

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**A & A SERVICE STATION, INC.** :

for Revision of a Determination or for Refund of Sales and :  
Use Taxes under Articles 28 and 29 of the Tax Law for :  
the Period March 1, 2003 through May 31, 2003. :

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In the Matter of the Petition :

of :

**A & K SERVICE STATION, INC.** :

for Revision of a Determination or for Refund of Sales and :  
Use Taxes under Articles 28 and 29 of the Tax Law for :  
the Period March 1, 2003 through November 30, 2005. :

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In the Matter of the Petition :

of :

**EMA SERVICE STATION, INC.** :

for Revision of a Determination or for Refund of Sales and :  
Use Taxes under Articles 28 and 29 of the Tax Law for :  
the Period March 1, 2003 through May 31, 2005. :

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In the Matter of the Petition :

of :

**ABDURRAHMAN AYDIN** :

for Revision of Determinations or for Refund of Sales and :  
Use Taxes under Articles 28 and 29 of the Tax Law for :  
the Period March 1, 2003 through November 30, 2005. :

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DECISION  
DTA Nos. 821605,  
821606, 821607 and  
821608

Petitioners A & A Service Station, Inc., A & K Service Station, Inc., EMA Service Station, Inc. and Abdurrahman Aydin filed an exception to the determination of the Administrative Law Judge issued on December 4, 2008. Petitioners appeared by Thomas P. Murray, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Sarah Dasenbrock, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioner's request, was held on May 13, 2009 in Troy, New York.

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

### ***ISSUES***

I. Whether petroleum business tax imposed pursuant to Tax Law Article 13-A was properly included in the sales tax base used to compute sales tax due on petitioners' sales of gasoline.

II. Whether cigarette excise tax imposed pursuant to Tax Law Article 20 was properly included in the sales tax base used to compute sales tax due on petitioners' sales of cigarettes.

### ***FINDINGS OF FACT***

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

Petitioner Abdurrahman Aydin, by the three corporate petitioners in this proceeding, (1) A & A Service Station, Inc. ("A & A"), (2) A & K Service Station, Inc. ("A & K"), and (3) EMA Service Station, Inc. ("EMA"), operated three retail gasoline stations on Long Island located on (1) Hicksville Avenue in Bethpage, (2) Deer Park Avenue in Deer Park, and (3) E. Main Street in Islip, respectively. Mr. Aydin was an officer and shareholder of all three corporations and handled their financial affairs. He signed New York State sales and use tax returns, New York

State corporation franchise returns, and powers of attorney for all three corporate petitioners. In addition, he signed checks on behalf of all of the corporations and was listed with the New York State Secretary of State as “President” for all three. In fact, a review of the administrative record does not show the name of any other individual as either an owner or corporate officer of the corporate petitioners.

The Division of Taxation (“Division”) issued a Notice of Determination dated May 8, 2006 against petitioner A & A, asserting tax due for the period March 1, 2003 through May 31, 2003 of \$2,672.68, plus interest and penalties under section 1145 of the Tax Law.

The Division issued a Notice of Determination dated May 8, 2006 against petitioner A & K, asserting tax due for the period March 1, 2003 through November 30, 2005 of \$18,935.83, plus interest and penalties under section 1145 of the Tax Law.

The Division issued a Notice of Determination dated April 3, 2006 against petitioner EMA, asserting tax due for the period March 1, 2003 through May 31, 2005 of \$24,488.00, plus interest and penalties under section 1145 of the Tax Law.

The Division issued three corresponding notices of determination, each dated May 5, 2006, against petitioner Abdurrahman Aydin as an “Officer/Responsible Person” of (1) A & A, asserting tax due for the period March 1, 2003 through May 31, 2003 of \$2,672.68, plus interest and penalties under section 1145 of the Tax Law, (2) A & K, asserting tax due for the period March 1, 2003 through November 30, 2005 of \$18,935.83, plus interest and penalties under section 1145 of the Tax Law, and (3) EMA, asserting tax due for the period March 1, 2003 through May 31, 2005 of \$24,488.00, plus interest and penalties under section 1145 of the Tax Law.

The Division conducted a field audit of the three gasoline service stations operated by the corporate petitioners. Although the Division obtained consents to conduct test period audits, it

ultimately accepted the reported gallons sold and cigarettes sold of the three businesses.<sup>1</sup> The taxes determined due resulted from the Division's discovery on audit that the three corporate petitioners were subtracting out the petroleum business tax from the taxable base of their fuel sales and subtracting the cigarette excise tax from the taxable base of their cigarette sales. As a result, the Division determined additional sales tax due on petitioners' sales during the periods at issue<sup>2</sup> as follows:

	Gasoline	Diesel	Cigarettes	Store	Total sales tax asserted due
A & A	\$ 1,382.53	\$ 40.05	\$1,250.11	-0-	\$ 2,672.68
A & K	\$16,311.75	\$1,418.54	\$ 673.16	\$532.38	\$18,935.83
EMA	\$23,148.00	-0-	\$ 1,340.00	-0-	\$24,488.00

The additional sales tax due of \$532.38 on the store sales of A & K, other than its cigarette sales, as shown above, was based upon a 40% markup of A & K's purchases of taxable items other than cigarettes. Since the Division performed a detailed review of petitioners' purchase records and utilized the same markup of 40%, which petitioners used to compute taxable sales reported on their tax returns, petitioners have apparently conceded this minor part of the assessment.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge found petitioners' argument that the Division incorrectly calculated sales and use tax due on sales of gasoline by including petroleum business tax in the tax base to be without merit. The Administrative Law Judge noted that Tax

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<sup>1</sup> At the hearing, petitioners' representative contended that the Division improperly used a survey to calculate petitioners' additional sales, which was contradicted by the testimony of the Division's auditor, and supporting documentary proof. The Division used petitioners' records and did not estimate sales by using a survey. Petitioners did not continue to press this contention in their briefs.

<sup>2</sup> During the period June 1, 2003 through August 31, 2003, which is not at issue in this proceeding, the Division calculated a sales tax credit due to A & A of \$101.39. In its brief, the Division offset such credit against the tax due for the period at issue of \$2,672.68, resulting in the amount of additional tax asserted due against A & A of \$2,571.29.

Law § 1111(k) mandates that petroleum business tax be included in the calculation of receipts subject to sales and use tax. Similarly, the Administrative Law Judge found that the Division properly utilized a tax base for petitioners' cigarette sales, which included cigarette excise tax. Pursuant to Tax Law § 1111(h), cigarette excise tax is required to be included in the calculation of receipts subject to sales and use tax.

The Administrative Law Judge observed that petitioners failed to cite any statutory provisions or case law to support their claim that the Division may not collect tax on taxes previously imposed. However, the Administrative Law Judge found the petitioners' claims to be an implied challenge to the statutes at issue on constitutional grounds. The Administrative Law Judge concluded that the Division of Tax Appeals lacked jurisdiction to consider claims alleging that a statute is unconstitutional on its face and observed that, at the administrative level, statutes are presumed to be constitutional.

Based on the evidence of corporate responsibility and control introduced by the Division, the Administrative Law Judge concluded that petitioner Abdurrahman Aydin was a person under a duty to act for each of the three corporate petitioners. The Administrative Law Judge found that petitioners made no showing that the penalties were wrongly assessed or that reasonable cause existed to abate penalty.

The Administrative Law Judge responded to petitioners' request to strike a portion of the Division's post-hearing brief, which speculated that the businesses of Abdurrahman Aydin may have collected sales tax based on the correct taxable base for fuel and cigarette sales, but "when it came time to file sales tax returns those taxes were then 'backed out'." The Administrative Law Judge stated that this speculation by the Division concerning fraud was given no weight and was irrelevant for purposes of resolving the issues in dispute. However, the Administrative Law Judge denied petitioners' request that such contentions should be stricken from the brief.

The Administrative Law Judge denied the petitions of A & A, A & K, EMA and Abdurrahman Aydin and sustained the notices of determination issued to them, which were the subject of this proceeding.

***ARGUMENTS ON EXCEPTION***

On exception, petitioners acknowledge the provisions of Tax Law §§ 1111(h) and 1111(k), which require the imposition of sales tax on receipts of gasoline and cigarette sales by including as part of such receipts the petroleum business tax and cigarette excise tax imposed, respectively, on such products. Petitioners also acknowledge the prior decision of this Tribunal in ***Matter of A & A Service Station*** (Tax Appeals Tribunal, February 5, 2004), in which the issue concerning the inclusion of the petroleum business tax in the taxable base for the computation of sales and use tax on fuel sales was decided against petitioner A & A, although petitioners argue that this prior decision was not appealed due to perceived difficulty based on “a multitude of issues” (Petitioners’ brief in support, p. 3).

However, petitioners request that the Tribunal refuse to “uphold the enactment of” Tax Law §§ 1111(h) and 1111(k), which imposes a tax on a tax, because the Legislature entered a “new and expanded arena of imposing taxes” that violated its prior precedent of generating additional revenue by imposing new taxes, rate increases and/or surcharges (Petitioners’ reply brief, p. 3). Petitioners also argue that by excepting motor fuel excise tax from the tax base, but including cigarette excise tax in such base, the Division has undercut its procedures and theory in calculating the tax base. Petitioners also argue that the Tribunal has the authority to find these statutes unconstitutional.

The Division, in opposition, argues that the Administrative Law Judge correctly determined that petitioners improperly failed to include petroleum business tax and cigarette excise tax as part

of their receipts subject to sales tax. The Division asserts that contrary to petitioners' assertions, the Legislature is not bound by tax theory but by law. By enacting Tax Law §§ 1111(h) and 1111(k), the Division believes that the Legislature made it clear that it was prescribing a specific method for calculating receipts subject to sales tax. The Division points out that petitioners cite no authority supporting their contention that a tax may not be levied on receipts which themselves include a different tax. Likewise, the Division maintains that petitioners have shown no support for their claim that the statutes at issue are unconstitutional. The Division argues that, in any event, at the administrative level, statutes are presumed to be constitutional. As a result, the Division requests that the determination of the Administrative Law Judge be affirmed.

### ***OPINION***

Pursuant to Tax Law § 1105(a), sales tax is imposed on the receipts from every sale of tangible personal property. Tax Law § 1101(b)(3) defines a "receipt" as the amount of the sale price of any property. That section further provides that "[f]or special rules governing computation of receipts, see section eleven hundred eleven."

Tax Law § 1111(h) provides that:

Receipts subject to tax under subdivision (a) of section eleven hundred five on retail sales of cigarettes and tobacco products and consideration given or contracted to be given for cigarettes and tobacco products the uses of which are subject to tax under section eleven hundred ten shall be deemed to include any tax imposed on cigarettes and tobacco products by article twenty of this chapter and any tax imposed on cigarettes by chapter thirteen of title eleven of the administrative code of the city of New York.

Tax Law § 1111(k) provides that:

Receipts subject to tax under subdivision (a) of section eleven hundred five of this article on retail sales of motor fuel, diesel motor fuel and residual petroleum product, and consideration given or contracted to be given for motor fuel, diesel motor fuel and residual petroleum product, the uses of which are subject to tax

under section eleven hundred ten of this article, shall be deemed to include any tax imposed on or with respect to motor fuel, diesel motor fuel or residual petroleum product under article thirteen-A of this chapter.

Petitioners do not deny that in computing its receipts from sales of motor fuel, diesel motor fuel and cigarettes, they failed to follow the mandates of Tax Law §§ 1111(h) and (k) by omitting from such computations the applicable petroleum business tax and cigarette excise tax. Instead, petitioners argue that those statutes are invalid because they violate “an axiomatic taxing principle and long standing precedent that a taxing authority does not impose a tax on an existing tax but instead resorts to imposing new taxes, tax increases and/or tax surcharge” (Petitioners’ brief in support, p. 2).

We disagree.

Whether or not the Legislature sought to ignore longstanding principles of taxation or to “expand its taxing power into an area for which there is no precedent” (Petitioners’ brief in support, p. 2) by enacting the statutes at issue, those statutes, having been enacted into law, prescribe the methodology for computing receipts from sales of motor fuel and cigarettes subject to sales tax. Inclusion of the petroleum business tax and cigarette excise tax in the computation of taxable receipts is compulsory, not a matter of caprice. Petitioners have provided no authority or argument to support their position that this methodology is either improper or unconstitutional.

Additionally, despite petitioners’ assertions, the Division of Tax Appeals lacks jurisdiction to consider claims alleging that a statute is unconstitutional on its face (*see, Matter of RAF General Partnership*, Tax Appeals Tribunal, November 9, 1995) and at the administrative level, statutes are presumed to be constitutional (*see, Matter of Lunding*, 218 AD2d 268 [1996], *revd* 89 NY2d 283 [1996], *cert granted* 520 US 1227 [1997], *revd* 522 US 287 [1998]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of A & A Service Station, Inc., A & K Service Station, Inc., EMA Service Station Inc., and Abdurrahman Aydin is denied;

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

3. The petitions of A & A Service Station, Inc., A & K Service Station, Inc., EMA Service Station Inc., and Abdurrahman Aydin are denied; and

4. The notices of determination dated May 8, 2006 issued against A & A Service Station, Inc., and A & K Service Station, Inc., the notice of determination dated April 3, 2006 issued against EMA Service Station Inc., and the three notices of determination dated May 5, 2006 issued against Abdurrahman Aydin are all sustained.

DATED: Troy, New York  
October 15, 2009

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
President

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