

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ROM GAS, INC.</b>	:	DECISION
	:	DTA No. 809565
for Review of a Determination or for Refund of Motor	:	
Fuel Tax under Article 12-A of the Tax Law for the	:	
Period June 1, 1983 through August 31, 1988.	:	

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Petitioner Rom Gas, Inc., c/o Leonard R. Rosenblatt, Esq., 130 East 35th Street, New York, New York 10016, filed an exception to the determination of the Administrative Law Judge issued on October 29, 1992. Petitioner appeared by Leonard R. Rosenblatt, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Both parties filed briefs on exception. Petitioner filed a reply brief which was received on January 15, 1993 and began the six-month period for the issuance of this decision.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

***ISSUE***

Whether petitioner is liable for a penalty for failure to file a return or pay tax on diesel fuel where the tax was paid late, but prior to the issuance of a notice of determination.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Rom Gas, Inc., operated a retail service station at 436 10th Avenue, New York, New York during the period at issue.

Petitioner started selling diesel fuel in February 1982, but did not register to sell diesel fuel until May 1986.

In June 1986, petitioner started filing monthly returns and paying tax on diesel fuel. On its returns, petitioner overreported gallonage to "catch up" for the unreported fuel sold during the period February 1982 through May 1986. Overpayments were made without any direction to the Division of Taxation ("Division") as to the application thereof.

Upon audit, the Division verified gallonage by information obtained from petitioner's suppliers, Amoco Oil Company, City Utilities, Inc. and MNG Petroleum, Inc. Audited gallonage and taxes due computed for the period February 1982 through September 1988 were as follows:

Audited gallonage	3,002,797
Tax rate	<u>.10</u>
Audited taxes	\$300,279.70
Less: reported taxes	<u>253,804.00</u>
Additional taxes due	\$ 46,475.70

The overpayments of tax which began in June 1986 were applied by the Division to the tax due for the earliest months of the audit period, with the result that taxes due for all quarters to and including May 1985 were paid. Also, penalty and interest credits were calculated for the overpayments and applied to the penalty and interest which had accrued from the quarters ending February 1982 through February 1983.

On May 24, 1989, the auditor issued a Proposed Audit Adjustment of Tax Due under Article 12-A of the Tax Law for the period February 1, 1982 through August 31, 1988 showing tax due of \$46,475.70, interest of \$28,503.07 and penalty of \$49,512.59, for a total of \$124,491.36.

By check dated September 1, 1989, petitioner paid the tax and interest, a total of \$74,978.77. Petitioner did not pay the \$49,512.59 in penalty.

On January 29, 1990, the Division issued a Notice of Determination to petitioner for the unpaid penalty of \$49,512.59. The computation summary attached to the Notice of Determination showed the following breakdown of "[a]dditional tax, penalty and interest":

"Tax Period	Tax Amount	(+) Interest Amount	(+) Penalty Amount	(-) Assessment Payments/	(=) Current Balance
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<u>Ended</u>	<u>Assessed</u>	<u>Assessed</u>	<u>Assessed</u>	<u>Credits</u>	<u>Due</u>
08-31-83	0.00	1,114.14	5,515.45	1,114.14	5,515.45
11-30-83	0.00	1,672.40	8,391.59	1,672.40	8,391.59
05-31-84	0.00	1,450.04	2,912.57	1,450.04	2,912.57
08-31-84	0.00	1,450.04	2,771.64	1,450.04	2,771.64
11-30-84	0.00	1,450.04	2,630.71	1,450.04	2,630.71
02-28-85	0.00	5,701.54	6,355.71	5,701.54	6,355.71
05-31-85	0.00	4,746.44	7,003.71	4,746.44	7,003.71
08-31-85	7,932.30	2,277.27	2,379.69	10,209.57	2,379.69
11-30-85	15,639.00	3,792.46	4,691.70	19,431.46	4,691.70
02-28-86	17,468.00	3,808.02	5,240.40	21,276.02	5,240.40
05-31-86	5,353.40	1,038.02	1,606.02	6,391.42	1,606.02
07-31-88	12.00	0.44	2.04	12.44	2.04
08-31-88	<u>71.00</u>	<u>2.22</u>	<u>11.36</u>	<u>73.22</u>	<u>11.36</u>
TOTALS	46,475.70	28,503.07	49,512.59	74,978.77	49,512.59"

### ***OPINION***

The Administrative Law Judge, based on his reading of Tax Law § 289(b)(1) in conjunction with other provisions of Article 12-A of the Tax Law, determined that: 1) it is clear that the Legislature intended that the returns be timely filed and the tax be timely paid; 2) a distributor should not be permitted to abrogate its responsibility and to evade penalty by paying tax many months late but prior to assessment; and 3) petitioner was fully cognizant of taxes owed and the application of the overpayments and was not misled in any respect. The Administrative Law Judge, thus, rejected as without merit petitioner's assertion that since no tax was specified in the Notice of Determination for the quarters ending August 31, 1983 through May 31, 1985,

there was nothing upon which to base the penalty. The Administrative Law Judge pointed out that, pursuant to Tax Law § 284, the tax for each period at issue was due on the date limited for filing of the return. The Administrative Law Judge concluded that the fact that petitioner was given credit for the late payments in the Notice of Determination does not mean that no tax was determined for those quarters, but rather, that by recognizing the payments, the Division actually determined that the taxes had been owed and had been paid prior to the issuance of the Proposed Audit Adjustment. "The only things that remained for the Division to assess were the additional tax, interest and penalty" (Determination, pp. 5-6). The Administrative Law Judge noted that the computation section attached to the Notice of Determination specifies that the computation reflects the "additional" tax due.

The Administrative Law Judge also rejected as without merit petitioner's alternative argument that, pursuant to Tax Law § 289-b(1)(a), the maximum possible penalty would be \$100.00, noting that the section applied only to "returns which are no more than 60 days late" (Determination, p. 6). The Administrative Law Judge determined that, since petitioner has not shown that its delay was excusable, the penalty will not be remitted.

The Administrative Law Judge denied petitioner's motion for summary determination, granted the Division's cross-motion for summary determination, denied the petition of Rom Gas, Inc. and sustained the Notice of Determination dated February 8, 1990.

On exception, petitioner argues that contrary to the unsupported statement of the Administrative Law Judge, the fact that petitioner was given credit by the Division for these late payments does not mean that tax was somehow "determined" for those quarters, especially in view of the unequivocal statement in the Notice to the contrary. Petitioner further argues that:

"[t]here is simply no way to read the Notice of Determination to mean that taxes were assessed for these quarters, and this Tribunal should not reread this Notice. Indeed, it is disingenuous for one to argue that, on the one hand, the Notice of Determination states that no tax was determined for these quarters and, on the other hand, that tax was determined for these quarters. Necessarily, it must

follow that the penalties should be cancelled" (Petitioner's exception).

The Division argues that in the Notice of Determination at issue, interest and penalties were asserted due for the periods August 1, 1983 through May 31, 1985 pursuant to the provisions of section 289-b of the Tax Law, which provides that a distributor or other person who fails to file a return or pay any tax within the time required shall be subject to penalty and interest computed on the amount of tax determined to be due. Further, the Division asserts that petitioner's argument would lead to the erroneous conclusion that since no additional tax was assessed with the Notice of Determination for the months ending August 31, 1983 through May 31, 1985, petitioner has no liability for penalty for failing to file its tax returns for those periods and for failing to remit, for several years, the tax due for such periods.

The Division alleges that petitioner's argument would permit a taxpayer to be excused from any penalty for failure either to timely file a return or timely pay tax due if, prior to the issuance of a Notice of Determination by the Division, the taxpayer remits the appropriate amount of tax and interest to the Division.

The Division argues that: 1) it was petitioner who was under a legal obligation to timely file returns for the months at issue and timely pay such taxes for such months when due; 2) there is no evidence that petitioner ever filed tax returns for the periods at issue; 3) petitioner's total tax liability for the audit period had been computed by the Division and the overpayments made with tax returns for months subsequent to June 1986 had been applied to the tax due for the earliest periods; 4) the Notice of Determination asserted only the additional tax and the full amount of the penalty and interest determined to be due for the entire audit period at the time of the completion of the audit; 5) petitioner and its representative were aware of both the application of the tax overpayments and the methodology used by the Division to compute penalty and interest credits; and 6) payment of the tax and interest by petitioner without protest and its failure to

request a refund of such amounts in this proceeding were, in effect, a stipulation by petitioner as to its liability for the amounts of tax computed due for the periods at issue.

The Division requests that the exception of petitioner be denied and the determination of the Administrative Law Judge be sustained.

Petitioner, in replying to the Division, argues that: 1) a Notice of Determination is a statutory creature which carries a presumption of correctness and 2) the Tribunal should reject the Division's attempt to have the Tribunal both "look behind" and reread this unambiguous Notice of Determination so as to permit its issuer to impose a penalty which was clearly unwarranted under former Tax Law § 289-b(1), which based the penalty on the "amount of tax determined to be due as provided in this article."

Petitioner further argues in reply that: 1) respondent forgets that it filled in the boxes on the attachment to the Notice of Determination in which it set forth that "\$0.00" was the "Tax Amount Assessed" for the periods ended August 31, 1983, November 30, 1983, May 31, 1984, August 31, 1984, November 30, 1984, February 28, 1985 and May 31, 1985, and that it waived its ability to "determine" taxes due for those periods, regardless of petitioner's prepayments; 2) the result sought is not at odds with the Administrative Law Judge's observation that "the Legislature intended that the returns be timely filed and the tax be timely paid"; 3) there is simply nothing in petitioner's argument which would promote the so-called evasion of penalties; and 4) its exception should be granted and the determination of the Administrative Law Judge should be reversed.

We find no basis in the record before us for modifying the determination of the Administrative Law Judge in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Rom Gas, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Rom Gas, Inc. is denied; and
4. The Notice of Determination dated January 29, 1990 is sustained.

DATED: Troy, New York  
June 24, 1993

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner