STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
O & R ENERGY, INC. **N/K/A NORSTAR HOLDINGS, INC.**	:	DETERMINATION
	:	DTA NO. 815488
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9 of the Tax Law for the Years 1991 through 1993.	:	
	:	

Petitioner, O & R Energy, Inc., now known as Norstar Holdings, Inc., 28 West Grand Avenue, Montvale, New Jersey 07645, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9 of the Tax Law for the years 1991 through 1993.

On August 4, 1997 and August 8, 1997, respectively, petitioner by its representative, Henry F. Chiwaya, Esq., and the Division of Taxation by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by March 4, 1998, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation's denial of a refund for the taxes paid under Article 9 of the Tax Law for the years 1991 through 1993 was improper where, following petitioner's

payment of such tax, the Division agreed not to audit or assess certain other taxpayers for potential liabilities arising under Article 9 of the Tax Law for years prior to 1994.

FINDINGS OF FACT

1. Petitioner, a subsidiary of Orange & Rockland Utilities, Inc., is a Delaware corporation that is primarily engaged in the business of marketing natural gas.

2. Petitioner first opened a New York office and began marketing natural gas in New York State on or about January 10, 1991.[1]

3. During the 1991 tax year, petitioner had more than $146 million in gross receipts or sales, with more than $60 million of that amount attributed to the sale of tangible personal property shipped to points within New York State.

4. As a marketer of natural gas for ultimate consumption within New York State during the 1991, 1992 and 1993 tax years, petitioner was subject to tax under Article 9, sections 186 and 186-a of the Tax Law.

5. For the 1991 tax year, petitioner erroneously determined that it was subject to Article 9-A and not Article 9. As a result, petitioner filed a General Business Corporation Franchise Tax Return late on or about September 15, 1992, along with a payment of the tax and interest determined to be due ($120,859.00).[2]

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[1] The date of January 10, 1991 was the date listed by petitioner on the 1991 General Business Corporation Franchise Tax Return as the date when petitioner began business in New York State. Subsequent returns filed by petitioner listed the date of initial operation in New York State as August 1, 1991. In the absence of evidence to the contrary, the first reported date is deemed to be the date when petitioner began business in New York State.

[2] Although petitioner calculated the late filing and late payment penalties due with its 1991 Corporation Franchise Tax Return and listed such amount on line 70 of its return, the amount was not remitted with the return.

6. For the 1991 tax year, petitioner also filed a Metropolitan Transportation Business Tax Surcharge Return (form CT-3M/4M) late on or about September 27, 1994. This return reported a surcharge due of $24,362.00 but failed to include any remittance.[3]

7. The Division did not conduct an audit of petitioner's erroneously filed 1991 Article 9-A returns.

8. As of September 15, 1992, petitioner had not filed either a form CT-186 (Franchise Tax Return - Gross Earnings of Electricity, Water, Steam, or Gas Companies), a form CT-186-M (Metropolitan Transportation Business Tax [MTA Surcharge] Return), a form CT-186-A (Utility Services Tax Return - Gross Operating Income), a form CT-186-A/M (Metropolitan Transportation Business Tax Surcharge Return) or a form CT-240 (Report of License Fee on Foreign Corporations) for any tax period.

9. On or about March 15, 1993, petitioner filed two applications for automatic six-month extensions for filing a franchise business tax return (form CT-5) regarding its 1992 CT-3 and CT-3M/4M, along with payment in the amount of $16,500.00. However, petitioner did not ultimately file a CT-3 or CT-3M/4M for the 1992 tax year.

10. In July 1993, attorneys Mark Klein and Christopher Doyle, of the Buffalo law firm Hodgson, Russ, Andrews, Woods & Goodyear, requested a meeting with Division representatives at the Division's Buffalo District Office to discuss the taxability of one of their clients, an out-of-state utility company. The identity of the taxpayer in question, although not revealed to the Division at that time, was petitioner.

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[3] Petitioner was subsequently assessed for the amount actually computed to be due by the Division ($13,743.35). However, this assessment was canceled after it was discovered that petitioner was not required to file and pay tax under Article 9-A of the Tax Law.

11. As a follow-up to the aforementioned meeting, Mr. Doyle wrote a letter to the Division, dated July 29, 1993, to set forth again the details of their unidentified client's situation. According to Mr. Doyle, the taxpayer had not properly filed and paid pursuant to Article 9, §§ 186 and 186-a for the 1991 and 1992 tax years, but rather had improperly filed and paid tax under Article 9-A. The letter further set forth a settlement proposal for dealing with the taxpayer's situation. Pursuant to this proposal, the taxpayer would voluntarily come forward and file the appropriate Article 9 returns for 1991 and 1992. In return, the Division would not assess late filing or payment penalties against the taxpayer. In addition, the taxpayer would be given credit for any Article 9-A tax, penalty and interest that had already been paid.

12. Generally, it is the Division's policy to approach agreements involving voluntary disclosures on a case-by-case basis, depending upon the facts of each particular situation. In this case, the Division concluded that the best way to proceed was to agree to the terms proposed by Mr. Klein and Mr. Doyle. The Division's determination was based, in part, upon the fact that in the absence of the agreement the Division would be unable to pursue the taxpayer in question because it did not know the identity of the nonfiler and was without the means to ascertain its identity. In addition, there was no guarantee that this nonfiler would eventually ever come forward and begin filing the appropriate returns and paying the tax due under Article 9. Therefore, in order to maximize taxpayer compliance with the Tax Law and keep viable businesses in New York State, the Division accepted the terms proposed by petitioner's representatives.

13. Petitioner filed forms CT-186, CT-186-M, CT-186-A, CT-186-A/M and CT-240 returns for the 1991 and 1992 tax years late on or about November 15, 1993.[4] It was at this time that the Division became aware of petitioner's identity.

14. The Division received a check in the amount of $346,262.00 from petitioner's representative on or about November 19, 1993. This payment constituted the amount of Article 9 tax owed by petitioner for the 1991 and 1992 tax years (including the CT-240 license fee), plus interest and minus the Article 9-A taxes and interest that had previously been paid. The amount of tax due had been calculated by the Division and agreed to by petitioner.

15. Petitioner timely filed its 1993 Article 9 returns on extension (forms CT-186, CT-186-M, CT-186-A, CT-186-A/M) on or about September 15, 1994. No remittance accompanied the foregoing returns due to the fact that petitioner's prepayment had placed it in a position where no tax was due.

16. At no time has the Division ever conducted an audit of the Article 9 returns filed by petitioner for the 1991, 1992 and 1993 tax years.

Petitioner's Refund Claim

17. On or about August 29, 1996, petitioner filed amended returns for the 1991, 1992 and 1993 tax years claiming refunds for the Article 9, §§186 and 186-a taxes paid in the amounts of $188,999.00 (1991), $138,684.00 (1992) and $20,981.00 (1993).

18. The basis for petitioner's refund claims was a letter dated January 10, 1995 that had been sent by John B. Langer, former Deputy Commissioner for Operations, to Mark Klein (in his capacity as the representative for other gas marketers), wherein petitioner alleges the Division set

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[4] The Division did not receive a 1991 form CT-186-M from petitioner. However, the Division received two 1991 forms CT-186-A/M containing different information. It is possible that petitioner intended one of these returns to be the CT-186-M. However, such an assumption has not been verified by petitioner.

forth its "policy of forgiveness of Article 9 tax for all gas marketers who were not in compliance with the requirements of Article 9 for tax years prior to 1994."

19. The Division denied petitioner's refund claim by letter dated September 19, 1996.

20. As expressed in its refund denial letter dated September 19, 1996, the basis of the Division's denial of the refunds was a determination that petitioner was correctly classified as an Article 9, §§186 and 186-a taxpayer and that it had properly filed (albeit late for 1991 and 1992) the appropriate returns and remitted the correct amount of tax for the 1991 through 1993 tax years. Thus, the Division determined that there was no legal basis to grant the refunds.

Background of Letter Dated January 10, 1995 to Mark Klein

21. Following the negotiation of the settlement of petitioner's outstanding Article 9 liabilities, Mr. Klein met with the Commissioner regarding some proposed legislation involving the section 186 and 186-a taxes. Also present at this meeting was a representative of the Independent Oil and Gas Association of New York ("IOGA"), a lobbyist for the oil and gas industry and the president of a natural gas marketing company (not petitioner herein). At the conclusion of the meeting, the Commissioner asked the Audit Division to take a closer look at the proposed legislation and work with these individuals to address their concerns.

22. Several follow-up discussions were held between Division representatives and the aforementioned individuals. One of the main topics of discussion at these meetings was the apparent confusion that many of Mr. Klein's clients allegedly had regarding their obligations under Article 9, sections 186 and 186-a.

23. Without providing the names of any of his clients, Mr. Klein indicated that he represented many small farmers who had no business backgrounds and small operating budgets, thus they could not afford full-time accountants or attorneys and could not themselves understand

the provisions of Article 9, which he characterized as very complex. Mr. Klein acknowledged that these taxpayers should have been filing returns and remitting tax under Article 9, but that most or all had not been doing so. Mr. Klein further represented that these taxpayers now recognized their obligations and intended to file and remit the tax due for the 1994 tax year and all subsequent years.

24. During these discussions, Mr. Klein also expressed his concern that requiring these taxpayers to pay the Article 9 tax due for all prior years could force many of them out of business. These taxpayers had such small operating budgets and so few customers that they would have been financially unable to pay for all the prior years remaining open under the statute of limitations for assessment. As a result, Mr. Klein proposed that his unidentified clients file returns beginning with the current tax year (1994) and that the Division would not audit them for any years prior to 1994.

25. In response to Mr. Klein's settlement proposal, the Division expressed its concern that such an agreement could be viewed unfavorably by other taxpayers in the industry that had already come forward and appropriately paid the tax due under Article 9. In particular, it was brought to Mr. Klein's attention that he had represented at least two other taxpayers and had negotiated different agreements with the Division in regard to their voluntary disclosures that were not as favorable as the proposal under discussion. The Division originally suggested that the two parties go back three years and require that returns be filed and the tax paid for those years. However, Mr. Klein repeatedly assured the Division that most of those taxpayers who had already paid were his clients and that the main concern of all of his clients was that there be a level playing field for the future. He further indicated that none of his clients (including

petitioner) would be filing refund claims for past years because the focus was not on any perceived prior inequities, but was solely creating a level playing field in the future.

26. The Division ultimately determined that the best way to proceed in this situation was to agree to the terms proposed by Mr. Klein. The Division's determination was based, in part, upon the fact that in the absence of the agreement the Division would be unable to pursue the taxpayers in question because it did not know the identities of the taxpayers who did not file returns and was without the means to ascertain their identities. In addition, there was no guarantee that these taxpayers who did not file returns would eventually ever come forward and begin filing the appropriate returns and paying the tax due under Article 9. Furthermore, the fact that these taxpayers were described as very small, unsophisticated operations that had no accounting departments and could be forced out of business if prior years were audited was found to set the situation apart from those who had already been the subject of a voluntary disclosure. Therefore, in order to maximize taxpayer compliance with the Tax Laws and keep viable businesses in New York State, the Division accepted the terms proposed by Mr. Klein.

27. The Division subsequently confirmed its agreement with Mr. Klein in a letter dated January 10, 1995 from Deputy Commissioner John B. Langer.

28. The letter dated January 10, 1995 provided, in pertinent part, as follows:

> On December 1, 1994, we met with you and several other persons concerning the application of sections 186 and 186-a of the Tax Law to gas producers, sellers and marketers. You concurred with other persons from the industry attending this meeting (as well as an earlier meeting) that there had been significant confusion among many people in the natural gas distribution industry about their functions as 'sellers' or 'marketers' in the natural gas distribution system. . . . You advised that some well-counseled firms in the industry had, notwithstanding this confusion, met their legitimate Article 9 state tax obligations and were most concerned about 'leveling the playing field' for the future rather than the perceptions of past 'inequities'.

> Subsequently, you and others were advised that the Department acknowledged that the confused state of affairs within the industry and the strong desire of those who would have paid their apparent Article 9 state tax obligations to begin filing and paying appropriately for 1994, required us to rethink our audit program in this area. Specifically, we have advised that with respect to companies which voluntarily come forward, properly file, and, where appropriate, pay their article 9 tax liabilities (generally arising under sections 186 and 186-a) beginning with tax year 1994 and all subsequent periods we will eschew our authority to audit such companies for potentially similar liabilities for pre-1994 tax periods. Obviously, companies who do not desire to meet their tax obligations by coming forward as proposed cannot claim 'good faith' uncertainty as to any of their obligations (now or before) and will be subject to audit.
>
> We confess to some confusion as to your questions about refund claims in light of your statements about the appropriate and careful tax advice which had been afforded to certain companies within this industry that they were obligated to make filings and payments pursuant to Article 9. If tax liabilities were due, owing and appropriately paid, obviously 'refund' claims will be denied.

29. The Division submitted an affidavit from John Verde, Program Manager of Corporation Tax Field Audit, regarding its intent in issuing the foregoing letter. According to Mr. Verde, the Division sought to encourage taxpayers who had not complied with the Tax Law to come forward and pay their taxes, as well as respond to Mr. Klein's request to "level the playing field" for the future. Mr. Verde stated that the Division was attempting to be fair to companies whom Mr. Klein asserted did not understand the law and who could not remain financially viable if they were to be audited for prior years. In addition, due to the fact that Mr. Klein refused to tell the Division who his clients were, the Division determined that agreeing to the proposal was the best solution. In the absence of an agreement, there was a distinct possibility that the taxpayers who did not file returns might never be identified and might never get on the tax roll, since the Division did not have an audit program in place and did not have the means to go back and find every company that should have been filing returns. As a result, the

Division determined that it should at least get every company filing as of the current tax year so that there would be no further inequities in the future.

30. The Division's position with respect to any refund claims was set forth in the letter dated January 10, 1995, i.e., there is no authority in the Tax Law to allow a refund of tax properly paid.

31. The Division detected no measurable increase in the number of Article 9 returns filed for the 1994 tax year in response to the issuance of the letter dated January 10, 1995. In fact, only three or four taxpayers actually came forward and addressed their filing responsibilities by specifically citing to the January 10, 1995 letter.

Clarification of the Division's Position

32. In May of 1995, the Division received a refund claim from a natural gas marketer and seller ("Taxpayer A").[5] Similar to petitioner, Taxpayer A had been represented by Mr. Klein with respect to the voluntary disclosure of its failure to file returns and pay tax due under Article 9 of the Tax Law for the 1991, 1992 and 1993 tax years.

33. Mr. Klein first approached the Division on Taxpayer A's behalf in early 1994 in an attempt to reach an agreement with respect to Taxpayer A's failure to file and remit. In accordance with his standard practice, Mr. Klein would not reveal Taxpayer A's identity until the Division agreed to his terms. The terms proposed by Mr. Klein were different from those subsequently proposed for his unidentified group of farmers in late 1994, as well as those previously proposed on behalf of petitioner in 1993.[6]

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[5] Taxpayer A's refund claim was denied by a letter dated August 24, 1995.

[6] Under the terms proposed by Mr. Klein, Taxpayer A agreed to file returns for the 1991, 1992 and 1993 tax years in return for the Division's agreement not to assess penalties for those years or to assess Taxpayer A for any tax years prior to 1991.

34. The terms proposed by Mr. Klein for Taxpayer A were subsequently accepted by the Division. According to Mr. Verde, the terms were accepted based, in part, upon the fact that in the absence of the agreement the Division would be unable to pursue the taxpayer in question because it did not know its identity and was without the means to ascertain its identity. In addition, there was no guarantee that this taxpayer would ever eventually come forward and begin filing the appropriate returns and paying the tax due under Article 9. Moreover, the Division determined that accepting the settlement proposed would help it obtain its mandated objective of maximizing taxpayer compliance with the Tax Laws.

35. Based upon Mr. Klein's repeated assurances in 1994 that none of his clients (including Taxpayer A) would be filing refund claims, and the fact that Mr. Klein's stated goal was to level the playing field for the future, the Division determined that a follow-up letter to Mr. Klein was required due to the refund claim that was filed by Taxpayer A.

36. In a letter dated March 12, 1996, Acting Deputy Commissioner of Operations Harris Sitrin wrote a letter to Mr. Klein wherein the Division attempted to clarify its audit and refund position and eliminate any possible misconceptions that might have arisen.

37. The March 12, 1996 letter states, in pertinent part, that:

> As you recall, the [January 10, 1995] correspondence provided the opportunity for those companies subject to the [186 and 186-a] tax to come forward and properly address their Article 9 tax liability for 1994 and future years. To date, several companies have come forward to address their filing responsibility.
>
> To assure that the Department's position is the proper position required by law, I have sought the advice of Counsel. That advice is stated as follows:
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> 1. The Commissioner or his delegate does have the power to encourage non-compliant taxpayers to come forward and pay taxes due and comply with the law, equally;

2. The audit selection process is the prerogative of the Commissioner. Simply put, the taxpayers and the periods selected are solely his discretion.

3. The Commissioner's power to promote voluntary compliance should not be misconstrued as a forgiveness of past liabilities of taxpayers who properly paid tax;

4. The law is clear that properly paid taxes cannot be refunded; and

5. This position was adequately clear in the January 10, 1995 letter, and any refund claims based on past properly paid taxes must be denied.

To eliminate any perceived misconceptions, the portion of the letter, not consonant with the Counsel's opinion, is withdrawn. All entities and persons liable for the tax are subject to the regular audit and selection processes of this Department.

38. In response to the aforementioned letter, Mr. Klein transmitted a letter to Mr. Sitrin, dated March 15, 1996, wherein he indicated that he believed the Division's position had been consistent throughout and that taxpayers who properly paid their Article 9 tax liabilities would not be entitled to refunds.

Additional Facts

39. The Division has acknowledged that it has not audited the three or four taxpayers that came forward under the terms of the January 10, 1995 voluntary disclosure settlement agreement.

40. There is no evidence in the record to indicate that the Division has ever audited any taxpayer subject to Article 9, sections 186 and 186-a, with respect to such tax liabilities for any tax year.

41. There is no evidence in the record to indicate whether petitioner has ever attempted to recoup the taxes in question from its customers pursuant to section 189 of the Tax Law.

SUMMARY OF THE PARTIES' POSITIONS

42. Initially, petitioner argues that the policy announced and implemented by the Division effectively repealed the Article 9 tax on gas marketers who were not in compliance with the Tax Law for periods before 1994. According to petitioner, the letter from Mr. Langer "announced a voluntary disclosure program for non-compliant gas marketers which constituted an administrative repeal of the applicable Article 9 taxes." (Petitioner's brief, p. 3.) Petitioner's brief states that:

> The voluntary disclosure program adopted and implemented by the Division extended far beyond standard voluntary disclosure programs. The terms of voluntary disclosure programs have typically been as follows:
>
> 1. The non-filer must file tax returns and remit unpaid tax for specified prior tax periods (such 'look-back' periods are commonly set at three years or a 'reasonable' starting point) as well as future periods.
> 2. In exchange for such disclosure, the Division agrees:
>   - To abate penalties and/or interest associated with the tax paid, and
>   - Not to audit the non-filer for any tax periods prior to the look-back period.
> 3. However, the Division reserves the right to audit the tax periods within the look-back period. (Petitioner's brief, p. 3.)

43. According to petitioner, the policy implemented by the Division can only be construed as the administrative repeal of the tax for gas marketers who did not comply with the Tax Law because: (1) even the broadest state voluntary disclosure agreements have abated only interest and penalty or limited the look-back period, whereas in this case the Division abated all tax, penalty and interest and eliminated the look-back period and (2) rather than approaching the voluntary disclosure agreements on a case-by-case basis, the Division implemented the program on an industry-wide basis. Petitioner contends that, by administratively repealing the Article 9 tax for periods before 1994 with respect to gas marketers who had not complied with the Tax Law, the Division exceeded the authority granted to it by the Legislature.

44. The second point raised by petitioner is that the Division's voluntary disclosure program and the repeal of Article 9 violate the equal protection clauses of the United States and New York State Constitutions as applied to petitioner who complied with the Tax Law. In support of this position, petitioner first argues that the strong presumption of constitutionality afforded to tax statutes should not be applied to policies implemented by the Division. According to petitioner, the standard utilized by the Supreme Court in ***Davis v. Michigan Department of Treasury*** (489 US 803, 103 L Ed 2d 891) and ***Philips Chemical Co. v. Dumas Independent School District*** (361 US 376, 4 L Ed 2d 384, ***reh denied*** 362 US 937, 4 L Ed 2d 751) is appropriate when analyzing the policy of an administrative agency. It is submitted that the standard used in the foregoing cases to evaluate the constitutionality of taxing statutes involving governmental immunity is "whether the inconsistent tax treatment is directly related to and justified by 'significant differences between the two classes.'" (***Davis v. Michigan Department of Treasury, supra***, at 816, 103 L Ed 2d at 905, quoting ***Philips Chemical Co. v. Dumas Independent School District***, ***supra***, at 383 - 385, 4 L Ed 2d at 389-390.) Petitioner contends that inconsistent treatment results from the forgiveness of pre-1994 tax liability for gas marketers who had not complied with the Tax Law and not for compliant gas marketers. According to petitioner, the Division's policy did not encourage taxpayers who had not complied with the Tax Law to comply with the law equally because the Division did not require such taxpayers to pay the taxes due. Petitioner posits that the Division's efforts to avoid further inequities only compounded the inequities that had already occurred because the taxpayers who were not in compliance with the law were forgiven forever. Petitioner contends that the Division's program does not encourage taxpayer compliance because the abatement of all Article 9 taxes for years prior to 1994 places compliant gas marketers at a disadvantageous position and

gives gas marketers who had not complied with the law an undeserved reward. Petitioner submits that "[c]onferring such an extreme benefit on gas marketers that had not complied with the tax law is certainly an inconceivable discrimination against compliant gas marketers that is grossly inequitable and unfair." (Petitioner's brief, p. 6.) On the basis of the foregoing, petitioner argues that the difference between the two classes (those who did and those who did not comply with the law) does not justify the inconsistent tax treatment and, therefore, the ***Phillips Chemical*** and ***Davis*** standard is not satisfied. Petitioner further submits that under the rational basis test the discrimination resulting from the voluntary disclosure program is so invidious as to violate the Equal Protection Clause. Petitioner maintains that the forgiveness of tax for any taxpayer who had not paid the tax in an entire industry is too severe to rationally promote the State's interest in obtaining taxpayer compliance. On the basis of the foregoing, petitioner requests a refund of its Article 9 tax in the amount of $462,043.00 with interest for the years 1991 through 1993.

45. In response to the foregoing, the Division first asserts that petitioner's brief contains numerous unsworn factual allegations regarding "standard voluntary disclosure programs" which are unsupported by the record and their inclusion in the brief is inappropriate. The Division further states that it did not ignore its policy to approach voluntary disclosure agreements on a case-by-case basis. It is submitted that the voluntary disclosure situations discussed by Mr. Verde in his affidavit set forth different factual situations and the Division responded accordingly. It is also contended that the fact that one of the negotiations involved a group of taxpayers does not mean that the Division did not adhere to its general policy since these taxpayers were represented to be similarly situated. The Division further maintains that the

voluntary disclosure program was not implemented on an "industry wide" basis and that it did not repeal the provisions of Article 9 of the Tax Law.

46. The Division submits that petitioner has not established that its audit policies resulted in a denial of equal protection. As corollaries to this argument, the Division maintains: that petitioner is not similarly situated to the taxpayers who were covered by the voluntary disclosure agreement of January 10, 1995; that the audit program was administered by the Division in a consistent manner; and that, assuming arguendo that the Division treated similarly situated taxpayers differently, the Division had a rational basis for its actions and the treatment was not so disparate as to constitute "invidious discrimination."

47. In its reply brief, petitioner argues that the Division's assertion that petitioner's argument is based on unsubstantiated assertions is without merit. Petitioner then requests that judicial notice be taken of the general characteristics of amnesty programs and voluntary disclosure programs. It also requests that judicial notice be taken of certain events which occurred at a public meeting presided over by the Division which took place at the Buffalo Marriott Hotel in February 1995.

48. Petitioner contends that the Division's reference to three different voluntary disclosure situations is irrelevant because petitioner's argument is based solely on the voluntary disclosure program contained in the Langer letter. According to petitioner, the Division's argument confirms petitioner's assertions that the Langer program is inconsistent with the Division's voluntary disclosure program. With respect to the Division's argument that the Langer letter was addressed only to Mr. Klein and there is no evidence that the program was intended to be disseminated industry-wide, petitioner states that there is no dispute that a meeting took place in Buffalo at which the letter was disseminated throughout the industry. Petitioner then questions,

why an industry-wide meeting was convened to discuss the letter and why three or four taxpayers cited to the letter of January 10, 1995, if the program in the Langer letter was for the sole benefit of Mr. Klein's clients. Petitioner submits that the effect of the Division's program was to render the Article 9 program void for gas marketers who had not complied with the Tax Law for years prior to 1994 and to usurp the Legislature's prerogative in determining who should be subject to tax.

49. The second point asserted in petitioner's reply brief is that the Division has failed to grasp petitioner's argument. Petitioner states that it has no basis to conclude that the Division's policies are discriminatory. Rather, petitioner summarizes its argument as follows:

> In so far as the Division instituted a voluntary disclosure program which, in effect, forgave a legislatively-imposed tax obligation for some taxpayers who had not complied which such obligations, but did not forgive the tax for taxpayers who had complied with the obligations imposed by the Legislature, the Division was in violation of the Equal Protection Clause of both the New York State and United States constitutions.
>
> We do not quarrel with the Division's equal protection analysis as it applies to legislative actions. However, this analysis is not relevant because an action of the Legislature is not at issue. At issue in the present matter is an administrative action taken by the Division. Consequently, the standard of review is not the "most lenient 'rational basis' test", as the Division sets forth. Rather, under the appropriate standard of review, Petitioner must establish: (1) that Petitioner was similarly situated to the taxpayers intended to be and/or actually covered by the voluntary disclosure program set forth in the January 10, 1995 letter; (2) that Petitioner was treated differently than such taxpayers; and (3) that the difference in treatment is directly related to and justified by significant differences between the two classes. (Petitioner's reply brief, p. 7.)

50. Petitioner's brief proceeds to reiterate its arguments: that it was similarly situated to the taxpayers covered by the voluntary disclosure program set forth in the letter of January 10, 1995; that petitioner was treated differently from other members of the natural gas marketing industry in that it should have been afforded the same relief that was available to taxpayers who

had not complied with the Tax Law; and that the difference in treatment was not directly related to and justified by significant differences between gas marketers who had and had not complied with the Tax Law. It is further submitted that Division's classification should not be upheld under the "legitimate state interest test."

CONCLUSIONS OF LAW

A. In accordance with State Administrative Procedure Act § 307(1), the Division's proposed findings of fact have generally been accepted and included herein. It is noted that petitioner's suggested modification to the Division's proposed finding of fact 20 has been accepted since it constitutes an accurate reflection of the record. Petitioner's proposed finding of fact 21 has been rejected since it is not supported by the record. Petitioner's request to modify the Division's proposed finding of fact 26 has also been rejected. Contrary to petitioner's position, a statement explaining why the Division took a particular action is a statement of fact and not argument.

B. State Administrative Procedure Act § 306(4) provides as follows:

> Official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party shall be given notice thereof and shall on timely request be afforded an opportunity prior to decision to dispute the fact or its materiality.

C. As set forth above, the State Administrative Procedure Act permits the taking of official notice in administrative proceedings if judicial notice could be taken. A court may only take judicial notice of particular facts if the items are of common knowledge or are determinable by referring to a source of indisputable accuracy (***Matter of Crater Club v. Adirondack Park***

Agency, 86 AD2d 714, 446 NYS2d 565, ***affd*** 57 NY2d 990, 457 NYS2d 244). The facts relied upon by petitioner do not satisfy either of the foregoing criteria and, since there is no basis in the record for petitioner's assertions regarding amnesty programs, voluntary disclosure programs or the meeting in Buffalo in February 1995, such facts may not be considered[7] (***see***, ***Matter of Balan Printing***, Tax Appeals Tribunal, April 17, 1991, footnote 10).

D. The Division has accurately noted that the Legislature has given the Commissioner broad authority to (1) "[a]ssess, determine, revise and impose the corporation taxes" under Article 9 of the Tax Law (Tax Law § 171[2]); (2) "enter into a written agreement with any person, relating to the liability of such person (or the person for whom he acts) in respect of any tax or fee imposed by the tax law or by a law enacted pursuant to the authority of the tax law . . . which agreement shall be final and conclusive . . ." (Tax Law § 171[18]) and; (3) "to administer and enforce the tax imposed by article nine" of the Tax Law (Tax Law § 1096[a]). These grants of authority implicitly include the authority to enter into voluntary disclosure agreements.

E. The facts in the record do not support petitioner's argument that the letter from Deputy Commissioner Langer was, in effect, an administrative repeal of the Article 9 tax for taxpayers which did not comply with the Tax Law. The three voluntary disclosure situations discussed in the affidavit of Mr. Verde (that is, petitioner, Taxpayer A, and small farmers) were handled on a case-by-case basis. In each instance, different arrangements were accepted by the Division in order to resolve different situations. The fact that one of the arrangements involved a group of

[7] It is noted that the file of the Division of Tax Appeals shows that petitioner originally was given until October 24, 1997 to submit documents, such as affidavits, in support of its position. At petitioner's request, this time was extended until November 21, 1997. The only item submitted was a brief. Therefore, petitioner did not utilize its opportunity to offer evidence in support of the facts stated in its brief.

taxpayers (small farmers) does not mean that the Division did not employ a case-by-case analysis since it was believed that the small farmers were similarly situated.

Moreover, as noted by the Division in its brief, there is no evidence that the voluntary disclosure program was offered on an "industry-wide basis." Deputy Commissioner Langer's letter of January 10, 1995 was addressed only to Mr. Klein. Since the agreement was made with one group of clients of a particular representative, it cannot be concluded that voluntary disclosure was tantamount to a repeal of Article 9 of the Tax Law for all taxpayers. Further, the inference to be drawn from the fact that just three or four taxpayers decided to take advantage of the voluntary disclosure agreement offers further support for the conclusion that the voluntary disclosure program was not offered on an industry-wide basis.

F. Petitioner maintains that the Division's voluntary disclosure program and the purported repeal of Article 9 violate the Equal Protection Clauses of the United States and New York State Constitutions as applied to petitioner who complied with the Tax Law and paid the taxes due.[8] The first question presented is what is the appropriate standard to employ when examining the equal protection argument. Petitioner asserts that the appropriate test is "whether the inconsistent tax treatment is directly related to and justified by 'significant differences between the two classes.'" ***(Davis v. Michigan Department of Treasury***, ***supra***, at 816, 103 L Ed 2d ***supra***, at 905, quoting, ***Philips Chemical Co. v. Dumas Independent School District***, ***supra***, at 383 - 385, 4 L Ed 2d ***supra,*** at 389-390.)

G. Petitioner's reliance upon ***Davis*** and ***Philips Chemical*** is misplaced. Each of these cases involved an issue of intergovernmental tax immunity when a state imposed a heavier tax

[8] The Division's statement that petitioner's claim essentially alleges that a lack of enforcement resulted in a denial of equal protection misstates petitioner's argument.

burden on parties that had associations with the Federal government than on parties that had dealings with the state. In ***Philips Chemical*** the Court noted that when the state is dealing with local concerns and not imposing upon the Federal government "the State's power to classify is, indeed, extremely broad, and its discretion is limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary." (***Philips Chemical Co. v. Dumas Independent School District***, ***supra***, at 385, 4 L Ed 2d ***supra***, at 390 ***reh denied***, 362 US 937, 4 L Ed 2d 751.)

H. The appropriate equal protection standard was set forth by the Tax Appeals Tribunal in ***Matter of Balan Printing*** (Tax Appeals Tribunal, April 17, 1991) wherein the taxpayer claimed that the Division's failure to treat its purchases of certain machinery and equipment used in the printing business in the same manner as another taxpayer's purchases were treated was a violation of the Equal Protection Clauses of the New York State and United States Constitutions. In analyzing this issue, the Tribunal stated:

> Administrative actions and classifications are subject to equal protection review (***see, Matter of Doe v. Coughlin***, 71 NY2d 48, 523 NYS2d 782, 787) under both the United States Constitution (US Const 14th amend) and the New York State Constitution (NY Const, art I, § 11). However, "the prohibition of the Equal Protection Clause goes no further than the invidious discrimination" (***Williamson v. Lee Optical of Okla.***, 348 US 483, 489). Thus, unless the State draws distinctions between similarly situated taxpayers whereby it classifies on the basis of a suspect class or impairs a fundamental right, equal protection only requires that such uneven treatment be rationally related to the achievement of a legitimate governmental purpose and not be palpably arbitrary (***see, Town of Tonawanda v. Ayler***, 68 NY2d 836, 508 NYS2d 171; ***Trump v. Chu***, 65 NY2d 20, 489 NYS2d 455). In addition, within the field of taxation more than in other fields, governmental authorities possess even more flexibility in making classifications and drawing lines which in their judgment produce reasonable systems of taxation (***see, Krugman v. Board of Assessors***, 141 AD2d 175, 533 NYS2d 495, 501; ***Shapiro v. City of New York***, 32 NY2d 96, 343 NYS2d 323, 329, ***appeal dismissed for want of a substantial fed. question*** 414 US 804, ***pet for rehr denied***, 414 US 1087; ***see also, Madden v. Kentucky***, 309 US 83, 87-88). A denial of equal protection will arise only where a purposeful, invidious and

> intentionally unfair discrimination in the enforcement of a statute is present (***Di Maggio v. Brown***, 19 NY2d 283, 279 NYS2d 161, 166-167; ***People v. Friedman***, 302 NY 75, ***appeal dismissed for want of a substantial fed. question*** 341 US 907; ***Matter of Doe v. Coughlin***, ***supra***). Equal protection does not require identity of treatment. It only requires that classification rest on some real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary (***Walters v. St. Louis***, 347 US 231, 237).

I. In support of its position that petitioner has failed to establish that the Division's audit policies resulted in a denial of equal protection, the Division argues that petitioner is not similarly situated to the taxpayers intended to be or actually covered by the January 10, 1995 disclosure agreement. The Division posits that the January 10, 1995 voluntary disclosure agreement was intended to cover small, unsophisticated farmers who did not have the resources to employ legal or accounting staffs and who, if it were required to satisfy all outstanding liabilities, would be unable to remain in business. In contrast, petitioner had more than $146 million in gross receipts or sales in 1991 with more than $60 million of that amount attributed to the sale of tangible personal property shipped to points within New York State. The Division also points out that there is nothing in the record regarding the three or four taxpayers that actually came forward under the terms of the January 10, 1995 voluntary settlement agreement. Therefore, it is maintained that petitioner has not proved that it is similarly situated to the taxpayers who received the favorable treatment.

The Division further submits that it administered its audit program in an evenhanded, consistent manner. In support of this position, the Division states that no section 186 or 186-a audits were conducted for any taxpayer subject to tax and therefore it received the same audit treatment as both the taxpayers intended to be covered by the January 10, 1995 voluntary disclosure agreement and the three or four taxpayers who actually filed returns as a result of the

agreement. The Division posits that the letter of March 12, 1996 from Mr. Sitrin eliminated any perceived equal protection problems when it stated that "all entities and persons liable for the tax are subject to the regular audit and selection process." (Finding of Fact "37".) Therefore, the Division contends that any taxpayer that did not file and pay tax as required was still subject to audit and assessment.

J. The foregoing arguments are without merit. First, the point raised by petitioner is that it and the farmers represented by Mr. Klein were all parties subject to the tax imposed by Article 9 of the Tax Law. To this important extent, petitioner was similarly situated to the taxpayers intended to be covered by the January 10, 1995 voluntary disclosure agreement (***see, Matter of Balan Printing, supra*** [where the Tribunal stated "one essential element of similarity is whether the taxpayers have been assessed for the same thing"]). The Division's second argument is rejected because it overlooks the critical fact that certain taxpayers which were not in compliance with the Tax Law were not required to pay taxes for the years in issue while petitioner paid taxes pursuant to Article 9 of the Tax Law.

K. The question remains whether the disparate treatment warrants a finding that there was a denial of equal protection. Here, the Division has shown that there was a rational basis for its actions which precludes a finding that there was a denial of equal protection. First, it must be remembered that petitioner's representative, Mr. Klein, had a practice of refusing to reveal the identity of his clients unless the Division agreed to his terms. As a result, the Division was left with the choice of either rejecting the offer from Mr. Klein and potentially never learning who the taxpayers were that were not complying with the Tax Law, as well as not obtaining tax monies that should be remitted in the future, or accepting the terms of the offer and gaining greater compliance with the Tax Law. At the same time it should be borne in mind that Mr.

Klein represented that his clients were concerned with "leveling the playing field" and not with any prior inequities. Therefore, Mr. Klein explained that those clients which had already negotiated voluntary disclosure agreements would not file claims for refunds. Under, these circumstances it was reasonable for the Division to conclude that the best way to obtain maximum taxpayer compliance with Article 9 of the Tax Law was to accept Mr. Klein's terms.

The fact that the Division did not know the identity of Mr. Klein's clients until after the terms of the voluntary disclosure agreement were negotiated also inures to the Division's benefit. The Division could not have engaged in a deliberate scheme of discrimination against petitioner if it did not know whether the terms of the voluntary disclosure agreement were intended to cover petitioner.

Lastly, the Division has correctly noted that public policy mandates that petitioner's refund claim be denied. The fact that a "better" settlement agreement might be negotiated by one taxpayer does not render other settlement agreements void. Some taxpayers might be willing to have different agreements. A requirement that such agreements be identical would undermine the Division's discretionary authority to enter into such agreements and encourage taxpayers who had not complied with the Tax Law to file returns and remit tax.

L. The petition of O & R Energy, Inc. n/k/a Norstar Holdings, Inc. is denied.

DATED: Troy, New York
August 6, 1998

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE