

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GLOBAL COMPANIES LLC	:	DETERMINATION
for Revision of Determinations or for Refund of Motor	:	DTA NO. 828980
Fuel Excise Tax under Article 12-A, Petroleum		
Business Tax under Article 13-A, and Sales and Use	:	
Taxes under Articles 28 and 29 of the Tax Law for the		
period May 1, 2011 through February 29, 2012.	:	

Petitioner, Global Companies LLC, filed a petition for revision of determinations or for refund of motor fuel excise tax under article 12-A, petroleum business tax under article 13-A, and sales and use taxes under articles 28 and 29 of the Tax Law for the period May 1, 2011 through February 29, 2012.

A hearing was held in Albany, New York, on August 12, 2020, with all briefs to be submitted by February 1, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared by Wichler & Gobetz, P.C. (Kenneth C. Gobetz, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel). After reviewing the entire record in this matter, Jessica DiFiore, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner is entitled to a refund of motor fuel excise tax, petroleum business tax, and prepaid sales and use taxes assessed and paid on 13,838,236 gallons of motor fuel.

II. Whether petitioner is entitled to a refund of the interest it paid with the tax assessed on the 13,838,236 gallons of motor fuel.

FINDINGS OF FACT

1. This proceeding is for a refund of motor fuel excise tax, petroleum business tax, and prepaid sales tax and related interest that was assessed and collected from petitioner, Global Companies LLC, by the Division of Taxation (Division), as the result of an audit of petitioner's books and records.
2. Petitioner is a Delaware limited liability company with an address at 800 South Street, Waltham, Massachusetts 02453. During the period at issue, petitioner was registered as a distributor of motor fuel in New York pursuant to Tax Law § 283.
3. During the period at issue, CITGO Petroleum Corporation (CITGO) was registered as a distributor of motor fuel in New York pursuant to Tax Law § 283.
4. Form PT-101, Tax on Motor Fuel, reflects motor fuel transactions in New York State on a monthly basis. It is used to report liabilities to the Division for motor fuel excise tax and petroleum business tax on the sale of motor fuel. The total tax due on motor fuel sales is then transferred to line one of form PT-100, Petroleum Business Tax Return.
5. On form PT-101, a distributor reports, among other things, the fully taxable gallons of motor fuel it receives each month and the number of those fully taxable gallons it receives where it paid the taxes due to its supplier. A distributor takes a credit on its returns for the taxes on those gallons that it paid to its supplier.
6. When a distributor purchases a quantity of motor fuel and has paid the correct amount of motor fuel excise tax and petroleum business tax to its supplier on that fuel, it will pay no additional tax on this quantity of motor fuel when it files form PT-101.

7. Form FT-945-1045, Report of Sales Tax Prepayment on Motor Fuel/Diesel Motor Fuel Return, is used to report liabilities for prepaid sales tax on motor fuel. A distributor may also take a credit on this form for prepaid sales tax paid to a supplier and will not have to pay that amount when filing its return.

8. The Division performed an audit of petitioner that began in April 2011 and was completed in March 2018. The audit period was December 1, 2008 through April 31, 2013 (audit period).

9. On December 26, 2017, petitioner and the Division entered into consents to extend the statute of limitations for the assessment of taxes for the audit period. The statute of limitations for the assessment of these taxes was extended by agreements to March 31, 2018.

10. On January 18, 2018, the Division issued petitioner statements of proposed audit adjustment for, among others not relevant here, audit case numbers X066990728 (motor fuel excise tax), X066958687 (petroleum business tax), and X066991011 (pre-paid sales tax) for additional tax due for the audit period.

11. Included in the additional motor fuel excise tax, petroleum business tax and prepaid sales tax that was determined to be due were taxes due on 13,838,236 gallons of ethanol fuel that petitioner imported into New York State and transferred to CITGO at its Albany, New York, terminal from May 1, 2011 through February 29, 2012 (refund audit period) pursuant to an ethanol exchange agreement (ethanol exchange gallons). When petitioner imported the ethanol exchange gallons, it did not include them on its returns or pay the taxes due.

12. An exchange, like the exchange involving the ethanol exchange gallons, is a contractual agreement between two suppliers whereby terminal position holders agree to deliver fuel to the other party in bulk (e.g., barges) or at their respective loading racks. An exchange

agreement between two suppliers allows the lifting (removal) of product at one time and location by one party in exchange for the other party's entitlement to lift product at another time and location. The exchange is recorded by each supplier as a terminal removal by the receiving supplier.

13. When petitioner transferred the gallons to CITGO, it did not pass through the taxes due on the motor fuel. It also did not provide CITGO with a certification that it paid the taxes due.

14. On January 22, 2018, James LaCelle, Section Head in the Audit Division of the Division, prepared and sent the e-mail below to Joseph Vanderlinden, Director of Field Audit Management, and Sean Campbell (an auditor from the Buffalo District Office who is assigned to audit Global on its next audit cycle):

"We received word from Ken Gobetz, Global's POA, that Global is going to agree and full pay our audit assessments. However, there is one issue that they are still researching. They will use the 6 months following payment to conduct the research, and if they determine that they over paid, they plan on filing a refund claim.

Overall, the taxpayer had errors that amounted to \$46,065,426.84 tax and interest. They also had errors that resulted in refunds of \$24,430,353.04 . . . The taxpayer will be making a payment of \$17,482,719.98 that will full pay the audit.

The outstanding issue: Global imported 13,838,236 gallons of Gasoline without paying the taxes. They then sold these gallons to Citgo via an exchange agreement for the period from May 11 through Feb 12, without charging the taxes to Citgo. We billed Global for these gallons. Global believes Citgo paid tax on for [sic] these gallons on their returns. Moheb Gerguis and I looked into this issue by looking at the Citgo returns. For the period in question, Citgo had receipts from inside the state of 196,291,270 gallons, and they claimed 196,050,058 gallons as being tax paid, leaving only 241,222 gallons available for offset . . . All of the Global transactions were reported on the Citgo receipts from inside the state. If somehow Citgo paid the tax and Global can prove that, then they would be entitled to a refund."

15. By letter dated January 24, 2018 from petitioner to the Division, the two entered into an agreement regarding proposed assessments from the audit period, wherein petitioner agreed to close the audit with a payment of tax of \$10,025,987.98 and interest of \$7,456,731.11 on or before February 16, 2018. The letter agreement also stated:

“Due to Global’s uncertainty concerning the proper resolution of issues forming a part of the \$10,025,987.98 in additional tax, Global will not sign a closing agreement in connection with its payment. Global and New York State Department of Taxation & Finance each acknowledge that Global is preserving its rights to file claims for refund (within applicable statutes of limitation) related to the period under audit. As part of its closing paperwork, the Department will include DTS-Form 996.”

16. On or about February 2, 2018, petitioner sent the Division a letter reiterating its statements from the January 24, 2018 letter. Petitioner also executed consents to the proposed assessments.

17. On or about February 21, 2018, petitioner paid \$1,816,902.42 in motor fuel excise tax, \$4,313,567.46 in petroleum business tax and \$3,895,518.10 in prepaid sales tax. Interest totaling \$7,456,731.11 was paid on these assessments.

18. On August 17, 2018, through amended forms PT-100, forms FT-945-1045 and form FT-949, Application for Refund of Prepaid Sales Tax on Motor Fuel Sold Other than at Retail Service Stations, petitioner timely filed claims for refund for taxes and interest paid on the ethanol exchange gallons. The monthly gallons and corresponding refund amounts are set forth below:

Month	Ethanol Exchange Gallons	12-A and 13-A Tax	Pre-Paid Sales Tax
May 2011	1,898,193	\$475,497.35	\$265,747.02
June 2011	1,265,145	\$316,918.82	\$177,120.31
July 2011	1,591,582	\$398,691.54	\$222,841.62

August 2011	1,674,505	\$419,463.50	\$234,430.70
September 2011	1,588,694	\$397,967.85	\$222,417.16
October 2011	840,381	\$210,515.44	\$117,653.34
November 2011	1,661,871	\$416,298.68	\$232,661.94
December 2011	1,052,355	\$263,614.93	\$147,329.71
January 2012	1,071,556	\$276,997.23	\$150,017.84
February 2012	1,193,953	\$308,636.85	\$167,153.42
Total	13,838,236	\$3,484,602.19	\$1,937,373.06

19. Petitioner's claims for refund were received by the Division no later than August 20, 2018.

20. Petitioner's claims for refund were timely because they were filed within two years after the payment of taxes and interest and/or prior to September 30, 2018 (six months after the expiration of the extended statutes of limitations).

21. These claims for refund were denied by refund claim determination notices dated October 31, 2018. In each of these notices, it states as follows:

"Issue on hand: TP claims NYS collected taxes on the same gallons twice. An exchange agreement between Global Companies LLC (TP) – Citgo Petroleum Corp to exchange Ethanol as tax-free gallons. As per the TP, between 05/11 – 02/12 the total of 13,828,236 gallons sold within Albany Terminals as in-tank exchange. TP (Global) was assessed on audit for the imported gallons. TP claims that Citgo paid the taxes on PT Rtn. Upon a quick review of Citgo's PT Rtns, the claim is not supported."

22. At the hearing in this matter, the auditor, Moheb Gerguis, testified that petitioner's books and records for the audit period were not complete or adequate. He stated that some transactions reflected on returns were late and some transactions were entered incorrectly as tax

being paid when they should have been tax free or vice versa. Petitioner also mixed up motor fuel and diesel fuel in its reporting. There were also issues with exemption forms.

23. The auditor testified that most of the people that prepared the returns during the audit period were no longer working for petitioner and that made it difficult because petitioner's employees had a hard time explaining other peoples' work and reconciling the returns.

24. The auditor testified that due to all of the issues with petitioner's records, it needed to revise its returns. He explained that the Division made an agreement with petitioner that it did not need to formally send in amended returns, it just needed to prepare them for audit, and the auditor would audit the amended returns and compare them to the original returns to determine what, if anything, was owed. Petitioner revised the proposed amended returns on an average of seven times, some monthly periods needing less attempts and others needing more, before they were correct.

25. The auditor testified that as a result of the audit, petitioner owed additional tax for the audit period. He stated that, ultimately, the Division and petitioner reached a settlement where petitioner paid \$21,500,000.00 in full satisfaction of all outstanding taxes due.

26. The auditor testified that on November 9, 2017, he finalized the audit file from the audit period, submitted it for review, and then met with petitioner's representative on November 16, 2017. The auditor stated that thereafter, on November 28, 2017, petitioner raised for the first time its claim for a refund regarding the ethanol exchange gallons. The auditor explained that petitioner believed the taxes were paid to the Division twice for the ethanol exchange gallons, once by petitioner as part of the settlement payment resulting from the audit and once by CITGO when it filed its returns for the refund audit period. The auditor testified that petitioner filed

amended returns for the refund audit period to apply for a refund on the payment for the ethanol exchange gallons.

27. The auditor testified that he did not audit CITGO. He stated that CITGO was subject to two audits during the refund audit period. The first audit concluded in August of 2011 and the second audit began in September of 2011. The auditor testified that he did not know the results of these audits. He also testified he did not review the CITGO returns to determine whether CITGO claimed the tax paid credit on the ethanol exchange gallons. He reviewed the supporting schedules that the Division had in its files for the returns as a courtesy to petitioner.

28. The auditor testified that he did a mathematical review comparing petitioner's amended returns to CITGO's supporting schedules that were used to prepare its returns for the period of January 1, 2011 through April 30, 2012, including form PT-101.1, Motor Fuel Receipts. These schedules were not submitted into evidence at the hearing. He stated that for this period, according to petitioner's returns, petitioner claimed to have sold CITGO 175,879,397 gallons of motor fuel but according to CITGO's schedules, CITGO claimed to have purchased 177,371,786 gallons of motor fuel. The auditor testified that CITGO then claimed that they received 177,980,729 gallons from petitioner where CITGO paid the tax to petitioner. He explained that this resulted in CITGO claiming to have paid petitioner tax on 608,943 more gallons than it claimed to have purchased from petitioner in total for the same period.

29. Included in the audit file was a schedule of the total amount of motor fuel CITGO purchased in this state from all vendors during the refund audit period according to its forms PT-101.1. The auditor testified that this schedule showed that CITGO purchased 196,291,270 gallons of motor fuel in New York State during the refund audit period. Of these gallons, the amount where taxes were paid to the supplier when the motor fuel was purchased by CITGO

totaled 196,050,048. The remaining gallons where CITGO paid the tax to the Division with its returns from all vendors, not just petitioner, totaled 241,222.

30. The auditor concluded that for the refund audit period, petitioner's amended returns and CITGO's schedules used to prepare its returns did not support that CITGO paid taxes to the Division equal to the taxes due on the ethanol exchange gallons. He also concluded that the analysis of all of the gallons purchased by CITGO from all suppliers as compared to those gallons where CITGO claimed taxes were paid to the supplier when the gallons were purchased does not support that CITGO paid the Division taxes equal to the tax due on the ethanol exchange gallons.

31. James LaCelle is a Division section head and the auditor's supervisor. On December 15, 2017, the auditor and Mr. LaCelle approached Jeremy Crowley, the auditor that audited CITGO's motor fuel returns for September 2011 through November 30, 2013. When petitioner's position was explained to him, Mr. Crowley "was leaning to agree with the argument that Citgo paid on the tax-free MF: Ethanol gallons purchased from [petitioner]."

32. Mr. Crowley sent the auditor an EXCEL file containing CITGO tax information, but this spreadsheet was not included in the auditor's report or introduced by the Division at the hearing.

33. At the hearing, petitioner submitted the affidavit of Gregory Anderson, the Motor Fuel Senior Analyst for CITGO. Since 1999, Mr. Anderson has worked for three entities, including CITGO, where his responsibilities included the filing of federal and state excise tax returns. Mr. Anderson has worked on state motor fuel excise tax return filings, audits, and compliance for state excise taxes throughout the United States, including the New York fuel excise tax returns. Since March of 2017, Mr. Anderson has been providing consulting and

advice regarding the types of transactions reported on CITGO's monthly New York fuel excise tax returns.

34. In his affidavit, Mr. Anderson averred that he is aware of the methods used by CITGO to electronically store the information used to prepare its forms PT-100 and the schedules that are filed with it. He stated that he is the custodian of the information used by CITGO to prepare the forms PT-100 during the refund audit period. He further stated that the information used to prepare the returns for the refund audit period is routinely and regularly electronically stored in computers owned by CITGO in the ordinary course of CITGO's business. He averred that the information was created, compiled, and stored at or about the time that each of the returns for the refund audit period was filed.

35. Mr. Anderson stated that, at the request of petitioner, he extracted from CITGO's records a true and accurate representation of the information stored in CITGO's electronic records showing the detailed information used to prepare the returns for the refund audit period. He also extracted the same information for the periods from January 2011 through April 2011 and for April 2012 from CITGO's stored electronic records. This information was retrieved from the database used by CITGO to prepare the returns during 2011 and 2012. Mr. Anderson averred that using this information, he created a workbook matching the electronically stored information used by CITGO to prepare the returns (Workbook). Mr. Anderson claimed the Workbook accurately matches the stored information used by CITGO to prepare the returns for the refund audit period as there was no change in data.

36. Mr. Anderson stated in his affidavit that for each month from January 2011 through April 2012, the Workbook fairly represented each transaction that was used to prepare the monthly forms PT-101 for CITGO. He later stated that the Workbook consists of spreadsheets

for each month's motor fuel receipts by CITGO for February 2011 through March 2012 and spreadsheets for the credits claimed by CITGO for tax paid to the supplier for February 2011 through March 2012.

37. Mr. Anderson explained in his affidavit that the CITGO motor fuel spreadsheets contained in the Workbook identify each motor fuel receipt with a "Control" number. The "receipts" spreadsheets identify the vendor, gallons received, the specific monthly form PT-101 on which the gallons were reported as received, and the month a credit was claimed on such receipt, if a credit was claimed. The "receipts" spreadsheets showing receipt of the ethanol exchange gallons were admitted into evidence and attached to Mr. Anderson's affidavit. The pertinent information from the portion of Workbook admitted into evidence, identifying the receipt of the ethanol exchange gallons, is as follows:

Bill of Lading Date	Gallons	CITGO Control #	Period Receipt Reported
5/8/2011	1,263,289	G-10772	5/2011
5/26/2011	634,904	G-10667	5/2011
6/9/2011	841,410	G-13999	6/2011
6/28/2011	423,735	G-15750	6/2011
7/3/2011	745,272	G-18791	7/2011
7/17/2011	846,311	G-18865	7/2011
8/2/2011	840,666	G-21625	8/2011
8/22/2011	833,839	G-19904	8/2011
9/5/2011	783,731	G-25578	9/2011
9/27/2011	804,963	G-25577	9/2011
10/20/2011	840,381	G-26066	10/2011

11/10/2011	841,372	G-30371	11/2011
11/28/2011	820,499	G-30755	11/2011
12/18/2011	1,052,355	G-34789	12/2011
1/11/2012	1,071,556	G-37039	1/2012
2/6/2012	1,193,953	G-38815	2/2012
Total	13,838,236		

38. Mr. Anderson averred that the excerpts from the Workbook show that CITGO properly reported the receipt of the ethanol exchange gallons on its forms PT-101 and, by virtue of the absence of any entry in the “Period Tax Paid Receipt was Reported” column, also shows that no credits were claimed for tax paid to suppliers on these receipts.

39. Mr. Anderson further stated in his affidavit that the ethanol exchange gallons were reported as “receipts” of motor fuel and such receipts are not listed on any of the “tax paid” spreadsheets. He asserted that he searched the “tax paid” spreadsheets in the Workbook using the “Control” number for the ethanol exchange gallon receipts and determined that these receipts do not appear on the “tax paid” spreadsheets.

40. Mr. Anderson asserted in his affidavit that the Division’s auditors were incorrect when they determined that CITGO overclaimed the credits for payments to petitioner on purchases of motor fuel. Mr. Anderson averred that the information from petitioner’s excise tax returns, CITGO’s returns, and CITGO’s electronic records, shows that CITGO did not claim any excess credits from its receipt of motor fuel from petitioner. He continued that the auditor did not account for (i) timing differences between petitioner’s and CITGO’s reporting of the sale and receipt of the ethanol exchange gallons; (ii) timing differences between CITGO’s reporting of

receipt of motor fuel and credits that were claimed arising from the receipts from petitioner; and
(iii) CITGO's errors in reporting diesel motor fuel and motor fuel on its forms PT-100.

41. Mr. Anderson averred that as to the second issue, CITGO believed that credits for a particular receipt of motor fuel could not be claimed until the taxes incurred were actually paid to a supplier. He explained that it was not unusual for CITGO to receive motor fuel in one month and pay for that fuel (with all charged taxes) in a subsequent month due to the timing of when invoices are received and subsequently paid. Rather than claiming the credit for the taxes paid in the same month that a receipt was reported, CITGO deferred claiming the credit until the taxes on a receipt of motor fuel were actually paid to its supplier. Mr. Anderson stated that on its monthly returns, "CITGO routinely claimed credits for receipts of motor fuel that were reported in a prior month." Mr. Anderson averred that the timing of CITGO's claims for the credits is based upon direction it received from a New York State Department of Taxation auditor.

42. In his affidavit, Mr. Anderson also stated that for certain receipts of diesel motor fuel during the refund audit period, CITGO claimed a credit on its motor fuel tax return schedules despite reporting the receipts as diesel motor fuel receipts. Mr. Anderson averred that using electronic information maintained by CITGO, he verified that the diesel receipts were reported as diesel motor fuel receipts on the proper form PT-102, Tax on Diesel Motor Fuel, but the credit was then claimed on the motor fuel form PT-101. Mr. Anderson asserted that CITGO corrected some, but not all of these errors on its PT-100 returns. He stated that the total amount that was uncorrected where a credit was claimed for payment to a supplier on motor fuel instead of diesel motor fuel was 2,958,417 gallons. The result of these errors was that the credits claimed on the motor fuel schedules were overstated and the credits claimed on the diesel motor fuel schedules were understated. Mr. Anderson stated that the net result was that CITGO underpaid the taxes

due by the difference in the tax rate for motor fuel and diesel motor fuel on the 2,958,417 gallons. Mr. Anderson asserted that these underpayments were negligible. He also created an example form PT-100 to show that for July 2011, CITGO underpaid the taxes due by \$48,886.74 as a result of claiming the diesel credits as motor fuel credits. He averred the Division's auditors did not attempt to reconcile the reporting errors regarding the credits for the diesel motor fuel.

43. Mr. Anderson also stated that it can be shown that CITGO did not claim excess credits on motor fuel receipts from petitioner by making adjustments to the reconciliation of CITGO's reported motor fuel receipts and claims for credits. Mr. Anderson created schedules attached as exhibit 7 to his affidavit showing that CITGO did not claim credits on the ethanol exchange gallons. The first schedule shows breakdowns for gallons CITGO received from petitioner where credits were claimed in a prior month, in the current month, or in future months and the remaining gallons where a credit was not claimed. The remaining gallons where a credit was not claimed during the refund audit period equaled the ethanol exchange gallons. The second and third schedules show a breakdown based on the timing of the receipt of the motor fuel.

44. Mr. Anderson averred that, using information contained in the Workbook, he reconciled and verified the accuracy of CITGO's returns for the refund audit period. Mr. Anderson averred that he reviewed the CITGO forms PT-100 filed with New York for the refund audit period as well as the electronically stored data related to the filing of those returns. He continued that for the returns filed for the refund audit period, CITGO reported the receipt of all of the ethanol exchange gallons. He stated further that CITGO did not claim a credit for tax paid to petitioner for any of the ethanol exchange gallon receipts reported during the refund audit period or in any subsequent returns. He averred that "the CITGO Returns and the electronic

records maintained by CITGO establish and confirm that CITGO paid the taxes due to the State of New York on the [ethanol exchange gallons].”

45. At the hearing, the auditor was unable to dispute Mr. Anderson’s assertion that the Division’s analysis failed to reconcile the timing differences between CITGO’s reporting of receipt of motor fuel and tax paid credit claims arising from receipts from petitioner and CITGO’s errors in reporting diesel motor fuel and motor fuel on its forms PT-100. The auditor did, however, look at sales between the two distributors from January 2011 through April of 2012 and to account for timing differences in the sale and receipt of the ethanol exchange gallons and credits claimed.

46. CITGO reported its receipt of the ethanol exchange gallons on its forms PT-100 and pre-paid sales tax returns.

47. Pursuant to 20 NYCRR 3000.15 (d) (6), petitioner submitted 48 proposed findings of fact. In accordance with State Administrative Procedure Act § 307 (1), proposed findings of fact 1, 4, 6, 8 through 14, 17, 19, 23, 25, 28, 30, 31, 34, 35, 37 through 41, and 48 are supported by the record, and have been consolidated, condensed, combined, renumbered and substantially incorporated herein. Proposed findings of fact 2, 5, 7, 16, 24, 26, 29, 32, 36 and 47 have been modified to more accurately reflect the record and/or accepted in part and rejected in part as conclusory, irrelevant and/or not supported by the record; to the extent accepted they have been consolidated, condensed, combined, renumbered and substantially incorporated herein, as modified. Proposed findings of fact 3, 15, 18, 20, 21, 22, 27, 33, and 42 through 46 are rejected as conclusory, irrelevant and/or not supported by the record.

SUMMARY OF THE PARTIES' POSITIONS

48. Petitioner argues that it is entitled to a refund because double taxation of motor fuel is statutorily prohibited, and the ethanol exchange gallons were taxed when CITGO filed returns and paid the tax and again when petitioner paid tax on them as part of the tax due from its audit. Petitioner also argues the Division's consideration of all of CITGO's receipts and credits from all sources instead of the specific gallons in question when determining whether to grant the refund, is in error as a matter of law. Petitioner asserts the inquiry must look solely at CITGO's treatment of the ethanol exchange gallons. Petitioner further claims that the Division's failure to introduce relevant evidence, such as CITGO's tax returns and tax information that it reviewed during the refund audit, gives rise to the inference that such evidence would have been favorable to petitioner.

49. The Division argues that petitioner is not entitled to a refund because, as the importing distributor, it was always responsible for the payment of the applicable taxes on the ethanol exchange gallons. The Division contends that petitioner failed to prove that it satisfied the eligibility requirements under the Tax Law to qualify for a refund. It asserts that the only way petitioner would be entitled to a refund on the taxes paid for the ethanol exchange gallons would be if it had first paid the taxes on that imported motor fuel and then sold that motor fuel to CITGO, at which time it received an exemption form from CITGO for a qualifying exemption. The Division also argues that the law requiring petitioner to report and pay the tax upon importing the motor fuel was created to combat and eliminate the evasion of motor fuel tax in New York State, and to allow petitioner to receive a refund would go against that intent. The Division further asserts that petitioner failed to prove that the tax on the ethanol exchange gallons was paid twice. It claims that petitioner failed to prove that it sold CITGO the ethanol

exchange gallons because it only provided summaries of returns and was obligated to provide sufficiently detailed records to verify taxable receipts and perform a complete audit. It also asserts that a review of petitioner's and CITGO's returns does not support petitioner's position.

CONCLUSIONS OF LAW

A. Tax Law §§ 284 (1), 301-a (a) and 1102 (a) (1) impose motor fuel, petroleum business and pre-paid sales taxes, respectively, on motor fuel imported by a distributor, or, where not previously imposed, when sold by a distributor in the State of New York. Tax Law § 285-a provides for a presumption that all motor fuel sold, received, or possessed in the State is subject to the taxes imposed until the contrary is established (*see* Tax Law § 285-a [2]).

B. The term "distributor" is defined in Tax Law § 282 (1) (a) as a person who imports or causes to be imported into the State, for use, distribution, storage or sale within the State, any motor fuel. The term "motor fuel" includes "fuel grade ethanol that meets the ASTM International active standards specifications D4806 or D4814" (Tax Law § 282 [2]).

C. Tax Law §§ 289-f and 1142 (11) provide that the Division has the authority to make regulations for the joint administration of taxes imposed under articles 12-A, 28 and 29 upon the sale of motor fuel, including the reporting, assessment, determination, collection and refunding of such taxes. Section 315 (a) of article 13-A of the Tax Law provides that the provisions of article 12-A shall apply to the administration of and procedure with respect to the tax imposed under article 13-A, except to the extent that a provision of article 12-A is either inconsistent with, or not relevant to, a provision of article 13-A (*see Matter of Watchtower Bible and Tract Socy. of New York, Inc.*, Tax Appeals Tribunal, July 16, 2020; *see also Matter of RAD Energy Corp.*, Tax Appeals Tribunal, December 30, 2004).

D. Every distributor of motor fuel is liable for the motor fuel, petroleum business and prepaid sales tax imposed at the time it is imported into the State (*see Herzog Bros. Trucking, Inc. v State Tax Commn.*, 72 NY2d 720, 723 (1988); *Matter of Titan Petroleum, Inc.*, Tax Appeals Tribunal, February 20, 1991; *see also* Tax Law §§ 284 [1]; 315; 1102; 20 NYCRR 412.1 [a] [1]). The taxes paid are then intended to be passed through to the retailer to ultimately be borne by the retail consumer (*see id.*; Tax Law §§ 289-c; 315).

E. Every distributor of motor fuel is required, on or before the 20th day of each month, to file with the Division a monthly return of tax on motor fuel stating, among other things, the number of gallons of motor fuel it imported or caused to be imported into the State for use, distribution, storage or sale, or when sold in the State, if the motor fuel tax had not been imposed prior to such sale by such distributor during the preceding calendar month (*see* Tax Law § 287; 20 NYCRR 413.1). A corresponding sales tax return is also due at this time (*see* Tax Law §§ 289-f; 1136 [b]). Every distributor of motor fuel must pay the motor fuel excise tax, petroleum business tax, and prepaid sales tax with the filing of the return on each gallon of motor fuel imported or caused to be imported into the state (*see Matter of Allegheny Petroleum Corp.*, Tax Appeals Tribunal, January 2, 1997; *see also* Tax Law §§ 298-f; 315; 20 NYCRR 413.2).

F. Upon each sale of motor fuel, at the time of the transfer, the seller is required to give the purchaser a certification whereby the seller certifies that it has paid or assumed the liability for the payment of the motor fuel, petroleum business and pre-paid sales taxes due and is passing through such taxes to the purchaser (*see* 20 NYCRR 412.3 [a] [1]). Where a purchaser accepts delivery of motor fuel but does not receive a properly completed certification, such purchaser is immediately jointly and severally liable, and, hence, personally liable for the payment of the motor fuel, petroleum business and pre-paid sales taxes (*see* Tax Law § 285-a [1]).

G. There is no dispute that petitioner was a registered distributor of motor fuel during the period in issue or that the product at issue is motor fuel within the meaning of Tax Law § 282 (2). There is also no dispute that at the time petitioner imported the ethanol exchange gallons, it did not file returns evidencing such importation or remit any of the taxes due on those gallons (*see* finding of fact 11). It is further undisputed that petitioner did not pass the tax through to CITGO or provide CITGO with a certification stating that the applicable motor fuel, petroleum business and prepaid sales taxes had been paid on the ethanol exchange gallons (*see* finding of fact 13), resulting in CITGO being jointly and severally liable for the tax due pursuant to Tax Law § 285-a (1).

H. The Division argues that petitioner would never be in the position to claim a credit or refund on the applicable taxes because the importing distributor is always required to pay the taxes on imported motor fuel pursuant to Tax Law §§ 284 (1) and 1102 (a) (1). The Division also argues that the legislature amended Tax Law § 284 and enacted Tax Law § 1102, at least in part, to impose the taxes due on the importation of motor fuel instead of at the time of the first sale by the distributor and at the time the motor fuel was sold to the ultimate consumer, respectively (*see Herzog Bros. Trucking, Inc.*, 72 NY2d at 723), to prevent loss of tax revenues. It is true, as the Division contends, that had petitioner paid the required taxes that were due when it imported the ethanol exchange gallons and then passed them through to CITGO, petitioner would have recouped those taxes and been made whole and the intent behind the amendment to Tax Law § 284 and enactment of Tax Law § 1102 would have been achieved. However, those are not the facts, or the issue presented. The issue is whether petitioner is entitled to a refund of tax paid, not whether petitioner was properly assessed for tax due as the result of an audit.

I. While the Division is correct in asserting that the petitioner would never be in the position to claim a credit as the importing distributor (*see* Tax Law § 284), it is not accurate to state that petitioner could never claim a refund. Tax Law § 289-a states in relevant part “Nothing in this article shall be construed to require the payment to the [Division] of such tax more than once on any quantity of motor fuel sold within the state” and as Tax Law § 315 incorporates article 12-A, such provision applies to the petroleum business tax as well. Moreover, Tax Law § 1102 (c) states in relevant part “[n]othing in this article shall be construed to require the payment of the tax required to be prepaid pursuant to this section more than once upon motor fuel or diesel motor fuel sold within the state.”

J. In stating that petitioner, as the importing distributor, would never be entitled to a claim for refund, the Division ignores the clear language of Tax Law §§ 289-a and 1102 (c). When interpreting a statute, the fundamental rule of statutory construction is to effectuate the intent of the legislature (*see Matter of Watchtower Bible and Tract Socy of New York, Inc.*, citing *Matter of 1605 Ctr. v Tax Appeals Trib. of State of N.Y.*, 83 NY2d 240, 244 [1994] *cert denied* 513 US 811 [1994]). “[W]hen the language of a tax statute is unambiguous, it should be construed so as to give effect to the plain meaning of the words used (citation omitted)” (*id.* quoting *New York State Assn. of Counties v Axelrod*, 213 AD2d 18, 24 [3d Dept 1995], *lv dismissed* 87 NY2d 918 [1996]). Where possible, every word must be given meaning because the language of the statute is the clearest indicator of legislative intent (*see id.*).

K. Here, the intent of the Legislature is clear from the statutory language used. While the importing distributor is required to pay the motor fuel excise tax, petroleum business tax and prepaid sales tax, Tax Law §§ 289-a and 1102 (c) both begin with “[n]othing in this article shall be construed . . .” and then continue on to say: to require the payment of motor fuel or prepaid

sales tax more than once. Accordingly, under the explicit language of Tax Law §§ 289-a and 1102, regardless of the language and requirements of the other statutes in articles 12-A, 28 and 29, under no circumstances should motor fuel excise tax or prepaid sales tax, and by Tax Law § 315, petroleum business tax, be collected more than once on motor fuel within this state (*see Matter of Golub Serv. Sta., Inc.*, Tax Appeals Tribunal, November 15, 1990). Therefore, even as the importing distributor of the ethanol exchange gallons, if the taxes due were already paid to the Division for these gallons by CITGO, or any other entity, and the Division should not have collected such tax from petitioner, but did so in error, petitioner is entitled to seek a refund.

L. The same reasoning and conclusion apply to the Division's argument that petitioner is not eligible for a refund because it does not satisfy the eligibility requirements of Tax Law §§ 289-c and 1139. Tax Law § 289-c (8) provides as follows:

“With respect to motor fuel imported . . . a refund or credit shall be allowed a distributor or a purchaser of the tax required to be paid pursuant to this article upon such motor fuel . . . in the amount of such tax paid by or included in the price paid by a distributor or such purchaser to the seller thereof if such fuel was exported from this state for sale or use outside this state, such distributor . . . exporting such fuel is duly registered with or licensed by the taxing authorities of the state to which such fuel is exported as a distributor or a dealer in the fuel being so exported, and in connection with such exportation such fuel was immediately shipped to an identified facility in the state to which such fuel is exported, and the applicant complies with all requirements and rules and regulations of the commissioner, including evidentiary requirements, relating thereto . . .”

Tax Law § 1139 (a) states in relevant part as follows:

“the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefore shall be filed with the tax commission . . .”

The Division argues that petitioner is not entitled to a refund because it cannot establish that the sale of the ethanol exchange gallons to CITGO was a taxable event where money was paid in error because the fuel was exported or transferred out of this state pursuant to Tax Law § 289-c.

The Division further asserts that in order to qualify for a refund of prepaid sales tax, petitioner must show that the tax and interest it paid in February 2018 was “erroneously, illegally or unconstitutionally collected” and that it cannot receive a refund until it proves that the tax it collected from a customer was first repaid to such customer as required by Tax Law § 1139 (a). While it could be argued that tax collected a second time would constitute erroneous collection within the meaning of Tax Law § 1139, it is inconsequential, as the language of Tax Law §§ 289-a and 1102 (c) make clear nothing in either article may be construed to require the payment of the respective taxes more than once (*see* Tax Law §§ 289-a; 1102[c]; *see also Matter of Watchtower Bible and Tract Socy. of New York, Inc.*). It follows, that if such tax is collected more than once, one of the parties that paid the tax would be due a refund, barring any prohibition by the relevant statute of limitations requirements, so as to be in compliance with Tax Law §§ 289-a and 1102 (c). Therefore, if the motor fuel excise tax, petroleum business tax or pre-paid sales tax is paid more than once, the unambiguous language of these statutes provides an additional opportunity to be eligible for a refund of these taxes.

The Division further argues that Tax Law §§ 289-a and 1102 (c) do not apply because these sections are only meant to provide a refund where the importing distributor pays the applicable motor fuel and sales tax due when it first imports the fuel into the State and a subsequent purchaser had those taxes passed through to it and instead of taking a credit on its returns for the taxes on that motor fuel, it again pays the tax. The Division asserts that Tax Law §§ 289-a and 1102 (c) provide relief solely for the subsequent purchasing distributor and that this relief is only available if the importing distributor pays the tax at the time of import. This interpretation stretches beyond the scope of the plain language of the statutes (*see* Tax Law §§ 289-a; 1102[c]). As stated above, Tax Law §§ 289-a and 1102 (c) provide that nothing in either

article 12-A or article 28 should be construed to require the payment of the respective tax due on motor fuel more than once. There is no limitation in the plain language of either provision that limits the eligibility for a refund as a result of the double payment to a subsequent purchasing distributor or bars the importing distributor from being the taxpayer to seek the refund (*see* Tax Law § 289-a and 1102 [c]; *see also Matter of Watchtower Bible and Tract Socy of New York, Inc.*).

M. The Division also argues that petitioner failed to prove that the tax was paid twice because petitioner failed to show that it sold CITGO the ethanol exchange gallons. The Division asserts that petitioner was obligated to provide sufficiently detailed records to enable the Division to verify taxable receipts, and perform a complete audit, and that the Division is not required to accept non-source records, such as lists or summaries, to determine the correct tax liability (*see Matter of Evangelista*, Tax Appeals Tribunal, September 27, 1990, *Matter of Giordano v State Tax Commn.*, 145 AD2d 726 [3d Dept 1988]).

It is not clear from the record whether the tax was assessed against petitioner during the audit because the Division found records indicating petitioner imported the gallons without reporting them or because the Division found evidence that petitioner transferred the gallons to CITGO. The record suggests the Division may have already conceded that petitioner transferred the gallons to CITGO (*see* finding of fact 14). Regardless, petitioner has submitted sufficient evidence to establish that it transferred the ethanol exchange gallons to CITGO.

N. Mr. Anderson's affidavit provided that he is a Motor Fuel Senior Analyst for CITGO with extensive experience in preparing and filing motor fuel returns across the country, including in New York (*see* finding of fact 33). In his affidavit, he averred that he is aware of the methods used by CITGO to electronically store the information used to prepare its New York State forms

PT-100, including the supporting returns, that he is the custodian of the information used by CITGO to prepare the forms PT-100 for the refund audit period, and that the information used to prepare CITGO's returns for the refund audit period is now, and has been, routinely and regularly electronically stored in computers owned by CITGO in the ordinary course of CITGO's business (*see* finding of fact 34). He also averred that this information was created, compiled, and stored at or about the time that each of the returns for the refund audit period were filed (*see id.*). Mr. Anderson authenticates the information attached to his affidavit by explaining that he extracted from CITGO's records a true and accurate representation of the information stored in CITGO's electronic records showing the detailed information used to prepare CITGO's returns for the refund audit period and compiled it in the Workbook (*see* finding of fact 35). He also avers that this information accurately matches the electronically stored information used by CITGO to prepare the returns as there was no change in data (*see id.*).

The information in the Workbook specifically identifies each motor fuel receipt with a "Control" number, the vendor, the amount of ethanol exchange gallons received, when they were received, the specific monthly form PT-101 on which the gallons were reported as received, and when a tax paid credit was taken, if it was taken at all (*see* finding of fact 37). While the Workbook, which is an excerpt of the business records of CITGO, is hearsay evidence, it was admissible in this forum and can form the basis for a determination if deemed credible and probative (*see Matter of Spallina*, Tax Appeals Tribunal, February 27, 1992). Mr. Anderson's affidavit and supporting exhibit depicting the electronically stored information regarding the ethanol exchange gallons credibly establishes that petitioner transferred the ethanol exchange gallons to CITGO and that CITGO included these gallons in its returns.

O. Notably, it is not clear from the record whether the transfer between petitioner and CITGO constituted a “sale” within the meaning of Tax Law §§ 282 (5) and 1101 (5). Tax Law § 282 incorporates the definition provided in Tax Law § 1101 (5), which provides that a sale is a transfer of title or possession or both for a consideration. The record does not provide what, if any, consideration petitioner received for transferring the motor fuel to CITGO other than potentially other motor fuel from CITGO at a different location (*see* finding of fact 12). This is especially significant here, where the Division asserts petitioner provided no source documents such as checks or invoices as evidence for the transfer of the motor fuel, because it is unclear whether such documents were ever created as part of the transaction.

P. Despite proving that petitioner transferred the ethanol exchange gallons to CITGO and that CITGO included such gallons on its returns for the refund audit period, petitioner has not established that petitioner paid for the ethanol exchange gallons, thereby entitling it to a refund. Refunds and credits are a form of tax exemption (*see Matter of Broadview Networks, Inc.*, Tax Appeals Tribunal, June 14, 2012; *We Care Transp., Inc. v Tax Appeals Trib.*, 298 AD2d 717, 719 [3d Dept 2002]). “A tax credit is ‘a particularized species of exemption from taxation’ (*Matter of Golub Serv. Sta., Inc. v Tax Appeals Trib.*, 181 AD2d 216, 219 [3d Dept 1992], quoting *Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 197 [1975], *rearg denied* 37 NY2d 816 [1975], *lv denied* 371 NYS2d 715 [1975]; *Matter of New York Fuel Terminal Corp.*, Tax Appeals Tribunal, August 27, 1998) and therefore, petitioner bore the burden of showing ‘a clear-cut entitlement’ to the statutory benefit” (*Matter of Luther Forest Corp. v McGuiness*, 164 AD2d 629, 632 [3d Dept 1991]). Statutes and regulations authorizing exemptions from taxation are to be strictly and narrowly construed (*see Matter of International Bar Assn. v Tax Appeals Trib. of State of N.Y.*, 210 AD2d 819 [3d Dept [1994], *lv denied* 85

NY2d 806 [1995]). If ambiguity or uncertainty exists, it is to be resolved in favor of the Division and against allowing the exemption (*see Matter of Charter Dev. Co., L.L.C. v City of Buffalo*, 6 NY3d 578, 582 [2006]).

Q. Petitioner asserts that CITGO did not claim a credit for paying the taxes to petitioner on its returns for the ethanol exchange gallons and, therefore, CITGO paid the taxes due to the Division when it filed the relevant returns. There is not sufficient evidence in the record to support these assertions. Despite credibly establishing that the CITGO returns for the refund audit period included the ethanol exchange gallons, the affidavit fails to establish that the taxes due on those ethanol exchange gallons were paid or that a credit was not taken. Mr. Anderson asserts that because CITGO’s records for the refund audit period show that CITGO reported the ethanol exchange gallons but do not show any entry for the period when a tax paid credit was claimed, it proves that no tax paid credit was claimed (*see* finding of fact 38). He asserts this conclusion is confirmed by a search in the Workbook of the “tax paid” spreadsheets using the “Control” number for the ethanol exchange gallon receipts and determining that these receipts do not appear on the “tax paid” spreadsheets (*see* finding of fact 39). This conclusion is insufficient.

The remainder of Mr. Anderson’s affidavit asserts that the auditor’s analysis of CITGO’s records was incorrect for, among other reasons, not considering the timing differences between CITGO’s reporting of receipt of motor fuel and reporting of the tax paid credit claims (*see* finding of fact 40). As Mr. Anderson explains in his affidavit, there are timing issues relating to CITGO’s reporting of receipts and its claims for credits for tax paid to the supplier on those receipts resulting from CITGO’s understanding that the credit for a particular receipt could not be claimed until the taxes incurred were actually paid to a supplier (*see* finding of fact 41).

Credits for taxes paid were not claimed in the same month that motor fuel receipts were reported (*see id.*). As Mr. Anderson averred “CITGO routinely claimed Tax Paid Credits for receipts of motor fuel that were reported in a prior month” (*see id.*). However, he also averred that the information for the Workbook was created, compiled, and stored at or about the time that each of the returns for the refund audit period was filed (*see* finding of fact 34). He does not then explain how he knows that the column for the reporting of the tax paid credit in the Workbook is accurate as that information would have to have been entered at a later time for a later return than the information for the receipt of the motor fuel.

Additionally, by reviewing the Workbook, which went through March or possibly April of 2012, two months after the refund audit period, Mr. Anderson’s review of the Workbook and the attached supporting evidence is insufficient to conclude that claims for credits for tax paid were not claimed on the ethanol exchange gallons at some future date. This conclusion is supported by a review of petitioner’s own spreadsheets submitted into evidence as exhibit 7. When explaining the discrepancies between a review of petitioner’s records and a review of CITGO’s records regarding receipts by CITGO of motor fuel, to account for all of the credits claimed by CITGO during the refund audit period, Mr. Anderson had to look to returns for future months to tie the credits claimed to the respective motor fuel (*see* finding of fact 43). He averred that CITGO did not claim the credit for any of the ethanol exchange gallons on the returns for the refund audit period or any subsequent returns but does not explain, or show, how he reached that conclusion as to the subsequent returns.

R. In reviewing CITGO’s supporting schedules for the returns filed for the refund audit period, the auditor found that from petitioner’s records, it sold CITGO 175,879,397 gallons of motor fuel, but according to CITGO’s schedules, CITGO claimed to have purchased

177,371,786 gallons of motor fuel. The auditor testified that CITGO also claimed to have received 177,980,729 gallons from petitioner where CITGO paid the tax to petitioner. This resulted in CITGO claiming to have paid petitioner tax on 608,943 more gallons than it claimed to have purchased from petitioner in total for the same period. In explaining the discrepancies between these returns, Mr. Anderson averred that the Division did not consider timing differences between the two entities reporting of sales and receipts, timing differences between CITGO's reporting of receipt of motor fuel and the claiming of a credit and CITGO's errors in reporting credits for diesel motor fuel on its motor fuel schedules. Mr. Anderson admits that a review of the return for July 2011, where a credit for diesel motor fuel was claimed on the motor fuel schedule, shows that CITGO underpaid the taxes due by \$48,886.74 for that month (*see* finding of fact 42). These timing discrepancies and reporting delays and inaccuracies call into question the credibility of CITGO's returns and, therefore, the tax paid therewith. Additionally, while petitioner can explain the discrepancies between CITGO and petitioner's records, this alone is not sufficient to prove that CITGO properly paid the tax due on the ethanol exchange gallons.

S. As shown in the audit file, for the refund audit period, CITGO purchased 196,291,270 gallons of motor fuel in the State. Of these gallons, those where taxes were paid to the supplier when the motor fuel was purchased by CITGO totaled 196,050,048, leaving only 241,222 gallons where a credit was not claimed, and the tax was paid to the Division. Petitioner argues, without citation to any authority in support of its proposition, that the statutes and regulations that prohibit double taxation focus on specific quantities of motor fuel and not the totality of a distributor's activities in New York and, therefore, the appropriate inquiry must begin and end with CITGO's treatment of the ethanol exchange gallons. This argument is unpersuasive.

T. When determining whether the tax due has been correctly determined and paid, all transactions for that set period, here monthly, must be reported (*see* Tax Law §§ 287; 289-f; 1136 [b]; 20 NYCRR 413.1). Every distributor of motor fuel must also pay the motor fuel excise tax, petroleum business tax, and prepaid sales tax with the filing of the return on each gallon of motor fuel imported or caused to be imported into the state (*see Matter of Allegheny Petroleum Corp.*, *see also* Tax Law §§ 298-f; 315; 20 NYCRR 413.2). Accordingly, unless a distributor's returns are accurate and match its supporting schedules and source documents, it is impossible to guarantee that the tax paid for a specific return was for specific motor fuel. It cannot be assumed that even if CITGO's records and discrepancies can be explained as to Global, and that the ethanol exchange gallons were included in those reported on the returns, that the tax paid with those returns covered the tax due for the ethanol exchange gallons. This is especially true here, where the returns for the refund audit period show that at most, CITGO paid tax on 241,222 gallons received from all suppliers. The auditor did not dispute Mr. Anderson's assertion that the Division's analysis failed to reconcile timing differences regarding the receipt of the motor fuel and the tax paid credit and CITGO's errors in reporting credits for diesel motor fuel. However, the auditor was not under an obligation to do so. Petitioner is relying on CITGO's records to prove that CITGO paid the tax. Accordingly, petitioner must demonstrate that CITGO's records show that the tax due for the audit periods was correct and that it was paid.

Petitioner also did not submit any evidence that payment was remitted for tax due during the refund audit period. Mr. Anderson averred that CITGO's returns for the refund audit period and the electronic records maintained by CITGO establish and confirm that CITGO paid the taxes due on the ethanol exchange gallons (*see* finding of fact 44). As stated above, petitioner has submitted sufficient evidence to find that CITGO included the ethanol exchange gallons on

its returns, but there is no evidence that any of the tax due, as reflected on the returns or otherwise, was paid. There are no checks, no letters, or even an explanation and submission of internal records from CITGO reflecting payment with the returns. Petitioner is asserting CITGO paid the taxes but has not produced any evidence that CITGO has paid any taxes due to the Division. Additionally, where a taxpayer makes a payment without a specific request as to how the funds are allocated, the payments may be applied as the taxing authority sees fit (*see Matter of Farkas*, Tax Appeals Tribunal, October 14, 1988). There is simply no evidence in the record regarding payment and accordingly, petitioner has failed to meet its burden.

U. Petitioner argues that the Division's failure to introduce CITGO's returns and other tax information in its possession to refute Mr. Anderson's affidavit or the assertion that the taxes were paid twice on the ethanol exchange gallons gives rise to the inference that such evidence would have been favorable to petitioner. Petitioner points out that the Division did not support its denials of the claims for refund by introducing CITGO's tax return information even though these denials were based upon a cursory review of the CITGO's backup schedules.

Petitioner's argument is rejected as petitioner, and not the Division, bears the burden of proof on that issue (*see Golub Serv. Sta., Inc.*, 181 AD2d at 221). Additionally, petitioner was not without remedy. Petitioner could have subpoenaed the auditor who audited CITGO's records or the records themselves (*see* State Administrative Procedure Act § 304 [2]; 20 NYCRR 3000.7(a)]; *see also Matter of Donahue*, Tax Appeals Tribunal, December 8, 1994). Moreover, as petitioner points out in its brief, when returns are directly involved with an action or proceeding, the court may require their production and admit into evidence so much of said returns or of the facts shown thereby as pertinent to the action (*see* Tax Law §§ 315; 1146). The Division produced the testimony of the auditor who performed the audit of petitioner's records,

and who, as a result, also performed the review of the refund request. As he conceded at hearing, he did not perform an audit of CITGO's records.

Additionally, petitioner was already in possession of CITGO's forms PT-101 for the refund audit period as it admitted them into evidence as its exhibit 1. It is not clear what other documents in the Division's possession petitioner sought in support of its position. Further, the only way for the Division to know what documents in its possession would support petitioner's position would be for the Division to perform another detailed audit of CITGO. To require the Division to perform a detailed audit of a third party to find information in support of petitioner's claim that another taxpayer paid tax for the same motor fuel as petitioner would shift the burden of proof from petitioner to the Division and is not supported by the Tax Law or relevant case law (*see Golub Serv. Sta., Inc.*, 181 AD2d at 221). Particularly here, where petitioner only needs such information because it did not properly report and remit the tax due on the ethanol exchange gallons when it imported them into the State, as expressly required by the Tax Law (*see* Tax Law § 284).

V. Because petitioner is not entitled to the refunds claimed, it is also not entitled to a refund of the interest paid on the assessment resulting from the audit.

W. The petition of Global Companies LLC is denied, and the refund denial notices dated October 31, 2018, are sustained.

DATED: Albany, New York
July 29, 2021

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE