

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**CANER AUTO, INC.** : DETERMINATION  
for Revision of a Determination or for Refund of Sales : DTA NO. 822237  
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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Petitioner, Caner Auto, Inc., filed a petition 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.

A hearing was commenced before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 30, 2008 at 10:30 A.M., and was concluded at the same location on April 24, 2009 at 10:30 A.M., with all briefs to be submitted by August 26, 2009, which date began the six-month period for the issuance of this determination. Petitioner appeared by Thomas P. Murray, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel).

***ISSUES***

I. Whether, in determining additional sales and use taxes due from petitioner, the Division of Taxation (Division) properly applied the results of a one-day observation test to the entire audit period.

II. Whether, in determining additional sales tax due on petitioner's sales of gasoline, the Division properly included petroleum business tax in the taxable base of gasoline sales subject to the imposition of sales tax.

III. Whether, in determining additional sales tax due on petitioner's sales of cigarettes, the Division properly included New York State excise tax in the taxable base of cigarette sales subject to the imposition of sales tax.

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

1. An audit of Caner Auto, Inc. (Caner) began in December 2005. Caner operated a convenience store and gas station in Bay Shore, New York. The convenience store sold cigarettes, beer, soda, candy and auto items; the gas station sold Getty gasoline and products and, for a portion of the audit period, operated three repair bays.

2. According to the audit report, an appointment letter was sent to Caner on December 12, 2005 and the auditor visited the business in January 2006.<sup>1</sup>

3. On January 19, 2006, the Division and Caner executed a Test Period Audit Method Election form wherein it was agreed that the audit of Caner's sales would be conducted using a test period method audit. The Test Period Audit Method Election form states thereon as follows:

Note: When my records are complete and available for the entire audit period, the Tax Department may not determine my tax based upon a test period audit without my consent. However, if I find that it may be practical to use the test period method audit, I may agree to use such a method by completing this form.

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The Tax Department representative has explained to me the various audit methods listed above. If the auditor determines that my books and records

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<sup>1</sup> The appointment letter and attached Records Requested List bear a date of July 19, 2006. However, the appointment letter indicates that the audit would begin on January 16, 2006 at the offices of Caner's representative.

are complete and adequate, I agree that the audit should be conducted using a test period method audit. It is understood that the agreement is contingent upon the adequacy of my records and pertains to the audit method to be used. It does not preclude my protest of the audit results on grounds such as . . . .

4. On January 20, 2006, the auditor made a written request for additional information which included all invoices (soda, candy, etc.), information on auto sales, detailed information on all repairs (for the periods commencing in March 2005) and current fuel invoices for the period January 11 through January 20, 2006.

5. On January 26, 2006 and February 6, 2006, respectively, Caner and the Division executed a Consent Extending Period of Limitations for Assessment of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law whereby it was agreed that the amount of sales and use taxes due from Caner for the period March 1, 2003 through November 30, 2005 would be assessed on or before April 30, 2007.

6. According to the Field Audit Narrative Sheet, dated December 11, 2006, the audit performed was described as follows:

An audit of sales and use tax was performed for the period 3/01/03 - 11/30/05. Daily cash register records from the store were not available but they did have daily hand written sales records. Cigarette prepaid was calculated from invoices and compared to the reported credit. Purchase invoices were listed for the test period. However not all invoices were not [*sic*] made available. Fuel invoices were listed and compared to reported sales. OPIS [Oil Pricing Information Service] was checked and compared to reported price per gallon. Repairs were listed from available invoices and compared to part purchases when possible. All purchase invoices were requested at the closing conference as well as information on auto sales and the repair business. No additional information was sent. Because records were inadequate an observation test was performed on September 13, 2006 from 6am - 10pm.

7. It must be noted that the Tax Field Audit Record states that on March 8, 2006, the auditor left a voice mail for Caner's representative "requesting status on additional information."

On April 7, 2006, the auditor telephoned Caner's representative "requesting update on information requested." On May 4, 2006, "Information rec'd reviewed and completed assessment. Sent 30 day letter to POA."

8. The auditor stated that he utilized the purchase invoices made available for the test period of March 1 through May 31, 2005, calculated a profit margin and marked up the purchase invoices by 25%.

Caner's store purchases for the test period were \$35,149.00. By applying the 25% markup, store sales were determined to be \$43,936.00. An examination of Caner's repair bay sales for the test period revealed that such sales totaled \$8,238.00. Therefore, total sales, excluding fuel sales, were found to be \$52,174.25. By applying the sales tax rate of 8.75%, sales tax per audit was \$4,565.25. After deducting Caner's audited cigarette prepaid tax for the test quarter of \$2,494.00 (\$2,206.00 times 113.06%<sup>2</sup>), sales tax due was determined to be \$2,071.25.

For the test quarter, Caner had reported total taxable sales of \$34,716.00. Applying the sales tax rate of 8.75% resulted in sales tax reported of \$3,037.65. After deducting Caner's cigarette prepaid credit of \$2,206.00, sales tax reported for the quarter was \$831.65. Therefore, pursuant to this test period audit, additional sales tax of \$1,618.00 was due.<sup>3</sup> An error rate of 50.26% was calculated by the auditor which was used throughout the audit period.

Applying the error rate of 50.26% to reported taxable sales for the audit period of \$415,637.00 with audited sales tax due thereon of \$54,624.00 and crediting Caner with audited

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<sup>2</sup> The audit report indicates that Caner's cigarette prepaid tax was underreported and, accordingly, additional credit was given.

<sup>3</sup> It is unclear from where the auditor derived the additional sales tax due of \$1,618.00. Pursuant to Schedule B of the audit report, additional store tax of \$1,239.00 plus fuel tax of \$2,116.00, or total additional tax of \$3,355.00 was due from Caner for this test period.

prepaid cigarette tax of \$28,198.00 and tax reported of \$11,222.00, resulted in additional store tax of \$15,204.00. Additional fuel tax was determined to be \$16,653.00, for a total additional tax due of \$31,857.00 for the audit period.

9. As noted in the Tax Field Audit Record, on May 4, 2006, a Statement of Proposed Audit Change for Sales and Use Tax was sent to Caner that asserted additional tax due in the amount of \$31,858.00, plus penalty and interest, for a total amount due of \$52,598.74 for the period March 1, 2003 through November 30, 2005.

10. The Tax Field Audit Record contains a notation that this case was closed on July 19, 2006, which coincidentally, was the date set forth on the appointment letter and records requested list (*see* Footnote 1).

11. After the Division issued the Statement of Proposed Audit Change for Sales and Use Tax on May 4, 2006, Caner's representative set forth in writing his disagreement therewith. In summary, Caner's representative's disagreement was as follows:

a. Taxable gasoline sales were increased by including petroleum business tax (14 cents per gallon) while excluding New York State excise tax (8 cents per gallon) in the taxable base for computing sales tax. Taxable sales were also increased with no explanation, which Caner's representative assumed related to a comparison with OPIS;

b. As to the additional tax asserted to be due on sales other than gasoline sales, Caner objected to the 25% markup on cigarette purchases, which Caner asserts was in contradiction to the actual pricing reflected in Caner's records; and

c. Caner objected to including repair bay sales in the auditor's calculation for the quarter ended May 31, 2005 and applying the error rate to the entire audit period since Caner did not engage in repairs until the quarter ended May 31, 2005.

12. After receiving Caner's representative's written disagreement with the audit findings, the auditor's supervisor decided to perform an observation test of Caner's business operation. By letter to Caner's representative dated August 23, 2006, the auditor stated, in relevant part, as follows:

As you are aware, a sales tax audit of the above-referenced taxpayer is currently in progress. Per our discussions, the vendor's books and records are insufficient to determine if the proper amount of sales tax has been reported for the audit period.

This letter will confirm our recent conversation regarding the necessity to perform an observation at your place of business within the next six weeks. Sales activity will be recorded for an entire day, from opening to closing. The observation will be performed discreetly, with minimal interruption of business activity.

Kindly inform your client of this observation at your earliest convenience.

13. The Division performed its observation test at Caner's place of business on September 13, 2006 from 6:00 A.M. until 10:00 P.M. Gross sales for the day were \$550.80 of which \$493.61 were taxable sales. Taxable sales per pack of cigarettes were used as the basis of determining sales tax liability. During the observation test, Caner sold 49 packs of cigarettes. From these figures, the auditor determined that petitioner had taxable sales of \$10.07 per pack of cigarettes (\$493.61 divided by 49 packs).

For the six-month period from March 2005 through August 2005, Caner had reported prepaid cigarette tax in the amount of \$4,717.67 on 12,939 packs of cigarettes purchased. The auditor determined that Caner had prepaid cigarette tax in the amount of \$4,999.40 for the period, which indicated that 13,700 packs had been purchased. The result was an accepted prepaid percentage of 105.88%.

The auditor then determined that for the audit period (March 1, 2003 through November 30, 2005), Caner had reported total cigarettes purchased in the amount of 68,908. By applying the aforesaid percentage of 105.88%, the auditor determined that Caner had purchased 72,960 packs of cigarettes during the audit period. He then multiplied the total number of packs (72,960) by the \$10.07 (taxable sales per pack of cigarettes) to arrive at audited taxable sales of \$734,975.00 for the period. The auditor then multiplied the audited taxable sales by the appropriate tax rate which resulted in audited tax of \$64,044.00.

Caner had reported taxable sales of \$415,637.00 for the audit period and had reported tax in the amount of \$36,162.00 for the audit period. Based upon the prepaid percentage of 105.88%, audited prepaid tax of \$26,412.00 was computed. Caner had reported prepaid tax of \$24,941.00. To determine total store tax due, the auditor subtracted audited prepaid tax of \$26,412.00 from the audited tax of \$64,044.00, which result was \$37,632.00. He then subtracted reported prepaid tax of \$24,941.00 from reported tax of \$36,162.00, which result was \$11,221.00. By subtracting the reported tax of \$11,221.00 from audited tax of \$37,632.00, the resulting store tax was determined to be \$26,410.00. The auditor found that Caner had repair bay sales only for the period March 1, 2005 through November 30, 2005 totaling \$25,241.00, with tax due thereon of \$2,187.00, which when added to store tax due resulted in additional tax due of \$28,597.00.

After reviewing Caner's sales of gasoline and diesel, its prepaid fuel tax and its reported sales tax collected on sales of fuel (gasoline and diesel), the auditor determined that Caner owed additional sales tax on its sales of motor fuel of \$16,653.00. When this amount was added to the store tax and repair bay tax of \$28,597.00, the result was total additional tax due of \$45,251.00.

14. Accordingly, on October 18, 2006, the Division issued a Statement of Proposed Audit Change for Sales and Use Tax to Caner that asserted additional tax due of \$45,252.00, plus penalty and interest, for a total amount due of \$78,424.99 for the audit period.

15. On November 12, 2006, Caner's representative again set forth in writing his disagreement with this latest Statement of Proposed Audit Change for Sales and Use Tax. Caner's representative noted that the auditor had failed to address his original objections to the May 4, 2006 Statement of Proposed Audit Change for Sales and Use Tax and, instead, had used the results of the observation test, which he noted, "asks the question are we to be exposed to a changing set of analysis until a level of assessment is reached and retaliates against the taxpayer but is acceptable to the management team?"

16. On January 2, 2007, the Division issued a Notice of Determination to Caner in the amount of \$45,252.00, plus interest, for a total amount due of \$62,007.26 for the period March 1, 2003 through November 30, 2005. It must be noted that despite the fact that penalty was asserted in the October 18, 2006 Statement of Proposed Audit Change for Sales and Use Tax, no penalty was assessed in the Notice of Determination.

17. Thereafter, Caner timely filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) and a conciliation conference was held on November 7, 2007. On January 25, 2008, a Conciliation Order (CMS No. 218152) was issued by BCMS which reduced the tax assessed against Caner from \$45,252.00 to \$24,364.00, plus interest at the applicable rate.

The conciliation conferee made no changes to the amount of fuel tax due (\$16,653.00), but reduced the store and repair bay tax due from \$28,597.00 to \$7,711.00. The amount of taxable sales per the observation test on September 13, 2006 (\$494.00) was multiplied by 91 days per

quarter which resulted in audited taxable sales of \$44,954.00 per quarter, or \$494,494.00 for the eleven sales tax quarters of the audit period. Added to the \$494,494.00 was \$25,241.00, which amount represented repair bay sales for the last three quarters of the audit period (March 1, 2005 through November 30, 2005). Tax due thereon was computed to be \$45,343.00. Audited prepaid cigarette tax (\$26,411.00) and net tax reported (\$11,222.00) were subtracted from the \$45,343.00, thereby resulting in additional store (and repair bay) tax due of \$7,711.00. When added to the fuel tax due of \$16,653.00, total tax due was determined to be \$24,364.00.

18. On March 3, 2008, the Division issued a Notice and Demand for Payment of Tax Due in the amount of \$37,184.51, which consisted of tax due of \$24,365.00, plus interest.

#### ***SUMMARY OF PETITIONER'S POSITION***

19. The only deficiency in Caner's records was that no electric total or register tape was produced for sales other than gasoline sales. However, since cigarette sales are the great majority of such sales, Caner maintained an inventory system by type, with opening balances, purchases, sales and closing inventory. As to its gasoline sales, Caner's record of sales is supported by daily pump readings summarized on a monthly sheet. Repair bay sales are listed daily on a quarterly summary sheet with supporting invoices.

The May 4, 2006 Statement of Proposed Audit Change for Sales and Use Tax, while objected to by Caner and subsequently superseded by the October 18, 2006 Statement of Proposed Audit Change for Sales and Use Tax, was based upon the auditor's use of Caner's purchase invoices. Caner's objection was that the auditor calculated total sales based upon a 25% markup on cigarette purchases when a markup of approximately 7% was the correct percentage.

20. The total assessment, i.e., the tax assessed per the observation test modified by the Conciliation Order (\$24,364.00), includes \$5,449.00 in excise tax (\$11.11 per carton) included in cigarette sales for purposes of imposing sales tax. Caner objects to the inclusion of the excise tax since it is excluded from the taxable base for purposes of imposing tax on gasoline sales. The remaining \$2,262.00 of the total additional tax on store sales relates to the skewed error factor percentage calculated by the Division when it applied the factor to the entire eleven sales tax quarters of the audit period even though repair sales did not begin until the ninth sales tax quarter of the audit period.

As to the remaining \$16,653.00 of the assessment, the Division has calculated the tax based on the inclusion of the New York State petroleum business tax, thereby resulting in the imposition of a tax on a tax.

21. Even though the conciliation conferee reduced the amount of tax assessed on sales other than gasoline sales from \$28,598.00 (per the October 18, 2006 Statement of Proposed Audit Change for Sales and Use Tax) to \$7,711.00, Caner objects to the revised amount because the Division applied the observation test results to each day in the audit period, which results were skewed because the error factor was applied to the entire audit period even though the repair bay sales did not begin until the ninth quarter (of eleven total quarters) of the audit period.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every “retail sale” of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A “retail sale” is “[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . .” (Tax Law § 1101[b][4][i]).

B. Tax Law § 1135(a) provides that “[e]very person required to collect tax shall keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require.”

20 NYCRR 533.2(b)(1) provides that the records which are required to be kept must contain a true copy of each:

(i) sales slip, invoice, receipt, contract, statement or other memorandum of sale;

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(iii) cash register tape and any other original sales document.

The audit report alleges, and Caner has offered no evidence to refute this allegation, that daily cash register receipts from the store were not available.

C. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, “or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . .” When acting pursuant to section 1138(a)(1), the Division is required to select a method of audit reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

D. The standard for reviewing a sales tax audit where external indices were employed was set forth in *Matter of Your Own Choice, Inc.*, as follows:

To determine the adequacy of a taxpayer's records, the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, [102 AD2d 352, 477 NYS2d 858]) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109). The purpose of the

examination is to determine, through verification drawn independently from within these records (*Matter of Giordano v. State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255; *Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576, 456 NYS2d 138; *Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *see also, Matter of Hennekens v. State Tax Commn.*, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is “virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit” (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43; *Matter of Christ Cella, Inc. v. State Tax Commn.*, *supra*), “from which the exact amount of tax due can be determined” (*Matter of Mohawk Airlines v. Tully*, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (*Matter of Urban Liqs. v. State Tax Commn.*). The estimate methodology utilized must be reasonably calculated to reflect taxes due (*Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150 [1957], *cert denied* 355 US 869, 2 L Ed 2d 75 [1957]), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176 [1976], *affd* 44 NY2d 684, 405 NYS2d 454 [1978]; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842, 502 NYS2d 113 [1986]) or that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451 [1981]; *Matter of Cousins Serv. Station*, Tax Appeals Tribunal, August 11, 1988). In addition, “[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case” (*Matter of Grecian Sq. v. Tax Commn.*, 119 AD2d 948, 501 NYS2d 219, 221 [1986]).

E. In the present matter, it appears that while the Division and Caner executed a Test Period Audit Method Election form in January 2006, a subsequent review by the Division of Caner's books and records revealed that they were inadequate for the performance of a detailed audit. This conclusion was based upon the absence of daily cash register records and some of Caner's purchase invoices for the test period of March 1 through May 31, 2005. The auditor calculated a profit margin and marked up Caner's purchase invoices for the test period by 25%. The result of this initial audit method (*see* Finding of Fact 8) was the issuance of a Statement of Proposed Audit Change for Sales and Use Tax on May 4, 2006 in the amount of \$31,858.00, plus penalty and interest, for total amount due of \$52,598.74 for the audit period.

While the audit report indicates that an appointment letter was sent to Caner on December 12, 2005, the record in this case does not include this letter. However, there is an appointment letter (with attached Records Requested List) dated July 19, 2006. It appears that, after Caner objected to the May 4, 2006 Statement of Proposed Audit Change for Sales and Use Tax, the auditor, after consultation with his supervisors, decided to forego the results of the markup of Caner's purchases which was conducted in early 2006 and, instead, determined that an observation test would be a more reasonable audit method. An appointment letter and Records Requested List were sent to Caner in July 2006 and when no additional information was forthcoming from Caner, an observation test was scheduled for September 13, 2006.

Accordingly, while the record lacks the original appointment letter and Records Requested List allegedly sent in December 2005, since the results of the purchase markup audit were not utilized by the Division, the appointment letter and Records Requested List dated July 19, 2006 constitute a sufficient request for records. Since no additional records were provided by Caner to rebut the Division's earlier conclusion that Caner's books and records were inadequate for the

performance of a detailed audit, it must be concluded that the Division's resort to an indirect audit method was proper. What must next be determined is whether the audit method selected by the Division, i.e., the observation test, was a method which was reasonably calculated to reflect tax due.

F. The use of a one-day observation test to determine gross and taxable sales for an audit period, where a taxpayer has failed to maintain adequate source documentation of sales, is supported by a large body of case law (*see e.g. Matter of Lombard v. Commr. of Taxation & Fin.*, 197 AD2d 799, 602 NYS2d 972 [1993] [one-day observation test]; *Matter of Club Marakesh v. State Tax Commn.*, 151 AD2d 908, 542 NYS2d 881 [1989], *lv denied* 74 NY2d 616, 550 NYS2d 276 [1989] [one-day observation test]).

Moreover, while Caner objects to the application of the observation test results to the entire audit period, it is well settled that it is not unreasonable to extrapolate the results of a one-day observation test over the entire audit period (*Matter of Del's Mini Deli, Inc. v. Tax Appeals Tribunal*, 205 AD2d 989, 613 NYS2d 967 [1994]). Specifically, Caner objects to the utilization of the results of the observation test because it contends that such results were skewed because repair bay sales did not begin until the ninth quarter (March through May 2005) of the audit period. A review of the revised assessment (*see* Finding of Fact 17) reveals that repair bay sales totaling \$25,241.00 which represented sales only from March through November 2005 were included by the conciliation conferee in calculating the revised assessment and were not part of the \$494.00 taxable store sales per day calculation. Accordingly, Caner's objection to the use of the observation test results must be rejected.

G. While Caner alleges that its cigarette and gasoline sales, and sales tax due thereon, are supported by the records presented on audit, as previously noted, source documents from which

the auditor could perform a detailed audit of Caner's business were lacking, thereby justifying the auditor's decision to perform an observation test. Caner has produced no documentary evidence, in the form of books and records, which would warrant any adjustment to the assessment, as revised by the conciliation order, resulting from the observation test.

H. Caner contends that the taxable base for petroleum sales includes the petroleum business tax (and excludes the New York State excise tax) and tax is imposed on that base. Therefore, Caner asserts, sales tax is being charged on petroleum business tax, i.e., a tax is being imposed on a tax. This argument has been previously addressed by the Tax Appeals Tribunal and has been found to be without merit.

Tax Law § 1111(k) provides as follows:

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 [Tax on Petroleum Businesses].

H. In *Matter of A&A Service Station, Inc.* (Tax Appeals Tribunal, February 5, 2004), the Tribunal affirmed an Administrative Law Judge's determination that stated:

Petitioner's argument that the auditor incorrectly calculated sales and use tax due on a tax basis which included petroleum business tax is also without merit. Pursuant to Tax Law § 1111(k), petroleum business tax is required to be included in the calculation of '[r]eceipts subject to tax.'

I. Tax Law § 1111(h) provides, in relevant part, as follows:

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 [New York State tax on cigarettes and tobacco products] and any tax imposed on cigarettes by chapter thirteen of title eleven of the administrative code of the city of New York [New York City cigarette tax].

Accordingly, Caner's contention that state and city cigarette excise taxes should not be included in the taxable base of cigarette sales subject to sales tax is also rejected.

J. The essence of Caner's argument that petroleum business tax should not be included in the taxable base of gasoline sales subject to sales tax and that cigarette excise taxes should not be included in the taxable base of cigarette sales subject to sales tax is its assertion that to do so, "has opened a new direction and dimension that permits the state to expand its taxing power into a new arena," thereby charging a tax on a tax, which Caner states allows the state to move "into this new arena wherein it applies a tax on a tax without any precedent whatever [*sic*]."

Although Caner does not cite any legal cases or statutory provisions in support of its contention, it is seemingly challenging Tax Law § 1111(h) and (k) on constitutional grounds. The Division of Tax Appeals lacks jurisdiction to consider claims alleging that a statute is unconstitutional on its face (*Matter of RAF General Partnership*, Tax Appeals Tribunal, November 9, 1995). At the administrative level, statutes are presumed to be constitutional (*Matter of Lunding*, Tax Appeals Tribunal, February 23, 1995, *annulled on other grounds* 218 AD2d 268, 639 NYS2d 519 [1996], *revd* 89 NY2d 283, 653 NYS2d 62 [1996], *revd* 522 US 287, 139 L Ed2d 717 [1998] ).

K. The petition of Caner Auto, Inc. is denied and the Notice of Determination issued January 2, 2007, as modified by the Conciliation Order (CMS No. 218152) dated January 25, 2008, is sustained.

DATED: Troy, New York  
February 18, 2010

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE