STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LAQUILA INDUSTRIES, INC.	:	SMALL CLAIMS DETERMINATION DTA NO. 821069
for Revision of a Determination or for Refund of Tax on Fuel Use under Article 21-A of the Tax Law for the Period October 1, 1998 through June 30, 2002.	:	

Petitioner, Laquila Industries, Inc., filed a petition for revision of a determination or for refund of tax on fuel use under Article 21-A of the Tax Law for the period October 1, 1998 through June 30, 2002.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York, on May 17, 2007 at 10:30 A.M. Petitioner appeared by Band, Rosenbaum and Martin, P.C. (Scott Martin, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (Owen McLean).

The final post hearing brief in this matter was due by October 26, 2006 and it is this date that commences the three-month period for the issuance of this determination.

ISSUE

Whether petitioner has established errors in the Division of Taxation's assessment of fuel use tax warranting a reduction or cancellation of said assessment.

FINDINGS OF FACT

1. On January 1, 1996, New York State became a participating member of the International Fuel Tax Agreement (IFTA). IFTA, which is in effect in most U.S. states and Canadian

provinces, simplifies the reporting of fuel use taxes by allowing a motor carrier to report all the fuel use taxes that it owes to the various IFTA member jurisdictions to a single base jurisdiction. Under IFTA, a carrier need only get a single IFTA fuel use tax license for all its qualified motor vehicles. The carrier must also get IFTA decals for each qualified motor vehicle. The decals are obtained from the carrier's base jurisdiction. The license and decals will allow those vehicles to travel in all IFTA member jurisdictions.

The carrier is required to file only one tax report each quarter with its base jurisdiction, to report and pay all fuel use taxes due to the member jurisdictions in which it operates. The base jurisdiction is then responsible for remitting the taxes due to the other jurisdictions. In most cases, the base jurisdiction will do a single audit for all member jurisdictions.

2. Petitioner, Laquila Industries, Inc., registered to become a licensed IFTA member on November 20, 1998. New York State is petitioner's base jurisdiction for IFTA purposes. Petitioner filed IFTA tax returns for the period at issue with the Division of Taxation (Division) reporting zero miles traveled, zero gallons of fuel purchased and zero fuel use tax owed to New York State or any other IFTA members' jurisdictions.

3. On October 8, 2002, the Division initiated a field audit of petitioner to determine if it owed any fuel use tax for the period October 1, 1998 through June 30, 2002. The Division made numerous written and oral requests to examine petitioner's records; however, no records were ever produced by petitioner for review. Since no records were produced on audit, the Division resorted to a review of petitioner's highway use tax returns for the same period. Petitioner's highway use tax returns for the period October 1, 1998 through June 30, 2002 reported that it had only three permitted vehicles and that these three vehicles traveled a total of 56,605 taxable miles in New York State during the audit period. The Division next divided the 56,605 taxable miles

traveled in New York State by an estimated four miles per gallon, thereby determining that the vehicles consumed 14,153 taxable gallons of diesel fuel during the audit period. By applying the appropriate tax rate to the 14,153 gallons of audited taxable diesel fuel, the Division determined that petitioner owed $4,124.98 of fuel use tax to New York State.

4. On March 26, 2004, the Division issued a Notice of Determination (Notice) to petitioner which assessed fuel use tax in the amount of $4,124.98, plus penalty of $750.00 and interest of $1,676.84, for the period October 1, 1998 through June 30, 2002. Petitioner protested the Notice and this small claims proceeding ultimately ensued.

5. Petitioner is a subsidiary of Laquila Construction, Inc. Both corporations have identical ownership, with Laquila Construction, Inc., acting as the operating company, while petitioner is a holding company set up solely to own construction equipment. As its name suggests, Laquila Construction, Inc., is engaged in the construction business, primarily excavation and concrete work in Manhattan, and it is a common industry practice for large contractors that are equipment heavy to set up subsidiary corporations to own the construction equipment. By having the construction equipment owned by a holding company (petitioner) it allows the equipment to be moved off a construction site in the event a lien is placed against the operating company (Laquila Construction, Inc.). If the equipment was owned by the operating company, the equipment, once a lien was placed against the operating company, would be frozen at the job site and could not be moved to another construction location.

6. Petitioner maintains that it purchased all of its bulk diesel fuel from two registered suppliers and that the proper New York State fuel use tax was paid to these two suppliers. To support its position, petitioner submitted in evidence fuel purchase invoices for the audit period from Century Petroleum (Century) and Motiva Enterprises, LLC (Motiva). The invoices from

Century were billed to Laquila Contracting, which, like petitioner, is also a subsidiary equipment holding company of Laquila Construction. The invoices from Motiva were billed to Laquila Construction. Both sets of invoices reflected that New York State fuel use tax was being charged. No records were submitted in evidence to document the transfer of bulk diesel fuel from either Laquila Construction or Laquila Contracting to petitioner.

7. Petitioner reserved time to submit post hearing substantial documentary evidence to further support its case. At the conclusion of the small claims hearing, petitioner's exhibits one (the Century purchase invoices) and two (the Motiva purchase invoices) were returned to petitioner so that they could be referenced when assembling the additional evidence to be submitted post hearing. Petitioner was to return exhibits one and two at the same time that it submitted the additional evidence. Petitioner did not submit any additional evidence or return exhibits one and two. By letter dated December 3, 2007, petitioner was advised that it had until December 14, 2007 to resubmit exhibits one and two and, if not submitted, they would be excluded from the record. Petitioner did not respond to the December 3, 2007 letter.

SUMMARY OF PETITIONER'S POSITION

8. Petitioner maintains that it and Laquila Contracting are merely equipment holding companies for Laquila Construction and that neither company performed any work or services for any entity other than Laquila Construction. It is petitioner's position that all of its bulk diesel fuel is purchased, fuel use tax paid, from two registered suppliers, Century and Motiva. In petitioner's view, Laquila Construction, Laquila Contracting and Laquila Industries, Inc., are in essence operating as a single entity and that the Division's refusal to give credit for the New York State fuel use tax paid on the Century and Motiva invoices, because they were billed to Laquila Construction and Laquila Contracting, is a form over substance argument.

CONCLUSIONS OF LAW

A. Articles 21 and 21-A of the Tax Law impose two highway use taxes upon commercial carriers with respect to motor vehicles operated on New York public highways. The first, commonly referred to as the truck mileage tax, is imposed pursuant to Tax Law § 503. This tax is based on the mileage of the vehicle on New York public highways and the weight of the vehicle. The other tax, authorized by Article 21-A, is known as the fuel use tax and is imposed pursuant to Tax Law § 523. The fuel use tax is based upon the amount of motor fuel and diesel motor fuel used by a carrier in such carrier's operations upon the public highways in New York. The procedures governing Article 21 also apply to Article 21-A (Tax Law § 528[a]).

B. Tax Law § 510 provides that if a return filed under Articles 21 and 21-A is "insufficient or unsatisfactory . . . or if no return is made for any period, the commissioner of taxation and finance shall determine the amount of tax due from such information as is available to the commissioner."

C. Tax Law § 507 imposes the following record-keeping requirements upon carriers subject to tax under Articles 21 and 21-A:

> Every carrier subject to this article and every carrier to whom a permit was issued shall keep a complete and accurate daily record which shall show the miles traveled in this state by each vehicular unit and such other information as the tax commission may require. Such records shall be kept in this state unless the tax commission consents to their removal and shall be preserved for a period of four years and be open for inspection at any reasonable time upon the demand of the tax commission.

D. Where a taxpayer fails to maintain or make available records required under Article 21-A, the Division is authorized to estimate the taxpayer's fuel use tax liability. The Division is required to select an audit method reasonably calculated to reflect tax due. Where a taxpayer's records are insufficient, unreliable and inadequate to verify, upon audit, the amount of the fuel

use tax due for the period under examination, the Division is authorized to estimate such tax liability on the basis of external indices (***see Matter of Lionel Leasing Industries Co., Inc. v. State Tax Commn.***, 105 AD2d 581, 481 NYS2d 520, 523 [1984]).

E. In the instant matter, petitioner has clearly failed to produce any daily records showing the miles traveled by its vehicles and the number of gallons of diesel fuel purchased and used by said vehicles during the audit period. Accordingly, the Division was authorized to estimate petitioner's fuel use tax liability. Moreover, the Division's method, based on calculating the gallons of diesel fuel used from the mileage reported by petitioner on its highway use tax returns, was, under the circumstances, reasonable. When a taxpayer fails to maintain or provide adequate records, exactness in the outcome of the audit method is not required. The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (***Matter of Lionel Leasing Industries Co. v. State Tax Commn., supra.***) Here, petitioner has failed to meet its burden to show that the methodology was unreasonable or that the amount of tax assessed was erroneous.

F. Petitioner's argument that it is entitled to credit for the fuel use tax paid on the Century and Motiva invoices must be rejected. While Tax Law § 524 provides for a credit or refund in certain circumstances, any credit or refund is premised on petitioner establishing that it has paid a fuel tax component or a sales tax component upon its purchase and use of fuel (Tax Law § 524[a]). While the Century and Motiva invoices reflect the payment of these two components, the Division has correctly noted that none of the invoices were billed to petitioner. Furthermore, there were no records or other evidence submitted on audit or at hearing to prove that the fuel purchased from Century or Motiva was ever transferred to petitioner. Petitioner's representative was the only person who testified on petitioner's behalf and he admittedly did not prepare the

highway use tax returns or the fuel use tax returns. Petitioner was allowed additional time post hearing to submit documentary evidence; however, it chose not to submit any evidence. While petitioner's claim may have some merit, there is simply no credible evidence in the record before me to support that petitioner purchased and used diesel fuel during the audit period upon which it had paid the fuel tax component or the sales tax component.

G. The petition of Laquila Industries, Inc. is denied and the Notice of Determination dated March 26, 2004 is sustained.

DATED: Troy, New York
January 24, 2008

/s/ James Hoefer
PRESIDING OFFICER