STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSE TRIVINO	:	DETERMINATION DTA NO. 819027
for Revision of a Determination or for Refund of Tax on Fuel Use under Article 21-A of the Tax Law for the Period July 1, 1996 through September 30, 1998.	:	

Petitioner, Jose Trivino, 7005 Shore Drive, Brooklyn, New York 11209, filed a petition for revision of a determination or for refund of tax on fuel use under Article 21-A of the Tax Law for the period July 1, 1996 through September 30, 1998.

A small claims hearing was held before Thomas C. Sacca, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on March 30, 2004 at 10:45 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Sheldon Trachtenberg).

The final brief in this matter was due by May 15, 2004, and it is this date that commences the three-month period for the issuance of this determination.

ISSUE

Whether the petitioner has established errors in the Division of Taxation's assessment of fuel use tax warranting a reduction or cancellation of said assessment.

FINDINGS OF FACT

1. On November 20, 2000, following an audit, the Division of Taxation ("Division") issued a Notice of Determination to petitioner, Jose Trivino, which assessed fuel use tax ("FUT")

in the amount of $18,710.99, plus penalty and interest, for the period July 1, 1996 through September 30, 1998.

2. Petitioner is in the trucking business and operates out of Brooklyn, New York. During the period at issue, petitioner made deliveries in New York and New Jersey. All trucks used in petitioner's business operation were registered to Jose Trivino.

3. On January 1, 1996, New York State became a participating member of the International Fuel Tax Agreement ("IFTA"). IFTA, which is in effect in most U.S. states and Canadian provinces, simplifies the reporting of fuel taxes by allowing a motor carrier to report all the fuel taxes that it owes to the various IFTA member jurisdictions to a single base jurisdiction. Under IFTA, a carrier need only get a single IFTS fuel tax license for all its qualified motor vehicles. The carrier must also get two IFTA decals for each qualified motor vehicle. Both are to be obtained from the carrier's base jurisdiction. The license and decals will allow those vehicles to travel in all IFTA member jurisdictions.

The carrier is required to file only one tax report each quarter with its base jurisdiction, to report and pay all fuel taxes due to the member jurisdictions in which it operates. The base jurisdiction is then responsible for remitting the taxes due to the other jurisdictions. In most cases, the base jurisdiction will do a single audit for all member jurisdictions.

4. On audit, the Division requested all documentation and information used by petitioner in the preparation of his IFTA fuel use tax returns. Specifically, the Division requested trip reports, Interstate Commerce Commission ("ICC") logs, toll receipts and fuel purchase receipts.

5. In response to this Division request, petitioner produced a local delivery printout, purchase invoices for fuel for RLM Trucking and JATA Trucking, Inc., bi-monthly fuel summary purchases for both RLM Trucking and JATA Trucking as well as truck-by-truck

summaries and insurance information for the trucks relating to business entities entitled Elizabeth Trivino d/b/a RLM Trucking, and JATA & Sons, Inc. The local delivery printout listed more trucks then were owned by petitioner, and the truck identification numbers did not match petitioner's truck identification numbers. In addition, there was no indication as to the entity which made the deliveries, and there were no records presented which indicated the miles driven. The truck-by-truck fuel summaries did not tie in with the fuel summaries for RLM Trucking, and petitioner's highway use tax returns did not reconcile with the summary of fuel receipts for RLM Trucking. As an example, the highway use tax returns of petitioner for the third and fourth quarters of 1996 indicate taxable fuel purchases of 166 and 179 gallons, respectively. In contrast, the total of fuel receipts for RLM Trucking for the same quarters establish fuel purchases of 1,409 and 1,342 gallons, respectively. Moreover, the receipts for fuel purchases did not list the vehicle for which the fuel was being purchased.

6. Following review of these records, the Division determined that it would be necessary to estimate petitioner's fuel purchases for FUT purposes. As the basis for this estimate, the Division used the personal income tax returns of petitioner to review the gross trucking revenues for years which either overlapped the years under audit or which were within the audit period. The auditor estimated the amount of mileage by applying a rate of $3.00 of trucking revenues per revenue miles based on the auditor's experience. Fuel use was estimated at the rate of 4 miles per gallon, an amount provided by the IFTA audit manual where the licensee's records were inadequate. Fuel use was divided between New York and New Jersey using the same ratio as indicated on petitioner's returns.

7. The tax paid on the gallons of fuel purchased, as indicated on the purchase invoices, was subtracted from the amount of audited tax due to arrive at the tax due per state. Any

claimed purchases which were not documented were disallowed for the claimed tax credit, as directed by the IFTA audit manual. Included within this area of disallowance was a letter from 278 Fuel Stop, 392 Leonard Street, Brooklyn, New York, which stated that it had sold gasoline to petitioner. However, the invoices supplied with the letter indicated that the fuel had been sold to either RLM Trucking or JATA & Sons, Inc.

8. According to petitioner, RLM Trucking is the same business entity as Jose Trivino. Petitioner claims that the highway use tax returns of petitioner were the forms upon which RLM Trucking reported its business activity and that they are not separate entities but, in fact, are identical. Given that they are identical, it is petitioner's contention that all required taxes have already been paid. In support of his position, petitioner points out that the letters "RLM" are the initials of his three children.

9. The Division maintains that petitioner and RLM Trucking are two separate and distinct business entities. In support of its position, the Division points to (i) the conflicting records provided by petitioner, (ii) the inconsistencies in the trucks registered to petitioner, (iii) the information which indicated additional trucks not registered to petitioner but operated by RLM Trucking, and (iv) the failure of petitioner's highway use tax returns relating to fuel purchases to reconcile with the purchase invoices provided by petitioner for RLM Trucking.

CONCLUSIONS OF LAW

A. Articles 21 and 21-A of the Tax Law impose two highway use taxes upon commercial carriers with respect to motor vehicles operated on New York public highways. The first, commonly referred to as the truck mileage tax, is imposed pursuant to Tax Law § 503. This tax is based on the mileage of the vehicle on New York public highways and the weight of the vehicle. The other tax authorized by Article 21-A is known as the fuel use tax and is imposed pursuant to Tax Law § 523. The procedures governing Article 21 also apply to Article 21-A (Tax Law § 520[a]). The FUT is based upon the amount of motor fuel and diesel motor fuel used in New York.

B. Tax Law § 510 provides that if a return filed under Articles 21 and 21-A is:

> insufficient or unsatisfactory . . . or if no return is made for any period, the commissioner of taxation and finance shall determine the amount of tax due from such information as is available to the commissioner.

C. Tax Law § 507 imposes the following recordkeeping requirements upon carriers subject to tax under Articles 21 and 21-A:

> Every carrier subject to this article and every carrier to whom a permit was issued shall keep a complete and accurate daily record which shall show the miles traveled in this state by each vehicular unit and such other information as the tax commission may require. Such records shall be kept in this state unless the tax commission consents to their removal and shall be preserved for a period of four years and be open for inspection at any reasonable time upon the demand of the tax commission.

D. Where a taxpayer fails to maintain or make available records required under Article 21-A, the Division is authorized to estimate the taxpayer's fuel use tax liability. The Division is required to select an audit method reasonably calculated to reflect tax due. Where a taxpayer's records are insufficient, unreliable and inadequate to verify, upon audit, the amount of the fuel use due for the period under examination, the Division is authorized to estimate such tax liability on the basis of external indices (***see, Matter of Lionel Leasing Industries Co., Inc. v. State Tax Commn.***, 105 AD2d 581, 481 NYS2d 520, 523).

E. Given petitioner's clear failure to maintain any daily records showing the miles traveled by his vehicles, the Division was authorized to estimate petitioner's fuel use tax liability. Moreover, the Division's method, based on petitioner's claimed gross trucking revenues on his personal income tax returns, was, under the circumstances, reasonable. As to the records provided, the local delivery printout listed more trucks then were owned by petitioner, the truck identification numbers did not match petitioner's truck identification numbers, there was no indication as to the entity which made the deliveries, and there were no records presented which indicated the miles driven. The truck-by-truck fuel summaries did not tie in with the fuel summaries for RLM Trucking, and petitioner's highway use tax returns did not reconcile with the summary of fuel receipts for RLM Trucking. Moreover, the receipts for fuel purchases did not list the vehicle for which the fuel was being purchased.

F. In this case, based upon petitioner's failure to provide adequate records, it was appropriate for the Division to resort to an indirect audit methodology and estimate fuel use tax due on the basis of external indices. Where, as here, the Division seeks to determine a taxpayer's fuel use tax liability on the basis of an indirect audit method, the methodology selected must be reasonably calculated to reflect the taxes due. However, exactness in the outcome of the audit method is not required. The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (***Matter of Lionel Leasing Industries Co. v. State Tax Commn., supra.***)

G. Petitioner's only challenge to the audit findings was the claim that RLM Trucking is the same business entity as Jose Trivino. This contention is rejected. The conflicting records provided by petitioner, the failure of petitioner to provide information as to the miles driven, deliveries and fuel use of the business's trucks, the inconsistencies in the trucks registered to petitioner, the information which indicated additional trucks not registered to petitioner but operated by RLM Trucking and the failure of petitioner's highway use tax returns relating to fuel purchases to reconcile with the purchase invoices provided by petitioner for RLM Trucking, taken together, provide sufficient justification for the Division's conclusion that petitioner and RLM Trucking were two distinct business entities.

H. The petition of Jose Trivino is denied and the Notice of Determination, dated November 20, 2000, is sustained.

DATED: Troy, New York
August 5, 2004

/s/ Thomas C. Sacca
PRESIDING OFFICER