STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions 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.	:	DECISION DTA NOS. 829399, 829400, 829401 AND 829402

Petitioner, Sunoco, Inc. (R&M) Combined Affiliates (n/k/a Sunoco [R&M], LLC), et al.,[1] filed an exception to the determination of the Administrative Law Judge issued on May 4, 2023. Petitioner appeared by Reed Smith LLP (Jennifer S. White, Esq., Aaron M. Young, Esq., and Georgio I. Tsoflias, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Bruce Lennard, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York on May 16, 2024, which date commenced the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Cahill dissents for the reasons set forth in a separate opinion.

ISSUE

Whether, pursuant to Tax Law former § 210 (3) (a), gross amounts attributable to the sale

[1] Petitioner is now known as ETP HoldCo Corporation, Inc. Consistent with the determination, this decision will refer to petitioner by its name as of the date of filing of the petitions.

side of the buy/sell transactions should have been included in the receipts factor of petitioner's business allocation percentage for purposes of New York's corporate franchise tax for tax years 2007 through 2010.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact 36, 39 and 50, which we have modified to more fully reflect the record. We have deleted finding of fact 76, as it restated the issue for determination below and renumbered the subsequent findings of fact accordingly. Similarly, we have not restated the Administrative Law Judge's finding of fact 80, as it discussed the treatment of the parties' proposed findings of facts as submitted below. As so modified, the Administrative Law Judge's findings of fact appear below.

1. Petitioner, Sunoco, Inc. (R&M) Combined Affiliates (n/k/a Sunoco [R&M], LLC), et al. (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 referred to herein as "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. This results in the net impact of the transactions residing within costs of goods sold. Specifically, the reclassification resulted in a negative cost of goods sold.

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, *U.S. Return of Partnership Income*.

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. Net out agreements were used for ease and efficiency of payment as they allowed for a single monthly payment for the parties as opposed to multiple payments for multiple transactions. Net out agreements were a payment mechanism and did not impact the underlying pricing terms of the transactions. When a net-out agreement applies to a buy/sell transaction, the gross receivable is combined with the gross payable for a net cash settlement. However,

petitioner recorded the gross amounts in its general ledger and, with respect to accounts receivable, petitioner applied cash to the receivable at the gross invoice level.

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, Company A in finding of fact 26), in the numerator and denominator of the receipts factor pursuant to Tax Law former § 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*, 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. 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.

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

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

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge framed the issue presented as whether the receipts from

[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 Transactions*, 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).

the sale side of petitioner's buy/sell transactions are receipts from sales of tangible personal property for purposes of petitioner's business allocation percentage (BAP) computation. The Administrative Law Judge considered the buy/sell transactions in their entirety and concluded that these transactions were exchanges of inventory and thus not receipts from sales of tangible personal property. The Administrative Law Judge reasoned that petitioner would not have agreed to sell oil in a buy/sell transaction if it had not also agreed to acquire oil in return. Having made this finding, the Administrative Law Judge concluded that petitioner's sale side of the buy/sale transactions were not sales of tangible personal property constituting business receipts.

The Administrative Law Judge rejected petitioner's argument that the transactions at issue differ from reciprocal inventory exchanges, where such exchanges are entered into for inventory management purposes with no third-party purchaser at the time of the exchange. The Administrative Law Judge noted that the subject transactions involved the transfer by petitioner of oil in its possession for the oil of another petroleum dealer. That petitioner made these transfers because it had a third-party purchaser and entered into these transactions for reasons of operational efficiency is irrelevant, according to the Administrative Law Judge.

The Administrative Law Judge found that petitioner's reliance on ***Matter of CS Integrated, LLC*** (Tax Appeals Tribunal, November 20, 2003, ***confirmed*** 19 AD3d 886 [3d Dept 2005]) was misplaced. According to the Administrative Law Judge, that case is distinguishable because, unlike the present matter, it did not involve an exchange of assets or buy/sell transactions.

The Administrative Law Judge also found that the true nature of the buy/sell transactions as inventory exchanges is shown by the use of net-out agreements, where one party to the agreement pays the other the net difference in buy and sell amounts during the previous month.

The Administrative Law Judge rejected petitioner's contention that because its receipts from the buy/sell transactions were included in the calculation of its entire net income (ENI) through negative costs of goods sold entries and thus accounted for in gross profit, such receipts should be included in petitioner's BAP computations. The Administrative Law Judge held that, although the receipts at issue were included in the calculation of ENI, they are not business receipts for purposes of the BAP computation because they were not accounted for as gross income.

The Administrative Law Judge also noted that both the Tax Appeals Tribunal and the Appellate Division decisions in ***Matter of CS Integrated*** rejected an assertion that receipts for BAP purposes means receipts less cost of goods sold. The Administrative Law Judge thus concluded that, as the buy/sell transactions were exchanges of inventory, the sell side of those transactions are not properly considered receipts for BAP purposes.

Accordingly, the Administrative Law Judge determined that petitioner failed to meet its burden to prove entitlement to the claimed refunds.

ARGUMENTS ON EXCEPTION

According to petitioner, for its receipts from the sale-side of the buy/sell transactions to be considered business receipts for BAP purposes, such receipts must have been: (1) generated from sales; (2) that occurred in the regular course of business; and (3) included in the computation of federal taxable income. Petitioner asserts that its sale-side receipts met these requirements.

Petitioner contends that the determination denies petitioner's claim on the basis that the receipts at issue were not generated from sales and therefore not includible in petitioner's BAP calculation. To the contrary, petitioner asserts that the record shows that the two sides of a

buy/sell transaction are separate and distinct; that the sale side of the buy/sell transactions met the definition of a sale under the factors considered in ***Matter of CS Integrated***; that buy/sell transactions are conceptually different from inventory exchanges and are accorded different accounting treatment by petitioner; and that the use of net-out agreements has no relevance to the proper characterization of those agreements.

The Division agrees with the Administrative Law Judge's conclusion that the buy/sell transactions were exchanges of inventory and did not generate gross income or receipts from sales of tangible personal property. Accordingly, the Division contends that such transactions may not be included in petitioner's BAP computations.

The Division asserts that each buy/sell transaction was one multi-step transaction and not two separate transactions as petitioner contends. The Division observes that petitioner entered into such transactions for the ultimate purpose of facilitating the sale of oil to a third-party customer. The Division characterizes the subject transactions as exchanges of inventory followed by a sale to a third-party customer.

The Division further contends that buy/sell transactions that were subject to net-out agreements did not involve exchanges for monetary consideration where such agreements limited the consideration exchanged to the net difference in the total values agreed to in the previous month. Furthermore, where petitioner received only the monthly net cash settlement amounts, the Division contends that petitioner cannot claim that it actually received the sale-side amounts that it contends should be factored into its BAP computation. The Division asserts that because petitioner reclassified the sale-side amounts as negative cost of goods sold, it recharacterized amounts as costs and not as receipts.

The Division finds further support for its position that the buy/sell transactions were nonmonetary exchanges of inventory and not sales of product in Accounting Principles Board (APB) 29: *Accounting for Nonmonetary Transactions*.

The Division contends that petitioner's accounting treatment of the buy/sell transactions shows that such transactions are not sales. In essence, the Division asserts that the negative cost of goods sold entries for the sale-side of the transactions simply offset the positive cost of goods sold entries made with respect to the buy-side of the transactions. According to the Division, the buy/sell transactions had no meaningful impact on the amount petitioner reported as gross income.

The Division also contends that the requirement of 20 NYCRR former 4-4.1 (a) that only receipts that are includible in the computation of ENI may factor into a taxpayer's BAP refers to receipts that are reported as gross income and not to sale-side amounts that are reclassified as a taxpayer's negative cost of goods sold. According to the Division, because the amounts at issue were not reported on federal returns as gross income, they are not receipts includible in a taxpayer's computation of BAP.

The Division argues that ***Matter of CS Integrated*** is distinguishable from the present matter because the transactions at issue in that case did not involve exchanges of inventory. Additionally, the Division suggests that a Texas case, ***Bullock v Marathon Oil, Co.***, 798 SW2d 353 (1990), supports its position.

In its reply brief, petitioner takes issue with the Division's contention that since petitioner did not include the receipts at issue in gross receipts on its federal returns, those receipts were not part of petitioner's gross income, federal taxable income, or New York ENI. Petitioner asserts that whether the amounts at issue constitute business receipts for BAP purposes does not depend

on whether such amounts are reported as gross receipts on its federal income tax returns. Rather, petitioner contends that the Tribunal has held that such business receipts for BAP purposes means receipts from sales of tangible personal property and that pursuant to ***Matter of CS Integrated***, the buy/sale transactions here were sales of tangible personal property.

Petitioner also takes issue with the Division's contention that petitioner's negative cost of goods sold entries were effectively offset by the cost of goods sold entries made with respect to oil received from other petroleum dealers. Petitioner asserts that its accounting practices, specifically its negative cost of goods sold adjustment, did not impact its gross profit. Petitioner claims that it has demonstrated that its gross profit was the same whether the sale-side of the buy/sell transactions at issue were accounted for in gross receipts or as a negative cost of goods sold.

In response to the Division's argument that the use of net-out agreements shows that the buy/sell transactions were not separate and distinct purchases and sales made for monetary consideration and that the only monetary consideration was the net difference due at the end of each month, petitioner asserts that the net-out agreement was merely a mechanism designed to reduce the number of payments exchanged between the parties.

Petitioner rejects the Division's claim that because petitioner treated the buy/sell transactions as non-monetary exchanges for financial accounting purposes it must continue that treatment for tax reporting purposes. Petitioner asserts that differences in accounting and tax reporting is justified. Petitioner further contends that, even if the buy/sell transactions are classified as inventory exchanges, the relevant question is whether such exchanges are sales for BAP purposes. According to petitioner, the factors discussed in ***Matter of CS Integrated*** indicate that these transactions were sales.

Finally, petitioner asserts that ***Bullock v Marathon Oil Co.*** is distinguishable from the present matter and thus provides no support to the Division's position.

OPINION

Petitioner seeks refunds or credits for its asserted overpayment of franchise taxes during the years at issue. Accordingly, petitioner bears the burden of proof to establish entitlement to its claims (Tax Law former § 1089 [e]; 20 NYCRR 3000.15 [d] [5]).

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 (Tax Law former § 209 [1]). Corporations located or doing business within the Metropolitan Commuter Transportation District are also subject to an additional surcharge tax (***see*** Tax Law former § 209-B).

During the years at issue, taxpayers computed their article 9-A tax liability pursuant to four alternative bases and reported tax due on the greatest amount so computed (Tax Law former § 210 [1]).[3] Petitioner reported its tax due for each of the years at issue pursuant to the ENI base (Tax Law former § 210 [1] [a]).

ENI is a taxpayer's entire federal taxable income modified by additions or subtractions as specified in the Tax Law (***Matter of Walt Disney Co. v Tax Appeals Tribunal*** ___ NY3d ___ [April 23, 2024] citing Tax Law former § 208 [9]; ***see also*** 20 NYCRR former 3-2.2 [b]). Federal taxable income is gross income minus allowable deductions (Internal Revenue Code [IRC] [26 USC] former § 63).

During the years at issue, for apportionment purposes, a taxpayer's ENI was categorized as either investment income or business income. Investment income, generally defined as

[3] Comprehensive corporate tax reform, effective for taxable years commencing on or after January 1, 2015, has made significant changes in the computation of liability under article 9-A (***see*** L 2014, ch 59).

income from investment capital (Tax Law former § 208 [6]), was allocated to New York using an investment allocation percentage (Tax Law former § 210 [3] [b]). Petitioner's allocated investment income is not at issue in the present matter. The balance of a taxpayer's ENI was its business income (Tax Law former § 208 [8]). Business income was allocated to New York by multiplying it by the taxpayer's BAP (Tax Law former § 210 [3] [a]). The total of the taxpayer's allocated business and investment income was its ENI base, which was taxed at the applicable rate (Tax Law former § 210 [1] [a]).

The dispute in the present matter concerns the proper computation of petitioner's BAP. During the years at issue, a taxpayer's BAP was calculated using a receipts factor (Tax Law former § 210 [3] [a] [10] [A] [ii]). The receipts factor was a fraction with a numerator equal to a taxpayer's business receipts attributable to New York and a denominator equal to the taxpayer's total business receipts (Tax Law former § 210 [3] [a] [2] [A-D]; 20 NYCRR former 4-4.1). For BAP purposes, business receipts are "gross income received in the regular course of the taxpayer's business, provided such receipts are includible in the computation of the taxpayer's entire net income for the taxable year" (20 NYCRR former 4-4.1 [a]). Thus, the question presented here is whether the gross amounts attributable to the sale side of petitioner's buy/sell transactions are properly considered to be business receipts and thus includable in the computation of petitioner's BAP.

As noted by the Administrative Law Judge, the word "sale" is not defined in Tax Law former § 210 (3) (a) (2) (A). We agree with her conclusion of law that such an undefined term must be construed according to its ordinary and accepted meaning (***see Matter of Catalyst Repository Sys., Inc.***, Tax Appeals Tribunal, July 24, 2019). We find her construction of the

term as "the transfer of property or title for a price" to be reasonable and gives the term its ordinary and accepted meaning (***see*** Garner, ***Black's Law Dictionary*** [9th ed 2009]).

We agree with the Administrative Law Judge that petitioner has failed to bear its burden of proving its entitlement to a refund of corporation franchise tax and the additional surcharge tax, as it has failed to establish that the sale side of the buy/sell transactions here at issue represent sales rather than mere exchanges of inventory followed by a sale (***see*** Tax Law former § 1089 [e]). Here, the facts indicate that a buy/sell transaction consisted of a transfer of inventory for other inventory in return, which was followed by a sale to petitioner's end customer. We find that these transactions were not sales for purposes of Tax Law former § 210 (3) (a) (2) (B), as they lacked independent economic substance separate from the end customer sale. Ultimately, petitioner would not have agreed to sell oil in a buy/sell transaction unless oil was to be acquired in return.

We agree with the Administrative Law Judge that the net-out agreements further demonstrate that the buy/sell transactions comprised non-sale inventory exchanges. According to the Administrative Law Judge, because the net-out agreements only required a party to one or more buy/sell transactions to pay the other party the net difference between what was purchased and what was sold on a monthly basis, the true nature of the transactions was that of an exchange of inventory, and not a sale. The net-out agreements further support the conclusion that the underlying buy/sell agreements were nonmonetary exchanges, as each exchange included the exchange of inventory, but not necessarily for a monetary asset (***see*** Accounting Principles Board [ABP]: *Accounting for Nonmonetary Transactions*). Such a transfer fails to qualify as a sale for purposes of BAP calculation.

Petitioner's accounting treatment of the receivables from the buy/sell transactions also informs our conclusion. Each side of the buy/sell transactions were recorded in Sunoco Logistics' books and records as separate and distinct purchase and sale transactions. However, petitioner's treatment of the receivables from the sale side of the buy/sell transactions were reflected on line 2, cost of goods sold, of Sunoco Logistics' federal forms 1065, US Return of Partnership Income, as negative costs of goods sold pursuant to GAAP rules (***see*** ABP: *Accounting for Nonmonetary Transactions*). As noted by the Administrative Law Judge, including the sale side of the buy/sell transactions in ENI through a deduction from cost of goods sold does not transform such transactions into business receipts.

Petitioner urges us to consider our decision in ***Matter of CS Integrated*** to be controlling on the question of whether the buy/sell transactions here at issue were properly includable in the computation of petitioner's BAP. In ***Matter of CS Integrated***, we considered a number of factors indicating whether a sale had occurred for purposes of calculating a taxpayer's BAP, including transfer of title and possession of the goods at issue, responsibility of the purchaser for an agreed price, freedom of the purchaser to set its own price for the goods upon resale, completeness of the goods, risk of loss, right of the purchaser to deal in the goods of persons other than the seller, and the right of the purchaser to deal in its own name without having to disclose that the goods are those of another (***id.***). While some of those factors are present here, the transactions at issue in ***Matter CS Integrated*** are distinguishable from the buy/sell transactions here at issue. There, CS Integrated agreed to buy their customer's entire inventory in exchange for an agreement to sell them back the original inventory at cost plus a carrying charge. Pursuant to this agreement, CS Integrated built a warehousing facility in New York to serve its customer's needs. CS Integrated had no other New York facilities. There was no

reciprocal exchange of inventory between CS Integrated and its customer, unlike petitioner and its buy/sell transaction counterparties. These differences indicate to us that the sale side of petitioner's buy/sell transactions does not represent business receipts made in the regular course of business, but rather inventory exchanges.

For the reasons stated above, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Sunoco, Inc. (R&M) Combined Affiliates (n/k/a Sunoco [R&M], LLC), et al., is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Sunoco, Inc. (R&M) Combined Affiliates (n/k/a Sunoco [R&M], LLC), et al., for a refund of corporate franchise tax for the periods ending December 31, 2007 through December 31, 2010, are denied; and

4. Petitioner's claims for refunds of corporation franchise tax made pursuant to its amended returns for the periods ending December 31, 2007 through December 31, 2010, are denied.

DATED: Albany, New York
November 18, 2024

/s/ Jonathan S. Kaiman
Jonathan S. Kaiman
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

COMMISSIONER CAHILL dissenting:

I respectfully disagree with my colleagues regarding the application of statutory and case law on the facts of this case outlined in the record. We do not disagree with either the facts as included in the record, the rendition herein of the position of the parties or the summary of the determination below. Likewise, we generally agree upon what the law dictates to be the means by which a taxpayer arrives at their New York tax liability in this realm. Accordingly, this dissent will not repeat those elements.

Petitioner was engaged in a business characterized by numerous and complex transactions. It produces, purchases, sells and exchanges commodities. Here, we are considering transactions where petitioner or other entity does not have a sufficient supply to meet its ultimate customers' demand of a specific product in a particular geographic region of the marketplace.

In these circumstances, the party that is in short supply acquires the product or rights to the product from a third party. In turn, an essential but seemingly complicating characteristic of these transactions is that when an entity is purchasing the supply from a third party, a contractual agreement may be entered into that the third party would also purchase a commodity owned by petitioner, located where that third party needed supply. The commodity supplied may or may not be of the same price, grade, quantity and quality.

In those situations, the parties fixed the prices and other terms and transfer title and legal risk of loss at the time of the transaction (***see*** findings of fact 12, 13, 18). After the transaction was concluded, the purchaser was entitled to set their own price, with absolutely no obligation to the entity that sold it to them. The ultimate customer conducted all of its dealings with the entity that was the purchaser in the exchange transaction, not the original selling entity (***see*** findings of fact 19, 20, 21).

Petitioner engaged in those transactions as both a purchaser and seller. This matter concerns the transactions where they were the seller and how those transactions impact the BAP when determining their New York tax liability. If the transactions are characterized as sales, the effect is to reduce their BAP for the periods in issue, as a function of sales that took place outside of New York State. Petitioner would include those sales in both the numerator and denominator of the BAP calculation. If they are not sales, they would not be included.

Initially, petitioner filed returns where the sale side of these transactions were excluded from the computation of their BAP. Subsequently, it amended the returns to include them.

That these transactions were made in the regular course of business is clear from petitioner's use of personnel dedicated to negotiating and managing buy/sell contracts (***see*** finding of fact 11) and the fact that the inclusion of receipts from the sale side of these transactions adds from about $8 to about $11 billion to petitioner's total business receipts for each of the years at issue (***see*** findings of fact 52 and 67).

The record also shows that these transactions were included in the computation of petitioner's ENI. Petitioner recorded these transactions in its general ledger in the same manner as any other purchase (***see*** findings of fact 28 and 33) and did not offset sale-side receipts from purchase-side expenses (***see*** finding of fact 33). Although the monthly reclassification zeroed out the receipts from the sale side of these transactions, the corresponding negative cost of goods sold general ledger entries means that these transactions were accounted for in petitioner's gross profit as reported in its federal income tax returns and thus included in the computation of its federal taxable income and ENI (***see*** finding of fact 36; 20 NYCRR former 4-4.1 [a]).

The Tax Law does not require that business receipts be exclusively reported as gross income or gross receipts on line 1 of the federal return to be includable in ENI, only that such

receipts are includable in the computation of the taxpayer's ENI for the taxable year (***see*** 20 NYCRR former 4-4.1 [a]).

As to whether the subject transactions are properly considered sales for BAP purposes, we examine the transactions for indicia of a buyer-seller relationship (***Matter of CS Integrated, LLC***, Tax Appeals Tribunal, November 20, 2003, ***confirmed*** 19 AD3d 886 [3d Dept 2005). In ***Matter of CS Integrated***, we considered the following factors indicative of whether a transaction was a sale warranting inclusion in a taxpayer's BAP:

1. Whether legal title and possession of goods was transferred to a purchaser;
2. Whether the purchaser became responsible for an agreed price;
3. Whether the purchaser could fix the price at which it resells without accounting to the seller for the difference between what it obtains and the price paid;
4. Whether the goods were incomplete or unfinished and it is understood that the purchaser is to make additions to them or complete the process of manufacture;
5. Whether the risk of loss by accident is upon the purchaser;
6. Whether the purchaser deals, or has the right to deal, with the goods of persons other than the seller; and
7. Whether the purchaser deals in its own name and does not disclose that the goods are those of another.

Pursuant to these factors, the sale-side of the transactions here at issue were clearly sales. That is, on the sale side of a buy/sell transaction, title and possession of the oil was transferred from petitioner to a buyer (***see*** finding of fact 18); the buyer was required to pay the agreed price to petitioner (***see*** finding of fact 13); the buyer was free to do what it wanted with the purchased oil without accounting to petitioner (***see*** finding of fact 19); the buyer assumed risk of loss upon purchase (***see*** finding of fact 18); the buyer could deal with other sellers (***see*** finding of fact 21); and the buyer dealt in its own name (***see*** finding of fact 20).

Petitioner demonstrated that the sale side of the buy/sell transactions constitutes sales and that receipts from such sales were properly included in its BAP for the tax years here at issue. In

reaching that conclusion, I respectfully disagree with the application by the Administrative Law Judge and my colleagues in the majority of step-transaction analysis to the facts of this case. The step-transaction doctrine is a rule of substance over form that treats a series of formally separate steps as a single transaction if such steps are in substance integrated, interdependent, and focused toward a particular result (***Esmark, Inc. v Commr***, 90 TC 171, 195 [1988], ***affd*** 886 F2d 1318 [1989] citing ***Penrod v Commr***, 88 TC 1415, 1428 [1987]). Specifically, the Administrative Law Judge analyzed the transactions by looking at the end result and concluding that a buy/sell transaction would not have happened but for petitioner's need for a particular grade and amount of oil at a particular location pursuant to an order from a customer. The Administrative Law Judge thus deemed the purchase and sale sides of the buy/sell transactions to lack economic substance as they comprised nothing more than an exchange of inventory followed by a sale to petitioner's end customer. Such treatment of the buy/sell transactions ignores the economic realities of the transfer of ownership, including risk of loss and the right to fix its own prices upon resale, however transitory ownership of the oil might be. Each transaction had an independent function and business purpose, including savings of transportation costs for a particular amount and grade of oil at a specific location, notwithstanding their concurrent execution.

Reliance on net-out agreements as evidence that the buy/sell transactions were non-sale inventory exchanges does not alter my view. According to the Administrative Law Judge, because the net-out agreements only required a party to one or more buy/sell transactions to pay the other party the net difference between what was purchased and what was sold on a monthly basis, the true nature of the transactions was that of an exchange of inventory, not a sale. This conclusion is contrary to the language of an example net-out agreement in evidence, which

stipulates that both parties shall continue to invoice the other party as applicable. Further, as found by the Administrative Law Judge, each side of the buy/sell transactions was recorded in Sunoco Logistics' books and records as separate and distinct purchase and sale transactions (***see*** findings of fact 28 through 39). Furthermore, Sunoco Logistics did not offset the sale receipts with the purchase expense to record only a net entry for the sale (***see*** finding of fact 33). The net-out agreements thus represent an amendment to the payment terms for separate purchases and sales, done for the convenience of the parties thereto, rather than revealing the "true nature" of the buy/sell transactions themselves.

Although the Administrative Law Judge found the buy/sell transactions to be non-sale exchanges of inventory, the facts describe inventory exchanges in a manner that differs significantly from the buy/sell transactions at issue. Revenues were not recognized for inventory exchanges (***see*** finding of fact 40). Inventory exchanges were entered into for inventory management purposes and there was no existing purchaser for the oil at the time of the exchange (***see*** finding of fact 41). Parties to an inventory exchange typically did not set payment terms or issue invoices, unlike in a buy/sell transaction (***see*** findings of fact 12 and 22), and typically exchanged oil of an equal value, regardless of quantity or grade (***see*** findings of fact 43 and 45).

The facts reflect that petitioner accounts for the buy/sell transactions differently from its other sales. On a monthly basis, Sunoco Logistics debited its sales accounts and credited costs of goods sold in order to zero out its sales pursuant to GAAP rules. Any pricing difference was reflected as an adjustment to inventory costs in costs of goods sold rather than gross receipts. However, as found by the Administrative Law Judge, such reclassification had no impact on the accounts receivable balance for the sale side of the buy/sell transactions. The receivables from

the sale side of the buy/sell transactions were ultimately reflected on line 2, Cost of Goods Sold, of Sunoco Logistics' federal forms 1065, US Return of Partnership Income.

The Division argues that because Sunoco Logistics reported the sale side receivables from the buy/sell transactions as negative cost of goods sold on line 2 of its federal forms 1065 rather than as gross income on line 1, such receivables are not includible in the computation of petitioner's ENI. I note that under Tax Law former § 208 (9), ENI is presumably the same as federal taxable income required to be reported to the IRS (***see also*** 20 NYCRR former 3-2.2). The Division's interpretation of *entire net income* effectively ignores the statutory presumption that ENI is the same as federal taxable income, in that the Division insists that only receipts reported as *gross income* may be included. This would be an anomalous result given that, for a corporate taxpayer, federal taxable income is not reported on form 1065, US Return of Partnership Income, but rather on line 30 of form 1120 (US Corporation Income Tax Return). In that case, reportable federal taxable income for a US corporation is reported as net of cost of goods sold (***see*** lines 2, 11, 28 and 30 of federal form 1120). There is no impact on federal taxable income when reporting the receivables from the sale side of the buy/sell transactions here at issue as cost of goods sold compared to reporting such receivables on line 1 as gross income, as a negative cost is mathematically and functionally equivalent to a gross receipt for purposes of calculating federal taxable income. While petitioner complied with GAAP rules for such sales, those financial reporting rules do not necessarily demand the same treatment as tax reporting. As petitioner notes, financial statement reporting may vary from tax reporting since the primary goal of financial accounting is to provide useful information to management and other interested parties while the primary goal of the income tax system is the equitable collection of revenue (***see Thor Power Tool Co. v Commr***, 439 US 522, 542 [1979]).

For the reasons stated above, I would reverse the determination of the Administrative Law Judge and grant the refund requested for the tax years in issue.

DATED: Albany, New York
November 18, 2024

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner