STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EAST COAST FUELING SERVICES, INC.	:	
for Revision of Determinations or for Refund of Tax on Petroleum Businesses and Sales and Use Taxes under Articles 13-A, 28 and 29 of the Tax Law for the Period April 1, 2003 through February 28, 2006.	:	
	:	DETERMINATION
In the Matter of the Petition	:	DTA NOS. 824019 AND 824020
of	:	
JAMES LAZNOVSKY	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2003 through February 28, 2006.	:	
	:	

Petitioner East Coast Fueling Services, Inc., filed a petition for revision of determinations or for refund of tax on petroleum businesses and sales and use taxes under Articles 13-A, 28 and 29 of the Tax Law for the Period April 1, 2003 through February 28, 2006.

Petitioner James Laznovsky filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period April 1, 2003 through February 28, 2006.

A consolidated hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 1384 Broadway, New York, New York, on August 29,

2012 at 10:00 A.M., with all briefs to be submitted by March 12, 2013, which date commenced the six-month period for the issuance of this determination. By letter dated August 26, 2013 the Administrative Law Judge extended the time for issuance of this determination for three months pursuant to Tax Law § 2010(3). Petitioners appeared by Timothy Devane, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether a portion of East Coast Fueling Services, Inc.'s sales are exempt from petroleum business tax or sales and use tax.

II. Whether petitioners have established that they are entitled to a refund of petroleum business tax.

III. Whether petitioners have established reasonable cause for the abatement of penalty.

FINDINGS OF FACT

1. On July 21, 2008, following an audit, the Division of Taxation (Division) issued to petitioner East Coast Fueling Services, Inc., (East Coast) a Notice of Determination that asserted $41,617.40 in additional petroleum business tax, plus penalty and interest, for a balance due of $71,973.06 for the period April 1, 2003 through February 28, 2006. Also on July 21, 2008, the Division issued a Notice of Determination to East Coast that asserted a deficiency of sales and use taxes for the period June 1, 2003 through February 28, 2006 in the amount of $174,151.66 plus penalty and interest for a balance due of $359,484.61.

2. The Division also issued a Notice of Determination, dated August 4, 2008, to James Laznovsky, as a responsible person of East Coast. The notice asserted a penalty pursuant to Tax Law § 1145(e), for the period June 1, 2003 through February 28, 2006, in the amount of $361,044.84.

3. On June 4, 2007, the Division sent letters to petitioner James Laznovsky, as the president of East Coast, and to Ms. Donna Stewart, as East Coast's representative, confirming a field audit of East Coast's petroleum business tax records, diesel motor fuel records and sales tax records as they related to the sales of motor fuels for the period April 1, 2003 through August 31, 2005. The letter included a detailed records request list that, for the petroleum business tax return, asked for, among other things, fuel inventory records and reconciliations, delivery tickets, exemption certificates and schedules, municipality contracts, purchase orders and/or delivery tickets and fuel disbursements. For the sales tax portion of the audit, the Division expressly requested tax returns and exemption certificates.

4. On December 27, 2007, the Division sent a letter to petitioners' representative, Ms. Donna Stewart that reiterated its request for books and records. The letter also adjusted the audit period to April 1, 2003 through February 28, 2006.

5. Ms. Stewart advised the auditor that Mr. Laznovsky prepared the petroleum business tax returns himself, and consequently, she had no knowledge of these returns.[1] In order to prepare the sales tax returns, Ms. Stewart utilized a handwritten summary that she received from Mr. Laznovsky. She did not report any exempt sales on East Coast's sales tax returns.

6. At the outset of the audit, the Division was told that the information available was not organized or complete.[2] The Division never received all of the delivery tickets for the period under review. Moreover, the auditor never reviewed any contracts, invoices, or checks indicating sales of fuel oil to an exempt entity because these items were not made available for review.

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[1] The petroleum tax returns were, in fact, prepared by Ms. Karen Pettigrew, a friend of Mr. Laznovsky.

[2] It is noted that the taxpayers had ample time to prepare for the audit since the first appointment letter was in July of 2006 and the audit did not take place until August of 2007.

Since certain records were not presented and what was available was not organized, it was concluded that it was necessary to resort to the use of test periods. On July 12, 2007, the auditor sent the accountant a facsimile designating the following test periods: June 1, 2005 through August 31, 2005, December 1, 2004 through February 28, 2005 and the months of October 2003 and May 2004. Petitioners never stated that the periods selected presented a concern.

7. To determine the total number of gallons purchased, the Division requested third-party information from two vendors - Metro Terminals Corp. and Bayside Fuel Oil Depot Corp. On the basis of the information it received, the Division concluded that petitioner purchased 2,104,342 gallons of motor fuel. However, during the same period, East Coast reported purchasing 582,096 gallons of fuel. Out of the 582,096 reported gallons, 580,086 gallons were reported on the line of the petroleum tax return for fuel for nonresidential heating and cooling. The remaining 2,010 gallons were reported as fully taxable.

8. When the auditor discovered that East Coast was reporting a little more than 25 percent of the gallons purchased, he had a discussion with East Coast's accountant. The accountant replied that she had no knowledge of the fuel reporting and that all she could do was call the taxpayer and then call the auditor back.

9. Through a series of consents extending period of limitations, the period in which the Division could determine or assess tax against the corporation and Mr. Laznovsky, individually, was extended to July 31, 2008.

10. In order to determine the amount of petroleum business tax due, the auditor started with a review of delivery tickets for the test periods. Utilizing the delivery tickets for the test periods June 1, 2005 through August 31, 2005, December 1, 2004 through February 28, 2005, October 2003 and May 2004, he calculated allocation percentages for commercial and residential

sales. The Division then applied the allocation percentages to the third-party information of gallons purchased to calculate petroleum business taxes due of $66,996.49, less credit for taxes paid of $25,379.08 resulting in a balance due of $41,617.40. On July 21, 2008, the Division issued a Notice of Determination to East Coast, assessment number L-030450885, that assessed petroleum business tax for the period April 1, 2003 through February 28, 2006 in the amount of $41,617.40 plus penalty and interest. In determining the amount of tax due, the auditor was aware that Mr. Laznovsky had made certain payments and took them into account. This included payments made with returns that were filed late.

11. The calculation of the amount of sales tax due began with the information obtained from third parties regarding total gallons purchased. It then followed a series of steps consisting of calculation of an average price per gallon for residential and commercial sales, allocation of sales between residential and commercial customers, allocation of the gallons sold to residences by county, calculation of a markup percentage, application of the markup percentage to the periods that were not examined in the sample in order to determine the selling price for the remaining periods, allocation of the tax-free gallons between the counties, calculation of the taxable base for the residential gallons and commercial gallons and lastly, calculation of the tax due. The auditor noted that the taxpayer was entitled to additional credits of $24,815.62 and applied them against the additional tax determined on the audit. On July 21, 2008, the Division issued a Notice of Determination to East Coast, Notice L-030456019, that assessed sales and use taxes for the period June 1, 2003 through February 28, 2006 in the amount of $174,151.66 plus penalty and interest. On August 4, 2008, the Division issued a Notice of Determination to James Laznovsky, as a responsible officer of East Coast, (assessment number L-030497233), that

assessed a penalty for the period June 1, 2003 through February 28, 2006 in the amount of $361,044.84.

12. Mr. Laznovsky was the sole owner of the outstanding stock of East Coast. East Coast acquired an existing company, known as ISO, which distributed petroleum products to its customers. At one juncture, ISO told Mr. Laznovsky that ISO's sales were exempt from tax. East Coast did not file petroleum business tax returns in 2003 because East Coast continued the deliveries that were made by ISO. East Coast collected and remitted sales tax on certain sales but not on fuel that was used to operate construction equipment.

13. In the first year of business, East Coast sold # 2 fuel oil to both residential and commercial customers. The fuel oil sold by East Coast was used for heating homes and businesses. It could also be used to operate equipment such as a compressor. Most of East Coast's sales were to commercial customers.[3] On or about the beginning of 2004, he started selling oil to companies that were painting bridges in New York City. About one-half of the time, the deliveries were made by Mr. Laznovsky and the remainder of the time, the deliveries were made by an employee of East Coast. During the period in issue, East Coast had, at most, two or three employees. When he first started, Mr. Laznovsky had one truck, which was used for the purpose of fueling equipment on bridges. Later, he operated three or four trucks.

14. East Coast made deliveries of # 2 fuel oil to companies engaged in performing services on bridges owned by the public. In particular, deliveries of #2 fuel oil were made to the following companies and work sites: L & L Painting at the George Washington Bridge, Alpha Painting and Construction at the 59th Street Bridge, Ahern Painting, which was engaged in work

[3] Mr. Laznovsky estimates that approximately 30 percent of the sales were to residences and 70 percent of the sales were commercial. A portion of the commercial sales were for heating with a furnace or boiler. No documentation was presented to support these estimates.

on the Pulaski Bridge and at the Throgs Neck Bridge, Dynamic Painting at the Tappan Zee Bridge, Odyssey Contracting Corp. at the 59th Street Bridge and RML Construction, Inc., at the 59th Street Bridge.

15. In order to paint the bridge, the contractors would use air compressors for sandblasting, generators for lights, heaters to maintain the temperature in the containment area and vacuum machines to control the dust in the containment area. Mr. Laznovsky personally filled the fuel tanks of the machines. Each machine had to be separately fueled. The fuel oil sold by East Coast was used to provide power for the forgoing devices and not incorporated into the bridge structure.

16. When Mr. Laznovsky acquired the business, the contractors told him that they were using nontaxable # 2 fuel oil. This prompted Mr. Laznovsky to adopt the practice of preparing invoices without charging tax. The bookkeepers for the contractors told the individual who prepared the invoices for Mr. Laznovsky that they would not pay sales tax because they were exempt.

17. The first time Mr. Laznovsky learned that he was required to have an exemption certificate to avoid collecting tax was after he was no longer in business and East Coast was in the process of being audited. A representative for Mr. Laznovsky had exemption documents prepared for all of East Coasts customers. Some customers completed the exemption certificate, but others said that East Coast did not need them and threw them away. Mr. Laznovsky does not know if L & L Painting completed an exemption certificate.

18. It is Mr. Laznovsky's belief that the bridges where he supplied the fuel were owned by exempt entities such as the Metropolitan Transit Authority, the City of New York or the State of New York.

19. On April 21, 2003, the Division issued to Mr. Laznovsky a license to distribute motor fuel. Thereafter, on the following dates, Mr. Laznovsky was sent notices for the failure to file petroleum business tax returns: July 15, 2003, August 15, 2003, June 15, 2004, July 15, 2004, August 13, 2004, August 20, 2004, December 15, 2004, March 15, 2005, April 15, 2005 and May 13, 2005. On August 27, 2003, September 29, 2004, and April 22, 2005 the Division also issued demands for NYS petroleum tax returns and/or payment of taxes due pursuant to Articles 12-A, 13-A, 28 and 29.

20. As a result of the continuing failures to file and/or pay the taxes due, the Division issued notices of proposed cancellation of registration as a distributor of motor fuel on September 24, 2003, October 22, 2004 and May 9, 2005.

21. Mr. Zirpoli, an employee of the Division at all times relevant to this matter, first had contact with Mr. Laznovsky on February 4, 2005 when Mr. Laznovsky stated that he was behind on his returns because his accountant was sick and that the delinquent returns would be mailed by February 9, 2005. When the returns were not received, he spoke to Mr. Laznovsky again. This time Mr. Laznovsky placed an associate on the phone who stated that the returns would be mailed by March 4, 2005.

22. When a license as a distributor of motor fuel is cancelled, it is not reinstated unless the cancellation was executed in error. However, a new licence may be applied for. As a result, if a license is cancelled, Mr. Zirpoli will tell the taxpayer to file a new application, make sure that all required returns have been filed and take steps to ensure that there are no outstanding liabilities.

23. On August 23, 2005, the Division received 11 petroleum business tax returns with payments and an application for registration. The balance of the required information was not

provided and, as a result, the Division issued to Mr. Laznovsky a Notice of Proposed Refusal to Register as a Distributor of Fuel.

24. Mr. Zirpoli did not advise petitioners that they did not have to pay sales tax.

25. East Coast's license as a distributor of motor fuel was revoked for failure to pay the taxes due. The business of supplying fuel oil ended after Mr. Laznovsky was told that his license would not be reinstated. Since he no longer had a license to purchase fuel, he entered the trucking business. At the time of the hearing, the trucking business was failing, he was having difficulty staying current with his bills and his house was being foreclosed upon. His personal vehicle has been repossessed numerous times for lack of payment.

SUMMARY OF PETITIONERS' POSITION

26. Mr. Laznovsky maintains that when East Coast began operating he was informed by Mr. Zirpoli that he did not have to pay taxes on the sales of oil but that he still had to file a monthly return. According to Mr. Laznovsky, he was told that if he was providing fuel for construction, the sales would be exempt from tax and he should enter zero on the monthly return for taxable sales. Mr. Laznovsky does not have anything in writing to this effect. According to Mr. Laznovsky, about a year later, a different employee of the Division decided that he had to start paying petroleum business taxes. It was at this juncture that the Division sent him a letter stating that his license was going to be revoked if the business did not become current in meeting its petroleum business tax obligations. Mr. Laznovsky believes he was advised that he did not have to be concerned with sales tax.

27. At the hearing, Mr. Laznovsky testified that he was informed by Mr. Zirpoli that if he paid all of his delinquent business taxes the Division would reissue the licence and he could continue working. According to Mr. Laznovsky, he made all of the required payments however

his license was not reinstated. Mr. Laznovsky's testimony was supported by Ms. Karen Pettigrew, a friend of Mr. Laznovsky, who stated that during the years 2003 through 2005, she spoke to Mr. Zirpoli on a regular basis. When Mr. Laznovsky took over the accounts from the prior owner, Mr. Zirpoli allegedly told her that providing fuel was nontaxable so they filed tax returns without a remittance.

28. On the basis of his reading of ***Matter of L & L Painting Co.*** (Tax Appeals Tribunal, June 2, 2011), Mr. Laznovsky posits that his supplying of fuel on the bridge is nontaxable because he is delivering fuel to companies performing capital improvements. Mr. Laznovsky also submits that he is entitled to a credit or refund of petroleum business taxes for the amounts already paid. In this regard, Mr. Laznovsky believes that an attorney filed a refund claim on his behalf but he never received a response to his claim. The individual who prepared Mr. Laznovsky's invoices also testified that a Mr. Diesel, another employee of the Division, stated that petitioners should not be paying petroleum tax and should be getting a refund.

29. Mr. Laznovsky also claims that he was selling fuel to an authorized agent of an exempt entity.

30. The hearing record includes a copy of a contract between L & L and, among others, the City of New York. The phrase "STANDARD CONSTRUCTION CONTRACT OCTOBER 2000" appears as a subscript on many pages of the contract. Petitioners rely upon the following sections of the contract to support their position:

(A.) Article 61 of the contract bears the caption "All Legal Provisions Deemed Included." Section 61.1 of the contract states:

> It is the intent and understanding of the parties to this **Contract** that each and every provision of **Law** required to be inserted in this **Contract** shall be and is inserted herein. Furthermore, it is hereby stipulated that every such provision is to

> be deemed to be inserted herein, and if, through mistake or otherwise, any such provision is not inserted, or is not inserted in correct form, then this **Contract** shall forthwith upon the application of either party be amended by such insertion so as to comply strictly with the **Law** and without prejudice to the rights of either party hereunder.

(B.) Article two of the contract bears the caption "Tax Exemption." Section 62.3 of the contract states:

> The purchase by the **Contractor** of the supplies and materials sold hereunder shall be a purchase or procurement for resale and therefore not subject to the New York State or **City** Sales or Compensation Use Taxes or any such taxes of cities or counties. The sale of such supplies and materials by the **Contractor** to the **City** is exempt from the aforesaid sales or compensating use taxes. With respect to such supplies and materials, the **Contractor**, at the request of the **City**, shall furnish to the **City** such Bills of Sale and other instruments as may be required by the **City**, properly executed, acknowledged and delivered assuring to the **City** title to such supplies and materials, free of liens and/or encumbrances, and the **Contractor** shall mark or otherwise identify all such materials as the property of the **City**.

(C.) Section 62.5 of the contract states:

> The purchase by **Subcontractors** of supplies and materials to be sold hereunder shall also be a purchase or procurement for resale to the **Contractor** (either directly or through other **Subcontractors**) and therefore not subject to the aforesaid Sales or Compensating Use Taxes, provided that the subcontract agreements provide for the resale of such supplies and materials prior to and separate and apart from the incorporation of such supplies and materials into the permanent structure and/or construction and that such subcontract agreements are in a form similar to this **Contract** with respect to the separation of the sale of materials from the **Work** and labor, services, consumable supplies and any other matters to be provided, and provided further that the subcontract agreements provide separate prices for materials and all other services and matters. Such separation shall actually be followed in practice, including the separation of payments for supplies and materials from the payments for other **Work** and labor and other things to be provided.

31. At the hearing, Mr. Laznovsky asserted that he paid $80,000.00 over a six-month period in order to meet his petroleum business tax obligations. The payments were purportedly made in October or November of 2005 or 2006. In order to support his position, he offered

copies of checks totaling $17,001.82. He was uncertain when the balance of the payments was made. The funds to pay the taxes were obtained from East Coast's profits. Mr. Laznovsky did not believe that he could approach the customers of East Coast to collect the tax after delivering the fuel and billing them without charging taxes.

CONCLUSIONS OF LAW

A. During the years in issue, Tax Law § 301(a)(1) imposed a tax "upon every petroleum business, for the privilege of engaging in business, doing business, employing capital, owning or leasing property, or maintaining an office in this state, for all or any part of each of its taxable years . . . ." Similarly, Tax Law § 1105(a) imposed a sales tax upon the retail sale of tangible personal property except as otherwise provided by the provisions of Article 28 of the Tax Law. Since it is undisputed that East Coast sold # 2 fuel oil, it follows that East Coast's sales of petroleum are subject to the petroleum business tax and the sales and use tax unless there is an applicable statutory exemption.

B. Petitioners do not challenge the audit methodology. Rather, they contend that their sales are not subject to the petroleum business tax or sales tax for the reasons stated below. In their opening brief, petitioners refer to provisions in a contract between L & L and the City of New York in apparent support of their position that they were making sales to an exempt entity. If this position is found to have merit, sales of the fuel to New York State or a subdivision would be exempt from petroleum business tax pursuant to Tax Law § 301-b(c) and sales tax pursuant to Tax Law § 1116(a).

C. The argument advanced by petitioners lacks merit. First, petitioners do not have any records establishing the amount of their sales to contractors working on bridges. This failure alone is sufficient to conclude that petitioners have not met their burden of proof establishing that

they are entitled to a reduction in the assessments (State Administrative Procedure Act § 306[1]). Second, the contract is unsigned and there is no evidence that it was in effect at the time East Coast was delivering fuel. Furthermore, assuming that the contract was in effect, section 62.5 of the contract clearly states that the exemption for sales to a governmental entity only applies if there is a resale of such supplies. Here, the fuel was not resold to a governmental entity. Rather, it was consumed in the operation of various pieces of equipment.

D. An additional difficulty is presented for petitioners because in order for the contractors to purchase as agents for an exempt governmental entity there must be some indication that the contractors were acting as agents on behalf of the exempt entity (***Matter of MGK Constructors***, Tax Appeals Tribunal, March 5, 1992). Among other things, petitioners did not present any purchase orders from the contractors as agents for an exempt entity or any checks listing the contractors as agents. In sum, petitioners failed to show that they sold fuel to a governmental entity or to an agent acting on behalf of a governmental entity.

E. The Division has also correctly noted that even if East Coast sold fuel to an appointed agent, fuel purchased for a contractor's own use, even if used to perform a task for a governmental unit, is not exempt from sales and use tax. Tax Law § 1116(b) provides, in pertinent part, as follows:

> Nothing in this section shall exempt: . . . . (5) purchases of motor fuel or diesel motor fuel from the tax required to be prepaid pursuant to section eleven hundred two of this article and retail sales of motor fuel or diesel motor fuel subject to the tax imposed by sections eleven hundred five and eleven hundred ten of this article, except such purchases of such fuel by an organization described in paragraph one or two subdivision (a) of this section for its own use or consumption . . . shall be exempt from such tax required to be prepaid and from retail sales taxes on such fuel.[4]

[4] Subdivision one and two of subdivision (a) of Tax Law § 1116 pertain, in general, to New York State and its subdivisions and to the United States and its agencies.

F. Petitioners contend that the sales of petroleum by East Coast were exempt because they were sales to contractors that were working for governmental entities and the contractors were engaged in capital improvement projects on bridges. In support of this position, petitioners rely upon the provisions of the contract, quoted above, between L & L and the governmental entities to establish the understanding between the governmental entitles and the contractors. They also rely upon the Tax Appeals Tribunal in ***Matter of L & L Painting Co., Inc.*** (Tax Appeals Tribunal, June 2, 2011). Petitioners submit that their inability to produce a Contractor Exempt Purchase Certificate is not determinative of the outcome of this matter. According to petitioners, their activities satisfy the criteria of a capital improvement set forth in Tax Law § 1101(b)(9)(i) and 20 NYCRR 541.8(a).

Petitioners maintain that most of their income was generated by the sale of #2 unenhanced fuel oil to contractors who engaged in sandblasting and painting bridges in New York City. Petitioners also maintain that the rules and regulations regarding these tax issues were in a state of flux. Petitioners ask that if the Division could not state with certainty whether certain documents were required, how were venders and subcontractors to know what was required?

G. With respect to the petroleum business tax, petitioners have not cited any statutory provision that creates an exemption for the sale of fuel oil used in the creation of a capital improvement. In the absence of any statutory authority to support this position, the argument is rejected. It is noted that the ***L & L Painting*** decision involved sales and use taxes and not petroleum business tax.

H. In general, Tax Law § 1105(c)(5) provides that the service of "maintaining, servicing or repairing real property" is subject to sales tax except when the improvement constitutes a

capital improvement. Tax Law § 1101(b)(9)(i) defines capital improvement as an addition or alteration to real property which:

> (A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
>
> (B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
>
> (C) Is intended to become a permanent installation.

I. It is clear that East Coast's sale of fuel oil does not constitute a capital improvement within the meaning of Tax Law § 1101(b)(9)(i). The fuel sold by petitioner was used to operate equipment such as air compressors, generators, heaters and vacuum machines. Each of the pieces of machinery was fueled separately and Mr. Laznovsky provided the fuel to operate the machines. It is evident that the fuel provided by East Coast was consumed through operation of the equipment and did not become part of the real property or become permanently affixed to the real property. Accordingly, the sale of petroleum products does not meet the second requirement of Tax Law § 1101(b)(9)(i) and does not qualify for being treated as a capital improvement.

J. In the reply brief, petitioners argue that the contractors were providing a capital improvement and that they could not have done so without the fuel provided by Mr. Laznovsky. Unfortunately for petitioners, this is not the test for a capital improvement. The test is the three criteria set forth in Tax Law § 1101(b)(9)(i), which, as noted above, petitioners do not satisfy.

K. Petitioners contend that the rules regarding the imposition of petroleum business tax were in a state of flux, confusing and misleading. It is submitted that the Division is now seeking to impose new rules that clarified imposition of tax and retroactively punish petitioners for the mistakes of the Division. This argument is also without merit. During the periods in issue, there

were no changes in the law pertaining to the matters at issue in this proceeding. Moreover, the affidavit of Mr. Zirpoli makes it very clear that petitioners were made aware on repeated occasions of their petroleum tax obligations through notices from the Division as well as from conversations with the Division's employees.

L. Petitioners submit that the contractors may have received refunds of taxes that were never paid to petitioners. First, this contention is purely conjecture. Second, there is no showing how this claim has any impact upon petitioners' obligation to collect and remit tax.

M. Petitioners contend that their failure to secure and maintain exempt purchase certificates should not preclude the conclusion that the sales are exempt from tax. Since it has been determined that providing fuel for machinery does not constitute a capital improvement, the failure to obtain and present capital improvement certificates is academic.

N. Petitioners complain that they were never told that sales tax was due until after the audit was completed. This argument is rejected because it amounts to an inappropriate attempt to shift the task of compliance. The taxpayer has the obligation to prepare a return and pay the tax due (Tax Law §§ 1136,1137). Ignorance of the law is not recognized as an excuse (***Browser v. New York Health and Hospitals Corp.,*** 93 AD3d 608, 942 NYS2d 44 [2012]).

O. In its brief, petitioners state that they are entitled to a refund because their sales were not taxable and the "approximately $70,000 - $80,000 paid by Petitioners for Petroleum taxes should not have been required to have been paid, since the work was part of a capital improvement." Petitioners' request raises a series of difficulties. First, the only clear evidence in the record of the amount of petroleum business tax paid is the group of checks offered at the hearing totaling $17,001.82. Second, assuming that such a refund would be appropriate, no records have been offered showing the amount of sales to commercial customers. Third, and

perhaps most important, assuming for the purposes of argument that petitioners were engaged in a capital improvement, there is no provision in the petroleum business tax law for an exemption for capital improvements.

P. In their brief, petitioners request an abatement of penalty and interest. Petitioners contend that they reasonably relied on the representations of state officials and contractors acting as agents of the state that the sale of # 2 fuel oil on bridge painting projects was not subject to sales tax or petroleum tax. Petitioners submit that the imposition of penalties and interest amounts to having to twice pay taxes that they never charged their customers.

Q. The petroleum business tax law and the sales tax law provide for the imposition of a penalty for the failure to file a return or timely pay the tax due (Tax Law §§ 315[a]; 1145[a][1][i]). The penalties may be abated upon a showing of reasonable cause and an absence of wilful neglect. Tax Law § 1145(a)(1)(vi) imposes a penalty for the failure to report and pay an amount in excess of 25 percent of the amount required to be shown on a return.

The affidavit of Mr. Zirpoli shows that there were numerous occasions when petitioners failed to file returns and remit the necessary tax. In particular, the recollection of Mr. Laznovsky and Ms. Pettigrew that they were told that they did not have to collect and remit petroleum business tax or sales tax strains credulity. The numerous notices sent to petitioners should have placed them on notice that further inquiry into their tax liability was warranted. Moreover, Mr. Laznovsky's reliance upon his customers for advice on when to collect tax is also unavailing. In order for reliance upon the advice of others to constitute reasonable cause, a taxpayer has to establish that he acted with ordinary business care and prudence in attempting to determine his tax liability (***Matter of Esikoff***, Tax Appeals Tribunal, October 26, 2000). One would not expect customers to have a completely objective perspective on whether they should incur an additional

expense. It is self evident that reliance upon petitioners' customers is not reasonable. In view of petitioner' inability to produce records of their sales, it is also clear that petitioners did not make an adequate effort to comply with their reporting and payment obligations. Under the circumstances, petitioners have not established reasonable cause for the abatement of penalties.

R. It is noted that the documents attached to petitioners' reply brief have been disregarded. The submission of documents after the closing of the record denies the opposing party the opportunity to question the evidence in the record (***Matter of Saddlemire***, Tax Appeals Tribunal, June 14, 2001).

S. The petitions of East Coast Fueling Services, Inc., and James Laznovsky are denied and the notices dated July 21, 2008 and August 4, 2008 are sustained together with such penalties and interest as are lawfully due.

DATED: Albany, New York
September 19, 2013

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE