STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BOLKEMA FUEL CO., INC.	:	DECISION DTA No. 808200
for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Years 1984 through 1988.	:	
	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 19, 1992 with respect to the petition of Bolkema Fuel Co., Inc., P. O. Box 218, Wyckoff, New Jersey 07481-1000, for redetermination of a deficiency or for refund of tax on petroleum businesses under Article 13-A of the Tax Law for the years 1984 through 1988. Petitioner appeared by Williams & Puglisi, Esqs. (Thomas W. Williams, Esq., of counsel) and John C. Williams & Associates (Ronald E. Raven, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Both the Division of Taxation and petitioner filed briefs on exception. Oral argument, at the Division of Taxation's request, was heard on September 10, 1992.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation should be estopped from collecting the tax asserted to be due from petitioner.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "6" which has been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional finding of fact are set forth below.

During the years in issue, petitioner, Bolkema Fuel Co., Inc., was a firm which sold gasoline, fuel oil and diesel motor fuel. The firm was located in Wyckoff, New Jersey, which is approximately five miles from the New York State border.

Petitioner did not file returns under Article 13-A of the Tax Law during the years in issue. However, petitioner was registered with New York State for purposes of the New York State motor fuel tax.

On the basis of a field audit, the Division of Taxation (hereinafter the "Division") concluded that petitioner was subject to tax under Article 13-A of the Tax Law. This conclusion was based on the fact that petitioner was importing petroleum products into New York. The Division also determined that there was a taxable nexus to New York because petitioner's vehicles were making "peddle"[1] deliveries into New York and because petitioner serviced residential oil burners in New York.

In order to determine the amount of tax due, petitioner ran a computer printout of its sales that would have been subject to tax under Article 13-A. The Division used the figures from the computer printout to calculate taxable revenues.

On the basis of the foregoing audit, the Division issued five notices of deficiency, dated December 22, 1988, to petitioner which asserted deficiencies of tax under Article 13-A of the Tax Law as follows:

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[1]A peddle delivery occurs when a vehicle makes multiple deliveries from the same vehicle.

Period Ended	Tax	Interest	Additional Charge	Total
4/30/84	$42,111.58	$22,544.56	$ -0-	$64,656.14
4/30/85	10,766.41	3,997.52	-0-	14,763.93
4/30/86	8,515.18	1,952.81	-0-	10,467.99
4/30/87	6,341.40	801.69	-0-	7,143.09
4/30/88	6,029.55	238.32	-0-	6,267.87

We modify the Administrative Law Judge's finding of fact "6" to read as follows:

> After the enactment of the tax on petroleum businesses, the Division mailed a letter, questionnaire and memorandum (TSB-M-83[22]C) to those companies which it thought had a likelihood of being subject to the tax. The letter explained that chapter 400 of the Laws of 1983 imposed a tax under Article 13-A on petroleum businesses importing petroleum or causing petroleum to be imported into the State for sale in the State. The letter then asked the recipient to complete the enclosed questionnaire
>
> in order to determine if the respective business was subject to tax.[2]

Petitioner completed and returned the Article 13-A questionnaire wherein it explained that its principal activity was as a supplier of petroleum products. In response to another question, regarding whether a service was provided in New York, petitioner stated that it provided burner service to home heating units only.

Upon receipt of the Article 13-A questionnaire, the Division examined a transcript of petitioner's tax return filings and found that petitioner made a practice of filing the Form CT-245 entitled Maintenance Fee and Activities Report of Foreign Corporations Disclaiming Tax Liability. In connection with this report, petitioner remitted tax in the amount of $200.00.

Upon reviewing the foregoing information, the Division concluded that petitioner was not subject to tax under Article 13-A. Thereafter, the Division mailed petitioner a letter, dated November 9, 1983, which stated as follows:

> "After reviewing the answers which you provided on our questionnaire relative to Article 13-A, we have determined that you are not a 'petroleum business' as defined in such article and are therefore not required to file reports with or to pay the applicable tax under Article 13-A directly to this department.

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[2] We have modified this finding of fact by adding (TSB-M-83[22]C) to indicate a proper cite for the memorandum.

> Such determination is based upon the fact that your answers indicate that you are not engaging in business, doing business, employing capital, owning or leasing property or maintaining an office in New York, even though it appears that you are importing petroleum into New York State for sale in the state.
>
> We, of course, reserve the right to verify the correctness of the statements made in your questionnaire at some later date.
>
> If the statement above which describes your business activities in New York is not accurate, please contact this office immediately."

The foregoing letter was signed by William H. Frank, Jr. as "Chief, Oil Tax Audits."

During the period in which the Division was reviewing the Article 13-A questionnaires, it was under a great deal of pressure to make rapid determinations. As a result of this pressure, the Division overlooked the fact that petitioner disclosed that it repaired heating units in New York

State. According to the Division's witness, if the Division's reviewers had examined the CT-245's which had been filed instead of a computer printout, which only indicated that such reports had been filed, it would have made a different determination.

At the hearing, the Division offered into evidence petitioner's CT-245's for the years 1981 through 1987. Except for the year 1981, petitioner disclosed that it performed services in New York State. Further, except for the year 1981, petitioner stated that it furnished technical advice to retailers or consumers in New York State. Petitioner also stated that, with the exception of 1981, it did not investigate claims in New York State. During each of the years 1981 through 1987, petitioner reported that it collected accounts in New York, performed services in New York and that it approved or rejected orders in New York State. Except for the year 1981, which was left blank, petitioner stated that it did not perform other activities in New York State. Lastly, except for the year 1984, petitioner reported that it did not coordinate or supervise the activities of a subsidiary which was taxable in New York State.

Mr. Theodore Bolkema served as the president of Bolkema Fuel. In 1983, he completed the Article 13-A questionnaire which requested information about petitioner's activities. In response, Mr. Bolkema received the letter from Mr. Frank dated November 9, 1983. As a result of this letter, it was Mr. Bolkema's understanding that petitioner was not required to remit the

tax imposed by Article 13-A. In reaching this conclusion, Mr. Bolkema relied on Mr. Frank's letter.

During the years in issue, petitioner's office was located in New Jersey. When petitioner received a request from a customer in New York for the delivery of a product, the order was accepted in New Jersey.

Petitioner did not purchase fuel from any supplier in New York. In or about 1982, petitioner purchased oil in New York and had it delivered by a third party to a location in New Jersey.

From 1980 until May of 1986, petitioner serviced home heating fuel units in New York. In May of 1986, this portion of petitioner's business was turned over to a new company. After May of 1986, petitioner did not provide any service in New York.

During the years in issue, petitioner did not repair storage tanks, gasoline pumps or other equipment relating to the machinery of the fuel business.

Petitioner did not have an office in New York. It did not have any capital, lease properties or maintain any facilities in New York.

Generally, petitioner received payments from its New York customers through the mail. It was petitioner's practice to send a bill when the product was delivered. Later, it sent a monthly statement. Most of petitioner's customers paid their debts in a timely manner.

On one occasion there was a New York customer who did not pay his bills. As a result, petitioner initiated a lawsuit in New York.

Petitioner relied upon business cards and "word of mouth" for its advertising. It did not use radio or television commercials.

Although one of petitioner's sales representatives resided in New York, petitioner did not solicit sales in New York before 1989.

At the hearing, petitioner presented testimony that when Article 13-A of the Tax Law was enacted, the Division chose to interpret the tax as a franchise tax. Later, the Division interpreted the tax as an excise tax. According to petitioner's witness, the reason the Division

chose to assert a deficiency of tax in 1989 and did not do so in 1983 was that there was a change in the interpretation of the law.

We also find as an additional finding of fact that in reliance on the letter, petitioner did not collect tax from its customers.

OPINION

The Administrative Law Judge, relying on Matter of North Am. Car Corp. v. State Tax Commn. (94 AD2d 880, 463 NYS2d 563) for the principle that "the servicing of a customer's equipment is the type of local, personalized service that constitutes 'doing business'," (Determination, p. 10) determined that "petitioner's servicing of home heating units [in New York] constituted doing business in New York and created a taxable nexus for purposes of Article 13-A of the Tax Law" (Determination, p. 10).[3] In so finding, the Administrative Law Judge rejected petitioner's assertions that the servicing of home heating units should not be considered because the activity is not taxable under Article 13-A of the Tax Law, and that the Division erroneously asserted tax under Article 13-A.

However, the Administrative Law Judge, relying on Schuster v. Commissioner (312 F2d 311, 62-2 USTC ¶ 12,121), rejected the Division's assertion that the Division's error was a mistake of law and that estoppel is not available to correct a mistake of law. The Administrative Law Judge determined that the principle of estoppel was applicable in the instant case and, citing Matter of Glover Bottled Gas Corp. (Tax Appeals Tribunal, September 27, 1990) and Matter of Harry's Exxon Serv. Sta. (Tax Appeals Tribunal,

[3]The Administrative Law Judge rejected other factors which the Division asserted demonstrated that petitioner was doing business in New York. Specifically, the Administrative Law Judge found that: petitioner's employment of a salesman in New York, standing alone, was "irrelevant" since there was no evidence that the salesman was soliciting orders in New York; petitioner's one time purchase of petroleum in New York and the delivery of the petroleum by another company to New Jersey did not support the Division's assertion that petitioner was doing business in New York; petitioner's delivery of petroleum into New York was not "doing business" since the Division's own guidelines (TSB-M-83[22]C) provide that a seller "which only delivers petroleum into the state and does not engage in business" is not subject to the 13-A tax (emphasis added); the single lawsuit instituted by petitioner in New York to collect a debt does not support the Division's assertion that petitioner was doing business in New York. Finally, the Administrative Law Judge found Mr. Bolkema's testimony that petitioner did not accept orders in New York to be credible and persuasive with regard to the Division's assertion that such testimony was inconsistent with information in petitioner's CT-245s.

December 6, 1988), concluded that the Division should be estopped from collecting the tax from petitioner. The Administrative Law Judge determined that: 1) petitioner was entitled to rely on the letter from the Division which stated that petitioner was not required to file reports or pay tax under Article 13-A of the Tax Law and that the Division should have expected that taxpayers would rely on such letters; 2) "the uncontradicted testimony [of petitioner] is that petitioner received and relied on the letter from the Division" (Determination, p. 12); and 3) such reliance was to the detriment of petitioner.

In reaching his conclusion, the Administrative Law Judge rejected the Division's assertions that estoppel is inappropriate because petitioner did not adequately describe its activities in New York on the questionnaire and that, in any event, the letter from the Division was qualified in that it stated that the information on the questionnaire was subject to verification. The Administrative Law Judge concluded that "petitioner was forthright in advising the Division that it repaired burners in New York [and] there was no reason for petitioner to believe that the Division misunderstood the nature of petitioner's activities or that an additional response [from petitioner] was necessary" (Determination, p. 12).

On exception, the Division reasserts its arguments at hearing that estoppel is not appropriate where tax has been determined to be legally due and that, in any event, estoppel is appropriate only under exceptional circumstances to correct a manifest injustice. The Division asserts that it was not reasonable for petitioner to rely on the November 1983 letter because the letter states that it was subject to verification. Moreover, the Division argues that "[t]he letter also states a conclusion (that petitioner was not doing business in New York) which petitioner should have realized was incorrect" and that "[t]he letter requests that the Department be informed if the petitioner's business is inaccurately described" (Division's brief on exception, p. 24). The Division asserts that a reasonable person "would have noticed the inaccuracies in the Division's description of petitioner's business and made inquiries to the Department. Since petitioner failed to do so, it is as much as [sic] at fault as the Division" (Division's brief on exception, p. 24).

The Division asserts further that there is no proof that petitioner relied to its detriment on the November 1983 letter essentially because:

> "[b]y not passing on Article 13-A tax to its New York customers petitioner obtained a [sic] advantage over its competitors who were Article 13-A taxpayers. Since it [sic] costs were lower, it [sic] selling price was lower or its profit margin was greater. A lower selling price would generate additional sales and thus additional profit. While petitioner may have to pay the tax without recouping the cost from its customers, it has not established that the additional profits generated by its New York billings are less than the tax due" (Division's brief on exception, p. 23).

Finally, the Division asserts that its misstatement was caused in large part by petitioner's failure to adequately describe on the questionnaire its New York activities and that the Administrative Law Judge erroneously concluded that petitioner had disclosed all the relevant facts regarding its New York activities on the questionnaire (Division's brief on exception, p. 26). The Division asserts that "peddle deliveries" (i.e., when multiple deliveries are made from the same vehicle) constitute a form of doing business; that petitioner only indicated that it delivered fuel into New York, not that it made "peddle deliveries"; and that petitioner's failure to indicate that it made "peddle deliveries" in New York leads to the conclusion that petitioner's description of its activities was "grossly incomplete" (Division's brief on exception, p. 27).

In response to the Division's exception, petitioner asserts that the Administrative Law Judge was correct in concluding that the Division should be estopped from collecting tax from petitioner. In its brief on exception, petitioner asserts that the Administrative Law Judge erred in concluding that petitioner was doing business in New York.

We limit our review of the determination of the Administrative Law Judge to the issue raised by the Division on exception, namely, whether the Administrative Law Judge correctly applied the doctrine of estoppel against the Division under the facts of this case.

The allegations presented to us by the Division in this exception concerning the doctrine of estoppel are the same as those made before the Administrative Law Judge. Our review of the record leads us to conclude that the Administrative Law Judge adequately and correctly addressed these same allegations in his determination. In particular, we find no basis to the

Division's assertion that petitioner could not reasonably rely on the Division's letter because petitioner misstated the principal activities of his business and did not adequately fill out the questionnaire. Our review of the record indicates petitioner fully and accurately answered the questionnaire and included all the facts necessary for the Division to make its determination on petitioner's tax status, including the fact that petitioner serviced heating units, the crux of the Administrative Law Judge's conclusion that petitioner was doing business in New York.[4]

Accordingly, we affirm the determination of the Administrative Law Judge for the reasons stated in his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

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

3. The petition of Bolkema Fuel Co., Inc. is granted; and

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[4]The Division's reliance on the open-ended "subject to verification" language of its letter, more than five years after its issuance, appears particularly unseemly. The Division never sought to verify the "correctness" of petitioner's statements on the questionnaire, but uses that language now as a device to change its opinion on the information provided. Moreover, such reliance is contrary to the ostensible purpose of the whole exercise, i.e., to bring certainty to businesses affected by a new tax. In this regard, we refer to the original letter asking petitioner to fill out the questionnaire which stated, in part, as follows:

> "[i]n order to make a determination, if your business is subject to tax under Article 13-A, please complete the enclosed questionnaire.
>
> * * *
>
> "Upon receipt of the completed questionnaire, we will make a determination of your status and advise you of this determination" (Exhibit "G").

4. The notices of determination dated December 22, 1988 are cancelled.

DATED: Troy, New York
March 4, 1993

/s/John P. Dugan
John P. Dugan
President

/s/Maria T. Jones
Maria T. Jones
Commissioner