STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

EAST COAST FUELING SERVICES, INC. :

for Revision of Determinations or for Refund of Tax on Petroleum Businesses and Sales and Use Taxes under Articles 13-A, 28 and 29 of the Tax Law for the Period April 1, 2003 through February 28, 2006. :

In the Matter of the Petition :

of :

JAMES LAZNOVSKY :

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 June 1, 2003 through February 28, 2006. :

DECISION
DTA NOS. 824019
AND 824020

Petitioners East Coast Fueling Services, Inc., and James Laznovsky each filed an exception to the determination of the Administrative Law Judge issued on September 19, 2013. Petitioners appeared by Timothy P. Devane, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioners filed a brief in support of their exceptions. The Division of Taxation filed a letter brief in opposition. Petitioners filed a brief in reply. Oral argument was heard in New York, New York on September 17, 2014, which date began the six month period for the issuance of this decision.

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

ISSUES

I. Whether a portion of East Coast Fueling Services, Inc.'s sales are exempt from petroleum business tax or sales and use tax.

II. Whether petitioners have established that they are entitled to a credit or refund of petroleum business tax.

III. Whether petitioners have established reasonable cause for the abatement of penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for finding of fact 25, which we have modified to more accurately reflect the record. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

1. On July 21, 2008, following an audit, the Division of Taxation (Division) issued to petitioner East Coast Fueling Services, Inc. (East Coast), a notice of determination that asserted $41,617.40 in additional petroleum business tax, plus penalty and interest, for a balance due of $71,973.06 for the period April 1, 2003 through February 28, 2006. Also on July 21, 2008, the Division issued a notice of determination to East Coast that asserted a deficiency of sales and use taxes for the period June 1, 2003 through February 28, 2006 in the amount of $174,151.66 plus penalty and interest for a balance due of $359,484.61.

2. The Division also issued a notice of determination, dated August 4, 2008, to petitioner James Laznovsky, as a responsible person of East Coast. The notice asserted a penalty pursuant to Tax Law § 1145 (e), for the period June 1, 2003 through February 28, 2006, in the amount of $361,044.84.

3. On June 4, 2007, the Division sent letters to petitioner James Laznovsky, as the president of East Coast, and to Ms. Donna Stewart, as East Coast's representative, confirming a field audit of East Coast's petroleum business tax records, diesel motor fuel records and sales tax records as they related to the sales of motor fuels for the period April 1, 2003 through August 31, 2005. The letter included a detailed records request list that, for the petroleum business tax return, asked for, among other things, fuel inventory records and reconciliations, delivery tickets, exemption certificates and schedules, municipality contracts, purchase orders and/or delivery tickets and fuel disbursements. For the sales tax portion of the audit, the Division expressly requested tax returns and exemption certificates.

4. On December 27, 2007, the Division sent a letter to petitioners' representative, Ms. Donna Stewart, that reiterated its request for books and records. The letter also adjusted the audit period to April 1, 2003 through February 28, 2006.

5. Ms. Stewart advised the auditor that Mr. Laznovsky prepared the petroleum business tax returns himself, and consequently, she had no knowledge of these returns.[1] In order to prepare the sales tax returns, Ms. Stewart utilized a handwritten summary that she received from Mr. Laznovsky. She did not report any exempt sales on East Coast's sales tax returns.

6. At the outset of the audit, the Division was told that the information available was not organized or complete.[2] The Division never received all of the delivery tickets for the period under review. Moreover, the auditor never reviewed any contracts, invoices, or checks indicating sales of fuel oil to an exempt entity because these items were not made available for review.

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[1] The petroleum tax returns were, in fact, prepared by Ms. Karen Pettigrew, a friend of Mr. Laznovsky.

[2] It is noted that the taxpayers had ample time to prepare for the audit since the first appointment letter was in July of 2006 and the audit did not take place until August of 2007.

Since certain records were not presented and what was available was not organized, it was concluded that it was necessary to resort to the use of test periods. On July 12, 2007, the auditor sent the accountant a facsimile designating the following test periods: June 1, 2005 through August 31, 2005, December 1, 2004 through February 28, 2005 and the months of October 2003 and May 2004. Petitioners never stated that the periods selected presented a concern.

7. To determine the total number of gallons purchased, the Division requested third-party information from two vendors - Metro Terminals Corp. and Bayside Fuel Oil Depot Corp. On the basis of the information it received, the Division concluded that petitioner purchased 2,104,342 gallons of motor fuel. However, during the same period, East Coast reported purchasing 582,096 gallons of fuel on its petroleum business tax returns. Out of the 582,096 reported gallons, 580,086 gallons were reported on the line of the petroleum business tax return for fuel for nonresidential heating and cooling. The remaining 2,010 gallons were reported as fully taxable.

8. When the auditor discovered that East Coast was reporting a little more than 25 percent of the gallons purchased, he had a discussion with East Coast's accountant. The accountant replied that she had no knowledge of the fuel reporting and that all she could do was call the taxpayer and then call the auditor back.

9. Through a series of consents extending period of limitations, the period in which the Division could determine or assess tax against the corporation and Mr. Laznovsky, individually, was extended to July 31, 2008.

10. In order to determine the amount of petroleum business tax due, the auditor started with a review of delivery tickets for the test periods. Utilizing the delivery tickets for the test periods June 1, 2005 through August 31, 2005, December 1, 2004 through February 28, 2005,

October 2003 and May 2004, he calculated allocation percentages for commercial and residential sales. The Division then applied the allocation percentages to the third-party information of gallons purchased to calculate petroleum business taxes due of $66,996.49, less credit for taxes paid of $25,379.08 resulting in a balance due of $41,617.40. On July 21, 2008, the Division issued a notice of determination to East Coast, assessment number L-030450885, that assessed petroleum business tax for the period April 1, 2003 through February 28, 2006 in the amount of $41,617.40, plus penalty and interest. In determining the amount of tax due, the auditor was aware that Mr. Laznovsky had made certain payments and took them into account. This included payments made with returns that were filed late.

11. The calculation of the amount of sales tax due began with the information obtained from third parties regarding total gallons purchased. It then followed a series of steps consisting of calculation of an average price per gallon for residential and commercial sales, allocation of sales between residential and commercial customers, allocation of the gallons sold to residences by county, calculation of a markup percentage, application of the markup percentage to the periods that were not examined in the sample in order to determine the selling price for the remaining periods, allocation of the tax-free gallons between the counties, calculation of the taxable base for the residential gallons and commercial gallons and lastly, calculation of the tax due. The auditor noted that the taxpayer was entitled to additional credits of $24,815.62 and applied them against the additional tax determined on the audit. On July 21, 2008, the Division issued a notice of determination to East Coast, assessment number L-030456019, that assessed sales and use taxes for the period June 1, 2003 through February 28, 2006 in the amount of $174,151.66 plus penalty and interest. On August 4, 2008, the Division issued a notice of determination to James Laznovsky, as a responsible officer of East Coast, assessment number

L-030497233, that assessed a penalty for the period June 1, 2003 through February 28, 2006 in the amount of $361,044.84.

12. Mr. Laznovsky was the sole owner of the outstanding stock of East Coast. East Coast acquired an existing company, known as ISO, which distributed petroleum products to its customers. At one juncture, ISO told Mr. Laznovsky that ISO's sales were exempt from tax. East Coast did not file petroleum business tax returns in 2003 because East Coast continued the deliveries that were made by ISO. East Coast collected and remitted sales tax on certain sales, but not on fuel that was used to operate construction equipment.

13. In the first year of business, East Coast sold number two fuel oil to both residential and commercial customers. The fuel oil sold by East Coast was used for heating homes and businesses. It could also be used to operate equipment such as a compressor. Most of East Coast's sales were to commercial customers.[3] On or about the beginning of 2004, East Coast started selling oil to companies that were painting bridges in New York City. About one-half of the time, the deliveries were made by Mr. Laznovsky and the remainder of the time, the deliveries were made by an employee of East Coast. During the period in issue, East Coast had, at most, two or three employees. When he first started, Mr. Laznovsky had one truck, which was used for the purpose of fueling equipment on bridges. Later, he operated three or four trucks.

14. East Coast made deliveries of number two fuel oil to companies engaged in performing services on bridges owned by the public. In particular, deliveries of number two fuel oil were made to the following companies and work sites: L & L Painting at the George Washington Bridge; Alpha Painting and Construction at the 59th Street Bridge; Ahern Painting,

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[3] Mr. Laznovsky estimates that approximately 30 percent of the sales were to residences and 70 percent of the sales were commercial. A portion of the commercial sales were for heating with a furnace or boiler. No documentation was presented to support these estimates.

which was engaged in work on the Pulaski Bridge and at the Throgs Neck Bridge; Dynamic Painting at the Tappan Zee Bridge; Odyssey Contracting Corp. at the 59th Street Bridge; and RML Construction, Inc., at the 59th Street Bridge.

15. In order to paint the bridge, the contractors would use air compressors for sandblasting, generators for lights, heaters to maintain the temperature in the containment area and vacuum machines to control the dust in the containment area. Mr. Laznovsky personally filled the fuel tanks of the machines. Each machine had to be separately fueled. The fuel oil sold by East Coast was used to provide power for the foregoing devices and not incorporated into the bridge structure.

16. When Mr. Laznovsky acquired the business, the contractors told him that they were using nontaxable number two fuel oil. This prompted Mr. Laznovsky to adopt the practice of preparing invoices without charging tax. The bookkeepers for the contractors told the individual who prepared the invoices for Mr. Laznovsky that they would not pay sales tax because they were exempt.

17. The first time Mr. Laznovsky learned that he was required to have an exemption certificate to avoid collecting tax was after he was no longer in business and East Coast was in the process of being audited. A representative for Mr. Laznovsky had exemption documents prepared for all of East Coast's customers. Some customers completed the exemption certificate, but others said that East Coast did not need them and threw them away. Mr. Laznovsky does not know if L & L Painting completed an exemption certificate.

18. It is Mr. Laznovsky's belief that the bridges where he supplied the fuel were owned by exempt entities such as the Metropolitan Transit Authority, the City of New York or the State of New York.

19. On April 21, 2003, the Division issued to Mr. Laznovsky a license to distribute motor fuel. Thereafter, on the following dates, Mr. Laznovsky was sent notices for the failure to file petroleum business tax returns: July 15, 2003, August 15, 2003, June 15, 2004, July 15, 2004, August 13, 2004, August 20, 2004, December 15, 2004, March 15, 2005, April 15, 2005 and May 13, 2005. On August 27, 2003, September 29, 2004, and April 22, 2005, the Division also issued demands for NYS petroleum tax returns and/or payment of taxes due pursuant to Articles 12-A, 13-A, 28 and 29.

20. As a result of the continuing failures to file and/or pay the taxes due, the Division issued notices of proposed cancellation of registration as a distributor of motor fuel on September 24, 2003, October 22, 2004 and May 9, 2005.

21. Mr. Gary Zirpoli, an employee of the Division at all times relevant to this matter, first had contact with Mr. Laznovsky on February 4, 2005 when Mr. Laznovsky stated that he was behind on his returns because his accountant was sick and that the delinquent returns would be mailed by February 9, 2005. When the returns were not received, he spoke to Mr. Laznovsky again. This time Mr. Laznovsky placed an associate on the phone who stated that the returns would be mailed by March 4, 2005.

22. When a license as a distributor of motor fuel is canceled, it is not reinstated unless the cancellation was executed in error. However, a new licence may be applied for. As a result, if a license is canceled, Mr. Zirpoli will tell the taxpayer to file a new application, make sure that all required returns have been filed and take steps to ensure that there are no outstanding liabilities.

23. On August 23, 2005, the Division received 11 petroleum business tax returns with payments and an application for registration. The balance of the required information was not

provided and, as a result, the Division issued to Mr. Laznovsky a Notice of Proposed Refusal to Register as a Distributor of Fuel.

24. Mr. Zirpoli did not advise petitioners that they did not have to pay sales tax.

25. East Coast's license as a distributor of motor fuel was canceled on August 15, 2005 for failure to file petroleum business tax returns and to pay the taxes due. East Coast's business of supplying fuel oil ended in February 2006, after Mr. Laznovsky was told that his license would not be reinstated. Since he no longer had a license to purchase fuel, he entered the trucking business. At the time of the hearing, the trucking business was failing, he was having difficulty staying current with his bills and his house was being foreclosed upon. His personal vehicle has been repossessed numerous times for lack of payment.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first noted that, during the period at issue, the sale of number two fuel oil was generally subject to petroleum business tax and sales tax pursuant to Tax Law §§ 301 (a) (1) and 1105 (a). Accordingly, the Administrative Law Judge concluded that East Coast's sales of fuel oil were subject to such taxes absent an applicable statutory exemption. The Administrative Law Judge proceeded to reject petitioners' various challenges to the subject assessments.

First, the Administrative Law Judge found that petitioners failed to prove any sales to an exempt governmental entity. Petitioners had asserted that East Coast's sales to contractors working on bridges (***see*** Findings of Fact 13-18) were exempt from tax pursuant to Tax Law §§ 301-b (c) and 1116 (a) as sales to a governmental entity. The Administrative Law Judge noted, however, that petitioners did not establish the amount of sales to such contractors and that this failure was enough to defeat their claim. Next, the Administrative Law Judge found that a

contract between L & L Painting and the City of New York that was received in evidence did not support petitioners' contention that East Coast made sales to a governmental entity. The Administrative Law Judge declined to give any evidentiary weight to the contract because it was unsigned and because there was no evidence that it was in effect during the period at issue. Even if it was in effect, the Administrative Law Judge reasoned, the terms of the contract provide for an exemption from sales tax only where supplies purchased by the contractor are resold to the governmental entity. The Administrative Law Judge found that East Coast's fuel oil was not resold to a governmental entity, but was consumed in the operation of equipment. Finally, the Administrative Law Judge determined that petitioners did not prove that the bridge contractors were acting as agents on behalf of an exempt governmental entity when they purchased number two fuel oil from East Coast. The Administrative Law Judge noted the absence of any documents in the record supporting the existence of such an agency relationship.

The Administrative Law Judge also dismissed petitioners' claim that East Coast's sales of number two fuel oil to bridge contractors were exempt from tax as capital improvements. With respect to this claim, the Administrative Law Judge first noted that the petroleum business tax has no exemption for fuel oil used in the creation of a capital improvement. For sales tax, the Administrative Law Judge determined that the sale of fuel oil to contractors did not qualify as a capital improvement under the definition of that term as set forth in Tax Law § 1101 (b) (9) (i) because the fuel oil was consumed in the operation of the equipment and thus did not become part of or permanently affixed to real property.

The Administrative Law Judge rejected as unsubstantiated petitioners' claim that East Coast paid $70,000.00 to $80,000.00 in petroleum business taxes with respect to the years at issue.

On the penalty issue, the Administrative Law Judge discredited petitioners' contention that the petroleum business tax and the sales tax were in a state of flux during the period at issue, noting that there were no substantive changes in the law during that time relevant to the matters at issue herein. The Administrative Law Judge also dismissed petitioners' complaint that they were never told that they owed sales tax. He noted that such obligations are imposed by statute and that ignorance of those obligations is unavailing as an excuse for failure. The Administrative Law Judge found that the testimony of Mr. Laznovsky and Ms. Pettigrew, stating that Mr. Zirpoli told them that East Coast did not have to pay petroleum business tax or sales tax, "strains credulity." The Administrative Law Judge also noted that petitioners received numerous notices that should have made them aware of their petroleum tax obligations. The Administrative Law Judge further concluded that petitioners' claimed reliance upon East Coast's customers for sales tax advice was self-evidently unreasonable. The Administrative Law Judge also rejected as pure conjecture petitioners' contention that the bridge contractors may have received refunds of taxes that were never paid to petitioners. The Administrative Law Judge further noted the irrelevance of this claim, noting that the claim, even if true, had no impact upon petitioners' obligation to collect and remit tax. The Administrative Law Judge thus concluded that the imposition of penalties in this matter was appropriate.

ARGUMENTS ON EXCEPTION

In their brief on exception, petitioners assert error in the Administrative Law Judge's framing of the issue herein as whether a portion of East Coast's sales are exempt from tax. Instead, petitioners contend that the issue is properly stated as whether "services" provided by East Coast are taxable or nontaxable.

Petitioners also contend that East Coast's accountant made available all requested books and records for the Division's review and that the Division used test periods as part of its audit for its "own convenience." Consequently, petitioners assert, the Division is responsible for the inaccuracy of the audit results.

As one explanation for the difference between gallons purchased by East Coast as indicated by third party information and gallons reported as sold on returns, petitioners contend that East Coast's primary supplier intentionally provided the Division with erroneous information.

As a second explanation, petitioners assert that the difference results from sales to bridge contractors engaged in capital improvement projects for governmental entities. Petitioners contend that East Coast simply did not report gallons sold to bridge contractors because they considered such sales exempt or nontaxable.

Petitioners take issue with the Administrative Law Judge's conclusion that they failed to prove that East Coast made sales to a governmental entity or to an agent acting on behalf of a governmental entity. Petitioners contend that this Tribunal's decision in ***Matter of L & L Painting*** (Tax Appeals Tribunal, June 2, 2011) found that the petitioner in that case was acting as an agent for an exempt governmental entity.

Petitioners also continue to assert on exception that East Coast's sales of fuel oil to bridge contractors were nontaxable because such contractors were performing capital improvement projects for exempt governmental entities. Specifically, petitioners contend that the fuel oil sold to bridge contractors was consumed in the operation of equipment used by the contractors in capital improvement projects. As they did below, petitioners assert that the capital improvement

projects were similar to the type of bridge painting project deemed a capital improvement by this Tribunal in ***Matter of L & L Painting***.

Also as they did below, petitioners assert that East Coast previously paid $70,000.00 to $80,000.00 in petroleum business taxes and that the Division failed to give credit for such payments.

Petitioners also continue to seek abatement of penalties imposed herein. They continue to contend that the rules and regulations regarding the imposition of petroleum business tax and sales tax were in a state of flux during the period at issue. They also continue to assert that they were told by Mr. Zirpoli that they did not have to pay petroleum business tax or sales tax. Petitioners assert that any failure to meet their obligations under the Tax Law resulted from reasonable reliance on statements made by state employees and bridge contractors to whom East Coast sold fuel oil. Petitioners also object to the Administrative Law Judge's dismissal of their assertion that bridge contractors may have received refunds of taxes that such contractors falsely claimed to have paid to petitioners.

Finally, we note that petitioner Laznovsky has not contested, either before the Administrative Law Judge or on exception, the Division's imposition of a penalty against him pursuant to Tax Law § 1145 (e), other than to contest the underlying sales tax assessment against East Coast upon which such penalty is premised.

With respect to the arguments petitioners made below and which they continue to pursue on exception, the Division takes the position that the Administrative Law Judge correctly addressed all such arguments in the determination.

With respect to petitioners' contention on exception that all requested books and records were provided to the auditor, the Division asserts that the record clearly shows that the records

provided were incomplete and inadequate. The Division further asserts that the audit method employed was reasonable and that petitioners' claim that one of East Coast's suppliers intentionally deceived the Division is without support in the record.

OPINION

For the reasons that follow, we affirm the determination of the Administrative Law Judge.

Preliminarily, we reject petitioners' assertion that the primary issue herein is the taxability of services provided by East Coast. There is no indication in the record that East Coast provided any services. It sold petroleum products. The issue is thus properly framed as whether or not sales of such products were subject to petroleum business tax or sales and use tax.

During the years at issue, Tax Law § 301-a (a) imposed a monthly tax on petroleum businesses based on four components. The component relevant to this matter imposed tax on the number of gallons of nonautomotive-type diesel motor fuel sold during the month (Tax Law § 301-a [c] [2]). The number two fuel oil sold by East Coast is such a nonautomotive-type diesel motor fuel. Tax Law § 1105 (a) imposed a sales tax upon the retail sale of tangible personal property, except as otherwise provided under Article 28 of the Tax Law. The Administrative Law Judge thus properly concluded that East Coast's sales of number two fuel oil were subject to petroleum business tax and to sales and use tax, absent an applicable statutory exemption.

As to petitioners' contentions regarding the Division's audit method, we reject petitioners' claim that East Coast provided the Division with all requested books and records. We find, rather, that the records made available were, in fact, incomplete (***see*** Findings of Fact 6-9). Under such circumstances, the Division's use of an estimate method to determine East Coast's petroleum business tax and sales and use tax liability was proper, so long as such method was reasonably calculated to reflect the taxes due (***see Matter of Winner's Garage***, Tax Appeals

Tribunal, April 16, 2014; ***Matter of Eastchester Transport Corp.***, Tax Appeals Tribunal, June 17, 2004). Here, the Division estimated East Coast's liability using both third party supplier information and test periods. Both are well established as acceptable audit methodologies (***see***, ***e.g.***, ***Matter of Continental Arms Corp. v State Tax Commn.***, 72 NY2d 976 [1988]; ***Matter of Roebling Liqs. v Commissioner of Taxation & Fin.***, 284 AD2d 669 [2001], ***cert denied*** 537 US 816 [2002]).

Contrary to petitioners' contention, under these circumstances, petitioners bear the burden of proving, by clear and convincing evidence, that the assessments are erroneous or that the audit methods are unreasonable (***Matter of Abbasi***, Tax Appeals Tribunal, June 12, 2008).

We find that petitioners have failed to meet their burden.

First, we reject petitioners' contention that East Coast's primary supplier intentionally provided the Division with erroneous information about East Coast's purchases. There is no evidence in the record to support this speculative claim.

We also reject petitioners' contention that East Coast made sales to a governmental entity or to an agent acting on behalf of a governmental entity. As the Administrative Law Judge observed, if this position is found to have merit, then such sales potentially would be exempt from sales tax pursuant to Tax Law § 1116 (a) and petroleum business tax pursuant to Tax Law § 301-b (c). We agree with the Administrative Law Judge, however, that there is no evidence in the record of any agency relationships between any of the bridge contractors and any governmental entity (***see Matter of MGK Constructors***, Tax Appeals Tribunal, March 5, 1992). We note further that petitioners' contention that our decision in ***Matter of L & L Painting*** found an agency relationship between the petitioner in that case and a governmental entity is a misreading of that decision. The existence of such a relationship was not at issue in that case and

therefore was not addressed in our decision. We also agree with the Administrative Law Judge's finding that the contract between L & L Painting and the City of New York that was received in evidence in this matter lacked any probative value because there is no evidence showing that the contract was in effect during the period at issue. We further agree with the Administrative Law Judge that the contract lacks any language supporting petitioners' claim that East Coast's sales to the contractors were nontaxable. Accordingly, as the record shows neither an agency relationship nor sales to a governmental entity, petitioners have failed to establish entitlement to an exemption under either Tax Law § 1116 (a) or Tax Law § 301-b (c).

Petitioners' other theory in support of the nontaxability of the additional sales as determined on audit is that such sales were made to contractors engaged in capital improvement work for an exempt governmental entity and that the fuel sold to the contractors was used or consumed in such capital improvement work.

We agree with the Administrative Law Judge's conclusion that this theory has no application to the petroleum business tax component of the audit, as the Tax Law provides no exclusion from the imposition of that tax with respect to fuel used in the creation of a capital improvement.

As to whether any portion of the sales tax assessment might be canceled pursuant to this theory, we note that petitioners have not established that any of the contractors to whom they sold number two fuel oil were engaged in capital improvement projects. Whether a particular project is properly classified as a capital improvement or a maintenance or repair service depends on the facts (***compare*** 20 NYCRR 527.7 [a] [1] and [3] [i]). The only evidence in the record regarding such projects is the testimony of petitioner Laznovsky, a casual observer of activity at the bridges while making deliveries of fuel oil. Such testimony is clearly insufficient to establish that the

work performed on any of the bridges was a capital improvement. We note that the lack of specific and credible evidence of capital improvements in the present matter contrasts sharply with the facts in ***Matter of L & L Painting***, wherein the particular aspects of various types of bridge painting projects are set forth in some detail.

More fundamentally, however, even if petitioners had shown that the contractors were engaged in capital improvement projects on property owned by an exempt governmental entity, the sale of fuel oil to such contractors would appear to be taxable nevertheless. There is no question that the fuel oil sold to the bridge contractors was consumed in the operation of equipment and was not incorporated into real property. The fuel oil was therefore a "supply" as defined in the Division's regulations (20 NYCRR 541.2 [k]). Except for agency contracts (as discussed, no such contracts are present here), sales of supplies to a contractor that do not become part of an exempt entity's property and are consumed by the contractor are subject to sales tax (20 NYCRR 541.3 [d] [2] [iv]). Again, we note petitioners's misplaced reliance on ***Matter of L & L Painting***, which did not involve the sale of supplies as that term is defined in the regulations.

Regarding petitioners' claim that East Coast paid $70,000.00 to $80,000.00 in petroleum business taxes and that such payments have not been credited by the Division, we note that the Division credited East Coast with payments totaling $25,379.08 in its calculation of the petroleum business tax assessment and that petitioners presented proof of only $17,001.82 in petroleum business tax payments at the hearing. Accordingly, we find that any claim of payments in excess of the amount previously credited is properly rejected as unsubstantiated.

The Division asserted penalty against East Coast Fueling in respect of its petroleum business tax liability pursuant to Tax Law §§ 315 (a) and 289-b (1) (a). Section 315 (a) provides

that the penalty provisions of Article 12-a of the Tax Law (motor fuel tax) relating to penalty and interest shall apply to the petroleum business tax. Article 12-a's section 289-b (1) (a) imposes a penalty for the failure to timely file a return or timely pay petroleum business tax. Such penalty may be abated upon a showing of reasonable cause and an absence of willful neglect (Tax Law § 289-a [1] [c]).

The Division also asserted penalties against East Coast in respect of its sales tax liability pursuant to Tax Law § 1145 (a) (1) (i) and (vi). Subparagraph (i) imposes penalty for the failure to timely file a return or timely pay sales and use tax. Subparagraph (vi) imposes a penalty for the failure to report and pay an amount in excess of 25 percent of the amount required to be shown on a return. Such penalties may be abated upon a showing of reasonable cause and an absence of willful neglect (Tax Law § 1145 [a] [1] [iii] and [vi]).

We agree with the Administrative Law Judge that petitioners have not established reasonable cause for abatement of penalties imposed herein. Petitioners' primary argument for abatement of penalties is their claim that Mr. Laznovsky and Ms. Pettigrew were told by a Division employee that East Coast did not have to collect or pay petroleum business tax or sales tax. The Administrative Law Judge specifically found that the testimony of Mr. Laznovsky and Ms. Pettigrew lacked credibility on this point. This Tribunal has consistently deferred findings of witness credibility to the Administrative Law Judge and we find nothing in the present record that would warrant disturbing this particular credibility finding (***see Matter of MediaBuss Systems***, Tax Appeals Tribunal, March 18, 2014). We also agree with the Administrative Law Judge's conclusion that any reliance by petitioners on the advice of their customers as to when to collect tax was unreasonable. Additionally, we note that the Administrative Law Judge accurately stated that there were no changes in the law relevant to the matters at issue herein

during the period at issue and, further, properly rejected petitioners' plea of ignorance of their tax obligations (***see Matter of Nathel v Commissioner of Taxation & Fin. of State of N.Y.***, 232 AD2d 836 [1996] [ignorance of the law is no excuse and a taxpayer is charged with knowledge of the law]). Finally, we note that the Administrative Law Judge properly dismissed as conjecture petitioners' claim regarding tax refunds to contractors.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exceptions of East Coast Fueling Services, Inc., and James Laznovsky are denied;

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

3. The petitions of East Coast Fueling Services, Inc., and James Laznovsky are denied; and

4. The notices of determination dated July 21, 2008 and August 4, 2008 are sustained.

DATED: Albany, New York
February 19, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner