STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MANHATTAN & QUEENS FUEL CORPORATION	:	DECISION DTA No. 810457
for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Period April 1, 1982 through May 31, 1983.	:	

Petitioner Manhattan & Queens Fuel Corporation, 251 Lombardy Street, Brooklyn, New York 11222, and the Division of Taxation each filed an exception to the order of the Administrative Law Judge issued on January 28, 1993. Petitioner appeared by Levine & Robinson (Kenneth L. Robinson, Esq., of Counsel) and Carl S. Levine and Associates (Carl S. Levine, Esq., of Counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of Counsel).

Both parties filed briefs in support of, in opposition to, and reply briefs concerning the respective exceptions. Oral argument requested by both parties was denied. Petitioner's reply brief was received on July 26, 1993 and began the Tax Appeals Tribunal's six-month time period to issue this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether either or both of the exceptions filed by the Division of Taxation and petitioner are premature under 20 NYCRR 3000.5(a)(5).

II. Whether the Administrative Law Judge properly partially granted petitioner's motion for discovery.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation ("Division") issued a Notice of Determination of Tax Due Under Motor Fuel Tax Law dated December 10, 1984 asserting additional motor fuel tax due of $1,074,717.44 (13,433,968 gallons at $.08 tax per gallon), plus penalty "due to unsubstantiated tax-free sales."

The following schedule, included in the audit report, disclosed the calculation of additional taxable gallons of 13,433,968, which resulted in additional motor fuel tax of $1,074,717.40:

Month	Additional Taxable Gallons	Additional Tax ($.08 per gallon)
November 1982	589,438	$ 47,155.04
December 1982	1,116,802	89,344.16
January 1983	835,508	66,840.64
February 1983	1,230,511	98,440.88
March 1983	3,655,441	292,435.28
April 1983	2,620,987	209,678.96
May 1983	3,385,281	270,822.48
Total	13,433,968	$1,074,717.40

On the bottom of this schedule was the following handwritten sentence: "All of the above tax free sales were made to Shoppers Marketing Inc."

A Conciliation Order dated November 1, 1991 reduced additional tax asserted as due from $1,074,717.40 to $849,342.32 based upon the following allowance against tax due for purchases from petitioner on which Shoppers Marketing, Inc. (hereinafter "SMI") paid tax:

Month	Unconfirmed Tax-Free Sales To SMI	Purchases on Which SMI Paid Tax	Balance of Additional Taxable Gallons	Balance of Tax Due ($.08 per gallon)
November 1982	589,438	346,392	243,046	$ 19,443.68
December 1982	1,116,802	1,116,802	-0-	-0-
January 1983	835,508	380,000	455,508	36,440.64
February 1983	1,230,511	298,950	931,561	74,524.88

March 1983	3,655,441	316,146	3,339,295	267,143.60
April 1983	2,620,987	253,488	2,367,499	189,399.92
May 1983	3,385,281	105,411	3,279,870	262,389.60
	13,433,968	2,817,189	10,616,779	$849,342.32

On January 31, 1992, petitioner filed a petition dated January 29, 1992 contesting the remaining tax claimed due of $849,342.32, plus penalty and interest. Petitioner summarized its position as follows in paragraph 67 of its petition:

> "In this Petition protesting the Conciliation Order, M & Q contends that it is not liable for any taxes upon its sales, as an agent of NYFT [New York Fuel Terminal Corp., an affiliate of petitioner which owned and operated a terminal where petitioner stored all gasoline it purchased which was not immediately resold], of gasoline to Shoppers for the following reasons:
>
> "(a) M & Q, as an agent for a disclosed principal, NYFT, is not liable to the Department for any allegedly unpaid excise tax on its sales, as an agent, of gasoline to Shoppers;
>
> "(b) Alternatively, M & Q's sales to Shoppers, a licensed motor fuel distributor, were not subject to the Motor Fuel Tax;
>
> "(c) All sales of gasoline to Shoppers purportedly paid for by third parties were actually sales to Shoppers;
>
> "(d) Shoppers is liable to the Department for any unpaid taxes; and
>
> "(e) M & Q and NYFT had not [sic] duty to determine and did not know whether Shoppers was complying with the Motor Fuel Tax Law."

The Division admitted by its answer dated June 29, 1992 paragraphs one through four of the petition which described the nature of petitioner's business as follows:

> "1. . . . Manhattan & Queens Fuel Corp. was a New York Corporation engaged, inter alia, in the importation, distribution, purchase and sale of gasoline and other petroleum products, with its principal place of business located [in Brooklyn].
>
> "2. On or about June 1, 1980, the New York State Department of Taxation and Finance granted M & Q Motor Fuel Distributor License No. M-2136 pursuant to its complete application and the posting of a Fifty Thousand Dollar bond.
>
> "3. This License authorized M & Q to import motor fuel into New York State and to purchase and sell gasoline in New York State 'ex-tax', that is, without incurring any liability to the Department for the otherwise applicable eight cent per gallon Motor Fuel Tax imposed on sales of gasoline by a distributor to licensed purchasers.
>
> "4. Pursuant to its License, M & Q imported or caused to be imported gasoline into New York State."

The Division summarized its position in the affirmative statements made in paragraphs 5 through 14 of its answer as follows:

> "5. . . . [P]etitioner filed motor fuel tax returns with the Division of Taxation on which it claimed to have sold amounts of motor fuel to SMI on a tax-free basis.
>
> "6. . . . [O]n each such return, the petitioner improperly claimed the amounts of fuel allegedly sold to SMI as a deduction from its total taxable distribution of motor fuel.
>
> "7. . . . [N]o such sales of motor fuel were made to SMI by the petitioner during that period.
>
> "8. . . . [T]o the contrary, the petitioner's affiliate, NYFT, which was not registered with the Division as a distributor of motor fuel, made sales of motor fuel to SMI during the applicable period.
>
> "9. . . . [P]etitioner improperly and without legal authority therefor, deducted the sales made by NYFT to SMI from the total taxable distribution of motor fuel on the petitioner's motor fuel tax returns.
>
> "10. . . . [P]etitioner has, by its motor fuel tax returns, demonstrated that it purchased the fuel at issue either from sources outside of New York State or from sources within NY State.
>
> "11. . . . [D]ocumentary evidence submitted by the petitioner in support of its petition amply demonstrates that the fuel at issue was sold not by M & Q but by NYFT.
>
> "12. . . . [S]ince the petitioner purchased such fuel, and such fuel was undeniably sold by NYFT to SMI or other third parties, such fuel was necessarily transferred by M & Q to NYFT in order that it might be sold by NYFT.
>
> "13. . . . [T]here was no authority for the petitioner, a registered distributor, to transfer motor fuel to NYFT, an unregistered distributor, on a tax-free basis.
>
> "14. . . . [S]ince the petitioner did not sell the fuel at issue to a registered distributor, it was not entitled to deduct such fuel from its total taxable distribution of motor fuel."

In a reply dated July 8, 1992, petitioner protested that the Division's position set forth in the affirmative statements described above constituted "a new theory of liability never before raised by the Department of Taxation and Finance"[1] which was barred by the statute of

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[1]Kenneth L. Robinson, in his affidavit dated October 8, 1992, described the original theory of liability as follows:

> "The rationale for the disallowance [of 13,433,968 gallons of motor fuel sold to SMI], as understood by the taxpayer, was that M & Q accepted payment for the motor fuel it sold to SMI from third parties, who were not Article 12-A distributors . . . . [Therefore,] M & Q really sold the gasoline to these unregistered third parties and should have collected the Article 12-A taxes from them."

limitations. In a sur-reply dated July 13, 1992, the Division denied that its position, as described in its answer, constituted a new theory of liability.

On July 9, 1992, a final[2] Notice of Hearing was issued by the Division of Tax Appeals scheduling this matter for formal hearing on August 4, 1992 which provided, in part, as follows:

> "Except as otherwise provided by law, the petitioner has the burden of proof and must establish by a preponderance of the evidence the facts necessary to show that there is no deficiency or that a refund is due. Such proof may be made by sworn testimony of the petitioner's witnesses or by documentary or other evidence introduced during the course of the hearing.
>
> "An adjournment may be requested but will be granted only for good cause and only if the request is received in writing at least 15 days prior to the hearing date, and only to such time and place as the Division of Tax Appeals finds appropriate." (Emphasis in original.)

Petitioner, by its attorney, served a subpoena duces tecum dated July 29, 1992 on the Commissioner of Taxation and Finance, which commanded the production of the following at the hearing in this matter:

> "(a) All files, records, documents, correspondence, notes, reports and memoranda made or maintained by the New York State Department of Taxation and Finance that are responsive to the following:
>
> "1. Complete work papers and audit report of the New York State Department of Taxation and Finance ('Department') in this matter.
>
> "2. Each Article 12-A and each Article 13-A tax return, and any amendment thereto, filed by Shoppers Marketing, Inc. ('SMI') during the period or [sic] November 1, 1982 through May 31, 1983 ('relevant period').
>
> "3. Identify each audit prepared by the Department in regard to SMI for all or part of the relevant period and provide each such audit file.

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[2]The hearing in this matter had been adjourned twice before at the request of petitioner's representative. Mr. Robinson's letter dated June 26, 1992 set forth the following explanation for the adjournment requests:

> "The hearing was originally scheduled for June 18, 1992 and was adjourned due to a conflict in cases we were handling.
>
> "We are requesting a second adjournment for several reasons. First, as of this date, we have not received a response to the discovery we served on the Law Bureau on May 27, 1992 . . . . Second, no answer has yet been served by the Law Bureau to the Petition. Third, it will take at least a week to prepare for trial."

"4. Identify each audit or investigation prepared by the Department in regard to N.A.I. Enterprises, Inc., Quick Petroleum Corp., and New York Fuel Terminal Corp., for all or part of the relevant period and provide each such audit file.

"5. Identify each payment of motor fuel taxes received by the Department from SMI that is reflected in the worksheet annexed hereto as Exhibit No. '1' and state:

"i) the date each payment was received;

"ii) the identity of the payor;

"iii) the manner of payment (i.e., check, cash, etc.);

"iv) provide a copy of each evidence of payment;

"v) the manner in which the Department credited these tax payments to Petitioner;

"vi) a copy of each correspondence or other document referring or relating to each such payment;

"vii) identify each representative of the Department with knowledge of such payment; and

"viii) Identify all other monies received from SMI in connection with the payment reflected on Exhibit No. '1' and the disposition of all such additional monies.

"6. Identify every tax amnesty application submitted to the Department by SMI for Article 12-A Motor Fuel Taxes and interest during and after the relevant period.

"7. Identify and produce each file the Department possesses or maintains in regard to SMI referring or relating, in whole or in part, to Article 12-A taxes.

"8. Identify each Department employee or agent, past or present, that had any responsibility whatsoever for auditing SMI in regard to Article 12-1 [sic] Motor Fuel Tax liabilities for the relevant period.

"9. Identify and produce all reports, writings or memoranda prepared by or for the Department referring or relating to any Article 12-A Motor Fuel Tax liability of SMI in regard to the relevant period.

"10. Identify all communication(s) and correspondence that the Department or its auditors received to indicate that the Department had not collected Article 12-A Motor Fuel Taxes on the petroleum products M&Q sold to SMI during the relevant period.

"11. All documents referring or relating to why the Department issued Notice No. 2457 to Petitioner on or about December 10, 1984.

"(b) All other documents, evidences and writings, which you have in your custody or power, concerning the above-captioned matter."

The documents and information requested pursuant to the subpoena duces tecum detailed above correspond in large measure to "informal discovery requests" made in a letter dated May 27, 1992 of petitioner's representative to opposing counsel. The Division, by a letter dated June 29, 1992 of Mr. DeWitt, responded to the "informal discovery requests." Since the response corresponded to the numbering of the paragraphs in the "informal discovery requests", for clarity the informal discovery requests in the letter of May 27, 1992 were as follows:

"1. Complete workpapers and audit report of the New York State Department of Taxation and Finance ('Department') in this matter.

"2. Name, current business address, and title of each person employed by or for the Department that prepared, supervised, reviewed and/or commented upon the audit report referred to in Request No. '1'.

"3. Each Article 12-A and each Article 13-A tax return, and any amendment thereto, filed by SMI during the relevant period.

"4. Identify each audit prepared by the Department in regard to SMI for all or part of the relevant period and provide each such audit file.

"5. Identify each audit or investigation prepared by the Department in regard to N.A.I. Enterprises, Inc., Quick Petroleum Corp., and New York Fuel Terminal Corp., for all or part of the relevant period and provide each such audit file.

"6. Identify each payment of motor fuel taxes received by the Department from SMI that is reflected in the worksheet annexed hereto as Exhibit No. '1' and state:

"(a) the date each payment was received;

"(b) the identity of the payor;

"(c) the manner of payment (i.e., check, cash, etc.);

"(d) provide a copy of each evidence of payment;

"(e) the manner in which the Department credited these tax payments to Petitioner;

"(f) a copy of each correspondence or other document referring or relating to each such payment;

"(g) identify each representative of the Department with knowledge of such payment; and

"(h) Identify all other monies received from SMI in connection with the payment reflected on Exhibit No. '1' and the disposition of all such additional monies.

"7. Identify every tax amnesty application submitted to the Department by SMI for Motor Fuel Taxes during and after the relevant period.

"8. Identify and produce each file the Department possesses or maintains in regard to SMI referring or relating, in whole or in part, to Article 12-A taxes.

"9. Identify each Department employee or agent, past or present, that had any responsibility whatsoever for auditing SMI in regard to Motor Fuel Tax liabilities for the relevant period.

"10. Identify and produce all reports, writings or memoranda prepared by or for the Department referring or relating to any Motor Fuel Tax liability of SMI in regard to the relevant period.

"11. Identify all communication(s) and correspondence that the Department or its auditors received to indicate that the Department had not collected Motor Fuel Taxes on the petroleum products M&Q sold to SMI during the relevant period.

"12. Explain why the Department issued Notice No. 2457 to Petitioner on or about December 10, 1984.

"13. Was SMI a registered Article 12-A motor fuel distributor during the entire relevant period?

"14. On what date and for what reason was SMI's registration as a distributor of motor fuel cancelled, revoked or suspended?"

The Division's response by its letter of June 29, 1992 was as follows:

"In the first instance, I do not agree with your description of the factual issues in dispute in this matter. Based on a review of the file, it appears that the basis of the Notice of Determination issued by the Division of Taxation of the Department of Taxation and Finance (Division) is that Manhattan and Queens Fuel Corp. (M & Q), during the period at issue, improperly reported certain sales of motor fuel on Schedule 11 of its motor fuel tax returns as sales by it within New York State to Shoppers Marketing, Inc. (SMI), a registered distributor. In fact, and as borne out by the allegations of and exhibits to the petition, this fuel was sold by New York Fuel Terminal, Inc. (NYFT) to SMI and/or other third parties.

"For the period at issue, M & Q was a distributor of motor fuel and was registered with the Division as such. A registered distributor of motor fuel could, at that time, sell motor fuel tax-free <u>to another registered distributor</u>. The Division's regulations (section 410.7(a) of 20 NYCRR) required that, for such sales, 'the seller must include the quantity so sold tax-free in his aggregate sales but will be permitted to deduct the gallonage so sold in arriving at the gallonage taxable.'. [sic] However, the fuel at issue was sold to SMI by NYFT (not M & Q) and NYFT was <u>not</u> a distributor of motor fuel registered with the Division during the period at issue.

"There is no dispute that the fuel at issue was purchased by M & Q from sources either within or without New York State. However, sales by M & Q were not to SMI but to NYFT, an unregistered distributor. M & Q was not authorized to make tax-free sales to NYFT nor was NYFT authorized to make tax-free sales to another distributor, registered or not.

"Since M & Q was not authorized to sell tax-free to an unregistered distributor, it was likewise not authorized to deduct the gallonage sold by NYFT from its aggregate sales during the month. In response to your demands, therefore, the following information is provided . . . :

"1. A copy of the work papers of the Division and the audit report is included herewith and will be introduced at the hearing on July 9, 1992.

"2. . . .

"(a) The auditor involved in this case was James Farrell, who is no longer employed by the Division.

"(b) The team leader for the auditor at the time the audit was conducted was Michael D'Esposito, who is no longer employed by the Division.

"(c) The supervisor of the team leader and the auditor at the time the audit was conducted was Peter Wynne, who is no longer employed by the Division.

"3, 4, 5. Since SMI, N.A.I. Enterprises, Quick Petroleum Corp. and/or NYFT are not parties to this proceeding, no copies of any tax returns filed by them or audits conducted concerning them will be produced, nor are such documents relevant to a resolution of the proceedings herein.

"6. The document identified as Exhibit '1' annexed to your letter already contains the pertinent data requested insofar as dates, amounts and identity of payor is concerned. The records of the Division do not indicate that any other funds were received from SMI in connection with the payments reflected on said Exhibit '1'.

"7, 8, 9, 10. Since SMI is not a party to this proceeding, amnesty applications, files, reports or other communications of the Division or the identity of personnel who may have been involved in any audit conducted of SMI will not be produced, nor are such documents relevant to a resolution of the proceedings herein.

"11. All communications relevant to this proceeding and on which the Department has relied in issuing the Notice of Determination at issue are contained in the audit report and workpapers provided herewith.

"12. See second, third and fourth unnumbered paragraphs at the beginning of this letter.

"13. Yes.

"14. SMI's registration as a motor fuel distributor was cancelled on December 28, 1983, and the reasons are not relevant to this proceeding."

At the formal hearing before Administrative Law Judge Brian Friedman on August 4, 1992, the Division was prepared to go forward with its case when petitioner's representative interrupted "to make a motion which pertains to discovery which we had been pursuing and which we had hoped to have resolved prior to the hearing today." The Division's representative indicated that the subpoena (as detailed above) would not be honored for the reasons noted in his letter dated July 31, 1992, which had provided, in relevant part, as follows:

> "[T]he information sought is substantially the same as requested in your letter of May 27, 1992, to which the Department responded on June 29, 1992. With that response, the audit report and workpapers relative to the audit of the petitioner were furnished to you. These documents also relate to the information sought in paragraphs 1 and 11 of the subpoena. In its June 29, 1992 letter [which is detailed in Finding of Fact '10'], the Department refused to disclose any information concerning files, tax returns, audits or other data, if such data exists, concerning taxpayers not a party to this proceeding. For the reasons set forth in that letter of June 29, 1992, the Department is unable to comply with paragraphs 2 through 10 of the subpoena you have issued, other than to the extent of the information it has already furnished."

In response, petitioner requested that Judge Friedman "compel" the Division to disclose the records sought by the subpoena duces tecum. Judge Friedman adjourned the hearing scheduled for August 4, 1992 in order to enable petitioner to make a motion "to compel compliance of a subpoena duces tecum." However, by a letter dated August 18, 1992, Judge Friedman indicated that he lacked the authority to enforce the subpoena and advised petitioner to make "a motion in Supreme Court to compel compliance . . . or . . . to make a motion for discovery of the items sought in the subpoena." As a result, the motion at issue was made by petitioner.

The audit report includes a section entitled "Sales" which provides as follows:

> "Sales are made [by petitioner] tax free to registered distributors, and tax is collected on sales to non-registered distributors. Total sales were checked to computer print-out showing all sales and to account receivable ledger, sales were also reconciled to inventory control sheets.
>
> "All tax free sales reported on schedule II to Shoppers Marketing Inc. are being disallowed. Disallowance was made since sales were not properly substantiated."

Petitioner contends that "SMI and its customers [N.A.I. Enterprises and Quick Petroleum] are, upon information and belief, defunct corporations, upon whom service of a subpoena cannot be had . . . ." A cursory review of Exhibit "3" attached to the petition dated January 29,

1992, which the petition alleges were photocopies of checks in payment of the motor fuel sales at issue herein, discloses that N.A.I. Enterprises and Quick Petroleum share the same Great Neck, New York address. Further, it appears that a Jerold Skolnik signed checks on behalf of N.A.I. Enterprises and Quick Petroleum. Checks on behalf of SMI were signed by individuals named Joseph Skolnik,[3] Leon Bercoris and Michael Makwaritz.[4] Petitioner did not indicate whether these individuals could be served with subpoenas to appear at the hearing in this matter.

OPINION

The Administrative Law Judge held that pursuant to 20 NYCRR 3000.5(a) there is no discovery in a Division of Tax Appeals proceeding except for a showing of good cause and petitioner had not demonstrated good cause. The Administrative Law Judge stated that the issue in the case is whether petitioner sold motor fuel to NYFT (who then sold the motor fuel to SMI) or whether the motor fuel sales were made directly to SMI by petitioner. The Administrative Law Judge further held that the records requested by petitioner in its motion for discovery were not relevant to this issue and that this issue was merely an expansion of the theory that was the basis of the Division's notice. In any event, the Division was allowed to raise a new legal theory.

The Administrative Law Judge disagreed with the Division's analysis of Thaler v. Murphy (42 Misc 2d 1, 247 NYS2d 816) and concluded that a policy of confidentiality of other taxpayer's returns did not by itself preclude the Division from complying with petitioner's discovery request. Finally, the Administrative Law Judge held that in those instances where the Division gave credit to petitioner for taxes paid by SMI, fundamental fairness required that those particular returns of SMI be provided to petitioner.

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[3]The record does not reveal if Joseph Skolnik is related to Jerold Skolnik.

[4]This is a best guess since the signature is difficult to decipher.

On exception, the Division argues that since disclosure may be granted only for good cause shown and that since the Administrative Law Judge found that petitioner had not demonstrated good cause, he could not grant any disclosure on the basis of fundamental fairness. The Division further argues that this is especially true when petitioner is asking for disclosure of other taxpayers' returns in light of the long-standing Division policy of protecting taxpayer confidentiality, citing Thaler v. Murphy (supra). The Division asserts that the Administrative Law Judge ignored offers of the Division to reach a compromise solution and submits another such compromise on exception, offering to disclose those returns required by the order of the Administrative Law Judge with the names of suppliers and/or customers of SMI, other than petitioner and NYFT, redacted. Finally, the Division asserts that petitioner is on a fishing expedition and has not shown good cause for disclosure because the documents sought by petitioner are not relevant to this proceeding and do not assist petitioner in meeting its burden of proof, emphasizing again the Division's policy of protecting taxpayer confidentiality.

On exception, petitioner asserts that it has shown good cause for disclosure of the documents requested because such documents are material and necessary to its case. Petitioner also asserts that Thaler does not extend to Article 12-A of the Tax Law the secrecy provisions of other articles of the Tax Law under circumstances where documents are sought to be disclosed in an administrative tax hearing and are necessary to a petitioner to defend an assessment against it. Furthermore, even if the secrecy provisions of the Tax Law applied to Article 12-A, disclosure is allowed under such provisions where the information sought is relevant to the proceeding, citing In re Grand Jury Proceedings (89 AD2d 605, 452 NYS2d 643); KLM Royal Dutch Airlines v. New York State Tax Commn. (87 AD2d 93, 449 NYS2d 358); State ex rel. Von Hoffman Press v. Saitz (607 SW2d 219 [Mo. App]). Petitioner also asserts that disclosure is necessary because there are no other means available to petitioner to get the requested information and such information is critical in that petitioner has the burden of proof in this case. Petitioner asserts that it does not have to prove that the documents sought under discovery are necessary to presenting its case, only that they may be necessary, and that

the Division cannot be allowed to be in a position of dictating which documents in its possession that have not been seen by a petitioner are relevant to that petitioner's case.

In response to our request that the parties address in their respective briefs the issue of whether either or both exceptions are premature pursuant to 20 NYCRR 3000.5(a)(2), the Division responded as follows:

> "it is noted that section 3000.5(a)(5) of the Tax Appeals Tribunal Rules of Practice and Procedure provides that 'An order by an administrative law judge on any motion which does not finally determine all matters and issues contained in the petition, for purposes of review by the tribunal, shall not be deemed final and conclusive. . . .' In Matter of Rally Oil (Tax Appeals Tribunal, January 17, 1991) (concerning an Order granting discovery) the Tribunal noted that, although section 3000.5(a)(5) provides 'as a general rule' that decisions on motions will not be subject to review until a decision is rendered disposing of the entire petition, 'there are instances where exceptions to our general rule may be required.' In that proceeding, the matter was remanded for informal discovery and further proceedings before the ALJ. However, in the instant proceeding, informal discovery has been pursued by the petitioner and the Division has complied to the extent it is capable.
>
> "The Division believes that the existence of an order directing it to disclose, without restriction, the tax returns of a taxpayer not a party to the instant proceeding is so egregious an intrusion of the rights of privacy of the State's taxpayers that it comes within the 'exception' to the general rule of section 3000.5(a)(5) and is subject to review by this Tribunal. However, the Division does feel that the exception of the petitioner, insofar as it seeks a review of the denial of its discovery motion on the ground that 'good cause' was not shown, is within the general rule of section 3000.5(a)(5) and is not subject to review" (Division's brief in opposition/reply, pp. 9-10).

Petitioner responded as follows:

> "[a]ccordingly, Petitioner believes that the determination of the Administrative Law Judge that the Division must produce the tax returns of SMI is not reviewable. However, since M&Q has demonstrated good cause, the Administrative Law Judge's denial of all other parts of Petitioner's discovery request comes within the 'exception' to the general rule of § 3000.5(a)(5) that non-final orders cannot be appealed (Matter of Rally Oil, Tax Appeals Tribunal, DTA No. 806712, January 17, 1991), and is subject to review by this Tribunal" (Petitioner's reply brief, p. 6).

At 20 NYCRR 3000.5(a)(5) our regulations provide that:

> "An order by an administrative law judge on any motion which does not finally determine all matters and issues contained in the petition, for purposes of review by the tribunal, shall not be deemed final and

> conclusive until the administrative law judge shall have rendered a determination on the remaining matters and issues."

This is not a case where the Tax Appeals Tribunal lacks subject matter jurisdiction to review the exceptions, as we do with the denial of a motion to dismiss a petition or the denial of a motion for summary judgment (see, e.g., Tax Law § 2006[5][ii], [7]). The order excepted to in this case granted petitioner's motion for discovery in part, petitioner excepting to the motion not being granted in total and the Division excepting to the production of the tax returns required by the order.

We have previously stated that there can be certain limited exceptions to the rule of 20 NYCRR 3000.5(a)(5) that non-final orders are not subject to review by the Tribunal until a determination has been issued on all the issues contained in the petition (see, Matter of Wachsman, Tax Appeals Tribunal, December 16, 1993; Matter of Rally Oil Co., supra). Both parties cite the Rally Oil decision in support of their respective positions that the exceptions they filed should be considered on the merits by the Tribunal because they fall within an exception to the general rule, and the other party's exception should not be reviewed because they are premature. The Rally Oil case did involve an exception to an order of an Administrative Law Judge granting in part a petitioner's motion for discovery. However, we stated that:

> "[c]learly, our Rules of Practice intend, as a general rule, that the Administrative Law Judge's decision on motions will not be subject to review until a decision is rendered disposing of the entire petition [cite omitted]. It is equally clear, however, that there are instances where exceptions to the general rule may be required [cite omitted]. We find the instant matter in such disarray that it is impossible to rationally determine whether the general rule or an exception should apply" (Matter of Rally Oil Co., supra).

This language clearly does not establish that all orders on discovery motions are immediately reviewable by the Tribunal.

Petitioner has not set forth any argument as to why that part of the order denying petitioner's motion for discovery does not fit into the general rule that such orders are appealable once a determination has been issued on all of the issues contained in the petition.

The Division argues that the part of the order requiring it to disclose to petitioner the tax returns of SMI setting forth the amounts credited to petitioner as a result of taxes paid by SMI, is a violation of secrecy and, therefore, must amount to an exception to the rule. While not ruling on the substantive interpretations of the Administrative Law Judge in the order, it should be noted that there can be no criminal prosecution of a Division employee for disclosing Article 12-A returns (see, Tax Law § 1825). Furthermore, under the particular facts of this case and the limited disclosure provided for in the order, the Division has not shown that the required disclosure is so "egregious" as to amount to an exception to the general rule that the Tribunal will not review non-final orders. Again, we point out that the jurisdiction and procedures of the Division of Tax Appeals and the Tax Appeals Tribunal are more like that of the Tax Court and Federal appellate procedure than that of the courts of New York State, meaning that we have a much more stringent policy regarding reviewability of interlocutory orders. As a general rule, discovery orders are considered interlocutory and cannot be appealed in the Federal system (see, 28 USC 1292; Matter of Wachsman, supra; Matter of Rally Oil Co., supra). Having determined there is no reason to make an exception to the rule in this case, we decline to exercise our jurisdiction to review these exceptions. Therefore, the substantive issue will not be addressed.

The issue of whether the compromise offered by the Division is acceptable to the Administrative Law Judge must be decided first by the Administrative Law Judge. The Administrative Law Judge must issue an order within 30 days of the issuance of this decision accepting or rejecting the Division's offer. This matter will then be scheduled for hearing as soon as practicable.

Accordingly, the exceptions of petitioner and the Division of Taxation are dismissed, and the hearing ordered by the Administrative Law Judge shall be held as expeditiously as possible.

DATED: Troy, New York
January 20, 1994

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

/s/Francis R. Koenig
Francis R. Koenig
Commissioner