STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EASTCHESTER TRANSPORT CORPORATION	:	DETERMINATION DTA NO. 818723
for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Period December 1, 1994 through November 30, 1995.	:	

Petitioner, Eastchester Transport Corporation,[1] % Letitia Ragno, 141 West 10th Street, New York, New York 10014, filed a petition for redetermination of a deficiency or for refund of tax on petroleum businesses under Article 13-A of the Tax Law for the period December 1, 1994 through November 30, 1995.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on December 4, 2002 at 10:30 A.M., with all briefs to be submitted by June 6, 2003, which date began the six-month period for the issuance of this determination. Petitioner appeared by Letitia Ragno, president, and on its post-hearing briefs by Jared J. Scharf, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel).

[1] During the period at issue, petitioner conducted business as Brook Fuel Oil Corp.

ISSUES

I. Whether the audit method employed by the Division of Taxation was reasonable or whether petitioner has shown error in either the audit method or result.

II. Whether any weight may be given to certain documents submitted by petitioner after the hearing was completed.

III. Whether certain findings of fact and conclusions of law made in a small claims matter concerning petitioner's liability for additional *sales* tax resulting from the same audit of its sales of fuel oil under review herein is binding upon the petroleum business tax liability at issue in this proceeding.

IV. Whether petitioner is entitled to have any overpayments of sales tax credited against its petroleum business tax liability.

FINDINGS OF FACT

1. Petitioner operated a retail heating oil business in the Bronx selling #2 fuel oil to residences and commercial establishments. For the one-year period at issue, December 1, 1994 through November 30, 1995, petitioner reported 8,533,253 "gallons sold or used" of heating oil on reports (forms PT-201 and PT-106) filed with the Division of Taxation ("Division") as follows:

Period	Total gallons sold or used
12/1/94-2/28/95	4,373,745
3/1/95-3/31/95	1,710,082[2]
4/1/95-4/30/95	646,562
5/1/95-5/31/95	417,178

[2] Next to the amount shown above is a higher amount of 2,773,822 pencilled in. There is no explanation of the meaning of such alternate amount or who was responsible for writing it on the tax report.

6/1/95-6/30/95	433,511
7/1/95-7/31/95	42,733
8/1/95-8/30/95	298,858
9/1/95-9/30/95	486,030
10/1/95-10/31/95	71,725
11/1/95-11/30/95	52,829
Total	8,533,253

2. Claiming that nearly all of its sales of heating oil were for *residential* heating purposes, petitioner reported only 29,925 gallons as subject to the imposition of petroleum business tax under Article 13-A of the Tax Law as follows:

Period	Gallons Used to Power Petitioner's Vehicles[3]	Gallons *Not* Sold for Residential Heating[4]
12/1/94-2/28/95	3,050	-0-
3/1/95-3/31/95	1,275	6,694
4/1/95-4/30/95	1,614	3,958
5/1/95-5/31/95	1,287	3,829
6/1/95-6/30/95	1,285	1,174
7/1/95-7/31/95	250	1,134
8/1/95-8/31/95	375	1,149
9/1/95-9/30/95	412	1,020
10/1/95-10/31/95	69	1,275
11/1/95-11/30/95	75	-0-
Totals	9,692	20,233

[3] These gallons would be subject to tax under Article 13-A by the imposition of the "automotive-type diesel motor fuel tax."

[4] These gallons would be subject to tax under Article 13-A by the imposition of the "nonautomotive-type diesel motor fuel tax."

3. The Division sought to audit petitioner's claim that nearly all of its sales of heating oil were exempt from Article 13-A tax as part of its audit of petitioner's (i) petroleum business tax returns, (ii) highway use tax returns, and (iii) "on a limited scope basis" sales tax returns.

4. By a letter dated October 6, 1997, the auditor confirmed a phone conversation with Letitia Ragno, petitioner's president, that he would be in her Bronx office on Monday, November 17, 1997 at approximately 10:00 A.M. to commence his audit. His letter also provided more than a month's notice of the records which should be made available, and with regard to the petroleum business tax portion of the audit, he requested the following records for the period December 1, 1994 to "the present," i.e., late 1997:

Tax returns (PT series)
Inventory records and reconciliations
Sales journals
Delivery tickets for test periods to be selected
Exemption certificates and schedules
Municipality contracts, purchase orders and/or delivery tickets
Export certificates
Registered distributors under Article 12A, resale certificates
Bulk receipts and invoices from suppliers
Pipeline statements
Fuel disbursements (sales, self-use)
960 and 970 transport vehicle manifest reports
943 service station reports (if applicable)
941 thruput detail-or monthly statements from terminal operator
Cash disbursements journals
Vehicle listing-include internal ID# and VIN numbers
General ledgers (to examine accrued accounts)

4. Petitioner produced very few records for the auditor's review in the course of his audit. The only delivery tickets produced were for the period October 1, 1996 through December 31, 1996, which is not part of the period which remains at issue. The nature of petitioner's business was transformed in late 1995 when it sold its #2 heating oil business and gave up Brook Fuel Oil Corp. as its name to Morningside Fuel Oil, the company which purchased its customer list. In

contrast, during the period still at issue, petitioner sold home heating oil to both residential and *commercial* establishments as well as a heavier type of oil to large housing projects. After late 1995, petitioner sold only the heavier type of oil (so-called residual fuel) exclusively to exempt entities such as large public housing projects and other governmental entities. Consequently, the delivery tickets provided by petitioner for a three-month period when petitioner's business had changed were not relevant to the auditor's review of petitioner's petroleum business tax liability for the earlier period at issue herein. The Division has conceded that petitioner is not liable for petroleum business tax for the period subsequent to the sale of its #2 heating oil business in late 1995.

5. With regard to the period at issue, petitioner in the course of the audit provided no records to substantiate its sales. However, petitioner did provide for the auditor's review its customer list, a 32-page computer printout containing names, addresses and telephone numbers of petitioner's 1,722 accounts for #2 fuel oil. To determine which of these 1,722 accounts were commercial accounts and thereby taxable, the auditor entered the address of each customer in the Division's Phone Disk system, a computer database of telephone customers by name and address in New York State. When an address is entered, each phone number that is registered at that address will be brought up. Further, the Phone Disk system sorts the telephone numbers brought up into business listings and residential listings. If an individual address in the Phone Disk database had more than one telephone customer listed, the auditor classified it as a commercial account for audit purposes only if it was 100% commercial. The auditor determined that 166[5] or 9.64% of petitioner's 1,722 accounts were commercial accounts. The auditor prepared a detailed

[5] Initially, by a manual count, the auditor determined that petitioner had 162 commercial accounts but when he computerized his data, he realized that his manual count was off by 4 accounts with petitioner's commercial accounts actually numbering 166.

list of the 166 accounts which he treated as commercial specifying addresses and telephone numbers. For example, included in this list were the following entities with names that begin with the letter "K":

Customer Name	Street Address	City	Telephone
P. Kalamaris	3011 Middletown Rd	Bronx	212 863 9550
H. Kennedy	368 East 169 Street	Bronx	212 293 8001
E. King	3269 Third Ave.	Bronx	718 665 3960
Koger Comp.	635 Morris Park Ave.	Bronx	212 597 5555
Kozy Korner Motel	4119 White Plains Rd.	Bronx	212 881 6272
B. Kramer	554 East 141 Street	Bronx	212 993 1488

In addition, perusing the list of the 166 accounts, it is observed that included are entities such as "B. Spanish Evan. Church," "Christ the King," "G. Tidings Church," "S Day Adventist Church." The auditor explained that he required documentation to prove a particular entity was a non-profit and that the fuel oil was actually sold to the entity that was listed. Since none was provided, he treated these entities as commercial accounts.

6. Since petitioner had no storage facilities for fuel inventory, the auditor assumed that all gallons of fuel oil purchased by the company during the one year at issue were sold. Petitioner reported purchases of 8,533,053 gallons of #2 fuel oil for the year at issue from six different suppliers as follows:

Period	Stuyvesant	Coastal	Mobil	Cibro	Rad Oil	Bayside	Total
2/95	299,687	100,550		1,647,349	2,108,418	219,441	4,375,445
3/95	712,992	72,786		499,364	423,040		1,708,182
4/95	435,282	500		131,322	81,998		649,102
5/95	272,282	11,891		56,727	76,838		417,738

6/95	233,699			13,069	184,843		431,611
7/95	800	2,012	16,517		22,204		41,533
8/95	3,000	25,308	14,912	1,600	256,348		301,168
9/95		69,313	15,826	7,156	396,970		489,265
10/95		3,000	63,555				66,555
11/95		3,005	49,449				52,454
Totals	1,957,742	288,365	160,259	2,356,587	3,550,659	219,441	8,533,053

To verify the above purchases reported by petitioner on its returns, the auditor had other Division staff cross check what three of the suppliers, Stuyvesant, Bayside and Rad Oil, reported on their respective tax returns as the amount of fuel oil sold to petitioner. He also utilized the Tracker database maintained by the Division which tracks sales of petroleum products between registered vendors or "inter distributor sales." As a result of this review, the auditor determined that petitioner's six suppliers sold it 8,880,987 gallons of motor fuel during the year at issue, 347,934 gallons more than what were reported by petitioner. This discrepancy is detailed as follows:

Supplier	Gallons reported purchased by petitioner	Gallons reported sold to petitioner by supplier	Discrepancy
Stuyvesant	1,957,742	2,149,999	192,257
Coastal	288,365	321,200	32,835
Mobil	160,259	160,259	-0-
Cibro	2,356,587	2,356,587	-0-
Rad Oil	3,550,659	3,673,501	122,842
Bayside	219,441	219,441	-0-
Total	8,533,053	8,880,987	347,934

7. To calculate petitioner's commercial gallons sold of heating oil, the auditor applied 9.64%, the percentage of petitioner's 1,722 accounts which he had determined were commercial accounts, to his audited amount of gallons sold to petitioner by its suppliers of 8,880,987 gallons, and multiplied the resultant product by two to arrive at commercial gallons of #2 fuel oil sold of 1,712,245 for the year at issue. The auditor multiplied by two based upon his estimate, rooted in his nine years of experience auditing petroleum businesses, that petitioner's commercial customers purchased twice as much fuel as residential customers.

8. Based upon the petroleum business tax rate per gallon of $.1080 during the period December 1, 1994 through May 31, 1995 and of $.1032 during the period June 1, 1995 through November 30, 1995, the auditor arrived at audited tax due of $183,503.37 detailed as follows:

Period	Total Gallons	Commercial %	Commercial Gallons	13-A Tax Rate	Audited Tax Due	Tax Paid	Additional Tax Due
12/1/94-2/95	4,434,266	9.64%	854,922	0.1080	$ 92,331.58	$955.89	$ 91,375.69
3/95	1,412,289	9.64%	272,288	0.1080	29,407.10	-0-	29,407.10
4/95	985,345	9.64%	189,974	0.1080	20,517.19	-0-	20,517.19
5/95	515,542	9.64%	99,396	0.1080	10,734.77	-0-	10,734.77
6/95	528,007	9.64%	101,990	0.1032	10,525.37	-0-	10,525.37
7/95	50,033	9.64%	9,646	0.1032	995.47	-0-	995.47
8/95	346,241	9.64%	66,754	0.1032	6,889.01	-0-	6,889.01
9/95	489,265	9.64%	94,330	0.1032	9,734.86	-0-	9,734.86
10/95	66,555	9.64%	12,832	0.1032	1,324.26	-0-	1,324.26
11/95	52,454	9.64%	10,114	0.1032	1,043.76	-0-	1,043.76
Totals	8,879,997		1,712,246		$183,503.37		$182,547.48

9. Against the audited total tax due shown above of $182,547.48, the auditor credited petitioner with petroleum business tax previously assessed by the Division of approximately $10,000.00 under the following three earlier assessments resulting from desk audits:

Period	Additional Tax Due	Previously Assessed L-011279714	Previously Assessed L-011279629	Previously Assessed L-011950438	Additional Tax Due for Assessment
12/1/94-2/95	91,375.69	$4,978.06	$ 575.80	-0-	$ 85,821.83
3/95	29,407.10	1,104.08	127.50	-0-	28,175.52
4/95	20,517.19	777.62	161.40	-0-	19,578.17
5/95	10,734.77	712.46	128.70	-0-	9,893.61
6/95	10,525.37	332.26	128.50	-0-	10,064.61
7/95	995.47	188.46	25.00	-0-	787.01
8/95	6,889.01	202.76	37.50	-0-	6,648.75
9/95	9,734.86		-0-	-0-	9,734.86
10/95	1,324.26		-0-	-0-	1,324.26
11/95	1,043.76		-0-	433.81	609.95
Totals	182,547.48	$8,290.70	$1,184.40	$433.81	$172,638.57

10. The Division issued a Notice of Determination dated August 5, 1999 against petitioner asserting petroleum business tax due of $172,638.57 plus interest and penalty in conformance with the additional tax due shown above. Although the auditor presented Letitia Ragno, petitioner's president, with his audit determination on June 30, 1998, no further evidence was produced by petitioner in the 14-month period leading up to the issuance of the statutory notice.

11. More than a year later, on November 16, 2000 at a conference held by the Bureau of Conciliation and Mediation Services ("BCMS"), petitioner finally provided a copy of a 297-page

document[6] to substantiate tax exempt sales of #2 fuel oil. After reviewing this document, the auditor determined that petitioner had established that it had sold 5,809,002 gallons of #2 fuel oil which were exempt from petroleum business tax: (i) 119,277 gallons to an emergency repair program operated by a New York City governmental housing program, and (ii) 5,689,002 gallons to what was described as "New York City Housing Authority."[7] The auditor prepared a detailed schedule, by month,[8] noting delivery dates and the number of gallons sold for each of the two government related customers. For example, included in the 119,277 gallons sold by petitioner to the emergency repair program and treated by the auditor as exempt from tax were 36,962.5 gallons sold in the month of February of 1995 detailed by the auditor as follows:

Delivery Date	Gallons Sold
2/2/95	3,500.0
2/3/95	2,987.0
2/4/95	118.0
2/7/95	817.0
2/7/95	4,397.0
2/8/95	7,000.0
2/10/95	2,881.0
2/10/95	1,806.0
2/16/95	3,760.0

[6] A copy of this document consisting of computer printouts was introduced into evidence but it is of poor quality and many pages are not decipherable. The parties advised the administrative judge that neither would need to reference particular pages.

[7] It is not known for certain whether this is the same as the New York City *Public* Housing Authority. Except for the hard-to-decipher copies of computer printouts, no invoices, receipts, or delivery tickets related to this governmental entity were introduced into the record.

[8] Sales to the emergency housing program were made in each of the months December 1994 through June, 1995, and sales to the housing authority were made in each of the months December 1994 through September 1995.

2/18/95	3,000.0
2/25/95	3,000.0
2/28/95	3,696.5
Total	36,962.5

Similarly, included in the 5,689,002 gallons sold by petitioner to the housing authority, which the auditor also treated as tax exempt sales, were, as an example, 696,322.4 gallons sold in the month of April of 1995 detailed by the auditor as follows:

Delivery Date	Gallons Sold
4/3/95	25,253.6
4/5/95	82,335.1
4/7/95	84,552.5
4/7/95	19,504.0
4/10/95	58,400.4
4/10/95	6,950.0
4/12/95	3,000.3
4/12/95	54,016.2
4/12/95	37,200.0
4/14/95	81,805.7
4/17/95	33,501.0
4/19/95	58,725.0
4/21/95	39,146.2
4/24/95	46,601.5
4/26/95	34,602.9
4/28/95	30,728.0
Total	696,322.4

12. As a result of petitioner's substantiation of additional sales exempt from the imposition of petroleum business tax, as detailed in Finding of Fact "11", the auditor substantially reduced petroleum business tax asserted due from $172,638.57, as noted in Finding of Fact "9", to $52,532.36 as detailed below:

Period	Total Gallons	Commercial Gallons (9.64% of Total Gallons	Tax Due at Tax Rate of 0.1080 for 2/95-5/95 and 0.1032 for 6/95-11/95
2/95	1,901,926	366,690	$ 38,646.63 ($39,602.52 less a credit for tax paid of $955.89)
3/95	272,134	52,468	5,666.54
4/95	279,653	53,916	5,822.93
5/95	3,587	692	74.74
6/95	229,018	44,154	4,556.69
7/95	32,819	6,328	653.05
8/95	57,916	11,166	1,152.33
9/95	175,923	33,918	3,500.34
10/95	66,555	12,832	1,324.26
11/95	52,454	10,114	1,043.76
Totals	3,071,985	592,278	$62,441.27

The $62,441.27 was further reduced to $52,532.36 after the auditor credited petitioner with petroleum business tax previously assessed by the Division as detailed in Finding of Fact "9". In conformance with these adjustments, a Conciliation Order dated June 29, 2001 was issued to petitioner reducing petroleum business tax due to $52,532.36 plus penalty and interest.

13. The Final Notice of Hearing dated October 28, 2002 issued to petitioner noted that:

> the petitioner has the burden of proof and must establish 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.

Furthermore, near the start of the hearing, petitioner was advised by the administrative law judge that:

> Administrative Law Judge: [A]nything that either side wants me to consider has to be brought out at today's hearing, or arrangements made for you to submit whatever it is to me.
>
> * * *
>
> My decision will be based only on the record that is being created. I won't go outside the record.
>
> * * *
>
> And also to keep in mind that it's very important that if you want me to consider something, make sure it gets into the record.
>
> Letita Ragno: Okay.
>
> Administrative Law Judge: I can't emphasize that enough. (Tr., pp. 25-26.)

14. Nonetheless, petitioner introduced little evidence to support its case at the hearing. At the very start of the field audit on October 1, 1997, Letitia Ragno had advised the auditor as noted in his log that:

> [S]he took over the business when her husband passed away the previous year [1996]. She explained that on the day of the funeral, the office was vandalized and everything was taken from it, including all computers, and records, (hard copies also).

Letitia Ragno also informed the auditor that in the summer of 1997, petitioner's offices were broken into again, "with many records stolen." Petitioner's prehearing memorandum, which was actually prepared by Letitia Ragno at the hearing, reflected this apparent lack of business documents, and listed only one exhibit to be introduced into the record by petitioner: "ck 1023-7/8/96- $3,133.93." However, in the course of the hearing, petitioner determined that its one

exhibit was "irrelevant" because it represented the payment of sales tax, not petroleum business tax, the tax at issue in this matter.

15. In addition, at the hearing, petitioner obtained permission to submit into the record two additional types of documents to support its case: (i) invoices from the New York City Housing Authority to show delivery of more fuel oil than what the auditor allowed because he had not yet seen such invoices according to Alicia Ragno, and (ii) checks to show payment of petroleum business tax which the auditor had not already accounted for. There was considerable discussion on the record concerning the specific nature of these documents in light of the administrative law judge's statement that the record would not be left open "in a vague fashion" and the need for petitioner to describe with detail the documents which it intended to submit after the completion of the hearing. With regard to the invoices, the administrative law judge advised petitioner that it would not be allowed to merely submit a stack of invoices since their relevancy would not be clear. The additional invoices must be related to the invoices which the auditor had already reviewed and used as a basis to credit petitioner for the tax exempt delivery of fuel oil to the New York City Housing Authority. Petitioner indicated that the invoices, which it intended to submit after the hearing, had already been submitted in a small claims matter[9] involving a sales tax assessment and would be resubmitted here with an affidavit. The administrative law judge was explicit about the need to have an affidavit to explain the additional invoices, described by petitioner as a fairly large document, for which the record was going to be left open:

> An affidavit without the invoices would not be given too much weight. The invoices without the affidavit would not be given too much weight. An affidavit

[9] The administrative law judge specifically noted that he would not consider documents introduced in the small claims proceeding involving a sales tax assessment against petitioner unless petitioner included them in the record for this matter.

> with the invoices might be given some weight. I cannot say how much weight I would give to it . . . I'd have to see those documents and then hear the objections to it. (Tr., p. 137.)

With regard to the checks to show payment of additional petroleum business tax not already credited by the auditor, petitioner estimated that it would provide approximately 10 checks.

16. A due date of December 20, 2002 was established for petitioner to submit the checks and a due date of January 24, 2003 was set for the submission of the affidavit explaining how attached invoices show the delivery of more fuel oil to the New York Housing Authority than what had been allowed by the auditor. Further, the Division was allowed time to review the checks and invoices to be submitted by petitioner and to submit an affidavit of the auditor after such review by March 7, 2003. The administrative law judge emphasized the strict enforcement of the due dates and that the parties should be certain to ask for more time to submit the specified documents before the due date expired. Further, the administrative law judge reiterated the following before allowing the parties to make a closing argument:

> Administrative Law Judge: Now, before I turn to Mr. McKinley for his closing argument and then the taxpayer will have last say at today's hearing, I just want to make sure that the parties understand that once the hearing is completed today, I won't accept anything else into the record other than what we have previously discussed.
>
> Letitia Ragno: Very good.
>
> Administrative Law Judge: Nothing further, Mr. McKinley in the nature of additional evidence, other than what's been discussed?
>
> Attorney McKinley: No, your Honor.
>
> Administrative Law Judge: Ms. Ragno, you understand too, that other than what we've discussed, nothing further will be permitted to come into the record.
>
> Letitia Ragno: Correct.
> (Tr, pp. 143-144.)

17. As noted in Finding of Fact "5", the auditor treated deliveries of fuel oil to entities such as Christ the King and G. Tidings Church as taxable because petitioner had not shown any documentation to establish that the entity was nonprofit. Nonetheless, petitioner did not offer any proof at the hearing of such nonprofit status and did not obtain permission to submit any specific evidence after the closing of the hearing to establish that certain accounts should have been treated by the auditor as religious, charitable or nonprofit entities.

18. By a letter dated December 26, 2002[10] of its current representative, attorney Jared J. Scharf, petitioner submitted 39 pages of confusing documents which the attorney described as follows:

> I am enclosing such checks with this letter without having had an opportunity to review them thoroughly with petitioner. In the case of checks that are barely legible, or not legible at all, I am enclosing such checks to demonstrate the printed check number, even though the amount cannot be read. I am also enclosing with such checks the bank statements that indicate the amounts. Petitioner believes that these checks indicate $101,639,48 [sic] in payments.

19. Petitioner failed to relate its alleged proof of additional payments of petroleum business tax to the amounts previously allowed by the auditor as detailed in the chart included in Finding of Fact "8", which noted that petitioner paid petroleum business tax only in the amount of $955.89, and Finding of Fact "9", which noted that petitioner was credited with previously assessed petroleum business taxes in the amount of $8,290.70, $1,184.40, and $433.81. Nonetheless the auditor carefully reviewed the 39 pages submitted by petitioner and determined that this document included copies of 14 checks and that petitioner was entitled to a credit of $595.28:

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[10] Attorney Scharf was granted an additional week, from December 20, 2002 until December 27, 2002, to submit the checks.

> Marine Midland check number 6027 in the amount of $595.28 is a payment made by petitioner for petroleum business tax for the period June-August, 1995. This payment was made in response to the Department's Notice and Demand number l-010674757.

However, the other 12 checks drawn on Marine Midland Bank were applied to petitioner's tax liabilities other than petroleum business tax, and the 14th check for $25,000.00, drawn from the attorney escrow account of Carl S. Levine and Associates, P.C., was made as a partial payment pursuant to a Deferred Payment Agreement covering six tax notices. Petitioner had already been given credit by the auditor for taxes assessed pursuant to notices L-011279714 and L-011279629, and the auditor noted after his thorough review that petitioner was not entitled to any additional credit. Other notices relate to (i) highway use tax, (ii)sales tax, and (iii) petroleum business tax prior to the period at issue herein.

20. As noted in Finding of Fact "15", petitioner also obtained permission to submit into the record after the completion of the hearing, by a due date of January 24, 2003, invoices from the New York City Housing Authority to show delivery of more fuel oil than what the auditor allowed. According to petitioner, it would resubmit invoices previously submitted in a sales tax matter previously held before a presiding officer in a small claims proceeding. Further, the administrative law judge encouraged petitioner to submit these invoices with an affidavit which would explain their relevance. By a letter dated January 23, 2003 of petitioner's current representative, "documents proving exempt sales and the tax that results" were transmitted and contended that a refund was due petitioner. The auditor carefully reviewed these documents consisting of adding machine tapes, but *no invoices*, and noted as follows:

> [The submission] consists of several pages of photocopied adding machine tapes with unsworn statements that the information represents itemized deliveries to the New York City Housing Authority. I compared the information in Exhibit 2 [the submission] to the detailed printouts previously provided by petitioner (Department's Exhibit U at hearing). There is no documentation in Exhibit 2 to

support petitioner's claim that it is entitled to additional credit for tax exempt sales of fuel sold to the Housing Authority during the audit period.

21. Petitioner submitted 11 proposed findings of fact. Proposed findings of fact "1" is accepted. The other 10 are not accepted.

Proposed finding of fact "2" incorrectly states that "115,209.5 gallons was [sic] exempt from the taxes on sales and on petroleum businesses as these sales were made to New York City Emergency Repairs . . . ." In fact, as noted in Finding of Fact "11", the auditor determined that petitioner had established that it had sold "119,277 gallons [a *higher* amount than proposed by petitioner] to an emergency repair program operated by a New York City governmental housing program."

Proposed finding of fact "3"incorrectly states that "6,256,835.1 gallons was [sic] exempt from the taxes on sales and on petroleum businesses as these sales were made to the New York City Housing Authority . . . ." In fact, as noted in Finding of Fact "11", the auditor determined that petitioner had established that it had sold "5,689,002 gallons to what was described as 'New York City Housing Authority'" and petitioner has not introduced any evidence to justify an increase in such amount as discussed further in the Conclusions of Law.

Proposed findings of fact "4", "5", "6",and "7" propose a calculation of sales subject to tax and the tax due on such sales which utilize the incorrect amounts detailed above, and proposed findings of fact "6" and "7" also include the sales tax due on such sales, which is irrelevant and confuses the matter at hand.

Proposed finding of fact "8" includes a reference to payments of sales tax which is irrelevant and confuses the matter at hand and as discussed in Finding of Fact "19", petitioner's proof of payments of petroleum business tax is defective and misleading.

Proposed finding of fact "9" is an ultimate finding of fact, more in the nature of a conclusion of law to be resolved in the analysis set forth in the conclusions of law.

Proposed findings of fact "10" and "11" are based upon findings made in a small claims proceeding which, as discussed in the conclusions of law, are not binding herein.

SUMMARY OF THE PARTIES' POSITIONS

22. At the hearing, petitioner appeared by its corporate president, Ms. Letitia Ragno, who described the issue "as far as I know" as only one: whether petitioner would be able to substantiate more exempt sales to New York City Housing Authority when the authority provided "all the backup records that we need and that we requested since May" (tr., pp. 23-24).

Two weeks after the completion of the hearing, petitioner's current representative, attorney Jared J. Scharf, by a letter dated December 18, 2002, protested that the matter went to hearing and asked for additional time to address a new issue concerning the statute of limitations and to gather evidence. The administrative law judge denied his request for additional time and advised the attorney of the due dates established at the hearing.

In its brief, petitioner contends that at the heart of this matter "the only issue is arithmetic" (Petitioner's brief, p. 5). It continues to assert that the adding machine tapes,[11] described in Finding of Fact "20", establish that petitioner is due a refund since they "correctly indicate that the total number of gallons of sales to the New York City Housing Authority amounts to 6,372,044.6 gallons" (Petitioner's brief, p. 4). In addition, petitioner in its brief asserts that it made payment of sales tax owed "twice in some instances" resulting in "overpaid sales taxes and underpaid petroleum taxes" (Petitioner's brief, p. 9). Petitioner contends that the Division

[11] With its brief, petitioner sought to introduce into evidence an affidavit of Letitia Ragno dated April 3, 2003 in order "to cure petitioner's failure to authenticate the adding machine tapes in an affidavit" (Petitioner's brief, footnote "1" on p. 4).

should be "equitably estopped from asserting that the payments [detailed in Finding of Fact "19"] which were for sales taxes . . . ought to be credited to petroleum taxes . . . ." Petitioner also points to the determination by a presiding officer in a small claims matter[12] involving petitioner for the same period at issue herein with regard to its sales tax liability on the sale of fuel oil. In this small claims determination, the presiding officer determined that petitioner had established additional exempt sales to the New York City Housing Authority of 295,575 gallons in February 1995 and of 120,537.5 gallons in June 1995 after his review of invoices submitted by petitioner at the small claims hearing. The presiding officer also reduced from 166 to 158 the number of commercial accounts and accordingly the commercial percentage was also reduced from 9.64 percent to 9.18 percent based upon his conclusion that "Petitioner has also shown that the commercial percentage should be reduced because certain tax exempt customers were included in the list of taxable commercial accounts."

23. The Division counters that petitioner never introduced into evidence the invoices relied upon by the presiding officer in the small claims matter involving petitioner's sales tax liability, and the auditor has never had an opportunity to review such invoices. Further, the Division points out that in the matter at hand, "Petitioner . . . merely cross-examined the Division's auditor regarding the exempt status of one organization, Banana Kelly" (Division's letter dated April 18, 2003, p. 3) and never offered any substantiation of the exempt status of any entities which were included in the 166 commercial accounts determined by the auditor. The Division maintains that its audit methodology was reasonably calculated to determine petitioner's petroleum business tax liability. As a result of petitioner's failure to maintain

[12] The small claims matter was designated DTA No. 818723, and the determination by Presiding Officer Timothy J. Alston was issued on January 30, 2003.

complete and accurate records of all its purchases and sales, the Division properly used petitioner's customer list, the only record provided by petitioner during the field audit, to estimate its sales subject to petroleum business tax. According to the Division, no precedential value may be given to the findings of fact and conclusions of law from the small claims case involving petitioner's sales tax liability for the period at issue. Further, the Division, citing ***Matter of Turbodyne Corp.*** (Tax Appeals Tribunal, July 3, 1996), contends that petitioner should have raised any alleged sales tax overpayment in its small claims proceeding because "[t]axpayers are allowed to offset tax overpayments against a tax deficiency if both the overpayment and the deficiency involve the same type of tax and the overpayment occurred during the period that comprises the deficiency." In sum, petitioner has not met its burden to prove by clear and convincing evidence that the audit and the tax assessment were erroneous or otherwise improper.

24. In its reply brief, petitioner counters that, in fact, "petitioner provided its purchase invoices and its delivery tickets," and this material "could have been used to determine a precise figure for exempt sales" (petitioner's reply brief, p. 16). Further, petitioner maintains that the findings of fact in the small claims matter involving petitioner's sales tax liability on the same sales of heating oil at issue here should be binding on the basis of the doctrine of judicial notice or a theory of collateral estoppel which "prevents a party to an earlier proceeding from denying in a later proceeding matters that were finally determined in the earlier proceeding (Petitioner's reply brief, p. 10). Finally, petitioner continues to maintain that it has "proved the audit results wrong" by the use of "correct figures and correct mathematics" as set forth in Letitia Ragno's affidavit attached to its initial brief (Petitioner's reply brief, pp. 13-14).

CONCLUSIONS OF LAW

A. Tax Law, Article 13-A, § 301 imposes an annual tax on petroleum businesses for the privilege of engaging in business in New York State. In addition, Tax Law §301-a(a) also imposes a monthly tax on petroleum businesses based on the sum of four components, including at section 301-a(c)(2) the component at issue in this proceeding, i.e., tax calculated on a per gallon basis on the sale of nonautomotive-type diesel motor fuel. This is the component at issue here since the heating oil sold by petitioner is properly treated as "nonautomotive-type diesel motor fuel."[13]

B. Pursuant to Tax Law § 301-b(d), sales of heating oil to consumers for *residential* heating purposes are exempt from tax. Further, Tax Law § 301-b(h) provides an exemption from tax for sales to certain not-for-profit organizations which have qualified under Tax Law § 1116(a)(4) or (5).[14] Consequently, to determine petitioner's petroleum business tax liability, the Division sought to determine its *commercial* sales of heating oil during the year at issue.

C. As detailed in Finding of Fact "1", petitioner reported substantial sales of heating oil during the year at issue of 8,533,253 gallons, and as noted in Finding of Fact "2", petitioner reported only a smidgen of such sales as commercial sales: 29,925 gallons or a mere 0.35% of

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[13]Tax Law § 300(c)(1)(C)(i) defines "nonautomotive-type diesel motor fuel" as follows:

> [A]ny diesel motor fuel . . . which would be excluded from the diesel motor fuel excise tax imposed by [section 282-a] of this chapter solely by reason of the enumerated exclusions based on ultimate use of the product set forth in [section 282-a(3)(b)].

The relevant enumerated exclusion in section 282-a(3)(b) is for fuel which is "not enhanced Diesel motor fuel" which is used exclusively for heating purposes.

[14] These subdivisions set forth a broad array of exempt organizations including "any corporation, association, trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes ...."

its total sales as subject to tax. The Division, in its regular course, as detailed in Finding of Fact "3" sought to audit petitioner's claim that nearly all of its sales of heating oil were not taxable.

D. Tax Law § 315(b) provides for the joint administration by the Division of sales and use tax and petroleum business tax including the joint determination of tax due. Further, Tax Law § 308(i) requires every petroleum business to "keep the records and documents referred to in [section 286(1)]." Pursuant to Tax Law § 286(1), petitioner was required to keep a complete and accurate record of all its purchases and sales. As noted in the findings of fact, petitioner failed to do so. Petitioner's varying allegations concerning either the destruction or loss of its records does not alter the pivotal fact that it did not have complete and accurate records of all its purchases and sales for the auditor's review.[15]

E. Since the joint administration of petroleum business tax under Article 13-A and sales and use tax under Article 28 is statutorily authorized, the case law concerning the estimating of a taxpayer's *sales* tax, when records are unavailable for audit, is of particular relevance. It is well established by such case law that if a taxpayer fails to maintain and provide records of its sales, the Division may resort to an estimate of sales, as long as the Division selects an audit method reasonably calculated to reflect the taxes due (***see***, ***Matter of W.T. Grant v. Joseph***, 2 NY2d 196, 204, 159 NYS2d 150, 157, ***cert denied*** 355 US 869, 2 L Ed 2d 75). Here, the Division properly cross checked petitioner's reported purchases of heating oil by analyzing the tax returns of petitioner's suppliers and the Division's own Tracker database, as detailed in Finding of Fact "6". In fact, petitioner has not contested the Division's determination that petitioner's six suppliers sold it 8,880,987 gallons of motor fuel during the year at issue, 347,934 gallons or

[15] Petitioner's bold contention in its reply brief that it provided its purchase invoices and its delivery tickets grossly ignores the relevant facts and reflects petitioner's tactic of obfuscation.

4.1% gallons more than the 8,533,053 reported by it. Next, given petitioner's lack of records, the Division properly estimated petitioner's commercial sales of heating oil by analyzing the customer list provided by petitioner, as detailed in Findings of Fact "5" and "7". Such estimate, although imprecise since it required the auditor to estimate that petitioner's commercial customers purchased twice as much fuel as residential customers based upon his auditing experience, nonetheless was reasonable. As noted by the Tax Appeals Tribunal in ***Matter of Alde Taxi Meter Service, Inc.*** (January 2, 1992):

> The fact that an estimation of sales tax due is required negates any demand for exactness on the part of the auditor (***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679). Accuracy was sacrificed in the first instance by the failure of the taxpayer to maintain adequate records. This initial failure cannot later inure to the taxpayer's benefit. Therefore, the audit method utilized must only be reasonable (***see, Matter of Grant v. Joseph, supra***).

F. Consequently, the burden of proof is on petitioner to show, *by clear and convincing evidence*, that the result of this audit of its commercial heating oil sales subject to tax was unreasonably inaccurate or that the amount of tax assessed was erroneous (***Matter of Sarantopoulos***, Tax Appeals Tribunal, February 28, 1991, ***confirmed*** 186 AD2d 878, 589 NYS2d 102). Petitioner has not met this burden. Initially, it is noted that the documents which petitioner sought to submit after the record had been closed to further evidence, may be accorded no weight. As the Tax Appeals Tribunal emphasized in its recent decision in ***Matter of Ronon*** (October 24, 2002):

> We have held that a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not helpful towards that end and does not provide an opportunity for the adversary to question the evidence on the record [citations omitted].

As noted in the Findings of Fact, petitioner introduced little evidence at the hearing to support its case. Further, although petitioner received permission to submit after the completion of the

hearing, as noted in Finding of Fact "15", invoices from the New York City Housing Authority to show delivery of more fuel oil than what the auditor allowed because he had not yet seen such invoices, it failed to do so. It also failed to explain such failure which is properly held against it (***see, Matter of Meixsell v. Commissioner of Taxation***, 240 AD2d 860, 659 NYS2d 325, ***lv denied*** 91 NY2d 811, 671 NYS2d 714). In short, there is no evidence in the record to support any further adjustments to petitioner's petroleum business tax liability on the basis that there were additional sales to either nonprofit or government entities which had not yet been credited by the auditor.

G. Petitioner's collateral estoppel argument that the Division is bound by the determination in the small claims matter concerning petitioner's liability for additional sales tax on the same heating oil sales at issue here is also rejected. In order to invoke the doctrine of collateral estoppel, two requirements must be satisfied: (1) there must be an identity of issue which has necessarily been decided in the earlier action and which is controlling of the present action and, (2) there must have been a full and fair opportunity to contest the decision which is claimed to be determinative (***see, Buechel v. Bain***, 97 NY2d 295, 303-304, 740 NYS2d 252, 257; ***Gilberg v. Barbieri,*** 53 NY2d 285, 291, 441 NYS2d 49, 51). Petitioner's small claims matter simply did not provide the Division with a full and fair opportunity to contest the proof relied upon by the presiding officer. The invoices introduced at the small claims matter were never reviewed by the Division and were not made a part of the record herein. Further, any testimony by Letitia Ragno in the small claims proceeding concerning the nonprofit nature of certain customers on petitioner's customer list was not subject to cross-examination by an attorney from the Division's Office of Counsel, and similar testimony was not presented at the hearing herein. In addition, as noted in Footnote "9", the administrative law judge specifically

noted at the hearing that he would not consider documents introduced in the small claims proceeding unless petitioner included them in the record for this matter. Consequently, the findings of fact and conclusions made in the determination in the small claims proceeding have no effect on the matter at hand.

H. In addition, petitioner's contention that its overpayment of sales tax, if any, may offset its petroleum business tax liability is also rejected. The doctrine of equitable recoupment requires that any overpayment must involve the same type of tax as the deficiency (***Matter of Turbodyne Corporation***, Tax Appeals Tribunal, July 3, 1996, ***confirmed*** 245 AD2d 976, 667 NYS2d 105, ***lv denied*** 91 NY2d 812, 671 NYS2d 715).

I. Finally, petitioner has not established that its failure to pay tax was due to reasonable cause and not due to willful neglect. In the words of the Tax Appeals Tribunal, in establishing reasonable cause, the taxpayer faces an "onerous task" (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained why the task is onerous as follows:

> By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]" (***Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, January 16, 1992).

Further, the destruction or loss of records does not provide a basis for abating penalties (***Matter of Tango Boutique, Inc.***, Tax Appeals Tribunal, April 28, 1994, ***confirmed sub nom. Cook v. Tax Appeals Tribunal***, 222 AD2d 962, 635 NYS2d 355). Simply stated, petitioner has not established that the destruction or loss of records was the cause for the *underpayment* of tax at issue. In addition, it is also observed that petitioner has conceded that it underreported, without any justification, its heating oil sales by 4.1% during the year at issue, as noted in Finding of Fact "6".

J. The petition of Eastchester Transport Corporation is granted to the extent of the Division's concession noted in Finding of Fact "19" but, in all other respects, is denied, and the Notice of Determination dated August 5, 1999 is modified to conform with such concession and the Conciliation Order dated June 29, 2001.

DATED: Troy, New York
September 4, 2003

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE