STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **SUNOCO, INC. (R&M) COMBINED AFFILIATES (n/k/a Sunoco [R&M], LLC), et al.** for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Period January 1, 2007 through December 31, 2010.	:	DETERMINATION DTA NOS. 829399, 829400, 829401 AND 829402

Petitioner, Sunoco, Inc. (R&M) Combined Affiliates (n/k/a Sunoco [R&M], LLC), et al. (Sunoco),[1] filed petitions for redetermination of a deficiency or for refund of corporation franchise tax under article 9-A of the Tax Law for the period January 1, 2007 through December 31, 2010.

On September 10 and 14, 2021, respectively, petitioners, appearing by Reed Smith (Jennifer S. White, Esq. and Georgio I. Tsoflias, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (James Passineau, Esq. and Bruce Lennard, Esq., of counsel), waived a hearing and submitted these consolidated matters for determination based on documents and briefs to be submitted by December 7, 2022, which date commenced the six-month period for the issuance of this determination. After due consideration of the documents and arguments submitted, Jessica DiFiore, Administrative Law Judge, renders the following determination.

[1] Taxpayer is now known as ETP HoldCo Corporation, Inc. However, this determination will refer to petitioner's name as of the date of filing of the petitions for consistency.

ISSUE

Whether, pursuant to Tax Law former §§ 210 (3) (a) or 210 (8), gross amounts attributable to the sale side of the buy/sell transactions should have been included in the receipts factor of Sunoco's business allocation percentage for purposes of New York's corporate franchise tax for tax years 2007 through 2010.

FINDINGS OF FACT

The parties entered into a stipulation of facts, which has been incorporated into the findings of fact below.

1. Sunoco was principally engaged in the business of petroleum refining and marketing, and chemical manufacturing, with headquarters in Philadelphia, Pennsylvania.

2. Sunoco Partners LLC (Sunoco Partners) was the general partner of Sunoco Logistics Partners L. P. (Sunoco Logistics).

3. Sunoco Partners had three corporate partners – (1) Sunoco, Inc. (R&M), (2) Atlantic Refining & Marketing Corporation, and (3) Sun Pipe Line Company – each of which was included in Sunoco's New York article 9-A corporate franchise tax and metropolitan transportation authority business tax (collectively, "Tax") filings for the period January 1, 2007 through December 31, 2010 (the Tax Period).

4. Sunoco Partners Marketing & Terminals L.P. (SPMT) was a disregarded entity that flowed into Sunoco Logistics.

5. SPMT engaged in the buy/sell transactions at issue in this appeal, which were ultimately reflected on the federal partnership returns filed by Sunoco Logistics. Due to the

disregarded nature of SPMT, these findings of fact will refer to Sunoco Logistics as the entity engaged in buy/sell transactions.

6. The partnership share of Sunoco Logistics was included in the U.S. corporate income tax returns filed by Sunoco. Due to the partnership flow through rules for state apportionment, the amounts attributable to the sell side of Sunoco Logistics' buy/sell transactions were included for state apportionment purposes on the amended New York Forms CT-3-A, General Business Corporation Combined Franchise Tax Returns filed by Sunoco for the Tax Period.

7. Sunoco Logistics engaged in the transport, terminaling and storage, and the purchase and sale of refined products and crude oil (jointly, Oil).

8. Sunoco Logistics owned thousands of miles of pipelines and numerous product terminals.

9. During the Tax Period, and in order to reduce transportation costs, or to acquire a grade of Oil that more closely matched a customer's needs, Sunoco Logistics engaged in buy/sell transactions.

10. Buy/sell transactions occurred when there was an ultimate, third-party purchaser for the Oil, such that the product purchased did not remain in inventory, but was, instead, re-sold to the third-party after it was obtained.

11. Sunoco logistics used dedicated personnel tasked with the negotiation and management of buy/sell contracts.

12. Buy/sell transactions, such as those executed by Sunoco Logistics, were governed by contracts that ran for finite periods of time and contained specific terms, including but not limited to: Oil grade, volume, price, delivery location, transfer of title and risk of loss, invoicing practices, and payment method.

13. The buy/sell transactions included an agreed upon price for both the Oil Sunoco Logistics' purchased and the Oil it sold.

14. Sunoco Logistics and other parties to buy/sell transactions employed fair market value pricing. The sale-side pricing is not tied to or discounted as a result of the buy-side pricing, or vice versa.

15. The Oil grade, volume, and pricing varied between the buy and sale sides.

16. Buy/sell transactions were recorded for both volume and cost.

17. Each party dealt from its own inventory in buy/sell transactions.

18. On the sale side of buy/sell transactions, Sunoco Logistics transferred legal title to, possession of, and risk of loss for the Oil to the purchasing petroleum dealer at the delivery location chosen by that dealer.

19. The purchasing dealer in a buy/sell transaction was entitled to set its own resale price for the Oil without any accounting to Sunoco Logistics for the difference between the purchase price and any subsequent resale price.

20. The purchasing dealer dealt with the Oil in its own name and did not have to disclose that the Oil acquired was that of Sunoco Logistics because Sunoco Logistics no longer owned the Oil.

21. The purchasing dealer was entitled to deal with goods of persons other than Sunoco Logistics; there was no exclusivity.

22. On the sale side, Sunoco Logistics issued invoices for buy/sell transactions, and the other petroleum dealer involved in the buy/sell transactions did the same when Sunoco Logistics was on the buy side.

23. The Division of Taxation (Division) received one sample buy/sell agreement, which was representative of the general nature of buy/sell exchange transactions.

24. In the buy/sell agreement received by the Division, Oil of a specific grade was purchased from a third-party petroleum dealer, with delivery effectuated at a location in close proximity to Sunoco Logistics' ultimate customer.

25. In the buy/sell agreement received by the Division, Sunoco Logistics sold Oil to the same third-party petroleum dealer in finding of fact 24, with delivery at a location desired by the purchaser.

26. According to the buy/sell agreement received by the Division, a fair and accurate representative example of a buy/sell arrangement is as follows:

a. Company A sought to purchase West Texas Intermediate ("WTI") from Sunoco Logistics, with delivery in Midland, Texas.

b. Sunoco Logistics only had WTI in Colorado City, Colorado.

c. Sunoco Logistics entered into a buy/sell agreement with BP Oil Supply Company (BP), whereby it sold to BP 50,000 barrels of WTI from its West Texas Pipeline, and effected delivery at its terminal in Colorado City.

d. As required by the buy/sell agreement, Sunoco Logistics would then buy from BP 50,000 barrels of WTI located in BP's Enterprise Pipeline, and effected delivery at BP's terminal in Midland.

e. Sunoco Logistics thereafter sold the newly acquired WTI to Sunoco's customer, Company A, with delivery in Midland.

27. The example buy/sell agreement received by the Division involved the transfer of the same quantity of Oil and the transactions included two parties. The transactions occurred

concurrently. The product transferred to Sunoco did not remain in inventory as it was sold immediately after it was obtained.

28. Sunoco Logistics recorded the buy and sell sides of the buy/sell transactions as two independent transactions and in the same manner as any other sale or purchase.

29. Buy/sell transactions were recorded in Sunoco Logistics' books and records as separate and distinct purchase and sale transactions in the general ledger accounts 214 and 215. During the Tax Period, Sunoco Logistics recorded all sales in general ledger sales accounts 214 and 215.

30. They were reversed out at the end of the month to adjusted sales of $0.00.

31. The purchase side of a buy/sell transactions was also recorded in the general ledger as a Cost of Goods Sold – *i.e.*, the price to obtain the product.

32. Sales fed from the COINS accounting system to Sunoco Logistics' general ledger.

33. For the sale side, Sunoco Logistics recorded the gross invoice amount from the sale side in both its revenue and receivable accounts. Sunoco Logistics did not offset the sale receipts with the purchase expense to record only a net entry for the sale.

34. Petitioner provided a representative excerpt from these general ledger accounts for January through September 2009. This excerpt included an entry titled "CNB02 Coins," which reflected approximately $9 billion in sales for the period including the sale side of buy/sell transactions.

35. For financial reporting purposes, Sunoco Logistics subsequently reclassified the buy/sell transactions per generally accepted accounting principles (GAAP) rules.

36. Specifically, at the end of each month, Sunoco Logistics debited its sales accounts and credited cost of goods sold (general ledger accounts 313 and 315) in order to adjust sales to

$0.00. Any pricing difference is reflected as an adjustment to inventory costs in costs of goods sold and not as gross receipts or sales.

37. The reclassification had no impact on the accounts receivable balance for the sale side of the buy/sell transactions.

38. The sell side of buy/sell transactions was ultimately reflected on Line 2, Cost of Goods Sold, of Sunoco Logistics' federal forms 1065.

39. Accompanying some of petitioner's buy/sell contracts were "net-out" agreements. These agreements amended the payment provisions of buy/sell contracts between petitioner and other Oil dealers and provided that, on the 20th day of any month, the parties to any buy/sell transactions conducted in the previous month only needed to pay the other party whatever net difference existed from the buy/sell transactions between those parties conducted in the previous month.

40. On page 66 of Sunoco Logistics' form SEC 10-K for the year ending December 31, 2008, Ernst & Young LLP states in its notes to Sunoco Logistics Partners L.P.'s financial statements, the following:

> "Revenues are not recognized for crude oil exchange transactions, which are entered into primarily to acquire crude oil of a desired quality or to reduce transportation costs by taking delivery closer to the Partnership's end markets. Any net differential for exchange transactions is recorded as an adjustment of inventory costs in the purchases component of cost of products sold and operating expenses in the statements of income based upon the concepts set forth in APB Opinion No. 29, 'Accounting for Nonmonetary Transactions' as amended by Emerging Issues Task Force Issue 04-13, 'Accounting for Purchases and Sales of Inventory with the Same Counterparty.'"

41. Inventory exchange transactions were typically entered into for inventory-management purposes and there was no ultimate, third-party purchase for the Oil at the time of

the exchange. Instead, the Oil remained in inventory for an unlimited amount of time after it was obtained.

42. An example of an inventory exchange is as follows: Petroleum Dealer 1 with crude oil production in Texas but a refinery in Pennsylvania, and Petroleum Dealer 2 with crude oil production in Pennsylvania but a refinery in Texas, may enter into an inventory exchange whereby Petroleum Dealer 1 trades its Texas-produced oil for Petroleum Dealer 2's Pennsylvania-produced oil (and vice versa) so that each may avoid the transportation expense of getting its own production to its own refinery.

43. The parties to inventory exchanges generally traded Oil of an equal value (regardless of quantity or grade) because the intent was to exchange product in-kind (e.g., barrels) and make the need for any cash exchange de minimis.

44. Consistent with this inventory-management purpose and similar to other supplier contracts, inventory exchanges were generally governed by long-term, evergreen contracts that automatically renewed after their initial term expired.

45. Also, the parties to an inventory exchange typically did not set payment terms (e.g., a price per barrel) or issue invoices.

46. Inventory exchanges were accounted for differently than buy/sell transactions.

47. During the Tax Period, Sunoco Logistics did not engage in inventory exchanges. A separate entity, Sunoco, Inc. (R&M), engaged in inventory exchanges.

48. Sunoco timely filed Tax returns for the Tax Period.

49. On its originally filed New York State Tax returns, Sunoco's business allocation percentage (BAP) was computed by excluding the amounts attributable to the sell side of Sunoco

Logistics' buy/sell transactions from both the numerator and denominator of the receipts factor used to compute its BAP pursuant to Tax Law former § 210 (3) (a).

50. On its originally filed New York State Tax returns, Sunoco's BAP was computed by including the amounts attributable to the sale to Sunoco Logistics' customers (for example, BP in finding of fact 26), in the numerator and denominator of the receipts factor pursuant to Tax Law § 210 (3) (a).

51. On its originally filed Tax returns for 2007, Sunoco's New York State receipts factor, and ultimately, its BAP was 10.4495%. Its receipts factor, and ultimately, its BAP for 2008 was 10.0556%. Its receipts factor, and ultimately, its BAP for 2009 was 12.8519%. Its receipts factor, and ultimately, its BAP for 2010 was 11.9718%.

52. On September 16, 2014, Sunoco timely filed amended Tax returns for Tax periods ending December 31, 2007 through December 31, 2009 (2007 through 2009 Refund Claims). The amended returns were filed to include the "buy/sell" transactions in the BAP- receipts factor as follows:

Tax Period	Total NY Receipts		Total Everywhere Receipts	
	Per Audit	Amended Return	Per Audit	Amended Return
2007	$4,201,428,809.00	$4,204,268,603.00	$41,454,285,013.00	$49,245,285,325.00
2008	$4,820,850,847.00	$4,822,428,129.00	$49,787,829,058.00	$57,830,967,017.00
2009	$3,659,791,194.00	$3,666,078,455.00	$28,238,735,520.00	$39,522,208,687.00

53. On Sunoco's amended return for 2007, petitioner listed the receipts factor, and ultimately, the BAP as 8.5374%. On its amended return for 2008, petitioner listed the receipts factor, and ultimately, the BAP as 8.3388%. For the 2009 amended return, petitioner listed the receipts factor, and ultimately, the BAP as 9.2760%.

54. On June 15, 2015, Sunoco filed amended returns for the periods ended 2005, 2006, 2007 and 2008 to reflect federal changes (the Federal Changes).

55. The Division conducted a Tax audit, Case ID: X079987035, of Sunoco for Tax years ended 2007 through 2009.

56. During the audit, on January 8, 2013, the Division sent petitioner Information Document Request (IDR) number 6. In this request, among other information, the Division asked for details regarding how receipts are recorded and received for buy/sell transactions, and it asked for a complete copy of a sample buy/sell agreement.

57. In response to IDR number 6, petitioner explained that whether the full monetary value is exchanged or just the net difference in cost in a buy/sell transaction depends on whether there is a net-out agreement in place. Petitioner explained that whether a sale is a net-out agreement or an exchange of full price depends on what makes the most business sense and is a means of managing petitioner's credit.

58. The Division also conducted a Tax audit, Case ID: X465785383, of Sunoco for Tax years ending 2010 through 2013. This audit also included:

a. The Federal Changes for Tax years ending 2005 through 2009; and

b. A review of the 2007 through 2009 Refund Claims.

59. The 2007 through 2009 Refund Claims are based on amended forms IT-204-CP, *New York Corporate Partner's Schedule K-1s*, issued to (1) Sunoco, Inc. (R&M), (2) Atlantic Refining & Marketing Corporation, and (3) Sun Pipe Line Company.

60. No amended federal form 1065, *U.S. Return of Partnership Income* (Form 1065), was filed for the 2007 through 2009 years.

61. The 2007 through 2009 Refund Claims were based on the inclusion of amounts attributable to the sell side of the buy/sell transactions in the computation of Sunoco's apportionment calculation. The 2007 through 2009 Refund Claims did not contest any adjustments previously made by the Division in its Tax audits.

62. On September 27, 2016, the Division issued a Consent to Field Audit Adjustment for Case ID: X465785383, through which it proposed to increase Tax for the Tax periods ending 2005 through 2012 by $945,117.00, plus corresponding interest. The workpapers attached to the Consent to Field Audit Adjustment stated that "[o]n September 16, 2014, the [T]axpayer filed amended state returns amending the Business Allocation percentage for years ending 2007, 2008 and 2009 these amended returns are being denied."

63. On October 13, 2016, Sunoco remitted to the Division two signed Consents to Field Audit Adjustments for Case ID: X465785383, and a corresponding payment in the amount of $1,291,967.00.

64. On June 29, 2017, Sunoco timely filed an amended Tax return for the Tax period ended 2010 (the 2010 Refund Claim).

65. The 2010 Refund Claim is based on amended forms IT-204-CP, *New York Corporate Partner's Schedule K-1s,* issued to (1) Sunoco, Inc. (R&M), (2) Atlantic Refining & Marketing Corporation, and (3) Sun Pipe Line Company.

66. No amended federal form 1065 was filed for the 2010 year.

67. The 2010 Refund Claim was also based on the inclusion of amounts attributable to the sell side of the buy/sell transactions in the computation of Sunoco's apportionment calculation as follows:

Tax Period	Total NY Receipts		Total Everywhere Receipts	
	Per Audit	Amended Return	Per Audit	Amended Return
2010	$3,986,551,378.00	$3,986,551,378.00	$33,299,545,849.00	$44,895,380,734.00

68. The receipts factor and ultimately the BAP listed on Sunoco's amended 2010 return was 8.8796%.

69. The 2010 Refund Claim did not contest any adjustments previously made by the Division in its Tax audits.

70. The 2007 through 2009 Refund Claims and 2010 Refund Claim (hereinafter jointly referred to as the Refund Claims) resulted in requests for Tax refunds in the following amounts:

a. 2007: $1,228,075.00, plus interest.

b. 2008: $951,223.00, plus interest.

c. 2009: $171,485.00, plus interest.

d. 2010: $290,282.00, plus interest.

71. On June 29, 2017, and February 2, 2018, Sunoco filed requests for conciliation conference (requests) related to the Refund Claims with the Bureau of Conciliation and Mediation Services (BCMS).

72. Sunoco's requests were docketed as CMS Nos. 302097 and 301493.

73. On March 1, 2009, BCMS issued conciliation orders for CMS Nos. 302097 and 301493 (the Orders). The Orders sustained the denial of the Refund Claims in their entirety.

74. Sunoco timely protested the Orders by filing its petitions on May 29, 2019, with the Division of Tax Appeals.

75. The Division timely served its answers to the petitions on August 21, 2019.

76. The only issue before the Division of Tax Appeals is whether, pursuant to Tax Law former §§ 210 (3) (a) or 210 (8), amounts attributable to the sell side of the buy/sell transactions are to be included in the receipts factor of Sunoco's BAP.

77. If a determination is made to overturn the Division's refund disallowance in full, Sunoco will be entitled to a Tax refund in the amount of $2,641,065.00, plus statutory interest.

78. If a determination is made to sustain the Division's determination in full, Sunoco will be entitled to no Tax refund.

79. Official notice is taken of Accounting Principles Board (APB) 29: *Accounting for Nonmonetary Transaction*.[2]

80. Pursuant to 20 NYCRR 3000.15 (d) (6), petitioner submitted 72 proposed findings of fact and the Division submitted multiple unnumbered paragraphs of proposed findings of fact. In accordance with State Administrative Procedure Act § 307 (1), petitioner's proposed findings of fact 1 through 5, 7 through 9, 13 through 16, 18, 19, 20, 22, 23, 25, 26, 27, 29, 30 through 34, 36, 37, 38, 39, 40, 41, 42, 43, 47 through 72, are supported by the record, and have been consolidated, condensed, combined, renumbered, and substantially incorporated herein. Petitioner's proposed findings of fact 6, 10, 11, 12, 17, 21, 24, 28, 44, 45 and 46 have been modified to more accurately reflect the record and/or accepted in part and rejected in part as conclusory, irrelevant and/or not supported by the record; to the extent accepted they have been consolidated, condensed, combined, renumbered, and substantially incorporated herein, as modified. Petitioner's proposed finding of fact 35 is rejected as conclusory, irrelevant and/or not

[2] The State Administrative Procedure Act (SAPA) provides that official notice may be taken of all facts of which judicial notice could be taken (SAPA § 306 [4]). 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, 715 [3d Dept 1982] *affd* 57 NY2d 990 [1982]). It is permissible to take official notice of APB 29: *Accounting for Nonmonetary Transaction*, because Opinions of the APB are "determinable from a source of indisputable accuracy" and are a matter of public record (***see Matter of Piscopo***, Tax Appeals Tribunal, April 29, 2019).

supported by the record. As the Division's proposed findings of fact are unnumbered, they will not be ruled on individually. To the extent the Division's proposed findings of fact are supported by the record and are consistent with the stipulation of facts, they are generally incorporated herein.

SUMMARY OF THE PARTIES' POSITIONS

81. Petitioner argues that, for New York corporate franchise tax purposes, Sunoco was entitled to allocate its business income to New York using a BAP that included gross receipts from sales of Oil pursuant to buy/sell transactions. Petitioner asserts that during the Tax Period, it computed its BAP using a receipts factor, which compared the taxpayer's business receipts generated within New York to the business receipts made within and without New York, and that the receipts factor included, among other things, receipts arising from sales of tangible personal property. Petitioner claims that in order for the receipts at issue to be included in its BAP, it must only (1) have been generated from sales, (2) that occurred in the regular course of business, and (3) that were included in the computation of federal taxable income.

Petitioner claims that the sale side of Sunoco's buy/sell transactions constituted a sale of tangible personal property because it transferred Oil to third parties for a price. Petitioner explained that it transferred legal title to, possession of, and risk of loss of the Oil to the purchaser and the purchaser was required to pay the agreed upon price for the goods. At that point, the purchaser was able to set its own resale price for sale to any customer of its choosing, with no influence from petitioner or the need to disclose that the Oil came from petitioner. Petitioner claims that its buy/sell transactions occurred in its regular course of business because they were recurring and executed by dedicated personnel using fair market pricing and were not one-off transactions.

Petitioner also asserts that its entire net income was the same as its federal taxable income. It claims that its accounting records and federal income tax returns demonstrate that the buy/sell transaction sales receipts were included in the calculation of its entire net income. Petitioner contends that it is irrelevant that its entire net income was prepared using reclassification entries showing that the receipts from the sale side of buy/sell transactions were included as a negative cost of goods sold. Petitioner asserts that the New York Tax Law did not require receipts to be reported on federal return line 1 to constitute "receipts" for purposes of computing a taxpayer's BAP. It claims the New York Tax Law only required that the receipts be included in the computation of the taxpayer's entire net income reported to the Internal Revenue Service (IRS). Petitioner asserts that federal returns calculate taxable income by subtracting allowed deductions from income and, therefore, Sunoco's gross receipts from the sale side of buy/sell transactions were included in its computation of taxable income as a deduction for costs of goods sold.

82. The Division asserts that petitioner did not include its sell-side amounts as gross receipts in its federal taxable income and, therefore, should not have included these amounts in its entire net income (ENI) as receipts for purposes of the computation of its BAP. The Division explained that the buy/sell transactions are not included in the gross receipts or sales reported on line 1 of petitioner's U.S. Return of Partnership Income, form 1065 (Partnership Return), but were instead reported as part of line 2 of the form, for cost of goods sold. The Division asserts that the receipts factored into petitioner's BAP should have been those amounts that reflected its actual business activity, which were those that were reported to the IRS as gross income, i.e., gross receipts or sales from line 1 of the Partnership Return.

The Division asserts that petitioner's buy/sell transactions were not each a distinct sale and purchase but were instead one multi-step transaction. It contends that petitioner did not conduct actual sales of Oil in the buy/sell transactions. The Division claims that the purchases and sales were not actually made in exchange for monetary consideration, per se. The Division asserts that petitioner's net-out agreements provided that on the 20th day of any month, the parties to any buy/sell transactions conducted in the previous months would only pay to the other parties whatever net difference existed from all of the buy/sell transactions between those parties conducted in the previous month. The Division claims this establishes that the transactions were not separate and distinct purchases and sales made for monetary consideration, but instead, were exchanges of inventory where only the net difference from multiple buy/sell contracts from the previous month was paid or received.

CONCLUSIONS OF LAW

A. Article 9-A of the Tax Law imposes a franchise tax on all domestic and foreign corporations doing business, employing capital, owning or leasing property, or maintaining an office in New York State (***see*** Tax Law § 209 [1]). Corporations located or doing business within the Metropolitan Commuter Transportation District are also subject to an additional surcharge tax (***see*** Tax Law § 209-B).

During the years at issue, New York corporate taxpayers reported as their article 9-A liability the greatest amount of tax due as computed by four different methods or bases (Tax Law former § 210 [1]). Of these, the present matter concerns the ENI base (Tax Law former § 210 [1] [a]). Tax Law § 208 (9) defines ENI, in relevant part, as "total net income from all sources, which shall be presumably the same as the entire taxable income . . . which the taxpayer is required to report to the United States treasury department . . ." (Tax Law former § 208 [9]).

This means that federal taxable income is "the starting point in computing entire net income" (20 NYCRR 3-2.2[b]). Under Internal Revenue Code (IRC) § 63, "taxable income" means gross income minus allowable deductions. This income is reported to the IRS on form 1120 (***see Matter of Sumitomo Mitsui Banking Corp.***, Tax Appeals Tribunal, May 31, 2007).

B. During the years at issue, ENI had two components, investment income and business receipts (Tax Law former § 210 [3]; 20 NYCRR 3-2.1 [b]). To determine the ENI base, a taxpayer multiplied its business income or receipts by its New York BAP (***see*** Tax Law former §§ 208 [8], 210 [3]).[3]

C. A taxpayer's BAP was calculated using a receipts factor (Tax Law former § 210 [3] [a] [10] [A] [ii]). "Business receipts" are the gross income received in the regular course of a taxpayer's business, as long as such receipts are includible in the computation of the taxpayer's entire net income for the taxable year (***see*** 20 NYCRR 4-4.1). The receipts factor was a ratio equal to the business receipts from sales of tangible personal property, services, rentals, royalties and other business receipts attributable to New York over such business receipts from business transactions everywhere (Tax Law former § 210 [3] [a] [2] [A-D]; 20 NYCRR 4-4.1). The issue here is whether the receipts from the sale side of petitioner's buy/sell transactions constituted receipts from the sales of tangible personal property.

D. The buy/sell agreements that petitioner participated in were exchanges of inventory and not receipts from the sales of tangible personal property. The word "sale" is not defined in Tax Law former § 210 (3) (a) (2) (A). Accordingly, it must be construed "according to its ordinary and accepted meaning at the time [of enactment]" (***Matter of***

[3] The ENI base "is determined by multiplying business income by a business allocation percentage, multiplying investment income by an investment allocation percentage, and adding the results so obtained" (20 NYCRR 3-2.1 [b]). However, only the business income and business allocation percentage are relevant to the instant matter.

Catalyst Repository Sys., Inc., Tax Appeals Tribunal, July 24, 2019) (internal quotations omitted) quoting ***Gevorkyan v Judelson***, 29 NY3d 452, 459 [2017]. Black's Law Dictionary defines a sale as "[t]he transfer of property or title for a price" (***see*** Sale, Black's Law Dictionary 1337 [8th ed. 2004]).[4]

Here, inventory was transferred, and other inventory was provided in return. According to petitioner's response to the Division's IDR number 6, there were occasions where the parties to a buy/sell agreement would also exchange the full monetary value of the Oil instead of the net difference between what was bought and what was sold. However, that does not change the substance of the transaction. The transaction at issue was not a sale for purposes of Tax Law former § 210 (3) (a) (2) (B). Oil would not have been provided in a buy/sell transaction if Oil was not also being acquired in return. Accordingly, petitioner's sale side of the buy/sale transactions were not sales of tangible personal property constituting business receipts.

E. Petitioner attempts to distinguish what it refers to as "inventory exchanges" from buy/sell transactions, arguing they were different because exchanges were entered into for inventory-management purposes with no ultimate, third-party purchaser for the Oil at the time of the exchange. Petitioner also claims that parties to inventory exchanges traded Oil of an equal value because the intent was to exchange product in-kind and make the need for any cash exchange de minimis. Petitioner contends that the buy/sell transactions here were different because each side was an independent sale, with a transfer of the Oil for a price, and were performed because there was ultimately a third-party purchaser. This argument is without merit. Petitioner was transferring Oil in its possession for the Oil of another petroleum dealer. The fact that, ultimately, petitioner made these transfers because it had a third-party purchaser and using

[4] The ninth edition, in effect from 2009 until 2013, uses the same definition of "sale."

this Oil saved in transportation costs or was of a more desirable quality to the end consumer is irrelevant and does not mean it was not an exchange. Because buy/sell transactions were an exchange of inventory, and not a sale of tangible personal property, they should not have been included in the business receipts used to determine the receipts factor and instead were properly included in the costs of goods sold.

F. Petitioner's reliance on ***Matter of CS Integrated*** (Tax Appeals Tribunal, November 20, 2003, ***confirmed*** 19 AD3d 886 [3d Dept 2005]), is misplaced. In ***Matter of CS Integrated***, a company (Company A) that used CS Integrated for cold storage entered into an agreement with CS Integrated whereby CS Integrated purchased Company A's inventory at cost that it was storing at its warehouse for Company A. Company A was then going to repurchase this inventory at cost, plus a service charge for CS Integrated's service of storing the inventory in its warehouse (***id.***). Under the agreement, CS Integrated could also sell the inventory to third parties after Company A was given the option to purchase it first (***id.***).

For the relevant tax years, CS Integrated did not include receipts from the sale of the inventory in its New York receipts when computing its New York BAP and it also did not include the inventory purchased from Company A in its New York property for such purposes (***id.***). CS Integrated argued that its agreement with Company A was an inventory financing agreement and, therefore, CS Integrated was not required to include the receipts from the sale of inventory or include the inventory in its New York property when computing its New York BAP (***id.***). The Tax Appeals Tribunal (Tribunal) rejected the agreement as an inventory financing agreement, and instead found such agreement constituted a sales agreement, where title to the inventory passed to the petitioner (***id.***).

Petitioner asserts that in ***Matter of CS Integrated***, the Tribunal established factors indicating when a transaction constituted a sale of tangible personal property, such that the transaction would be included in the business receipts used in the receipts factor for determining a BAP. These factors included the transfer of legal title and possession of the goods, that the purchaser was responsible for an agreed upon price, and that the risk of loss by accident was transferred to the purchaser (***id.***). Petitioner argues that application of those factors here establishes that petitioner's sale side of the buy/sell transactions were sales constituting business receipts included in its BAP. However, petitioner cannot focus on one side of the buy/sell transaction and ignore the other. Petitioner was not making a sale when it transferred possession of Oil and received monetary compensation in return. Instead, petitioner exchanged Oil in return for other Oil that it then sold to a third party. ***CS Integrated*** did not involve an exchange of assets, and only addressed one side of the instant transactions. Additionally, the use of net-out agreements for some of the buy/sell transactions here further shows the true nature of the buy/sell transactions, whereby one party to one or more buy/sell transactions only pays the other party for any net difference in cost of what was bought versus what was sold after all of the exchanges of inventory from the previous month. The facts of ***CS Integrated*** are distinguishable from the facts here involving an exchange of inventory and are not applicable.

G. Petitioner argues that its buy/sell transaction sales receipts were included in the calculation of "entire net income." It claims that because cost of goods sold entries from buy/sell transactions were reported as federal cost of goods sold, they impacted the amount reported as gross profit and, ultimately, taxable income. Petitioner claims that the Tax Law did not require receipts to be reported on federal return line 1 to constitute "receipts" for purposes of computing a taxpayer's BAP, only that they were includible in the computation of the ENI reported to the

IRS. While petitioner's receipts were included in the calculation of "entire net income," as established above they are not business receipts. Business receipts are gross income received in the regular course of a taxpayer's business, as long as they are includible in the computation of the taxpayer's ENI (***see*** 20 NYCRR 4-4.1). Here, just because the sale side of the buy/sale transactions as included in ENI through a deduction for cost of goods sold, does not mean they are business receipts.

H. Additionally, while the factors established in ***CS Integrated*** do not apply here in determining what constitutes a sale, the Tribunal in that case expressly rejected the argument petitioner is claiming here, which is that "business receipts" means total sales less cost of goods sold. In confirming the decision of the Tribunal, the Third Department also stated: "we are unpersuaded by petitioner's interpretation of Tax Law § 210 (3) (a) (2) by which it would define 'receipts' as 'receipts less cost of goods sold'" (***id.***, 19 AD3d at 889). The Tribunal held "'receipts' used to compute the taxpayer's receipts factor pursuant to Tax Law § 210 (3) (a) (2) (A) means the receipts from the sales of petitioner's tangible personal property . . ." Accordingly, here, where the transaction was not a sale of tangible personal property but was instead an exchange of inventory properly included in the cost of goods sold, it was not a receipt that should be included in the receipts factor.

I. Petitioner bears the burden of proof in any case before the Division of Tax Appeals except where that burden has been specifically allocated to the Division (Tax Law § 1089 [e]). Here, petitioner has failed to meet its burden of proving that it was entitled to a refund of corporation franchise tax and the additional surcharge tax.

J. The petitions of Sunoco, Inc. (R&M) Combined Affiliates (n/k/a Sunoco [R&M], LLC), et al. are denied and their Refund Claims are denied.

DATED: Albany, New York
May 04, 2023

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE