STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MODERN OVERLAND DELIVERY, INC.	:	DECISION DTA No. 812769
for Revision of a Determination or for Refund of Motor Fuel, Petroleum Business and Sales and Use Taxes under Articles 12-A, 13-A, 28 and 29 of the Tax Law for the Period December 1, 1989 through June 30, 1992.	:	

Petitioner Modern Overland Delivery, Inc., 2355 Westchester Avenue, Bronx, New York 10462, filed an exception to the determination of the Administrative Law Judge issued on March 28, 1996 and filed an exception to the order of the Administrative Law Judge issued on July 25, 1996. Petitioner appeared by DeGraff, Foy, Holt-Harris, Mealey & Kunz, LLP (James H. Tully, Jr., Esq., of counsel) and Robert B. Borella, CPA. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James P. Connolly, Esq., of counsel).

Petitioner submitted a letter brief in support of its exception to the order issued by the Administrative Law Judge. The Division of Taxation submitted a brief in opposition to both exceptions. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Pinto took no part in the consideration of this decision.

ISSUES

I. Whether the Division of Taxation properly determined additional motor fuel, sales and use and petroleum business taxes for the period in issue.

II. Whether the Administrative Law Judge properly denied petitioner's motion to reopen the record in this matter.

FINDINGS OF FACT

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

The Division of Taxation (hereinafter the "Division") commenced an audit of Modern Overland Delivery, Inc. ("MOD") on or about January 24, 1992. MOD was a petroleum business operating in the Bronx and wasregistered as a diesel motor fuel distributor under Article 12-A of the Tax Law. The Division called MOD's president, Mr. Dominic DeRobertis, on January 24, 1992, and when he did not respond, sent him an appointment letter with attached record request by certified mail on January 28, 1992, setting an appointment date of February 25, 1992. An adjournment was granted at the request of MOD and the appointment was changed to March 25, 1992.

At the March 25, 1992 meeting, the auditor examined the forms PT-100, petroleum business tax returns, and a cash disbursements journal which listed suppliers. There was a separate cash disbursements journal for Fred M. Schildwachter Co., Inc., another supplier, but it was not available at this meeting. The auditor also requested forms CT-13-AH, residential use certificates, for the years 1989 and 1990, sales tax returns, and records of sales and purchases for the test months of July 1990 and July 1991, including monthly customer lists. These items were produced at the next meeting on April 9, 1992.

On April 9, 1992, the auditor made a second visit to petitioner's business and received the monthly lists of accounts. Petitioner produced a handwritten sales journal for the month of July 1990, not a computer printout. The sales journal did not have names of customers, only addresses, and the auditor checked this information against the master account list in order to determine customers and if a gross receipts tax was due. This analysis was continued on April 21, 1992, at which time the auditor received copies of the CT-13-AH's, residential use certificates, for Schildwachter, and the handwritten sales journal for July 1991, which also was checked against the master list to determine liability for the gross receipts tax. Subsequently,

petitioner produced a handwritten sales journal for December 1990 on May 26, 1992. There were claims that petitioner made sales of No. 2 fuel oil to resellers during July 1990, December 1990 and July 1991, but petitioner did not have available records with regard to all these sales and promised to produce them later. The cash disbursements journal for Schildwachter was produced, but yielded nothing of significance. Purchase invoices for July 1991 were also checked as were sales tax returns for the quarters ended July 1990 and 1991. However, some schedules were not available.

The Article 12-A returns filed by petitioner, MT-1000's prior to September 1, 1990 and PT-100's thereafter, reported that all of petitioner's sales were subject to tax and reported the minimum tax due, claiming that it purchased all of its product on a tax-included basis from one company, Fred Schildwachter. Many of the returns examined were incomplete and had no attached schedules of receipts and sales, form PT-102.1, on which a taxpayer is required to identify from whom and in what quantity it is buying its products and to describe its tax free sales to registered dealers.

By letter dated August 27, 1992, after a review of the materials that had been submitted, the Division requested that petitioner file amended returns for the period December 1, 1989 through the date of the letter, reflecting the tax-free receipts and the suppliers and the disposition of the fuel in question. By letter dated September 28, 1992, petitioner filed amended forms PT-100 for the period December 1989 to July 1992. Each of these returns indicated no tax due, but did show tax-free purchases of No. 2 fuel oil from Schildwachter. The quantities of the tax-free purchases were consistent with the information received from Schildwachter. Petitioner claimed that all of the No. 2 fuel oil was sold tax free as heating fuel.

The amended returns for the test months for sales of heating oil to customers did not agree with the auditor's analysis of petitioner's sales journals and indicated that petitioner made no sales to registered dealers, as shown on form PT-102, contradicting what the auditor was told. In addition, petitioner did not report its purchases or sales of diesel motor fuel sold to other dealers, a fact confirmed by the auditor's analysis of petitioner's July 1990 sales journal,

which omitted sales to other dealers. Petitioner believed that it did not have to report these sales, thinking that the sales to other dealers were tax-exempt.

In a letter from the Division to petitioner, dated October 9, 1992, petitioner was informed that key information and materials requested in a prior letter of August 27, 1992 had not been produced and the amended diesel returns filed by petitioner did not identify any dealers to which fuel was sold, nor were any valid exemption or resale certificates submitted with the returns. As a result, the Division informed petitioner that it would assess based upon the "available information" and assume all No. 2 fuel oil was diesel motor fuel and not home heating oil. The gross receipts tax and sales tax prepayment audits were also based, in large part, on the diesel audit and were described as "considerable". The October 9, 1992 letter also informed petitioner that the field audit of New York State gross receipts tax indicated additional unpaid gross receipts tax under Article 13-A of the Tax Law for nonresidential sales other than diesel. The Division explained that the percentage, .2977, was arrived at based on 3 test periods, i.e., the months of July 1990, December 1990 and July 1991.

Subsequently, a pre-assessment conference was held with petitioner and its representative on October 29, 1992 at the Westchester District Office. Petitioner's representative, Robert Borella, CPA, produced a computer sales printout for the three test months of July 1990, December 1990 and July 1991. Mr. Borella advised the Division that it should not rely on the handwritten sales journal provided to the auditor but on the computer printouts he had supplied. Although petitioner presented no resale certificates from dealers, it maintained that it made no sales of No. 2 fuel oil to other dealers. However, even the sales journal printout presented by petitioner's representative indicated such sales. In fact, the home heating fuel sales shown on the computer printouts agreed with the home heating fuel sales shown on the handwritten sales journal for the month of July 1991.

In a letter dated November 11, 1992, Mr. Borella supplied workpapers indicating sales of No. 2 fuel oil to dealers for the three test months. Sales of No. 2 allegedly were made to four dealers: Relco, Charles Williams Lanzillotto, New York Oil & Service Co., Inc. and New Age

Heating Services, Inc. A blanket resale certificate was supplied for each of these companies. From the certificates it was determined that Charles William Lanzillotto and New York Oil & Service Co., Inc. were not registered as Article 12-A distributors during the test months, discussed further below.

Given this background, the Division determined that the books and records of petitioner were inadequate to perform an audit and accurately determine its liability for the fuel taxes due largely because petitioner failed to produce records of sales to other dealers. Once it was discovered that there were sales omitted as indicated in the sales journal and Article 12-A returns, and petitioner was requested to submit amended returns and other documentation, and when information was not provided, the Division resorted to an estimate it calculated based on an extrapolation of the three test months and an assumption that all the unaccounted for receipts were sold as diesel fuel oil and not heating oil. Although petitioner eventually provided information with regard to the dealer sales for the test months, it never provided any information with respect to the other months of the audit period.

The Division calculated the amount of additional Article 12-A tax due using the general outline set forth above. It examined the PT-100's to determine the amount of fuel purchased tax free. Then the Division listed all sales of No. 2 fuel oil as set forth on the handwritten sales journal for each of the three test months. It is noted that the handwritten sales journal listed only addresses of customers and the auditor needed to refer to the master list of accounts to determine the names of the customers. The auditor's schedule indicated that petitioner's sales to customers for heating or production averaged only 37.95% of all purchases of tax-free receipts of diesel motor fuel reported on its amended PT-100's, with 62.05% left unaccounted for. The auditor applied these percentages to the remainder of the audit period to arrive at the number of gallons not exempt as heating or production sales.

The Division accepted petitioner's schedule of dealer sales for the three-month test period, but then used the figures to estimate for the remainder of the audit period. The auditor's analysis of the test period figures provided by petitioner showed that 14.70% of claimed sales

were to New York Oil & Service and Lanzillotto, neither of which was registered as a motor fuel distributor for the test months. Therefore, the auditor applied a 14.70% disallowance rate to the accounted for tax-free receipts as gleaned from the amended returns filed by petitioner for the remainder of the audit period and taxed those resulting gallons as taxable sales of diesel motor fuel. The ten cent excise tax rate was then applied to the additional gallons.

Based upon this calculation, the Division issued a Proposed Audit Adjustment of Tax Due under Article 12-A, dated December 9, 1992, for the period December 1989 through August 31, 1990 setting forth additional tax due of $5,797.20, plus penalty and interest. It also issued a Proposed Audit Adjustment of Tax Due under Article 12-A, dated December 9, 1992, setting forth tax due for the period September 1, 1990 through June 30, 1992 in the sum of $18,615.00, plus penalty and interest. The Division issued a Notice of Determination, dated February 16, 1993, to petitioner which set forth additional tax due under Article 12-A of $5,797.20 plus penalty and interest for the period December 1, 1989 through August 31, 1990. A second Notice of Determination was issued to petitioner, dated March 5, 1993, assessing additional tax due under Article 12-A in the sum of $18,615.00, plus penalty and interest for the period September 30, 1990 through June 30, 1992.

With respect to the Article 13-A tax assessed by the Division, it is noted at the outset that petitioner's liability for the nonautomotive component of the Article 13-A tax depended only on petitioner's sales to end-users, i.e., sales to businesses for heating and production of tangible personal property. The Division deemed petitioner's sales journal an adequate record of the nonautomotive sales and therefore offered petitioner a test period agreement for that portion of the audit. Petitioner agreed to use of the test period June 1, 1989 to the date of the agreement, August 4, 1992. This portion of the tax due was not addressed by the parties.

The Article 13-A petroleum business tax has four components: sales of motor fuel, sales of automotive diesel motor fuel, sales of nonautomotive diesel motor fuel and sales of residual petroleum products. The test period agreement applied to the sales of nonautomotive diesel motor fuel. An exemption from the petroleum business tax is provided for sales of enhanced

diesel motor fuel as residential home heating fuel by registered dealers as a distributor of diesel motor fuel.

The actual audit by the Division was based largely on the determinations made in the Article 12-A audit. The calculation of the nonautomotive diesel motor fuel component was made by taking petitioner's heating fuel sales as determined in the Article 12-A audit and determining the percent of those sales which would qualify as nonexempt heating sales under Article 13-A, i.e., all gallons other than those sold as residential heating fuel. These nonresidential heating sales under Article 13-A were arrived at by analyzing petitioner's sales of No. 2 fuel oil, arriving at 29.77% as the percentage of heating sales which were nonresidential heating sales subject to the nonautomotive component of the petroleum business tax. These nonresidential heating sales were multiplied by the nonautomotive diesel fuel component rate to arrive at the additional tax due under the nonautomotive diesel fuel component.

As a result, the Division issued a Notice of Determination, dated March 8, 1993, which set forth additional petroleum business tax due of $23,159.00, plus penalty and interest for the period September 1, 1990 through June 30, 1992.

The Division's calculation of the automotive diesel motor fuel component took the tax-free receipts of diesel motor fuel which were found to be unaccounted for on the Article 12-A audit, and thus presumed to be taxable sales of diesel motor fuel, and multiplied those gallons by the automotive diesel motor fuel component rate, .0633. For the automotive diesel motor fuel component of the Article 13-A tax, the Division issued a second Notice of Determination, dated February 16, 1993, which set forth additional tax due of $20,748.00 plus penalty and interest, for the period September 1, 1990 through June 30, 1992.

In addition, the Division assessed penalty pursuant to Tax Law former § 311, which assessed penalty for failure to provide residential use certificates as required by Tax Law § 303(b). In this regard, the Division issued a Notice of Deficiency, dated February 16, 1993, which assessed penalty only pursuant to Tax Law § 311 for the periods ended December 31, 1989 and November 15, 1990, in the total sum of $7,680.35.

Finally, the Division assessed additional sales and use taxes, or prepaid sales tax liability, using the gallons of diesel motor fuel which could not be accounted for in the Article 12-A audit. These gallons were presumed to have been the subject of taxable sales to unregistered dealers. The gallons were multiplied by the sales tax prepayment rate and resulted in additional tax of $22,096.00 plus penalty and interest, for the period September 1, 1989 through June 30, 1992.

The Division submitted the affidavit of Peter Spitzer, an excise auditor with the Registration/Bond Unit of the Department of Taxation & Finance. Mr. Spitzer supervised the maintenance of the unit's records. In the regular course of the unit's business, it maintains a list of entities that have been registered as distributors under Article 12-A of the Tax Law. In addition, the unit maintained a list of entities to which the unit has granted registrations under Articles 12-A and 13-A of the Tax Law and also current files of all entities which have been granted distributor status. Mr. Spitzer produced with his affidavit lists of Article 12-A registrations dated April 1, 1990, and also supplemental lists for the periods April 1, 1990 through May 31, 1990 and also the period June 1, 1990 to June 30, 1990. There was also a list of the 12-A registrations as of August 1, 1990. Neither Charles William Lanzillotto nor New York Oil & Service Co., Inc. appear on the lists.

Mr. Spitzer also checked current files for these same two entities and found that Charles William Lanzillotto was issued a registration as a retailer of heating oil only on February 10, 1992. New York Oil & Service was granted the same type of license on January 2, 1992. Mr. Spitzer also reviewed the unit's computer data base of entities registered under Articles 12-A and 13-A and found that the same two entities were registered as retailers of residential heating oil only on the same dates as the Article 12-A registrations. Mr. Spitzer concluded, on the base of his search, that Charles William Lanzillotto and New York Oil & Service were first registered as retailers of residential heating oil on February 10, 1992 and January 2, 1992, respectively.

Modern Overland Delivery, Lanzillotto and New York Oil & Service executed blanket resale certificates in November 1992, over four months after the end of the instant audit period, which purportedly covered the audit period.

Petitioner submitted two quarterly sales and use tax returns for "New York Oil & Service Corp.", forms ST-100, for the quarters December 1, 1991 through February 29, 1992 and June 1, 1992 through August 31, 1992. The return for the period ended February 29, 1992 indicated that the company was in the fuel oil and service business, made $60,914.00 in gross sales, $57,830.00 in taxable sales and stated tax due of $2,686.85. The return for the period ended August 31, 1992 set forth gross sales of $31,088.00, taxable sales of $30,863.00 and stated a tax due of $1,421.24. Neither return was signed, although they were both imprinted with a stamp which identified them as copies. No address for the business was set forth on either return and it is not known if the tax stated as due was paid.

Petitioner also submitted a New York State and Local Sales and Use Tax Return for Limited Jurisdictions on behalf of Charles Lanzillotto-Energy Consultant, for the quarter ended August 31, 1991, which set forth its business as energy consultant, gross sales of $17,851.00, taxable sales of $2,375.00 and a tax due of $147.97. A second return submitted on behalf of Lanzillotto was a form PT-200, Quarterly Petroleum Business Tax Return of a Retailer of Heating Oil Only and a Distributor of Kero-Jet Fuel Only, for the quarter ended August 31, 1992, which set forth the taxpayer's name as "Charles W. Lanzillotto, C L Fuel Co." and listed it as a retailer of heating fuel only. The second page attached to the PT-200 was a form PT-201, Retailers of Heating Fuel Only, for the same period, which indicated that all sales were through third parties and that all sales were residential. The form PT-201 indicated no inventory for the quarter, no purchases and no sales. Neither of the returns filed on behalf of Lanzillotto were signed and both were marked as "client's copy".

Petitioner also submitted delivery tickets and bills for sales to Charles Lanzillotto and New York Oil & Service for the test months of July 1990, December 1990 and July 1991. The

bills submitted were to both Lanzillotto and New York Oil & Service and amounted to $2,441.00 for July 1990, $8,383.00 for December 1990 and $1,541.00 for July 1991.

Petitioner submitted a schedule it prepared, which set forth what it alleged were the true tax-free receipts total, billings and the difference. The schedule set forth the following:

	Tax Free Receipts	Billed	Variation
July 1990	$ 18,846.	$ 18,799.	47
December 1990	$102,748.	$ 96,900.	$5,848.
July 1991	$ 23,102	$ 24,121.	($1,019.)
Total	$144,696.	$139,820.	$4,876.
Variation Percentage			3.36%

OPINION

In his determination below, the Administrative Law Judge found that with respect to the tax pursuant to Article 12-A, petitioner failed to demonstrate that it made sales to anyone other than unregistered entities and, therefore, it did not qualify for the resale exemption provided in Tax Law § 282-a(3)(b)(ii). The Administrative Law Judge based his conclusion on the fact that Charles William Lanzillotto (hereinafter "Lanzillotto") and New York Oil & Service were not registered motor fuel distributors during the test months in issue and that these two entities had registered only in the last few months of the audit period. The Administrative Law Judge also cited the fact that petitioner submitted no records regarding its sales other than for the three test period months and that even these records were incomplete. Accordingly, the Administrative Law Judge sustained the notices of determination issued to petitioner for additional motor fuel taxes.

The Administrative Law Judge then addressed the sales tax portion of the audit which was based upon the unaccounted for sales to Lanzillotto and New York Oil & Service for the liability for prepaid sales tax. The Administrative Law Judge reasoned that for each gallon of diesel motor fuel unaccounted for and ultimately held taxable for Article 12-A purposes, petitioner owes the prepaid tax described in section 1102 of the Tax Law. Accordingly, the Administrative Law Judge sustained the additional sales and use taxes imposed.

With respect to Article 13-A, an annual tax is imposed on petroleum businesses for the privilege of engaging in business, doing business or maintaining an office in New York State. Moreover, Tax Law § 301-a(a) imposes a monthly tax on petroleum businesses based on the following four components: motor fuel, automotive-type diesel motor fuel, nonautomotive-type diesel motor fuel and the residual petroleum products. The nonautomotive-type diesel motor fuel component is determined using the number of gallons of diesel motor fuel sold by the petroleum business (Tax Law § 301-a[c][2]). The Administrative Law Judge noted that similar to other articles in the Tax Law, Article 13-A provides an exemption from the tax imposed by Tax Law § 301-a for sales of diesel motor fuel to registered diesel motor fuel distributors (Tax Law § 301-b[e]). However, since Lanzillotto and New York Oil & Service were not registered diesel motor fuel distributors, the Administrative Law Judge concluded that petitioner's sales to these two entities were properly taxable under Article 13-A.

Lastly, the Administrative Law Judge addressed petitioner's argument raised in its brief that the relationship between petitioner and the two entities was essentially an agency arrangement whereby petitioner reported the sales and paid the tax on behalf of Lanzillotto and New York Oil & Service since petitioner took responsibility for purchasing, delivering and billing for the two companies. However, the Administrative Law Judge stated that the record does not contain any evidence that this was the case. The Administrative Law Judge noted that a formal agency agreement was not submitted into evidence and there was no evidence that petitioner was doing business under the names of the other two entities. Therefore, the Administrative Law Judge concluded that, in fact, no agency relationship existed.

After the determination in this matter was issued, petitioner brought a motion to reopen the record pursuant to 20 NYCRR 3000.16(a)(1) claiming that its former representative was unaware of newly discovered evidence. Petitioner alleged that after reading the determination, it believed it could produce evidence which the Administrative Law Judge specifically found lacking in the record. Moreover, it alleged that, in addition to the newly discovered evidence regarding the agency issue, it now had the records for the entire audit period, which, if

previously available and introduced into the record in this matter, would have produced a different result.

The Administrative Law Judge denied petitioner's motion on the basis that petitioner has failed to demonstrate that the evidence it now wished to introduce was unavailable at the time of the hearing or could not have been discovered with due diligence. Furthermore, the Administrative Law Judge noted that it is not in the interests of judicial economy or fairness to allow petitioner to use the determination issued in this matter as a guide for submission of evidence since condoning such behavior would prevent closure and finality in the hearing process (Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991).

Petitioner filed an exception to both the determination and the order issued by the Administrative Law Judge.

With respect to the determination, petitioner, in citing to Tax Law § 285-b(3)(a), argues in its exception that the auditor could have determined from the information provided to him that the diesel motor fuel sold by it was exclusively used for heating fuel and could have devised an alternate procedure to reach a correct assessment. Petitioner did not submit any further argument in support of this statement contained in its exception.

With respect to the order denying petitioner's motion to reopen the record, petitioner states that although the Administrative Law Judge correctly stated that "[i]t was incumbent upon petitioner to use reasonable diligence in its efforts to locate and produce the evidence within the time limits provided, and it is fatal to petitioner's motion that it did not demonstrate that it could not have discovered the evidence it now wishes to introduce with the exercise of said diligence," his refusal to reopen the record prevents petitioner from proving that it utilized reasonable diligence (petitioner's exception to the order, ¶ 4). Petitioner asserts that the obvious way for it to show the prior diligence in attempting to locate evidence and also to show the relationship between petitioner and Lanzillotto and New York Oil & Service is to present oral testimony in that regard (petitioner's letter brief, p. 2).

In opposition to the exception filed to the determination, the Division argues that petitioner's argument, that the auditor erred in concluding that not all of petitioner's sales were for home heating fuel, lacks merit. The Division states that the records submitted in this matter establish that petitioner's sales were not exclusively for home heating fuel, but rather, that petitioner made sales to other dealers. Specifically, the Division points out that petitioner's former representative supplied the auditor with a worksheet detailing claimed exempt dealer sales of No. 2 fuel oil to Relco, Lanzillotto, New York Oil & Service and New Age Heating Services, Inc. Resale certificates for each of the companies were also provided. However, Lanzillotto and New York Oil & Service were not registered as Article 12-A distributors at the time of the test period months. Therefore, the Division reasons that since those two entities were not registered, the auditor properly concluded that the sales to them did not qualify for the resale exemption provided for in Tax Law § 282-b(3).

In addressing the exception taken to the order issued by the Administrative Law Judge, the Division asserts that the Administrative Law Judge properly concluded that petitioner failed to establish the right to reopen the record.

The Division cites to Matter of Jenkins Covington, N.Y. (Tax Appeals Tribunal, November 21, 1991, confirmed Matter of Jenkins Covington, N.Y. v. Tax Appeals Tribunal, 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664, 610 NYS2d 151, quoting Evans v. Monaghan, 306 NY 312, 118 NE2d 452, 457) for the proposition that:

> "it is appropriate to reopen an administrative hearing where one party offers important, newly discovered evidence which due diligence would not have uncovered in time to be used at the previous hearing" (Matter of Jenkins Covington, N.Y., supra).

The Division argues that the Administrative Law Judge correctly determined that petitioner's motion failed to identify or describe the newly discovered documentation that it seeks to submit and that it failed to establish why, with the exercise of reasonable diligence, the evidence could not have been submitted as of the date set for petitioner's submission of documents. Accordingly, the Division requests that the determination and order be affirmed and that the assessment issued to petitioner be sustained.

After reviewing the entire record in this matter, we conclude that the Administrative Law Judge dealt adequately and completely with the issues presented to him. Therefore, we affirm both the determination and the order based on the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Modern Overland Delivery, Inc. are denied;

2. The determination and the order of the Administrative Law Judge are sustained;

3. The petition of Modern Overland Delivery, Inc. is denied; and

4. The five notices of determination, ## L-007032685, L-007049550, L-007056197, L-007032687 and L-007032684, and Notice of Deficiency #L-007032686 are sustained.

DATED: Troy, New York
May 1, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner