STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MODERN OVERLAND DELIVERY, INC.	:	DETERMINATION DTA NO. 812769
for Revision of a Determination or for Refund of Motor Fuel, Petroleum Business and Sales and Use Taxes under Articles 12-A, 13-A, 28 and 29 of the Tax Law for the Period December 1, 1989 through June 30, 1992.	:	

Petitioner, Modern Overland Delivery, Inc., 2355 Westchester Avenue, Bronx, New York 10462, filed a petition for revision of a determination or for refund of motor fuel, petroleum business and sales and use taxes under Articles 12-A, 13-A, 28 and 29 of the Tax Law for the period December 1, 1989 through June 30, 1992.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (James P. Connolly, Esq., of counsel), and petitioner, appearing by Robert B. Borella, CPA, agreed to have the controversy determined on submission without a hearing and the Division of Taxation's representative and petitioner's representative executed a consent form to this effect on May 22, 1995 and May 10, 1995, respectively. All briefs were to have been filed by October 3, 1995. After due consideration of the documents submitted by the parties and the briefs submitted in support of the parties' positions, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division properly determined additional motor fuel, sales and use and petroleum business taxes for the period in issue.

FINDINGS OF FACT

1. The Division of Taxation commenced an audit of Modern Overland Delivery, Inc. ("MOD") on or about January 24, 1992. MOD was a petroleum business operating in the Bronx and was registered as a diesel motor fuel distributor under Article 12-A of the Tax Law. The Division called MOD's president, Mr. Dominic DeRobertis, on January 24, 1992, and when he did not respond, sent him an appointment letter with attached record request by certified mail on January 28, 1992, setting an appointment date of February 25, 1992. An adjournment was granted at the request of MOD and the appointment was changed to March 25, 1992.

At the March 25, 1992 meeting, the auditor examined the forms PT-100, petroleum business tax returns, and a cash disbursements journal which listed suppliers. There was a separate cash disbursements journal for Fred M. Schildwachter Co., Inc., another supplier, but it was not available at this meeting. The auditor also requested forms CT-13-AH, residential use certificates, for the years 1989 and 1990, sales tax returns, and records of sales and purchases for the test months of July 1990 and July 1991, including monthly customer lists. These items were produced at the next meeting on April 9, 1992.

On April 9, 1992, the auditor made a second visit to petitioner's business and received the monthly lists of accounts. Petitioner produced a handwritten sales journal for the month of July 1990, not a computer printout. The sales journal did not have names of customers, only addresses, and the auditor checked this information against the master account list in order to determine customers and if a gross receipts tax was due. This analysis was continued on April 21, 1992, at which time the auditor received copies of the CT-13-AH's, residential use certificates, for Schildwachter, and the handwritten sales journal for July 1991, which also was checked against the master list to determine liability for the gross receipts tax. Subsequently, petitioner produced a handwritten sales journal for December 1990 on May 26, 1992. There were claims that petitioner made sales of No. 2 fuel oil to resellers during July 1990, December 1990 and July 1991, but petitioner did not have available records with regard to all these sales

and promised to produce them later. The cash disbursements journal for Schildwachter was produced, but yielded nothing of significance. Purchase invoices for July 1991 were also checked as were sales tax returns for the quarters ended July 1990 and 1991. However, some schedules were not available.

2. The Article 12-A returns filed by petitioner, MT-1000's prior to September 1, 1990 and PT-100's thereafter, reported that all of petitioner's sales were subject to tax and reported the minimum tax due, claiming that it purchased all of its product on a tax-included basis from one company, Fred Schildwachter. Many of the returns examined were incomplete and had no attached schedules of receipts and sales, form PT-102.1, on which a taxpayer is required to identify from whom and in what quantity it is buying its products and to describe its tax free sales to registered dealers.

3. By letter dated August 27, 1992, after a review of the materials that had been submitted, the Division requested that petitioner file amended returns for the period December 1, 1989 through the date of the letter, reflecting the tax-free receipts and the suppliers and the disposition of the fuel in question. By letter dated September 28, 1992, petitioner filed amended forms PT-100 for the period December 1989 to July 1992. Each of these returns indicated no tax due, but did show tax-free purchases of No. 2 fuel oil from Schildwachter. The quantities of the tax-free purchases were consistent with the information received from Schildwachter. Petitioner claimed that all of the No. 2 fuel oil was sold tax free as heating fuel.

4. The amended returns for the test months for sales of heating oil to customers did not agree with the auditor's analysis of petitioner's sales journals and indicated that petitioner made no sales to registered dealers, as shown on form PT-102, contradicting what the auditor was told. In addition, petitioner did not report its purchases or sales of diesel motor fuel sold to other dealers, a fact confirmed by the auditor's analysis of petitioner's July 1990 sales journal, which omitted sales to other dealers. Petitioner believed that it did not have to report these sales, thinking that the sales to other dealers were tax-exempt.

5. In a letter from the Division to petitioner, dated October 9, 1992, petitioner was informed that key information and materials requested in a prior letter of August 27, 1992 had not been produced and the amended diesel returns filed by petitioner did not identify any dealers to which fuel was sold, nor were any valid exemption or resale certificates submitted with the returns. As a result, the Division informed petitioner that it would assess based upon the "available information" and assume all No. 2 fuel oil was diesel motor fuel and not home heating oil. The gross receipts tax and sales tax prepayment audits were also based, in large part, on the diesel audit and were described as "considerable". The October 9, 1992 letter also informed petitioner that the field audit of New York State gross receipts tax indicated additional unpaid gross receipts tax under Article 13-A of the Tax Law for nonresidential sales other than diesel. The Division explained that the percentage, .2977, was arrived at based on 3 test periods, i.e., the months of July 1990, December 1990 and July 1991.

6. Subsequently, a pre-assessment conference was held with petitioner and its representative on October 29, 1992 at the Westchester District Office. Petitioner's representative, Robert Borella, CPA, produced a computer sales printout for the three test months of July 1990, December 1990 and July 1991. Mr. Borella advised the Division that it should not rely on the handwritten sales journal provided to the auditor but on the computer printouts he had supplied. Although petitioner presented no resale certificates from dealers, it maintained that it made no sales of No. 2 fuel oil to other dealers. However, even the sales journal printout presented by petitioner's representative indicated such sales. In fact, the home heating fuel sales shown on the computer printouts agreed with the home heating fuel sales shown on the handwritten sales journal for the month of July 1991.

7. In a letter dated November 11, 1992, Mr. Borella supplied workpapers indicating sales of No. 2 fuel oil to dealers for the three test months. Sales of No. 2 allegedly were made to four dealers: Relco, Charles Williams Lanzillotto, New York Oil & Service Co., Inc. and New Age Heating Services, Inc. A blanket resale certificate was supplied for each of these companies. From the certificates it was determined that Charles William Lanzillotto and New

York Oil & Service Co., Inc. were not registered as Article 12-A distributors during the test months, discussed further below.

8. Given this background, the Division determined that the books and records of petitioner were inadequate to perform an audit and accurately determine its liability for the fuel taxes due largely because petitioner failed to produce records of sales to other dealers. Once it was discovered that there were sales omitted as indicated in the sales journal and Article 12-A returns, and petitioner was requested to submit amended returns and other documentation, and when information was not provided, the Division resorted to an estimate it calculated based on an extrapolation of the three test months and an assumption that all the unaccounted for receipts were sold as diesel fuel oil and not heating oil. Although petitioner eventually provided information with regard to the dealer sales for the test months, it never provided any information with respect to the other months of the audit period.

9. The Division calculated the amount of additional Article 12-A tax due using the general outline set forth above. It examined the PT-100's to determine the amount of fuel purchased tax free. Then the Division listed all sales of No. 2 fuel oil as set forth on the handwritten sales journal for each of the three test months. It is noted that the handwritten sales journal listed only addresses of customers and the auditor needed to refer to the master list of accounts to determine the names of the customers. The auditor's schedule indicated that petitioner's sales to customers for heating or production averaged only 37.95% of all purchases of tax-free receipts of diesel motor fuel reported on its amended PT-100's, with 62.05% left unaccounted for. The auditor applied these percentages to the remainder of the audit period to arrive at the number of gallons not exempt as heating or production sales.

The Division accepted petitioner's schedule of dealer sales for the three-month test period, but then used the figures to estimate for the remainder of the audit period. The auditor's analysis of the test period figures provided by petitioner showed that 14.70% of claimed sales were to New York Oil & Service and Lanzillotto, neither of which was registered as a motor fuel distributor for the test months. Therefore, the auditor applied a 14.70% disallowance rate

to the accounted for tax-free receipts as gleaned from the amended returns filed by petitioner for the remainder of the audit period and taxed those resulting gallons as taxable sales of diesel motor fuel. The ten cent excise tax rate was then applied to the additional gallons.

10. Based upon this calculation, the Division issued a Proposed Audit Adjustment of Tax Due under Article 12-A, dated dated December 9, 1992, for the period December 1989 through August 31, 1990 setting forth additional tax due of $5,797.20, plus penalty and interest. It also issued a Proposed Audit Adjustment of Tax Due under Article 12-A, dated December 9, 1992, setting forth tax due for the period September 1, 1990 through June 30, 1992 in the sum of $18,615.00, plus penalty and interest. The Division issued a Notice of Determination, dated February 16, 1993, to petitioner which set forth additional tax due under Article 12-A of $5,797.20 plus penalty and interest for the period December 1, 1989 through August 31, 1990. A second Notice of Determination was issued to petitioner, dated March 5, 1993, assessing additional tax due under Article 12-A in the sum of $18,615.00, plus penalty and interest for the period September 30, 1990 through June 30, 1992.

11. With respect to the Article 13-A tax assessed by the Division, it is noted at the outset that petitioner's liability for the nonautomotive component of the Article 13-A tax depended only on petitioner's sales to end-users, i.e., sales to businesses for heating and production of tangible personal property. The Division deemed petitioner's sales journal an adequate record of the nonautomotive sales and therefore offered petitioner a test period agreement for that portion of the audit. Petitioner agreed to use of the test period June 1, 1989 to the date of the agreement, August 4, 1992. This portion of the tax due was not addressed by the parties.

The Article 13-A petroleum business tax has four components: sales of motor fuel, sales of automotive diesel motor fuel, sales of nonautomotive diesel motor fuel and sales of residual petroleum products. The test period agreement applied to the sales of nonautomotive diesel motor fuel. An exemption from the petroleum business tax is provided for sales of enhanced

diesel motor fuel as residential home heating fuel by registered dealers as a distributor of diesel motor fuel.

The actual audit by the Division was based largely on the determinations made in the Article 12-A audit. The calculation of the nonautomotive diesel motor fuel component was made by taking petitioner's heating fuel sales as determined in the Article 12-A audit and determining the percent of those sales which would qualify as nonexempt heating sales under Article 13-A, i.e., all gallons other than those sold as residential heating fuel. These nonresidential heating sales under Article 13-A were arrived at by analyzing petitioner's sales of No. 2 fuel oil, arriving at 29.77% as the percentage of heating sales which were nonresidential heating sales subject to the nonautomotive component of the petroleum business tax. These nonresidential heating sales were multiplied by the nonautomotive diesel fuel component rate to arrive at the additional tax due under the nonautomotive diesel fuel component.

As a result, the Division issued a Notice of Determination, dated March 8, 1993, which set forth additional petroleum business tax due of $23,159.00, plus penalty and interest for the period September 1, 1990 through June 30, 1992.

The Division's calculation of the automotive diesel motor fuel component took the tax-free receipts of diesel motor fuel which were found to be unaccounted for on the Article 12-A audit, and thus presumed to be taxable sales of diesel motor fuel, and multiplied those gallons by the automotive diesel motor fuel component rate, .0633. For the automotive diesel motor fuel component of the Article 13-A tax, the Division issued a second Notice of Determination, dated February 16, 1993, which set forth additional tax due of $20,748.00 plus penalty and interest, for the period September 1, 1990 through June 30, 1992.

In addition, the Division assessed penalty pursuant to Tax Law former § 311, which assessed penalty for failure to provide residential use certificates as required by Tax Law § 303(b). In this regard, the Division issued a Notice of Deficiency, dated February 16, 1993, which assessed penalty only pursuant to Tax Law § 311 for the periods ended December 31, 1989 and November 15, 1990, in the total sum of $7,680.35.

Finally, the Division assessed additional sales and use taxes, or prepaid sales tax liability, using the gallons of diesel motor fuel which could not be accounted for in the Article 12-A audit. These gallons were presumed to have been the subject of taxable sales to unregistered dealers. The gallons were multiplied by the sales tax prepayment rate and resulted in additional tax of $22,096.00 plus penalty and interest, for the period September 1, 1989 through June 30, 1992.

12. The Division submitted the affidavit of Peter Spitzer, an excise auditor with the Registration/Bond Unit of the Department of Taxation & Finance. Mr. Spitzer supervised the maintenance of the unit's records. In the regular course of the unit's business, it maintains a list of entities that have been registered as distributors under Article 12-A of the Tax Law. In addition, the unit maintained a list of entities to which the unit has granted registrations under Articles 12-A and 13-A of the Tax Law and also current files of all entities which have been granted distributor status. Mr. Spitzer produced with his affidavit lists of Article 12-A registrations dated April 1, 1990, and also supplemental lists for the periods April 1, 1990 through May 31, 1990 and also the period June 1, 1990 to June 30, 1990. There was also a list of the 12-A registrations as of August 1, 1990. Neither Charles William Lanzillotto nor New York Oil & Service Co., Inc. appear on the lists.

Mr. Spitzer also checked current files for these same two entities and found that Charles William Lanzillotto was issued a registration as a retailer of heating oil only on February 10, 1992. New York Oil & Service was granted the same type of license on January 2, 1992. Mr. Spitzer also reviewed the unit's computer data base of entities registered under Articles 12-A and 13-A and found that the same two entities were registered as retailers of residential heating oil only on the same dates as the Article 12-A registrations. Mr. Spitzer concluded, on the base of his search, that Charles William Lanzillotto and New York Oil & Service were first registered as retailers of residential heating oil on February 10, 1992 and January 2, 1992, respectively.

13. Modern Overland Delivery, Lanzillotto and New York Oil & Service executed blanket resale certificates in November 1992, over four months after the end of the instant audit period, which purportedly covered the audit period.

14. Petitioner submitted two quarterly sales and use tax returns for "New York Oil & Service Corp.", forms ST-100, for the quarters December 1, 1991 through February 29, 1992 and June 1, 1992 through August 31, 1992. The return for the period ended February 29, 1992 indicated that the company was in the fuel oil and service business, made $60,914.00 in gross sales, $57,830.00 in taxable sales and stated tax due of $2,686.85. The return for the period ended August 31, 1992 set forth gross sales of $31,088.00, taxable sales of $30,863.00 and stated a tax due of $1,421.24. Neither return was signed, although they were both imprinted with a stamp which identified them as copies. No address for the business was set forth on either return and it is not known if the tax stated as due was paid.

15. Petitioner also submitted a New York State and Local Sales and Use Tax Return for Limited Jurisdictions on behalf of Charles Lanzillotto-Energy Consultant, for the quarter ended August 31, 1991, which set forth its business as energy consultant, gross sales of $17,851.00, taxable sales of $2,375.00 and a tax due of $147.97. A second return submitted on behalf of Lanzillotto was a form PT-200, Quarterly Petroleum Business Tax Return of a Retailer of Heating Oil Only and a Distributor of Kero-Jet Fuel Only, for the quarter ended August 31, 1992, which set forth the taxpayer's name as "Charles W. Lanzillotto, C L Fuel Co." and listed it as a retailer of heating fuel only. The second page attached to the PT-200 was a form PT-201, Retailers of Heating Fuel Only, for the same period, which indicated that all sales were through third parties and that all sales were residential. The form PT-201 indicated no inventory for the quarter, no purchases and no sales. Neither of the returns filed on behalf of Lanzillotto were signed and both were marked as "client's copy".

16. Petitioner also submitted delivery tickets and bills for sales to Charles Lanzillotto and New York Oil & Service for the test months of July 1990, December 1990 and July 1991.

The bills submitted were to both Lanzillotto and New York Oil & Service and amounted to $2,441.00 for July 1990, $8,383.00 for December 1990 and $1,541.00 for July 1991.

17. Petitioner submitted a schedule it prepared, which set forth what it alleged were the true tax-free receipts total, billings and the difference. The schedule set forth the following:

	Tax Free Receipts	Billed	Variation
July 1990	$ 18,846.	$ 18,799.	47
December 1990	$102,748.	$ 96,900.	$5,848.
July 1991	$ 23,102	$ 24,121.	($1,019.)
Total	$144,696.	$139,820.	$4,876.
Variation Percentage			3.36%

SUMMARY OF THE PARTIES' POSITIONS

18. Petitioner contends that it is not liable for any additional tax under Articles 12-A, 13-A or 28/29. It believes the Division erred in taking the position that diesel fuel sold by Charles William Lanzillotto and New York Oil Service Co. Inc. was subject to tax because the fuel was purchased from petitioner and sold by those vendors exclusively as heating oil. Petitioner contends that it is responsible for purchasing, delivering and billing on behalf of those companies as their agent and duly reported all sales and paid all the taxes that were due. Petitioner believes that a review of the test period sales journal and the delivery tickets shows that all shipments of diesel fuel were exclusively for home heating oil sales.

19. Petitioner also contends that the Division erred in relying on the handwritten records and not the computer printout it produced later. Petitioner argues that this record proved it kept adequate books and records.

20. Finally, petitioner argues that proof that its records are adequate can be found in the fact that actual sales per the sales journal reconciled to tax free receipts per the PT-100's within 3.36%.

21. The Division takes the position that petitioner's sales of diesel motor fuel to dealers not registered as diesel motor fuel distributors were taxable under Tax Law Articles 12-A, 13-A and 28/29. The Division did not recognize as tax free the sales to Lanzillotto and New York Oil

& Service because they were not registered dealers. The Division contends that petitioner did not meet its burden of proof despite the documentation provided.

CONCLUSIONS OF LAW

A. Tax Law § 282-a(1) imposes an excise tax on the sale of diesel motor fuel. The tax is imposed on the first sale or use of diesel motor fuel to occur which is not exempt from tax under Article 12-A. The term diesel motor fuel includes kerosene, crude oil, fuel oil or other middle distillate and motor fuel suitable for use in the operation of diesel type engines (Tax Law § 282[14]). The Tax Law specifically provides that no person can enhance motor fuel, make a sale of diesel motor fuel or import or cause the importation of diesel motor fuel into this State unless such person is registered by the Department of Taxation and Finance as a distributor of diesel motor fuel (Tax Law § 282-a[2]).

Certain sales of diesel fuel are specifically exempt from tax. One of these is the sale or use of the previously untaxed fuel which has not been enhanced and is used exclusively for heating purposes or for use or consumption directly and exclusively in the production of tangible personal property (Tax Law § 282-a[3][b][i]). Another exemption is provided for sales of previously untaxed diesel motor fuel, which is not enhanced, to a person registered under Article 12-A as a distributor of diesel motor fuel, other than a retail sale to such person, or a sale to such person which involves a delivery to a filling station or any other place which is equipped with apparatus for filling fuel tanks of motor vehicles (Tax Law § 282-a[3][b][ii]).

Tax Law § 285-b(1) provides that there is a presumption of taxability with respect to diesel motor fuel. With the exception of specific instances not present herein, no person is to purchase diesel motor fuel unless the Article 12-A taxes have been assumed by a registered distributor of diesel motor fuel.

With regard to the exemptions set forth above, i.e., those at Tax Law § 282-a(3)(b)(i) concerning fuel used exclusively for heating purposes, Tax Law § 285-b(3) provides that the exemption must be established by an exempt transaction certificate. The section continues:

> "If any such exemption is applicable, such certificate shall be provided by the purchaser to the seller at the time of or prior to delivery of the Diesel motor fuel.

> Such exempt transaction certificate shall set forth the name and address of the purchaser and the basis of the exemption and shall be signed by such purchaser and by the seller. Such certificate shall be in such form and contain such other information as the commissioner of taxation and finance shall require." (Tax Law § 285-b[3][a].)

Since it was established through the affidavit of Peter Spitzer that Charles William Lanzillotto and New York Oil & Service were not registered motor fuel distributors during the test months in issue, and only registered in the last few months of the audit period, coupled with the fact that petitioner supplied no records regarding sales other than for the months being tested and even those were incomplete, it is determined that petitioner has not demonstrated that it was making sales to anyone other than unregistered entities and therefore did not qualify for the resale exemption provided for under Tax Law § 282-a(3)(b)(ii).

The blanket resale certificates executed by Lanzillotto, New York Oil & Service and Modern Overland Delivery in November 1992 do not establish grounds for a resale exemption for months during the audit period, since it ignores the fact that Lanzillotto and New York Oil & Service were not registered prior to 1992.

Also problematic is petitioner's inability to account for all of what it claims were tax-free receipts which were indicated on the amended PT-100's. The computer printout sales journal provided by petitioner included sales to Lanzillotto and New York Oil & Service which it has been determined cannot be tax free due to the fact that those two entities were not registered dealers and therefore could not qualify for the resale exclusion provided for by Tax Law § 282-a(3)(b)(ii).

As a secondary argument, petitioner claims that the sales to Lanzillotto and New York Oil & Service should be tax free because those entities sold exclusively residential heating fuel. However, as stated above, the primary issue is whether it sold to registered dealers. Lanzillotto and New York Oil & Service were still unregistered dealers of diesel motor fuel and, as such, sales to them were not exempt (Tax Law § 282-a[3][b][ii]). Any sales by Lanzillotto and New York Oil & Service were not exempt because, lacking evidence to the contrary, it must be assumed that they were making sales of diesel motor fuel when not registered to do so (see Tax

Law § 282-a[2]). Further, petitioner's evidence in support of its position that the two companies sold only home heating fuel does not establish that the companies sold only home heating oil for the entire audit period. Lanzillotto was not granted a distributor's license until February of 1992 and filed a PT-200, quarterly petroleum business tax return of a retailer of heating oil only, for the quarter ended August 31, 1992 and a quarterly sales and use tax return for the quarter ended August 31 1990. The sales tax return is not probative because it was purportedly filed long before Lanzillotto received its license. The PT-200, without more, is not proof that Lanzillotto did not make any taxable sales during the quarter because even the sales tax return indicated some taxable sales. Since the return is not executed and it is not known if this is the return filed with the Division and no one testified or provided a sworn affidavit, it must be accorded little weight.

The two quarterly sales and use tax returns filed by New York Oil and Service did state a substantial percentage of taxable sales but there are many unanswered questions raised by them. It is not known if these were the returns filed by New York Oil and Service or if it was also making the same claim of selling heating oil to residential customers only. Once again, without testimony or an affidavit by someone with personal knowledge, the returns can not be accorded much probative weight.

The Division's use of the audit methodology was proper given the documentation presented by petitioner. The Division made several requests for information but petitioner was never able to provide adequate books and records to support the number of tax-free receipts it claimed on its amended PT-100 returns.

Tax Law § 286 provides that every person who purchases or sells diesel motor fuel in New York shall keep a complete and accurate record of all purchases and sales, uses or other disposition. The section also requires the records to be in such form and contain such other information as the Commissioner of Taxation and Finance shall prescribe. The regulation at 20 NYCRR 413.4 provides the same requirements as Tax Law § 286 and also requires that complete and accurate records must be kept for any information the Division may require,

including sufficient information so as to properly complete and substantiate any return, report or certification required by or pursuant to the authority of Article 12-A.

Further, with regard to the exemption from tax claimed by petitioner, the Division's regulations provide that motor fuel may be exempt from the tax under Article 12-A but that any person or entity purchasing motor fuel and entitled to an exemption from tax must furnish the seller with proper documentation substantiating its right to the exemption. Only if the purchaser presents this documentation may the seller not pass through the tax. The documentation must be kept for three years from the date the transaction was required to be reported or the date it was actually reported (20 NYCRR 414.1[c][1]). In addition, the regulations clearly state that the burden of proving that any sale of motor fuel is not subject to tax is on the purchaser of motor fuel and also on the person required to pass through the tax (20 NYCRR 414.1[d][1]). Given the record established in this matter, petitioner has not established entitlement to the exemption claimed. The Division gave petitioner ample opportunity to substantiate the unaccounted for exempt sales, but it failed to do so. As such, the Division properly assessed the Article 12-A tax on those receipts for which petitioner could not establish the exemption from tax.

B. The Division's sales tax audit was based upon the unaccounted for sales to Lanzillotto and New York Oil and Service for the liability for prepaid sales tax. As Tax Law § 1102(a)(2) provides:

> "Every distributor of diesel motor fuel shall pay, as a prepayment on account of the taxes imposed by this article . . . a tax upon the sale or use of diesel motor fuel in this state . . . . The prepaid tax on diesel motor fuel shall not apply to the sale of previously untaxed diesel motor fuel which is not enhanced Diesel motor fuel to a person registered as a distributor of Diesel motor fuel other than a sale to such person which involves a delivery at a filling station or into a repository with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle . . . ."

Therefore, for each gallon of diesel motor fuel unaccounted for and ultimately held taxable for Article 12-A purposes, petitioner owes the prepaid tax described in Tax Law § 1102. The determination of additional sales and use taxes due is sustained.

C. Article 13-A imposes an annual tax on petroleum businesses for the privilege of engaging in business, doing business or maintaining an office in New York State. (Tax Law § 301.) In addition, There is also a monthly tax on petroleum businesses based on four components, i.e., motor fuel, automotive-type diesel motor fuel, nonautomotive-type diesel motor fuel and the residual petroleum products (Tax Law § 301-a[a]). The nonautomotive-type diesel motor fuel component is determined using the number of gallons of diesel motor fuel sold by the petroleum business (Tax Law § 301-a[c][2]). As in the other Tax Law Articles, Article 13-A provides that there is an exemption from the tax imposed by Tax Law § 301-a for sales of diesel motor fuel to registered diesel motor fuel distributors (Tax Law § 301-b[e]). Diesel motor fuel sold by a person registered under Article 12-A as a distributor to another registered distributor is exempt (Tax Law § 301-b[e][1]). Since this was not the case in the instant matter, the sales to Lanzillotto and New York Oil and Service were properly taxable under Article 13-A.

D. Although not seriously argued by petitioner in its brief, it contended that the relationship between petitioner and the two companies was "in effect" an agency arrangement, where petitioner reported the sales and paid the tax on behalf of Lanzillotto and New York Oil and Service, since petitioner took responsibility for purchasing, delivering and billing for the two companies. However, the record does not contain any evidence that this was the case, not even a de facto agency arrangement. There was no formal agency agreement in evidence and no evidence that petitioner was doing business under the names of the other two entities. Since petitioner bears the burden of demonstrating that such an arrangement existed, it is determined that it has not done so and that there was no agency relationship (20 NYCRR 414.1[d][1]).

E. The petition of Modern Overland Delivery, Inc. is denied and the five notices of determination and one notice of deficiency, as more fully described in Findings of Fact "10" and "11" above, are sustained.

DATED: Troy, New York
March 28, 1996

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