-101.2 (one for each month January through October 1992), petitioner reported a total of 146 "direct shipments to customers in this State", with Anthony Petroleum listed under the "sold to" column for all of the shipments. Shipments were disproportionately greater in number during August and September, which was unexplained:

Month During <u>1992</u>	Number of Direct Shipments to Anthony Petroleum <u>Reported</u>
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January	3
February	9
March	15
April	10
May	13
June	15
July	12
August	24
September	31
October	<u>14</u>
Total	146

Petitioner reported no shipments of motor fuel other than the 146 shipments noted above.

A close review of petitioner's Form PT-101.2 for the month of September 1992 (as a representative report) concerning petitioner's direct shipments to Anthony Petroleum is shown in chart form on Appendix A.

Petitioner transferred information reported on the Forms PT-101.2 to corresponding Forms PT-101, Tax on Motor Fuels, on which it computed its tax liability under Tax Law Articles 12-A and 13-A. For example, on its PT-101 report for the month of September 1992, petitioner reported total gallonage shipped to New York of 12,875,278, which it had detailed on the PT-101.2 noted in Finding of Fact "6". It computed New York State motor fuel excise tax due (under Article 12-A) of \$1,030,022.24 (12,875,278 gallons x \$0.08) and tax due under Article 13-A of \$1,910,691.26 (12,875,278 gallons x \$0.1484) representing the "motor fuel component tax" and of \$6,437.64 (12,875,278 gallons x \$0.0005) representing the petroleum testing fee. These amounts were transferred to a Form PT-100, Petroleum Business Tax Return, for the month of September 1992. On this return, petitioner certified that it was "duly licensed or registered to deal in each of the products that are being reported and that this return, including any accompanying riders, is to the best of my² knowledge and belief true, correct and complete", and it reported total tax due under Articles 12-A and 13-A as detailed and computed on the other forms.

A review of the petroleum business tax returns shows petitioner reported and paid the

²The copies of the Forms PT-100 attached to the stipulation as Exhibit "C" were unsigned, but apparently the originals were signed by Jerome R. Smith, as president of petitioner.

following:

<u>Month</u>	Article 12-A Tax	Article 13-A Tax	Total <u>Tax</u>	Gallons Reported Shipped to New York
January 1992	\$ 151,882.09	\$ 279,991.33	\$ 431,873.42	1,886,734
February 1992	460,962.72	849,774.76	1,310,737.48	5,726,245
March 1992	497,738.82	917,570.70	1,415,309.52	6,183,091
April 1992	419,218.96	772,821.05	1,192,040.01	5,207,689
May 1992	524,654.64	967,189.43	1,491,844.07	6,517,449
June 1992	595,738.56	1,098,231.08	1,693,969.64	7,400,479
July 1992	532,093.25	980,902.33	1,512,995.58	6,609,854
August 1992	970,130.37	1,788,414.26	2,758,544.63	12,051,309
September 1992	1,036,459.88	1,910,691.26	2,947,151.14	12,875,278
October 1992	<u>581,626.83</u>	<u>1,072,216.42</u>	<u>1,653,843.25</u>	<u>7,225,178</u>
Totals	\$5,770,506.12	\$10,637,802.62	\$16,408,308.74	71,683,306

Petitioner's Arrangement with Anthony Petroleum In Operation

The parties stipulated how the arrangement between petitioner and Anthony Petroleum operated as follows:

"Generally, Anthony negotiated with the third party suppliers for the purchase of the motor fuel by Petitioner. Anthony in every transaction wire transferred funds to Petitioner, who thereupon wire transferred the funds for the purchase to the supplier of the motor fuel, prior to any transfer of motor fuel" (stipulation, ¶ "7").

* * *

"Petitioner was granted shipper status on the Buckeye Pipeline on April 2, 1992" (stipulation, ¶ "9").

"In each transaction between Anthony and Petitioner, Anthony decided whether the motor fuel purchased by Anthony should be transported by barge or pipeline, and Petitioner was so directed" (stipulation, ¶ "10").

"In each transaction between Anthony and Petitioner, all transportation charges incurred in transporting the motor fuel into New York, whether the transportation was by barge or pipeline, were paid by Anthony" (stipulation, ¶ "11").

As noted in Finding of Fact "8", petitioner was granted shipper status on the Buckeye Pipeline on April 2, 1992. The Division submitted into evidence a cover letter dated February 11, 1993 from Jeffrey C. Seeds, Chief Revenue Accountant of the Buckeye Pipe Line Company ("Buckeye"), which acknowledged that Buckeye invoiced petitioner for transportation charges for certain shipments of gasoline in November 1992, and that "Allegheny was the

shipper of record on these movements from Linden, NJ to Long Island City, NY." The record, however, does not explain why the 21 invoices attached to Mr. Seeds' letter (i) reference Manhattan & Queens Fuel Co. as the entity to which the gasoline was delivered (especially when the agreement detailed in Finding of Fact "3" provides for "a mutual exclusive" between petitioner and Anthony Petroleum, and petitioner has maintained that its relationship to gasoline shipped into New York was as a financing agent of Anthony Petroleum), and (ii) why the invoices fail to correspond to the 13 Buckeye pipeline deliveries listed in Appendix B.

The Arrangement Dissolves

The parties stipulated that in November 1992, "motor fuel was sold by the Petitioner to Anthony pursuant to purchase and sales contracts", which were attached to the stipulation as Exhibit "B" (stipulation, ¶ "8"). Such exhibit consists of 19 "agreements" showing the sale of the following quantity of gasoline by petitioner to Anthony Petroleum:

<u>Date of Agreement</u>	<u>Barrels of Gasoline</u>
(1) October 21, 1992	10,000
(2) October 30, 1992	15,000
(3) October 30, 1992	10,000
(4) November 3, 1992	15,000
(5) November 3, 1992	15,000
(6) November 3, 1992	10,000
(7) November 6, 1992	10,000
(8) November 6, 1992	10,000
(9) November 10, 1992 ³	15,000
(10) October 21, 1992 ⁴	15,000
(11) November 13, 1992	15,000
(12) November 12, 1992	15,000
(13) November 6, 1992	15,000
(14) November 18, 1992	15,000
(15) November 12, 1992	10,000
(16) November 23, 1992	10,000

3

This agreement is marked "revised", which was unexplained.

4

The agreements are listed in the order they were attached to the stipulation. It is unknown whether there was a reason for not submitting the agreements in chronological sequence, and the Administrative Law Judge has left them in the chronological sequence presented.

(17) November 20, 1992	15,000
(18) November 16, 1992	15,000
(19) November 16, 1992	<u>10,000</u>
Total	245,000

The agreement with the latest date in November 1992 of November 23, 1992 (number "16" in the list above), which may be utilized as a representative agreement since they all appear to include similar terms, provided as follows:

"Date: November 23, 1992
Attn: Mr. Jeff Pressman

"This confirms the agreement made on January 31, 1992 between the following parties as described hereinafter:

Seller: Allegheny Petroleum Corporation
2011 Silver Street
Houston, Texas 77007

Buyer: Anthony Petroleum, Inc.
2004 Newbridge Road
Bellmore, NY 11710

Contract Number: 922510157⁵

Batch Number: 359-312-6537

Product: Regular Unleaded Motor Gasoline

Quantity: 10,000 barrels regular unleaded oxygenated gasoline

Quality: Product shall meet good commercial grade specifications for regular unleaded oxygenated gasoline

Delivery:⁶ For New York harbor via Buckeye Pipeline during

⁵

Each agreement was assigned a different contract number.

⁶

Thirteen of the agreements specified delivery via Buckeye Pipeline. The remaining six (numbered "4", "9", "11", "13", "14", and "17" in Finding of Fact "10") specified delivery as:

"For New York harbor into buyer's barge [during a specified period] via

the period Nov. 25-28 1992. Via mutually agreeable scheduling or via mutually acceptable book, stock or inventory transfer against designated barrels of originator. Measurement based on pipeline meter tickets.

Inspection: Seller to appoint mutually acceptable independent inspectors at loading port to ascertain quantity and quality. Independent inspectors will use the latest petroleum industry's acceptable test methods and the results to be final and binding for both parties. Certificate of quantity and quality issued by independent inspector at load port.

Price: Regular unleaded - 0.6280 per US gallon, fixed and firm
Pipeline tariff to be paid at 0.298 per barrel
Terminal thruput to be paid at 0.63 per barrel

Terminal spill tax to be paid at 0.825 per barrel
Said unit price is exclusive of all federal taxes.

Federal taxes are the sole responsibility of the buyer. State and local taxes to be invoiced by seller to buyer.

Payment: Prepayment via wired funds prior to lifting

Title and Risk of Loss: At loading port as the oil passes the intake flange of the vessel/barge or at the time of book, stock or inventory transfer.

Other: This agreement shall be governed by the laws of the State of New York. Anything not specifically covered herein shall be in accordance with industry practice. If any of the above provisions are not in accordance with your understanding of our agreement, please notify this office by TLX/TWX/FAX/mailgram within 24 hours of receipt of this transmission; otherwise, the terms and conditions indicated herein shall be considered binding on both parties.

Please refer to Allegheny's contract number on any future correspondence.

Regards,
Allegheny Petroleum Corporation"

As noted in Finding of Fact "3", Anthony Petroleum agreed to pay all taxes due on motor fuel shipments reported by petitioner, as a distributor, by the 15th of the month following

mutually agreeable scheduling or via mutually acceptable book, stock or inventory transfer against designated barrels of originator."

the month in which the fuel was shipped to Anthony Petroleum. However, Anthony Petroleum failed to pay such taxes on petitioner's shipments in November 1992, and petitioner filed tax returns for such month which reflected such failure. Attached to the stipulation as Exhibit "D" are photocopies of the November tax returns: Forms FT-945/1045, Report of Sales Tax Prepayment on Motor Fuel/Diesel Motor Fuel, PT-101, Tax on Motor Fuels, and PT-100, Petroleum Business Tax Return, each form dated December 17, 1992. Also included is a photocopy of Part II - "Direct Shipments to Customers in this State" of Form PT-101.2. A letter dated December 18, 1992 from attorney Martin, petitioner's representative, explaining the returns for November 1992 is included in Exhibit "B" since it was attached to the tax returns as filed.

Petitioner reported 21 direct shipments to customers in New York for November 1992, including 19 to Anthony Petroleum and 2 to an entity named Ampetrol Inc. on Part II of Form PT-101.2, which are shown in chart form on Appendix B.

On its Form PT-101, Tax on Motor Fuels, for November 1992, petitioner computed its tax liabilities under Tax Law Articles 12-A and 13-A based upon its shipments of 630,314 gallons of motor fuel to Ampetrol, Inc. only (items "7" and "8" noted on its PT-101.2 for November 1992 detailed in Appendix "B", i.e., 211,269 gallons + 419,045 gallons = 630,314). Consequently, petitioner reported on its Form PT-101, Tax on Motor Fuels, for November 1992, New York State motor fuel excise tax due under Article 12-A of \$50,425.12 (630,314 gallons x \$0.08), an Article 13-A motor fuel component tax of \$93,538.60 (630,314 gallons x \$.1484) and an Article 13-A petroleum testing fee of \$315.16 (630,314 gallons x \$0.0005).⁷ Petitioner then transferred these amounts of tax due to its PT-100, Petroleum Business Tax Return, for November 1992 showing a total amount due of \$144,278.88 (\$50,425.12 + \$93,538.60 + \$315.16).

⁷At the bottom of the Form PT-101.2, the instructions direct the taxpayer to enter the total gallonage on the Form PT-101 (which, as noted in Appendix "B", was 10,279,856 gallons). The letter of attorney Martin detailed in Finding of Fact "16" explained petitioner's failure to follow this instruction.

On its Form FT-945/1045, Report of Sales Tax Prepayment on Motor Fuel/Diesel Motor Fuel, for November 1992, petitioner also computed its sales tax prepayment due of \$51,685.75 based upon its shipment of 630,314 gallons of motor fuel to Ampetrol, Inc.

As noted in Finding of Fact "12", petitioner's petroleum business tax return for November 1992, as well as the sales tax prepayment report, referenced an attached letter dated December 18, 1992 of attorney Frederick J. Martin. Mr. Martin explained, in relevant part, as follows why petitioner did not pay tax on the shipments to Anthony Petroleum which it had reported on the PT-101.2 (as detailed in Finding of Fact "10"):

"Allegheny is in the business of purchasing bulk surplus gasoline and reselling the same to another wholesaler (in this case Anthony Petroleum, Inc., a New Jersey Corporation with an office at 2004 Newbridge Road, Belmore, New York 11710). We are advised that product is delivered F.O.B. New Jersey and shipped in purchaser's barges or vehicles at purchaser's cost, into New York.

* * *

"Since the inception of its business with Anthony Petroleum Inc., in or about the end of January 1992, Allegheny has regularly collected from Anthony all appropriate excise and sales taxes, in arrears, and paid the same timely to the New York State Department of Taxation and Finance.

"Pursuant to a financing arrangement between Allegheny and Anthony, Anthony is permitted to retain the New York State sales tax until the 15th day of the month following delivery. Since the inception of this agreement between Allegheny and Anthony, Anthony has always paid promptly to Allegheny and Allegheny has remitted timely to the tax authorities.

"In late November of this year, the U.S. Attorney and the F.B.I. seized and froze the bank accounts of a number of companies, Anthony included. Anthony currently owes approximately \$3,000,000.00 to Allegheny under the financing agreement and, as of the 20th of this month, Allegheny will be unable to pay the sales tax due to New York State unless Anthony is permitted to pay Allegheny. Anthony has indicated a willingness to make a partial assignment or other arrangement for payment to Allegheny, if the U.S. Attorney's Office will permit. An application has been made to that office but no response has been received as yet.

"Allegheny is entirely unaware of the reasons for or the nature of the investigation in which the U.S. Attorney seized the assets and froze the accounts of various companies including Anthony. Allegheny is no part of this investigation nor has it had any communications regarding the investigation other than from Anthony. Allegheny is an injured innocent bystander.

* * *

"Even though Allegheny has acted as a conduit for the payment of the New

York Sales Tax, it is clear that Allegheny is not liable for the prepaid sales tax or excise tax under the New York Sales and Compensating Use Tax Law and the Tax on Gasoline and Similar Motor Fuel. Since both statutes have similar provisions, reference will be made only to the Sales Tax provisions.

"Section 1102(a)(1) of the Sales Tax Law stated that a distributor of motor fuel must pay a prepaid sales tax on each gallon of motor fuel which it (i) imports or causes to be imported into New York for use, distribution or storage or sale in New York, or (ii) produces, refines, manufactures or compounds in New York. Allegheny does not produce, refine, manufacture or compound motor fuel in New York State or in any other place in the United States. Thus, Allegheny is liable for the prepaid sales tax (and the excise tax) only if it imports or causes to be imported motor fuel into New York.

"The Regulations promulgated under Section 1102 define what constitutes importing motor fuel into New York. In particular, Regulation §561.2(c) states as follows:

A person imports motor fuel or causes it to be imported into this State (i) if such person has ownership of motor fuel at the time the fuel enters New York State's jurisdiction or at any time thereafter up to and including the off-loading of such fuel; (ii) if such person directs or controls importation of motor fuel into New York State; or (iii) if such person purchases motor fuel located outside New York State for delivery into New York State from a seller who is not a registered distributor in New York State under Article 12-A of the Tax Law.

"Under the contractual arrangement between Allegheny and Anthony, the ownership of the motor fuel passed from Allegheny to Anthony at the point where the gasoline was delivered to Anthony. The occurrence of that event has always been at various locations in New Jersey. Allegheny never owned the gasoline when it entered the jurisdiction of New York State Allegheny completed its part of the transaction with Anthony in New Jersey. All risk of loss after the gasoline was delivered to Anthony in New Jersey was borne by Anthony.

"The contractual arrangement between Allegheny and Anthony is analogous to the facts of Example three in Regulation §561.2(c)(2). In that example, D (Anthony) contracts with E (Allegheny), a New York registered distributor under Article 12-A, for the purchase of motor fuel located outside the State (New Jersey). D takes delivery at E's terminal outside the State. (Likewise, Anthony took delivery in New Jersey.) D arranges for the transportation from E's premises to its New York terminal. (Likewise, Anthony arranged for transportation into New York.) D (Anthony) is the importer. E (Allegheny) is not the importer because ownership passed to D (Anthony) at the point of delivery in New Jersey.

"The facts clearly show that Allegheny did not direct or control importation of gasoline into New York. In contrast, the facts show that Anthony performed all the acts necessary to import gasoline into New York. In particular, Anthony placed at least 95% of the orders with out-of-state suppliers, Anthony arranged for all transportation into New York State, Anthony transmitted all funds for the purpose of the gasoline to Allegheny who, in turn, transmitted them to the sellers of the gasoline (*i.e.*, Allegheny did not use its funds to pay for the gasoline), and the arrangements between Anthony and Allegheny were at arms-length (*i.e.*, Anthony and Allegheny are not related companies). Thus, Allegheny did not direct or

control the importation of gasoline into New York State.

"Finally, Allegheny did not purchase gasoline out-of-state for delivery into New York State. By the time that the offloading of gasoline commenced in New York, Anthony was already the owner of the gasoline"

According to the stipulation of the parties at paragraph "18", the Division, by a letter dated February 4, 1993 (which petitioner included in its petition), questioned "the difference between the tax return and the total volumes reported on . . . Form PT-101.2."

Petitioner responded by another letter of attorney Martin, dated February 19, 1993, which transmitted an additional copy of his letter dated December 18, 1992. Mr. Martin also enclosed (i) a copy of the so-called "Reciprocal Financing Agreement" dated January 31, 1992, as detailed in Finding of Fact "3", and (ii) copies of 19 "contracts" between petitioner and Anthony Petroleum for the respective shipments of gasoline included on the November tax returns, as detailed in Appendix B, and 19 "invoices". Mr. Martin emphasized that the purchase and sales agreements provided that title and risk of loss passed to Anthony Petroleum in New Jersey, in the language of the agreements, at "loading port as the oil passes the intake flange of the vessel/barge or at the time of book, stock or inventory transfer." Attorney Martin interpreted the latter phrase as covering "instances of pipeline delivery where the transfer is evidenced by the meter reading at the point at which the product is first introduced into the pipeline system."

The 19 invoices were on petitioner's letterhead and were addressed to Anthony Petroleum. The invoice in the largest amount was one for a "total invoice amount" of \$630,619.63,⁸ and, as a representative sample, provided the following information:

"Mode: Barge Hygrade 24
Load: 11/03/92 - GATX, Carteret, N.J.
Disch.: 11/04/92 - Commander, Oyster Bay, N.Y.
Product: Unleaded Regular: 418,530 gals/ 9,965.00 bbls
 Unleaded Premium: 210,053 gals/ 5,001.25 bbls
 Total: 628,583 14,966.25
Price UR: \$.6711/gallon . . . \$280,875.48
Price UP: \$.7311/gallon . . . \$153,569.38

⁸This particular invoice was a "revised" invoice, which was not explained in the record.

Product Total	\$434,444.86	
NY State Sales Tax \$0.0820./gal	51,543.81	
NY State Motor Fuel Tax . . . \$0.0805./gal	50,600.93	
NY Gross Receipts Tax \$0.1484./gal	93,281.72	
Vapor Recovery Fee \$0.05./bbl	<u>748.31</u>	
Total Invoice Amount		\$630,619.63
Prepaid to Allegheny Petroleum		<u>440,000.00</u>
Amount Due Allegheny Petroleum		\$190,619.63

Payment: Via Federal Wire Funds Transfer
 To: National Westminster Bank USA
 ABA (Routing) #021000322

Credit Funds to: National Westminster Bank
 Account: Allegheny Petroleum Corporation
 Account #: 2056609015

"The seller certifies that both the motor fuel tax and prepaid sales tax required to be paid for the motor fuel shown on this document have been or will be paid by the seller or its [sic] supplier

"Title passes at load port
 Quantity and quality based on loaded inspections
 Allegheny Petroleum - M2690"

The invoices that reflect delivery by pipeline include similar provisions, except for the provisions concerning the delivery. For example, an invoice dated November 6, 1992 in the "total invoice amount" of \$435,712.15 provided the following delivery information:

"Mode: Buckeye Pipe Line
 Batch No.: 359-333-6523
 Deliver: 10/23/92 - 5,271 bbls M & Q Terminal, Brooklyn, NY
 10/26/92 - 4,004 bbls M & Q Terminal, Bklyn, NY
 11/02/92 - 739 bbls M & Q Terminal, Bklyn, NY."

In addition, motor fuel shipped by pipeline in lieu of a "vapor recovery fee", as imposed on the shipment by barge as noted above, imposed the following fees:

"Terminal Spill Tax . . M & Q . . \$0.0825/bbl	\$826.16
Terminal Thruput Chg. . M & Q . . \$0.63/bbl	6,308.82
Pipe Line Tariff. \$0.298/bbl	2,984.17"

In his letter of February 19, 1993, attorney Martin minimized his client's role:

"Allegheny's role in these series of transactions has been far less substantive than one would glean from a review of some of the documents. For a fixed fee of \$0.006 per gallon, Allegheny offered its services as a financing agent for Anthony's motor fuel business. Allegheny had no established relationship with either Anthony's suppliers (Texport; Northville; BP) or customers for motor fuel in the New York area, and it evidently had no wish to compete for Anthony's business (see the Reciprocal Financing Agreement wherein Allegheny pledged not to deal with anyone other than Anthony). Allegheny's purchases of product were done

solely and exclusively as Anthony directed, and Anthony took all risks and costs associated with the transactions

"If it can be said at all that Allegheny was a principal in the ownership, custody or control of the product, it certainly ceased upon the sale to Anthony in New Jersey

"Any services performed by Allegheny following the sale to Anthony in New Jersey were done strictly as Anthony's financing agent No activity was conducted by Allegheny in its own right or for its own account, as it had no substantive interest in the transaction."

The Division, by its Fuel, Alcohol, Cigarette and Carrier Tax Section (F.A.C.C.T.S.) of the Transaction and Transfer Tax Bureau (T.T.T.B.), responded to attorney Martin's letter of February 19, 1993 with the issuance of three notices and demands for payment of tax, each dated March 8, 1993 (Exhibit "F" to the stipulation). One notice asserted tax due under Article 13-A of \$1,431,992.03, plus penalty and interest, based upon a desk audit of petitioner's PT-100, Petroleum Business Tax Return, for the period November 1992. The second asserted tax due under Article 12-A of \$776,788.13, plus penalty and interest, similarly based upon a desk audit of the same PT-100 for November 1992. Finally, the third notice asserted prepaid sales tax due under Articles 28 and 29 of \$791,262.44, plus penalty and interest, based upon a desk audit of petitioner's FT-945/1045, Report of Sales Tax Prepayment on Motor Fuel/Diesel Motor Fuel Return, for November 1992.

By a letter dated March 16, 1993 (Exhibit "G" to the stipulation), attorney Martin responded to the notices and demands by enclosing copies of his earlier letter dated February 19, 1993 (detailed in Finding of Fact "18"), as well as his initial letter dated December 18, 1992 which he had attached to the tax return at issue (quoted at length in Finding of Fact "16"). He repeated petitioner's position that Anthony Petroleum "is the party responsible for the payment of taxes referred to in the Notices."

Division Negotiates Petitioner's Letter of Credit

Pursuant to the "Reciprocal Financing Agreement" detailed in Finding of Fact "3", Anthony Petroleum provided petitioner with the collateral necessary to obtain a letter of credit so that, in the words of the stipulation at paragraph "5", "the effectiveness of the Petitioner's

license" could be "secure[d]". In March 1992, a letter of credit in the face amount of \$600,000.00 was issued in favor of the Division by ABN Amro Bank N.V. The Division negotiated this letter of credit on or about March 9, 1993 crediting \$600,000.00 against sales tax owing of \$791,262.44.⁹

The Division also sought to collect tax against petitioner by the issuance of two warrants (photocopies of the warrants are attached to the stipulation as Exhibit "H"). One warrant (ID# E-004795814-W001-6), dated April 1, 1993, showing sales tax due under Articles 28 and 29 for the period ending November 30, 1992 of \$192,840.17,¹⁰ plus penalty and interest, was docketed in the office of the Albany County Clerk on April 8, 1993. The second warrant dated April 14, 1993 (which is in a different form than the first warrant and does not reference a warrant ID number) showed tax due

under Article 13-A¹¹ consisting of two assessments for the period ending November 30, 1992 of \$776,788.13, plus penalty and interest, and of \$1,431,992.03, plus penalty and interest, and was

⁹According to the affirmation dated June 7, 1994 of attorney DeWitt:

"[s]ince Allegheny did not replace the security required to be maintained in order for it to continue to be registered as a distributor of motor fuel, Allegheny's license as a distributor of motor fuel was revoked."

Mr. DeWitt noted further that petitioner has challenged the revocation of its license in a separate matter before the Division of Tax Appeals (DTA No. 811905).

¹⁰As noted in Finding of Fact "21", the Division issued a notice and demand asserting prepaid sales tax due under Articles 28 and 29 of \$791,262.44. As noted in Finding of Fact "23", the Division negotiated the letter of credit in the amount of \$600,000.00 and applied it against sales tax asserted due of \$791,262.44. There is no explanation in the record why the warrant was in the amount of \$192,840.17 instead of \$191,262.44 (\$791,262.44 less \$600,000.00).

¹¹As noted in Finding of Fact "21", the sum of \$1,431,992.03 represented tax asserted as due under Article 13-A, and the second amount of \$776,788.13 represented tax asserted as due under Article 12-A. Besides failing to reference Article 12-A, this warrant also incorrectly reversed information under the columns for "taxable period ending" and "assessment number".

docketed in the office of the Albany County Clerk on April 19, 1993.

In response to the issuance of the warrant dated April 8, 1993 for unpaid sales tax, petitioner, by its attorney, Frederick J. Martin, wrote to James W. Wetzler, then-Commissioner of Taxation and Finance, in a letter dated May 5, 1993 (attached to the stipulation as Exhibit "I") protesting the issuance of the warrant without "an opportunity to present [petitioner's] reasons for disagreement with the amount of tax assertedly owing at an administrative hearing."

Michael Kalin, Tax Compliance Manager I, in a letter dated May 19, 1993 (attached to the stipulation as Exhibit "J"), responded to this letter of Mr. Martin which requested an administrative hearing. Mr. Kalin advised attorney Martin that taxes asserted as due by the Division resulted from a "liability [that] was self-assessed by the filing of a return reporting the importation of product subject to sales, motor fuel, and petroleum business taxes." According to Mr. Kalin, the tax return constituted the assessment and since "the liability [did] not arise under section 1138 [, no] administrative hearing right was created."

Related Litigation

On August 9, 1993, petitioner filed an Order to Show Cause asking the Supreme Court (Albany County) to vacate and annul (i) the notices and demands and (ii) warrants on the basis that a notice of determination had not been given to petitioner and an administrative hearing on the validity of the taxes asserted as due was not provided. The warrant filed on April 8, 1993 under Articles 28 and 29 was vacated pursuant to an order issued August 12, 1993 by the Honorable John Turner, Supreme Court (Albany County). However, Honorable Edward S. Conway, Supreme Court (Albany County) refused to vacate the April 19, 1993 warrant pursuant to his order issued November 23, 1993. (A photocopy of Judge Conway's order was attached to the stipulation as Exhibit "K".) Judge Conway decided that the Division's determination that motor fuel and petroleum business taxes were due under Articles 12-A and 13-A had a "rational basis", and he dismissed petitioner's petition to vacate and annul the warrant dated April 19, 1993 and to obtain an administrative hearing. Petitioner has appealed this decision. It is

observed that the Tax Appeals Tribunal was a named respondent (along with Commissioner Wetzler and the Department of Taxation and Finance) in the proceeding before Judge Conway. Furthermore, it is observed that Judge Conway concurred with the Division's argument that petitioner's tax liability under Articles 12-A and 13-A was self-assessed by its filing of the applicable tax return:

"Here, respondents never challenged the sufficiency or the correctness of petitioner's tax return. Petitioner's return set forth all of the necessary information."

Other Miscellaneous Documents Submitted by the Division

The Division submitted into the record an undated form letter from Doris Richardson, Principal Audit Account Clerk of the Motor Fuel Section of the New Jersey Division of Taxation, to the Division's auditor which enclosed copies of New Jersey Motor Fuel Tax Reports, Schedules 10 and 10A for Texport Oil. These schedules show that Texport Oil Company made 17 shipments of gasoline totalling 7,103,928 gallons during the month of November 1992, which were "sales for export outside this State [New Jersey] to the State of New York, where petitioner was listed as the entity to which such shipments were 'sold to'."¹²

The Division also submitted into the record documents obtained from two transporters of gasoline. A cover letter dated March 9, 1993 from Spentonbush/Red Star Companies transmitted a "Uniform Manifest for Interstate Importation/Movement of Automotive Fuel for New York State importing transporter, Spentonbush/Redstar", and its original Diesel Motor Fuel and Motor Fuel Transporter's Monthly Report for November 1992. The manifest shows a shipment of gasoline loaded on November 3, 1992 onto a barge which then departed on November 4, 1992 from Carteret, New Jersey and made delivery on November 5, 1992 in Oyster Bay, New York. Petitioner was shown as the distributor for such gasoline and as the owner of the gasoline after loading. However, Anthony Petroleum was shown as the firm ordering transportation. The monthly report shows delivery to petitioner in New York as well

¹²The record provides no explanation why Appendix "B" shows only 14 shipments by Texport Oil instead of 17.

as listing petitioner as the distributor for such gasoline. A similar monthly report for November 1992 of Ekloff Marine Corp. (a second transporter) shows petitioner as the distributor for four shipments of gasoline in November 1992, but identifies Anthony Petroleum as the "owner after fuel is loaded." It is unexplained why the corresponding manifests for interstate movement of the gasoline shows Ampetrol, Inc. ordering transportation of the gasoline in one instance and Anthony Petroleum in the three other instances (and not in all four instances which would correspond with the monthly report). In all four instances, petitioner was shown as the "owner of automotive fuel after loading" on the manifests.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends that it is not liable for the taxes at issue because it transferred ownership of the gasoline to Anthony Petroleum in New Jersey prior to its shipment into New York:

"Only if the Petitioner either owned the motor fuel at the point of offloading within New York or controlled the offloading within New York can the Petitioner be considered to have imported the subject motor fuel into New York and, therefore, be subject to the three taxes that are triggered by the importation of motor fuel into New York" (Petitioner's brief, p. 10).

Petitioner argues that the motor fuel tax regulations at 20 NYCRR 410.2(c)(3) and the sales tax regulations at 20 NYCRR 561.2(c)(3) provide the following rules for determining who is liable for the taxes at issue:

"(1) Persons owning motor fuel at the time offloading is commenced are liable for the tax.

"(2) Persons owning motor fuel prior to the person owning it at the time offloading is commenced are not liable for the tax.

"(3) If the owner of the motor fuel at the time that offloading is commenced is not registered as a distributor under Article 12-A of the Tax Law, then the owner of the fuel immediately after it is offloaded is jointly and severally liable.

"(4) If sales take place on New York territorial waters prior to offloading into a New York land-sited facility, all parties have caused the fuel to be imported into New York" (Petitioner's brief, p. 17; emphasis in original).

Petitioner also points to the legislative history behind the 1985 changes in the Tax Law to

a prepaid sales tax and motor fuel tax in support of its contention that tax is imposed on the first sale of gasoline in the State. According to petitioner:

"[I]t is clear that Anthony is the first person in the chain that can be subject to the taxes. It was the owner when the fuel entered New York waters, and it was the offloader. Since Anthony was unlicensed, the second person liable was Anthony's purchaser" (Petitioner's brief, p. 19).

Petitioner adds that the commerce clause of the United States Constitution precludes the Division from taxing petitioner's gasoline sales to Anthony Petroleum which occurred entirely outside the State.

Finally, petitioner contends that it is irrational for the Division to concede that petitioner has a right to a hearing on whether 9,649,542 gallons of gasoline were imported for sales tax purposes, but has no right to a hearing on whether the same 9,649,542 gallons were imported for motor fuel tax and petroleum business tax purposes:

"The same event triggers taxation -- importing or causing to be imported motor fuel into New York State. The purpose of the prepayment scheme was to have the three taxes attach to the very same act. [Footnote omitted.] To argue that the three taxes operate differently is irrational, contrary to the statutes and contrary to the respondent's own regulations. Accordingly, at the very least, the petitioner has a right to an administrative hearing on whether all three taxes were correctly assessed by the Respondent" (Petitioner's brief, pp. 30-31; emphasis in original).

The Division counters that petitioner may be viewed as importing the gasoline at issue or causing it to be imported:

"[T]he only conceivable purpose for Allegheny to have purchased and sold motor fuel to Anthony . . . was to allow Anthony to use Allegheny's status as a licensed distributor to aid Anthony, as an unregistered distributor, in the importation of motor fuel into the State of New York. By its participation in this plan, Allegheny . . . has demonstrated that it imported or caused to be imported into New York State the motor fuel which it sold to Anthony" (Division's brief, p. 6).

According to the Division, even if petitioner is not viewed as having imported the fuel itself, "it aided and abetted the importation of motor fuel by an unlicensed distributor" (Division's brief, p. 11).

The Division also rejects petitioner's constitutional argument because, "as a registered distributor of motor fuel in New York State" which reported the importation of gasoline and paid tax, it had "substantial contact with the State of New York" (Division's brief, p. 13).

Finally, the Division contends that petitioner has no right to consideration of the merits of the notices and demands issued for motor fuel tax or petroleum business tax because:

"Allegheny's tax liability was self-assessed by the reporting on its November 1992 PT-100, PT-101 and PT-101.2 Forms of the quantities of motor fuel imported or caused to be imported by Allegheny" (Division's brief, p. 14).

The Division argues that it did not have to resort to any information other than the information contained in such tax forms:

"At the bottom of PT-101.2, the taxpayer is instructed to: 'Total Column A plus Column B. Enter this amount on Form PT-101, line 5, Columns 1 & 2'. On the petitioner's November PT-101.2 Form, the total of columns A and B was 10,279,856 gallons. However, this was not the amount entered on line 5 of Form PT-101. Rather, the petitioner entered the amount of 630,314 gallons. There was no authority for the petitioner to enter any amount other than it was instructed to do on Form PT-101.2. Its error in completing its November 1992 tax return is evident on the face of the return itself and the actual liability of the petitioner can be determined from the information provided therein" (Division's brief, pp. 14-15).

In its reply brief, petitioner argues that it did not direct or control the importation of gasoline into New York State because it did not direct or control the gasoline after it entered New York. Petitioner points to the motor fuel tax regulations at 20 NYCRR 410.2(c) in support of its position, carefully reviewing the factors listed therein for determining who has control over gasoline as it enters New York. It argues that an example in the regulations, 20 NYCRR 410.2(c)(2)(v), Example 2, is on point. Furthermore, petitioner contends that the fact petitioner had a New York license and filed New York tax returns does not mean that it had nexus with New York with regard to the gasoline shipped in November 1992:

"To hold Petitioner liable for the tax would, in effect, be taxing a New Jersey sale, which clearly violates the Commerce Clause" (Petitioner's reply brief, p. 11).

Petitioner also cites the recent decision of the Appellate Division, Third Department in Meyers v. Tax Appeals Tribunal (201 AD2d 185, 615 NYS2d 90, lv denied 84 NY2d 810, 621 NYS2d 519) in support of its argument that petitioner has a right to a hearing to review its liability for motor fuel tax and petroleum business tax on the November 1992 shipments of gasoline.

Subsequently, petitioner submitted, on November 25, 1994, a photocopy of an opinion by Judge James B. Canfield in Tug Buster Bouchard Corp. v. Wetzler (Albany County, Special Term, June 9, 1994) for the proposition that "if the Petitioner were 'deemed' to be an importer,

imposition of this Article 13-A tax would be violative of the Commerce Clause as in the enclosed opinion."

CONCLUSIONS OF LAW

A. As noted in Finding of Fact "27", Judge Conway dismissed petitioner's Order to Show Cause in State Supreme Court, refusing to vacate and annul the warrant dated April 19, 1993 issued by the Division. The Judge, in his dismissal order, decided that the Division had a "rational basis" for its determination that motor fuel and petroleum business taxes were due from petitioner under Articles 12-A and 13-A. Consequently, Judge Conway's order is entitled to res judicata treatment and bars petitioner from contesting the Division's issuance of notices and demands for motor fuel tax and petroleum business tax in the administrative proceeding at hand (see, Siegel, NY Prac § 445 [2d ed]). In short, petitioner previously litigated the Division's authority to proceed against it by the issuance of notices and demands, and to attempt to collect such taxes by issuance of a warrant. As a result, Judge Conway's decision is res judicata to such issues (see, Jointa Lime v. Canonie Env. Services, 198 AD2d 659, 603 NYS2d 605). Petitioner's remedy is to perfect the appeal of Judge Conway's order noted in Finding of Fact "27".

B. It is observed that neither party raised the matter of res judicata. However, the Tax Appeals Tribunal has noted that an Administrative Law Judge may address relevant legal grounds affecting a matter's resolution even if the parties do not do so (see, Matter of Chamberlin, Tax Appeals Tribunal, January 30, 1992).

C. Nonetheless, all of the issues designated at the beginning of this determination will be analyzed because an Administrative Law Judge does not have the authority to "moot" issues (see, Matter of Bleistein, Tax Appeals Tribunal, August 11, 1994). Furthermore, the issue of whether petitioner is liable for sales tax on the 9,649,542 gallons of gasoline shipped to Anthony Petroleum in November 1992 (10,279,856 total gallons shown in Appendix "B" less the gallons shipped to Ampetrol of 630,314 gallons) requires the same analysis as the issue of petitioner's liability for motor fuel and petroleum business tax on such shipments. For purposes

of all three taxes, the person required to pay the taxes is the person who "imports" or "causes to be imported" gasoline into New York State as detailed in Conclusion of Law "E".

D. It is noted that the Appellate Division recently interpreted Tax Law § 2006(4) in a liberal fashion and concluded that a taxpayer has a right to contest the issuance of a notice and demand in an administrative proceeding in the Division of Tax Appeals (see, Meyers v. Tax Appeals Tribunal, 201 AD2d 185, 615 NYS2d 90, lv denied 84 NY2d 810, 621 NYS2d 519). Consequently, the Division of Tax Appeals has jurisdiction to review petitioner's challenge to notices and demands for motor fuel tax and petroleum business tax which were issued by the Division based upon information reported by petitioner in its tax returns.

E. Tax Law § 284(1) imposes an excise tax of four cents per gallon (motor fuel tax under Article 12-A), in relevant part, as follows:

"upon motor fuel (a) imported into or caused to be imported into the state by a distributor for use, distribution, storage or sale in the state Provided, further, no motor fuel shall be included in the measure of the tax unless it shall have previously come to rest within the meaning of federal decisional law interpreting the United States constitution" (emphasis added).

Similarly, Tax Law § 301-a, which imposes a monthly tax on every petroleum business for the privilege of doing business in New York (petroleum business tax under Article 13-A), is composed, in part, of a motor fuel component.¹³ The motor fuel component is defined in Tax Law § 301-a(b), in relevant part, as follows:

"The motor fuel component shall be determined by multiplying the motor fuel and automotive-type diesel motor fuel rate times the number of gallons of (1) motor fuel imported or caused to be imported into this state by the petroleum business for use, distribution, storage or sale in the state Provided, however, that no motor fuel shall be included in the measure of the tax unless it shall have previously come to rest within the meaning of federal decisional law interpreting the United States constitution . . ." (emphasis added).

Tax Law § 1102, which requires prepayment of sales tax on motor fuel, follows suit:

¹³The monthly petroleum business tax is equal to the sum of (1) the motor fuel component (at issue herein), (2) the automotive-type diesel motor fuel component, (3) the nonautomotive-type diesel motor fuel component, and (4) the residual petroleum product component (Tax Law § 301-a).

"(a)(1) Every distributor of motor fuel shall pay, as a prepayment on account of the taxes imposed by this article [28] and pursuant to the authority of article twenty-nine of this chapter, a tax on each gallon of motor fuel (i) which he imports or causes to be imported into this state for use, distribution, storage or sale in the state

* * *

"(3) . . . Provided, further, no motor fuel or diesel motor fuel shall be included in the measure of the tax under clause (i) of paragraph one . . . of this subdivision unless it shall have previously come to rest within the meaning of federal decisional law interpreting the United States constitution" (emphasis added).

F. Petitioner has not contested its status as a New York "distributor". As noted in Finding of Fact "2", the parties stipulated that petitioner held a New York Certificate of Registration as a Distributor of Motor Fuel. For purposes of the motor fuel tax under Article 12-A, "distributor" is defined, in relevant part, to mean:

"any person, firm, association or corporation, who or which imports or causes to be imported into the state, for use, distribution, storage or sale within the state, any motor fuel" (Tax Law § 282[1][a]).

As noted in Conclusion of Law "E", the excise tax of four cents per gallon (motor fuel tax under Article 12-A) is imposed upon motor fuel imported into or caused to be imported into the State by a distributor.

Similarly, Tax Law § 1102 requires the prepayment of sales tax by every distributor of motor fuel which imports or causes to be imported gasoline into New York State. Tax Law § 1101(b)(4)(ii)(B) provides that "distributor" shall have the same meaning for sales tax as it has for motor fuel tax under Article 12-A. Likewise, Tax Law § 301-a(b) imposes tax on a petroleum business that imports or causes to be imported gasoline into New York State and, at Tax Law § 300(b)(1)(i), a "petroleum business" means a business "importing motor fuel to be imported into the state for use, distribution, storage or sale in the state."

G. As noted in Finding of Fact "16", as soon as petitioner's arrangement with Anthony Petroleum collapsed, petitioner acted swiftly to deny its status as a distributor of the nearly 10,000,000 gallons of gasoline at issue. Of course, petitioner's attempt to deny its status as a distributor and to cast itself as an innocent bystander rings hollow given its use of such status to

ship nearly 72,000,000 gallons of gasoline into New York as noted in Finding of Fact "7".

However, much to the frustration of the Division, petitioner's arrangement with Anthony Petroleum appears to have been carefully crafted so as to provide a way for petitioner to avoid liability for the taxes at issue.

H. Petitioner's representative has cogently set forth an analysis of the Division's regulations concerning the regulatory standard for determining whether a person causes gasoline to be imported into New York. Regulations, which are almost identical, have been promulgated under the Sales Tax Law and the Motor Fuel Tax Law to define "imports or causes motor fuel to be imported" at 20 NYCRR 410.2(c)(1) (motor fuel tax) and at 20 NYCRR 561.2(c)(1) (sales tax). It is observed that no similar regulations have been promulgated under Article 13-A. Such definitions include a person who "directs or controls the importation of motor fuel into New York State", which would seem to encompass petitioner. However, the regulations go on to elaborate on who is subject to tax and who is not subject to tax, and persons in petitioner's situation are not subject to tax under the regulatory formula. 20 NYCRR 561.2(c)(3) of the Sales Tax Law provides as follows:

"For the purposes of the prepaid sales tax imposed by section 1102 of the Tax Law and the excise taxes on motor fuel imposed by article 12-A of such law, New York State's jurisdiction includes New York's territorial waters. When sales or transfers of motor fuel occur when such motor fuel is on New York territorial waters prior to its being off-loaded into a New York land-sited facility, all the parties to all such sales or transfers have caused the motor fuel to be imported into New York for use, distribution, storage or sale in this State. Additionally, if the party owning the motor fuel at the time off-loading into a New York land-sited facility commences is not registered as a distributor under Article 12-A of the Tax Law, the party owning the motor fuel immediately after its off-loading shall also have caused the motor fuel to be imported into New York. The owner of motor fuel at the time that off-loading is commenced at or into any terminal, facility or any other land-sited repository is responsible for payment of the taxes with respect to such motor fuel, and, in determining the amount of the tax, the motor fuel is to be measured by the amount of motor fuel which is off-loaded into the terminal, facility or other land-sited repository. Persons owning motor fuel prior to the person owning it at the time off-loading is commenced are not liable for the tax. If, however, the owner of the motor fuel at the time that off-loading is commenced is not registered as a distributor under Article 12-A of the Tax Law, then the owner of the motor fuel immediately after it is off-loaded is jointly and severally liable for payment of the tax (see section 561.3 of this Part). In no event shall the tax be collected more than once with respect to the particular importation of motor fuel" (emphasis added; 20 NYCRR 410.2[c][3] of the Motor Fuel Tax Law is virtually identical).

This concept that the person liable for the tax is the person who owns the fuel at the time of commencement of offloading is reiterated in motor fuel tax regulation 20 NYCRR 412.1(a)(1) and sales tax regulation 20 NYCRR 561.3(a)(1). In particular, motor fuel tax regulation 20 NYCRR 412.1(a)(1) states:

"The person who owns such fuel while it is held in the truck, vessel or other means of transportation at the time of the commencement of offloading of the fuel is the party responsible for the payment of the tax."

It is further observed that the regulations narrowly define who is a person who directs or controls the importation of motor fuel. A person who is directing or controlling the offloading transaction is jointly and severally liable for the tax along with the person who is the owner of the fuel at the time of offloading. In particular, motor fuel tax regulation 20 NYCRR 412.1(a)(2) provides, in part, as follows:

"Where the circumstances of an importation transaction indicate that a person or persons, other than the person indicated as the owner of the motor fuel at the time of offloading, is directing or controlling such transaction, the person or persons directing or controlling the importation is jointly and severally liable for the payment of the tax."

The above analysis of the regulations supports petitioner's contention that the taxes at issue are imposed on the person or persons who own the fuel at the time of offloading or those who are directing or controlling the offloading transaction; that is, the act that is subject to the tax is the act of offloading fuel into a New York repository, and the person who owns the fuel at that point plus any person who is directing or controlling the offloading transaction is liable for the tax. The regulations clearly state that persons owning the fuel prior to the offloading are not liable for the tax (20 NYCRR 410.2[c][3]; 561.2[c][3] quoted above).

I. As noted in Finding of Fact "11", the purchase and sales contracts between petitioner and Anthony Petroleum with regard to the November 1992 shipments of gasoline provided for title and risk of loss to the gasoline to pass to Anthony Petroleum in New Jersey. Consequently, petitioner is correct that the decision of the Tax Appeals Tribunal in Matter of Harbor Petroleum (September 21, 1989 [wherein the Tribunal decided that Harbor Petroleum was an importer of motor fuel]) is distinguishable. Harbor Petroleum, which was not a registered New

York distributor, was asked by one of its customers, Fireline Petroleum Supply Distribution Company, Inc. ("Fireline"), to sell gasoline to Fireline for an upcoming Independence Day weekend. Harbor Petroleum purchased the gasoline from a supplier, Lesez, in New Jersey. The contract between Harbor Petroleum and Fireline stated that the destination of the fuel was Agway Terminal, Albany, New York. Harbor Petroleum paid for the barging of the fuel to Albany. The payments from Fireline to Harbor Petroleum and from Harbor Petroleum to Lesez were virtually contemporaneous.

The Tribunal held that Harbor Petroleum was liable for the motor fuel tax because it was determined that the contracts were destination contracts as opposed to shipment contracts. It held that although contracts are normally shipment contracts, these were destination contracts because Harbor Petroleum agreed to deliver the gas to a particular destination. The consequence of finding that the contracts were destination contracts was that, under the Uniform Commercial Code ("UCC"), title to the fuel did not transfer until fuel was delivered to the Agway Terminal in New York State. Consequently, since Harbor Petroleum was the owner of the fuel at the commencement of the offloading in New York, it was liable for the taxes. In contrast to the Harbor Petroleum case, title and risk of loss passed from petitioner to Anthony Petroleum at the loading port in New Jersey.

J. However, although petitioner has established that it and Anthony Petroleum concocted an arrangement so as to ensure that title and risk of loss to the gasoline passed from petitioner to Anthony Petroleum in New Jersey, petitioner, as noted in Findings of Fact "4" and "5", reported its sales of gasoline to Anthony Petroleum as if it was the one importing or causing to be imported such gasoline into New York by choosing to serve as a New York distributor. The limited record does not develop the factual basis for why this format was utilized, although it seems reasonable to conclude that the desire to deceive the Division played some part. In any event, the circumstances of this matter support the application of the concept that the form chosen by the taxpayer should control the tax consequences (cf., Matter of Chanry Communications, Tax Appeals Tribunal, March 7, 1991, confirmed sub nom Henry v. Wetzler,

183 AD2d 57, 588 NYS2d 924, affd 82 NY2d 859, 609 NYS2d 160, cert denied ___ US ___, 128 L Ed 2d 863). This is especially so because the creation of a loophole may be avoided by viewing petitioner as the "distributor" and therefore the "importer" of the gasoline so that an entity which served as a front for a culpable party may not avoid liability for taxes duly owing (cf., Ianniello v. Tribunal, ___ AD2d ___, 617 NYS2d 973).

K. Consequently, it is reasonable to conclude that since petitioner is a "distributor" and since the statutory definition of "distributor" is a person who imports or causes to be imported gasoline into New York, petitioner is therefore liable for the taxes at issue. The Division has argued that, by the filing of its tax returns, petitioner has admitted its status as a New York "distributor", and petitioner should simply be held liable for the taxes owed on the gasoline shown shipped to Anthony Petroleum on its Form PT-101.2 for November 1992 (Appendix "B"). This type of strict liability approach displays a certain circular reasoning: petitioner caused to import gasoline because it is a distributor; petitioner is a distributor because it caused to import gasoline. Nonetheless, the relevant statutes support such interpretation and the State should not be penalized because the Division's regulations¹⁴ failed to anticipate the extraordinary

circumstances of the matter at hand: a taxpayer who has held itself out as a distributor of nearly

¹⁴As noted in paragraph "31", petitioner has argued that Example 2 at 20 NYCRR 410.2(c)(2)(v) is on point. This example provides as follows:

Example 2: Ownership. D contracts with E, a New York registered distributor under article 12-A, for the purchase of motor fuel located outside the State. D and E agree that D will take delivery of the motor fuel at E's terminal outside the State. D arranges for the transportation from E's premises to its New York terminal. D has imported motor fuel or caused motor fuel to be imported into New York State."

Petitioner contends that it, like "E" in this example, delivered the gasoline to its customer (Anthony Petroleum) outside New York State. However, unlike "E" in this factually simple example, petitioner has, over a ten-month period, filed reports with the State as a distributor of similar gasoline "deliveries" amounting to the shipment of nearly 72,000,000 gallons. For this reason, this example is distinguishable.

72,000,000 gallons of gasoline to a specified customer now introduces a private agreement with such customer to show, in reality, it was not a distributor (cf., Matter of Orvis, Tax Appeals Tribunal, January 14, 1993, revd on other grounds 204 AD2d 916, 612 NYS2d 503, lv granted 84 NY2d 805, 618 NYS2d 7 [wherein the Tribunal observed that regulations should not be expected "to specify every possible nuance of meaning"])). Therefore, based upon the unusual factual circumstances involved in this matter, petitioner may be viewed as having caused to be imported into New York the 9,649,542 gallons of gasoline shipped to Anthony Petroleum in November 1992 because, by its participation as a front for Anthony Petroleum, it brought about the importation of such gasoline in its role as a "distributor". In other words petitioner is properly estopped from denying that it was a "distributor" of the November 1992 shipments at issue (cf., Matter of General Oil Distributors, Inc., Tax Appeals Tribunal, March 14, 1991) [wherein the Tribunal decided that a taxpayer, having accepted the benefit of its registration as a distributor, was estopped from denying such status].

L. Petitioner's argument, based upon the decision of Judge Canfield in Tug Buster Bouchard Corp. v. Wetzler (supra) that the law imposing petroleum business tax violates the commerce clause of the United States Constitution, may not be addressed given the lack of jurisdiction of the Division of Tax Appeals to determine the constitutionality of a statute on its face (see, Matter of Unger, Tax Appeals Tribunal, March 24, 1994). Furthermore, the taxes at issue, as applied to petitioner, a licensed New York distributor of motor fuel, do not violate the commerce clause of the United States Constitution. The imposition of such taxes on petitioner's November 1992 shipments of gasoline to Anthony Petroleum does not discriminate against interstate commerce since such taxes are imposed on the sale of all gasoline in New York (see, Schwartz, The Commerce Clause Quartet, NYLJ, October 18, 1994 [for a discussion of four recent decisions of the United States Supreme Court in which the Court decided that certain state or local laws, which discriminated against out-of-state commerce, were found to violate the commerce clause of the United States Constitution]).

M. The petition of Allegheny Petroleum Corporation is denied, and the three notices and demands, each dated March 8, 1993, are sustained.

DATED: Troy, New York
March 23, 1995

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE

APPENDIX A

<u>Date</u>	<u>Method of</u>	<u>Name of</u>	<u>Purchased</u>	<u>Point of</u>	<u>Point of</u>	<u>Gallons</u> ¹⁶	
<u>Shipped</u>	<u>Delivery</u>	<u>Transporter</u> ¹⁵	<u>From</u>	<u>Sold To</u>	<u>Shipment</u>	<u>Delivery</u>	
(1) 9/2/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum ¹⁷	Carteret, NJ	Brooklyn, NY	420,000
(2) 9/2/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(3) 9/5/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,084
(4) 9/1/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Bayonne, NJ	Oyster Bay, NY	417,935
(5) 9/1/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	208,827
(6) 9/5/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000

15

A Transporter Number was also listed on the report.

16

Gallons were all reported under a column labelled "Column B" for "All Other Gallons". No gallons were listed under a column labelled "Column A" for "Gallons Purchased on Which the Tax has been Passed Through to You."

17

Petitioner also listed an identification number of 22-259-6161 for Anthony Petroleum. The instructions noted that petitioner should:

"Enter 'M' number if purchaser is a registered motor fuel distributor. If not, enter New York State sales tax vendor identification number. If neither of the above is available, enter federal identification number."

(7) 9/5-9/92 ¹⁸	Pipeline	Buckeye	Global Petroleum	Anthony Petroleum	Linden, NJ	Brooklyn, NY	420,000
(8) 9/7-12/92	Pipeline	Buckeye	Global Petroleum	Anthony Petroleum	Linden, NJ	Brooklyn, NY	630,000
(9) 9/14/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(10) 9/14/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(11) 9/4/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	598,869
(12) 9/17/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	422,814
(13) 9/16/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(14) 9/10/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	394,908
(15) 9/11/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Linden, NJ	Oyster Bay, NY	209,035
(16) 9/2/92	Pipeline	Buckeye	Global Petroleum	Anthony Petroleum	Linden, NJ	Brooklyn, NY	20,160

The record does not reveal why several shipments were reported as taking place over a few days, since the gallonage for such shipments did not vary noticeably from shipments apparently completed on a single day.

APPENDIX A (cont'd.)

Date	Method of	Name of	Purchased		Point of	Point of	
<u>Shipped</u>	Delivery	<u>Transporter</u>	From	Sold To	<u>Shipment</u>	<u>Delivery</u>	<u>Gallons</u>
(17) 9/7/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Perth Amboy, NJ	Brooklyn, NY	18,144
(18) 9/16/92	Pipeline	Buckeye	Meridian Resources	Anthony Petroleum	Westville, NJ	Brooklyn, NY	420,000
(19) 9/18-19/92	Pipeline	Buckeye	Coastal Oil	Anthony Petroleum	Westville, NJ	Brooklyn, NY	419,958
(20) 9/16-19/92	Pipeline	Buckeye	Coastal Oil	Anthony Petroleum	Westville, NJ	Brooklyn, NY	420,588
(21) 9/15-16/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	600,540
(22) 9/21-23/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(23) 9/19-28/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(24) 9/23-26/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(25) 9/22/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	605,117
(26) 9/18/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	609,895
(27) 9/26/92	Barge	Ekloff Marine	Texport Oil	Anthony Petroleum	Perth Amboy, NJ	Oyster Bay, NY	126,758
(28) 9/25/92	Barge	Ekloff Marine	Texport Oil	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	499,138
(29) 9/28-30/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(30) 9/30/92	Barge	Ekloff Marine	Texport Oil	Anthony Petroleum	Perth Amboy, NJ	Oyster Bay, NY	615,520
(31) 9/30/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	<u>596,988</u>
						Total	12,875,278

APPENDIX B

<u>Date</u>	<u>Method of</u>	<u>Name of</u>	<u>Purchased</u>		<u>Point of</u>	<u>Point of</u>	
<u>Shipped</u>	<u>Delivery</u>	<u>Transporter</u>	<u>From</u>	<u>Sold To</u>	<u>Shipment</u>	<u>Delivery</u>	<u>Gallons</u>
(1) 10/23-11/2	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,588
(2) 11/2/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	630,168
(3) 11/6/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	423,948
(4) 11/4/92	Barge	Red Star	Texport Oil	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	628,583
(5) 11/11/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	621,348
(6) 11/11/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	394,128
(7) 11/7/92	Barge	Ekloff Marine	Meridian Resources	Ampetrol	Linden, NJ	Inwood, NY	211,269
(8) 11/8/92	Barge	Ekloff Marine	Meridian Resources	Ampetrol	Bayonne, NJ	Inwood, NY	419,045
(9) 11/11/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,000
(10) 11/16/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	420,672
(11) 11/11/92	Barge	Ekloff Marine	Texport Oil	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	630,120
(12) 11/7/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Perth Amboy, NJ	Brooklyn, NY	71,694
(13) 11/16/92	Barge	Ekloff Marine	Meridian Resources	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	612,311
(14) 11/16/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	630,294
(15) 11/8/92	Barge	Ekloff Marine	Northville Ind	Anthony Petroleum	Linden, NJ	Oyster Bay, NY	619,417
(16) 11/19/92	Barge	Ekloff Marine	Texport Oil	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	616,868

(17) 11/20/92	Pipeline	Buckeye	Texport Oil	Anthony Petroleum	Carteret, NJ	Brooklyn, NY	421,260
(18) 11/21/92	Barge	Ekloff Marine	Texport Oil	Anthony Petroleum	Carteret, NJ	Oyster Bay, NY	633,935
(19) 11/25/92	Pipeline	Buckeye	Northville Ind	Anthony Petroleum	Linden, NJ	Brooklyn, NY	422,100
(20) 11/20/92	Pipeline	Buckeye	BP Oil	Anthony Petroleum	Linden, NJ	Brooklyn, NY	402,990
(21) 11/25/92	Pipeline	Buckeye	Northville Ind	Anthony Petroleum	Linden, NJ	Brooklyn, NY	<u>629,118</u>
						Total	10,279,856