STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BARRIER OIL CORPORATION	:	ORDER DTA NO. 809984
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, 1985 and 1986.	:	

Petitioner, Barrier Oil Corporation,[1] appearing by Carl S. Levine, Esq., has brought a motion dated April 27, 1998 to reopen this matter. Petitioner submitted an affidavit dated April 27, 1998 of its attorney Carl S. Levine, plus attachments designated Exhibits "1" through "10". The Division of Taxation by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel) filed opposition papers consisting of an affidavit dated May 26, 1998 of attorney John E. Matthews, plus attachments designated Attachments "1" through "3" and an affidavit dated May 20, 1998 of Tax Compliance Agent II Theodore Eckler, plus an Attachment "A". Petitioner filed a brief in reply on June 22, 1994, which commenced the 90-day period for the issuance of this order. Upon review of the documents submitted, and the transcript of the hearing held in this matter on February 23, 1993 and continued on October 13, 1993, the following order is rendered.

[1]Petitioner Barrier Oil Corporation is now known as Barrier Motor Fuels, Inc.

ISSUE

Whether the Division of Taxation in a stipulation of discontinuance misrepresented the meaning of certain terminology concerning the calculation of interest so that this matter may be reopened.

FINDINGS OF FACT

1. On December 14, 1993, petitioner by its representative, attorney Carl S. Levine, and the Division of Taxation ("Division") by its representative, attorney Michael B. Infantino, executed a "Stipulation for Discontinuance of Proceeding" ("stipulation for discontinuance")[2] with reference to this matter which provided as follows:

> The above-entitled proceeding having been resolved, it is hereby stipulated and agreed by and between the parties herein that such proceeding be and the same is discontinued, *with prejudice*, and that the deficiency/determination or refund is recomputed as follows:
>
> Deficiency/determination $297,851.10
> Interest Minimum
> Penalty None
>
> (Emphasis added.)

2. The stipulation for discontinuance resolved between the parties three notices of deficiency, each dated April 20, 1989, which had asserted tax, interest, and penalty against petitioner in the following amounts:

Period Ended	Tax	Interest	Penalty
December 31, 1984	$279,523.75	$139,241.88	$ 69,880.94
December 31, 1985	161,119.12	53,600.86	40,279.78
December 31, 1986	30,574.30	6,509.72	7,643.58

[2]The stipulation for discontinuance was prepared on a Division of Tax Appeals ("DTA") form TA-30.2, which is one of three forms adopted by the Tax Appeals Tribunal to allow parties to notify DTA of a decision to discontinue a proceeding.

Totals	$471,217.17	$199,352.46	$117,804.30

Although the above three notices of deficiency were the subject of petitioner's request for conciliation conference dated July 14, 1989 and its subsequent petition, the motion at issue addresses the calculation of interest on the tax deficiencies for only 1984 and 1985 and not 1986.

3. In the respective requests for conciliation conference for each of the three years originally at issue, petitioner included the following request with regard to the imposition of penalty and interest:

> If any liability is ultimately assessed, simple interest and no penalties should be applied based on the taxpayer's good faith intent to comply with the complex, constantly changing and vague regulations, as well as giving complete cooperation to the State to aid in determining the proper tax liability.

The record created for this motion does not include a copy of the petition. Consequently, it is not possible to find whether the petition included a similar provision with regard to the imposition of penalty and interest.

4. An administrative hearing was commenced in this matter on February 23, 1993 and continued on October 14, 1993. At the hearing on October 14, 1993, the parties stated on the record that they had reached a resolution[3] of this matter but for two issues which the parties requested additional time to address through negotiations. They predicted that the matter would be resolved without any further litigation. The parties also indicated that petitioner would be given three to five years to pay the settlement amount under a deferred payment agreement, and

[3]The Division had agreed to reduce the amount of petitioner's gross receipts subject to tax based upon a reduction in the cost per gallon which it used to calculate petitioner's gross receipts including (i) eliminating a 5¢ per gallon markup since petitioner's sales were made to a related corporation, (ii) a 2 ¾¢ per gallon reduction because petitioner did not recoup gross receipts tax from the related corporation to which sales were made, and (iii) a 2 ¼¢ per gallon reduction apparently based upon a further sampling of invoices.

specified on the record that they had agreed that petroleum business tax in the amount of $302,736.00 was due from petitioner subject to a further reduction if petitioner could document the Arco rebate program. Nonetheless, the hearing was continued to December 15, 1993:

> ALJ Barrie: Since the parties have not resolved the issue of penalty, and since there still is outstanding this adjustment for the rebate program with Arco, I am going to set a date for a continuation if necessary on these two areas. (Tr., pp. 207-208.)

However, when asked whether he had anything further to add before the record was closed on October 14, 1993, petitioner's representative added that there was another issue concerning "the deductibility for gross receipts tax purposes of bad debts" (tr., p. 209). The administrative law judge responded by noting that neither the petition nor the statement of issues by petitioner's representative had raised this additional issue. The Division's representative indicated that "in the spirit of reasonableness . . . [the deductibility of bad debts] would be something else we would have to look at" if the Tax Appeals Tribunal or a court were to decide that bad debts were deductible for gross receipts tax purposes (tr., p. 211). Even so, the administrative law judge advised the parties:

> Administrative Law Judge Barrie: I would just like to have it clear on the record that on December 15th, if we should reconvene, I would not permit the petitioner to raise the issue of the deductibility from gross receipts tax of the bad debts . . . unless before such date you [petitioner's representative] have requested in writing permission to amend your petition to assert that additional ground for relief, and we have had a response from the Division on that particular point. . . . Do you see what I am saying, gentlemen?
>
> Division's Attorney Infantino: Yes.
>
> Petitioner's Attorney Levine: I think the approach is fair. (Tr., pp. 213-214.)

5. Consequently, what was left for possible resolution at the continuation of the hearing scheduled for December 15, 1993 were issues concerning the abatement of penalty and an

adjustment to petitioner's gross receipts for the rebate program with Arco. Neither party noted any issue between them concerning the calculation of interest on petroleum business (gross receipts) tax due from petitioner. On December 14, 1993, the day before the hearing in this matter was to be continued, the parties executed the stipulation for discontinuance detailed in Finding of Fact "1", which reflected a further reduction of $4,884.82 in petroleum business tax due from petitioner ($302,735.92, the amount agreed upon at the hearing on October 14, 1993 less $4,884.82 equals $297,851.10, the amount stipulated as due) and the abatement of penalty.

6. Approximately two years later, the Division's Westchester District Office of its Tax Compliance Division ("Tax Compliance") issued a warrant which was docketed on November 9, 1995 against petitioner directing that the following tax with penalties and interest, which remained wholly unpaid, be satisfied out of petitioner's real and personal property located in Westchester County:

Assessment ID	Period Ending	Tax	Penalty	Interest	Assessment Total
L-010829112-4	12/31/84	$185,549.78	$1,858.61	$308,990.99	$496,399.38
L-010829111-5	12/31/85	111,676.26	1,116.76	152,544.55	265,337.57
Totals		$297,226.04[4]	$2,975.37[5]	$461,535.54	$761,736.95

The warrant specifically noted that the amount noted as due continued to accrue interest:

> Current interest rate *9.00% per year* on $758,761.58 from October 31, 1995
>
> The *interest rate may vary* according to the Tax Law. (Emphasis added.)

[4]The record on this motion does not explain the $625.06 difference between the amount stipulated as due of $297,851.10 and the amount of tax noted in the warrant of $297,226.04.

[5]The record on this motion also does not explain why penalty in the total amount of $2,975.37 was included in the warrant in light of the fact that the stipulation of discontinuance abated penalty.

7. In November 1995, shortly after the docketing of the warrant detailed in Finding of Fact "6", petitioner made a payment of $20,000.00 on tax due. In December 1995, petitioner made a second payment of $20,000.00 on tax due. On February 9, 1996, petitioner sold its customer lists for Westchester and Putnam Counties to Singer Holding Corporation and used $257,226.04 of the sale proceeds to pay off the remaining principal portions of the assessments for 1984 and 1985 (two payments of $20,000 plus $257,226.04 equals $297,226.04, the total *tax* due noted in the warrant). By a letter dated February 27, 1996, Tax Compliance notified petitioner that it relinquished its tax lien on petitioner's intangible assets consisting of the customer lists and telephone number sold to Singer Holding Corporation as a result of petitioner's payment of $257,226.04. However, Tax Compliance also noted that its tax lien remained effective on any other assets owned by petitioner.

8. Approximately two months after petitioner's payment of the tax due of $257,226.04, Tax Compliance issued a Deferred Payment Agreement dated April 4, 1996 projecting an amount for deferred payment of $563,781.12 calculated as follows:

Period Ending	Tax Due	Interest[6]	Current Amount Due
12/31/84	$145,547.21	$327,079.38	$472,626.59
12/31/85	111,676.26	162,807.56	274,483.82

[6]The Division used the term "penalty & interest" in the proposed deferred payment agreement. Since penalty had been abated pursuant to the stipulation of discontinuance and the amounts shown represented "interest" only, the column heading "interest" is used above.

Totals	$257,223.47	$489,886.94 Less downpayment Plus estimated additional interest accruing during the life of the DPA Projected DPA amount due	$747,110.41 (257,226.04) 73,896.75 $563,781.12

9. Petitioner refused to sign the deferred payment agreement. According to the affidavit dated April 27, 1998 of petitioner's attorney filed on this motion:

> After reviewing the 1996 Proposed DPA it became evident to Petitioner, for the first time, that the Tax Department had miscalculated the interest due on the Assessments pursuant to the Stipulation.

10. By a letter dated May 10, 1996 to the Division's attorney, Patricia L. Brumbaugh, petitioner's representative noted his disagreement with the calculation of interest due in the deferred payment agreement:

> The Tax Department asserts that Barrier owes $489,886.94 in interest for the period March 16, 1985 through the date of the Deferred Payment Agreement of April 4, 1996.
>
> Barrier, in turn, believes that it owes only $267,269.77 in interest for this period. Barrier used a 6% interest rate compounded daily to arrive at its figure.
>
> The difference between the two amounts is $222,617.17.

11. Petitioner asserts that the term "minimum interest" means a rate of 6% per annum rather than the underpayment rates, ranging from 7½% to 12% per annum, used by the Division. The Division maintains that the underpayment rates represent the minimum interest that the Division may assert under the relevant statutory provisions.

CONCLUSIONS OF LAW

A. Paragraph 18 of section 171 of the Tax Law provides as follows:

> The commissioner of taxation and finance shall:
>
> * * *
>
> Eighteenth. Have authority to enter into a written agreement with any person, relating to the liability of such person (or of the person for whom he acts) in respect of any tax or fee imposed by the tax law or article two-E of the general city law, *which agreement shall be final and conclusive*, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact; (a) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of this state, and (b) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, cancellation, abatement, refund or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded . . . .” (Emphasis added.)

B. Although prepared on a Division of Tax Appeals form, the stipulation of discontinuance at issue was a written agreement of the nature described above; therefore, the grounds set forth in Tax Law § 171(18) must be considered to be the sole grounds for the stipulation of discontinuance to “be annulled, modified, set aside or disregarded” (***see, Matter of D & C Glass Corp***., Tax Appeals Tribunal, June 11, 1992). Petitioner contends that it is seeking to have the stipulation merely interpreted and not set aside or disregarded. However, in seeking to have it determined that interest at the rate of 6% per annum should be imposed on the tax it agreed was due, petitioner is not merely seeking an interpretation but rather a modification of the stipulation of discontinuance by substituting for the terminology used in the stipulation of “minimum” interest, the specific interest rate of 6%. Consequently, petitioner must first meet the heavy burden of establishing “fraud, malfeasance, or misrepresentation of a material fact,” the extraordinary grounds sufficient to permit the modifying of the stipulation of discontinuance, which by its terms discontinued the matter at hand with prejudice, as noted in

Finding of Fact "1" (***see, Matter of Brahms,*** Tax Appeals Tribunal, July 3, 1997; ***Matter of Mullin,*** Tax Appeals Tribunal**,** June 9, 1994***; Matter of Felix Industries***, Tax Appeals Tribunal, July 22, 1993; ***see also Hallock v. State*** 64 NY2d 228, 485 NYS2d 510, 512 [wherein the Court of Appeals held that a settlement agreement made during litigation is favored by the courts and not lightly cast aside because "strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process"]). Petitioner mistakenly relies primarily on a matter involving merely the interpretation of a stipulation of *facts,* not a stipulation of *discontinuance* (***see, Matter of J & L Home Improvement Corp***., Tax Appeals Tribunal, August 1, 1991). Unlike the situation at hand, the taxpayer in ***Matter of J & L Home Improvement Corp***. was not a party to a stipulation of *discontinuance* by which it forfeited, with prejudice, the right to a hearing.

C. Petitioner has not met the heavy burden of establishing that the Division misrepresented the rate at which interest would be calculated on the tax petitioner conceded was due. The only alleged misrepresentation according to petitioner's motion papers was the Division's use of the term "minimum" to describe the rate at which interest would be calculated. Petitioner does not allege that the Division at any point represented that interest would be calculated at 6%, not prior to the execution of the stipulation of discontinuance nor after its execution; and, most important, the stipulation does not provide that interest would be computed at 6%. Petitioner maintains that upon the Division's issuance of the proposed deferred payment agreement, "for the first time" it became evident that interest had been miscalculated. However, as noted in Finding of Fact "6", approximately six months before the Division's issuance of the proposed deferred payment agreement, the warrant docketed by Tax Compliance against petitioner on November 9, 1995 clearly noted that the then current interest

rate was 9.00% per year and that the interest rate may vary according to the Tax Law. Furthermore, the three notices of deficiency, as detailed in Finding of Fact "2", clearly show that interest was calculated at a rate greater than 6% per annum. For example, tax asserted due of $279,523.75 for the period ended December 31, 1984 had interest calculated due of $139,241.88, as of April 20, 1989, the date of the notice of deficiency, which reflected the use of interest rates in excess of 6%, and, more specifically, interest rates in accord with 20 NYCRR Part 2393.3(a), which sets forth the applicable interest rates for underpayment of petroleum business tax (Tax Law Article 13-A) as follows:

Period	Rate
1/1/84 through 2/29/84	12%
3/1/84 through 2/28/85	11.0%
3/1/85 through 2/28/86	11.8%
3/1/86 through 2/28/87	9.5%
3/1/87 through 2/29/88	7.5%
3/1/88 through 2/28/89	8.9%
3/1/89 through 8/31/89	10.2%

In addition to the fact that the interest asserted due of $139,241.88 on tax of $279,523.75 reflects the use of the above varying interest rates in excess of 6%, petitioner in its request for conciliation conference, as noted in Finding of Fact "3", did not request that an interest rate of 6% should be used. Moreover, petitioner at the hearing, as noted in Findings of Fact "4" and "5", did not raise any issue concerning the rate at which interest should be calculated.

D. The Division properly points out that for periods after August 31, 1989, both Tax Law

§ 1096, which is made applicable to the petroleum business tax by Tax Law § 315,[7] and 20 NYCRR 2393.1(e) provided that the Commissioner shall set the underpayment rates without the necessity of promulgating a regulation by publishing the rates so set in the State Register. The rates so set by the Commissioner and published in the State Register were as follows:

Period	Rate
9/1/89 through 10/1/89	12%
10/1/89 through 3/31/91	11%
4/1/91 through 12/31/91	10%
1/1/92 through 3/31/92	9%
4/1/92 through 9/30/92	8%
10/1/92 through 6/30/94	7%
7/1/94 through 9/30/94	8%
10/1/94 through 3/31/95	9%
4/1/95 through 6/30/95	10%
7/1/95 through 3/31/96	9%
4/1/96 through 6/30/96	8%
7/1/96 through 3/31/98	9%
4/1/98 through present	8%

E. Petitioner is correct that Tax Law § 171(26) and § 1096(e)(1) specify that the overpayment and underpayment rates of interest applicable to the petroleum business tax shall be (i) "not less than six percent per annum" and (ii) if no rates are set "shall be deemed to be set

[7]Tax Law former § 315 specifically incorporated Article 27 of the Tax Law "with respect to the administration of and procedure with respect to the [petroleum business tax]." Tax Law § 315, as amended by Laws of 1990 (ch 190), incorporates "those provisions of such article twelve-A relating to penalty and interest" with respect to the petroleum business tax. Pursuant to Tax Law § 171(26) the overpayment and underpayment rates of interest for article twelve-A are the same as those set pursuant to Tax Law § 1096, which are the interest rates detailed in these conclusions of law.

at six percent per annum", respectively. However, petitioner ignores Tax Law § 1096(e)(2) which provides that the overpayment and underpayment rates of interest shall be the prime rate as follows:

> On or before the fifteenth day of January in each year, the commissioner of taxation and finance shall determine the average prime rate charged by banks for the quarter-year ending on the immediately preceding December thirty-first. Such average prime rate, rounded to the nearest one-tenth of a percentage point, shall be the rate of interest prescribed by this paragraph that shall be effective during the twelve-month period commencing on the first day of March in such year. Provided, however, that on or before the fifteenth day of July in each year, such commissioner shall determine the average prime rate charged by banks during the quarter-year ending on June thirtieth of such year. In any year which the average prime rate for the quarter-year ending on June thirtieth differs by more than two percentage points from the average prime rate for the quarter-year ending on the immediately preceding December thirty-first, then such average prime rate for the quarter-year ending on June thirtieth, rounded to the nearest one-tenth of a percentage point, shall be the rate of interest prescribed by this paragraph for the six-month period commencing on the first day of September in such year. . . . For purposes of this paragraph, the average prime rate charged by banks during any quarter-year shall be the average predominant prime rate quoted by commercial banks to large businesses in the three months constituting such quarter-year as such rate is determined and published by the board of governors of the federal reserve system of the United States.

Consequently, under the applicable provisions of the Tax Law, the underpayment interest rate to be imposed on petroleum business tax due is the prime rate, but not less than six percent per annum.

F. The Division is correct that there is no statutory basis for the abatement of interest imposed on petroleum business tax determined due. Unlike interest imposed on assessments of sales and use tax, there is no penalty interest that may be imposed on petroleum business tax determined due. In the context of sales and use tax, the terminology of "minimum interest" is used to distinguish "statutory interest" imposed on sales tax assessments which includes penalty interest (***see, Matter of Welco Ad Corporation***, Tax Appeals Tribunal, November 23, 1994).

Penalty interest may be abated under Tax Law § 1145(a)(1)(iii):

> If the commissioner of taxation and finance determines that such failure or delay [to pay sales and use tax] was due to reasonable cause and not due to willful neglect.

However, only the portion of interest that exceeds the underpayment interest rates may be so abated (***see, Matter of Welco Ad Corporation***, ***supra***). In fact, the underpayment interest rates for sales tax purposes which may not be abated are the same underpayment interest rates set for petroleum business tax determined due.

G. Petitioner contends that in its review of other stipulations of discontinuance referenced in certain decisions of the Tax Appeals Tribunal, the Division noted that interest was "to be computed" (***see, e.g., Matter of Felix Industries, Inc., supra***). Nonetheless, the fact that in the matter at hand, the Division specified that "minimum" interest was to be applied does not mean that the Division has misrepresented the interest to be computed on the tax the parties stipulated was due. The interest computed based on the underpayment rates established by the commissioner represents the minimum amount of interest due on petroleum business tax that has been determined due. The Division is correct that there is no basis for abating interest to an amount less than the underpayment rates (***see, Matter of Welco Ad Corporation, supra***).

H. In sum, petitioner has failed to establish that the Division misrepresented the rate at which interest would be calculated on the petroleum business tax it conceded was due.

I. The motion of Barrier Oil Corporation to reopen this matter is denied.

DATED: Troy, New York
September 3, 1998

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE