STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions :

of :

NEW YORK FUEL TERMINAL CORP. :

for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Periods Ended April 30, :
1989 and January 31, 1991 and the Period
November 1, 1990 through February 28, 1991. :

DECISION
DTA Nos. 811653
and 811678

Petitioner New York Fuel Terminal Corp., 251 Lombardy Street, Brooklyn, New York 11222, filed an exception to the amended determination of the Administrative Law Judge issued on October 20, 1994. Petitioner appeared by Carl S. Levine & Associates, P.C. (Carl S. Levine and Diane J. Moffet, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh and Donald C. DeWitt, Esqs., of counsel).

Petitioner filed a brief in support of its exception, the Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument was heard on May 11, 1995, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Donald C. DeWitt took no part in the consideration of this decision.

ISSUES

I. Whether the Administrative Law Judge erred in holding that petitioner was required to explicitly claim a credit for a bad debt on its return in order to create a justiciable issue.

II. Whether the Administrative Law Judge erred in holding that section 1139(c) of the Tax Law precluded petitioner from claiming a credit for a bad debt where petitioner had failed to protest the denial of the credit claimed for a prior period.

III. Whether petitioner was entitled to a credit or refund of prepaid sales taxes on motor fuel based on the fact that the underlying transactions between petitioner and third parties became uncollectible and were treated by petitioner as bad debts.

IV. If the tax is determined to be due and owing, whether petitioner has established that its failure to pay the tax was due to reasonable cause and not willful neglect.

FINDINGS OF FACT

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

Petitioner, New York Fuel Terminal Corp. ("NYFT"), at all times pertinent herein was a licensed New York State motor fuel distributor.

NYFT timely filed a Report of Sales Tax Prepayment on Motor Fuel, Form FT-945, for the period ended January 31, 1991. NYFT stated on said report that the net sales tax prepayment due was $417,320.18, but remitted only $117,320.18 with the return. The only credits claimed by NYFT and accepted as correct by the Division of Taxation ("Division") were $342.00 as credit for sales to exempt purchasers and $4,582.71 as other credits including casualty losses.

In response to petitioner's failure to remit the full amount of the tax due with the Form FT-945, the Division issued a Notice and Demand for Payment of Sales and Use Taxes Due, Notice Number S9103270032, dated March 27, 1991, which billed NYFT for the amount of tax not remitted with the FT-945, plus penalty and interest. This amounted to $300,000.00 in tax, $33,000.00 in penalty and $3,471.34 in interest.

On November 20, 1992, the Bureau of Conciliation and Mediation Services issued an order, CMS No. 116317, which sustained the statutory notice referred to above. The order noted that $292,320.18 had been applied to this notice.

This appeal followed when NYFT filed a petition for review of the Conciliation Order on February 12, 1993. As indicated in the Findings of Fact above, the subject of the petition is solely the notice and demand, number S9103270032, which is directly responsive to the unpaid taxes as set forth on NYFT's prepaid sales tax report for the period ended January 31, 1991, notwithstanding allegations to the contrary in NYFT's petition, which confuse items listed on a Division field memorandum issued to petitioner on April 4, 1991, including withholding taxes for 1989 and a sales tax balance for April 1989, as well as the additional sales taxes due for January 1991.

The second petition filed by NYFT was an appeal of Conciliation Order No. 116318 which concerned two assessments, to wit: S910604950C and S910424951C.

The first assessment, number S910604950C, was dated June 4, 1991 and stated that it covered the period "0991", which corresponded to the same number on the amended FT-945 filed for February 1991. It set forth additional tax due of $148,120.68,[1] plus penalty and interest. The explanation contained on the assessment's face stated: "Disallowance of credit for prepaid sales tax applicable to bad debts claimed."

The second assessment, number S910424951, was dated April 24, 1991 and covered the periods November and December 1990. The assessment set forth additional tax due of $442,536.69,[2] plus penalty and interest. This assessment set forth the same explanation for the assessment as set forth above.

However, assessment number S910424951C was accompanied by a letter from the Division which set forth a detailed reason for the assessment as follows:

> "Enclosed is a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, number S910424951C. This assessment was issued as a result of our disallowance of the credits claimed on your November and December 1990 Report

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[1]The amended Report of Sales Tax Prepayment on Motor Fuel filed on or about March 25, 1991, for the period February 1991, indicated a net sales tax prepayment due, before adjusting for the credit for bad debts disallowed by the Division in the sum of $192,785.68, of $148,120.48. It is noted that the statutory notice stated tax due of $0.20 more than the actual amount.

[2]This amount represents tax due in November 1990 of $329,159.95 and in December 1990 of $113,376.74.

of Sales Tax Prepayment on Motor Fuel, FT-945's. The credit you claimed related to an uncollectible debt which was incurred as a result of sales of motor fuel in March 1988 by your company to Tunyung Oil Corp. for which your company has not been paid.

"The Sales Tax Laws and Regulations governing the prepayment of Sales Tax on Motor Fuel are separate and distinct from the General Sales Tax Laws and Regulations. Therefore, Sections 1132(e) of the Tax Law and Section 534.7 of the Tax Regulations do not apply to Motor Fuel.

"Section 1102(a) of the Sales Tax Law (copy enclosed) states in part 'Every distributor shall pay as a prepayment on account of the taxes imposed by this article and pursuant to the Authority of Article 29 of this Chapter a tax on each gallon of the Motor Fuel (i) which he imports or causes to be imported into the State for use, distribution, storage or sale in the state . . .'

"Section 1120 of the Sales Tax Law specifically sets forth the instances under which a refund or credit may be issued for the sales tax prepayment on motor fuel. There is no provision in this section for a refund or credit of the sales tax prepayment on motor fuel as a result of a bad debt.

"In addition, we have noted that you claimed the credit for this bad debt previously on your April 1989 Report of Sales Tax Prepayment on Motor Fuel. The credit was disallowed and an assessment, number S900131250C was issued. You fail [sic] to appeal the assessment within ninety (90) days and the assessment became final. Section 1139(c) states in part that:

"'A person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section eleven hundred thirty-eight where all opportunities for administrative and judicial review as provided in Article forty of this Chapter have been exhausted with respect to such determination.'

"Therefore, based on the above, the credits claimed on your November and December 1990 FT-945's are disallowed."

The credits claimed by NYFT against its prepaid sales tax liability for the months of November and December 1990 and February 1991 were based upon certain transactions which were ultimately claimed by NYFT as bad debts.

In March and April 1988, NYFT sold approximately 7,000,000 gallons of gasoline to Tunyung Oil Corporation ("Tunyung"). Included on the invoices to Tunyung were sales taxes in the sum of $384,275.68.[3]

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[3]It is noted that the FT-945's for March and April 1988 are not in the record and therefore it is not known what NYFT prepaid for those months.

Except for one payment received from Tunyung, NYFT never received any further monies on its sales made in March and April 1988. NYFT claimed these invoices as uncollectible and reported them as bad debts on its 1988 U.S. Corporation Income Tax Return filed in February of 1990.

In the interim, on its FT-945 filed for the month of April 1989 on May 16, 1989, NYFT took a credit for the sales taxes paid in 1988 with respect to the Tunyung sales in the amount of $376,224.30 (the difference between the sales tax owed by Tunyung and the amount it paid), against the $357,420.05 sales tax prepayment due for the month of April 1989. Simultaneously with the filing of its FT-945 for April 1989 on May 16, 1989, NYFT applied for a credit or refund of State and local sales and use taxes in the amount of $28,909.28.

In May of 1989, NYFT commenced an action against Tunyung in Supreme Court, New York County, for the debt. NYFT obtained a judgment, which was entered on August 21, 1989, in the amount of $7,277,189.72. NYFT was not able to collect any monies on that judgment.

Although not in issue, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessment number S900131250C, dated January 31, 1990, the basis for which was the disallowed sales tax credit taken by NYFT for the Tunyung bad debt on its FT-945 for April 1989. The assessment included penalty and interest. NYFT conceded that it never protested the tax set forth in this notice. (NYFT did, in fact, file a petition protesting penalties set forth in assessment number S900131250C, which is now pending before the Division of Tax Appeals under DTA# 810253. The petition was received by the Division of Tax Appeals on December 2, 1991.[4]) However, in his affidavit submitted subsequent to hearing, Carl Levine, Esq., stated that he was not sure when the notice was received by petitioner, but did not deny that it was received.

A second notice not in issue, but helpful in understanding the background to the assessments which are in issue, was assessment number L-001392646-9, dated January 8, 1990, which assessed additional gasoline excise tax for the period April 1989. This notice of

[4]Official notice is taken pursuant to State Administrative Procedure Act § 302 of records of the Division of Tax Appeals.

determination was timely protested by request for a conciliation conference on January 30, 1990, and ultimately an appeal was made to the Division of Tax Appeals on November 12, 1991, which assigned the matter DTA# 810140. It is important herein because petitioner contends that its petition in this matter should have placed the Division on notice that it was also protesting the sales taxes assessed by notice number S900131250C because the two liabilities arose from the same underlying transactions.

On December 21, 1990, NYFT paid the tax and interest set forth in the sales tax assessment, number S900131250C, in the sum of $415,592.69. Penalty was specifically omitted. NYFT submitted a letter to the Tax Compliance Division requesting an abatement of the penalty asserted on the sales tax assessment due to what NYFT believed was reasonable cause. The reasonable cause referred to was uncollectible bad debts, specifically the Tunyung transactions discussed above. NYFT and its accountants believed that the bad debts could be credited against the prepayment of sales taxes based on applicable regulations. Further, NYFT believed this issue was one of first impression for the Tax Appeals Tribunal, i.e., that an interpretation of credits for bad debts under the "First Import Law" vis-a-vis the sales tax law has never been made by the Tax Appeals Tribunal, and therefore NYFT's good faith interpretation based upon sales tax law and regulations constituted a good faith effort to comply with the law and, in turn, constitutes reasonable cause for the abatement of penalty.

By letter of April 4, 1991, the Division's Metropolitan District Office denied NYFT's request for abatement of penalty.

During July and August 1990, NYFT sold motor fuel to Decopen Enterprises, Inc. ("Decopen"). Petitioner prepaid the applicable sales taxes on these sales. However, by the end of 1990, Decopen failed to pay for the motor fuel purchased in July and August, including sales taxes. NYFT treated the amounts owed by Decopen as bad debts at the end of 1990 and commenced an action against Decopen on October 7, 1991. A judgment was entered against

Decopen in favor of NYFT on November 13, 1991 in the sum of $6,457,095.03. No monies have been collected on that judgment.

NYFT claimed a credit for the Decopen bad debt on its February 1991 FT-945 in the sum of $192,785.68. It also filed a refund application, dated March 20, 1991, seeking a refund in the sum of $123,128.08.

For reasons unknown, the February 1991 FT-945 and the refund application were amended and refiled on March 25, 1991. The number of gallons of motor fuel sold were modified and the refund requested became $44,665.20. However, the credit claimed for the Decopen bad debt remained the same on the amended return, i.e., $192,785.68.

For informational purposes only, it is noted that the Division originally issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period "February 1981", assessment number S910424950C. This assessment was cancelled and replaced by notice number S910604950C for the period February 1991, which is discussed above.

OPINION

To restate certain essential facts, this case involves three assessing documents: Notice and Demand number S9103270032; Notice of Determination number S910604950C; and Notice of Determination number S910424951C.

Turning first to the Notice and Demand, the Administrative Law Judge concluded that under Matter of Meyers v. Tax Appeals Tribunal (201 AD2d 185, 615 NYS2d 90, lv denied 84 NY2d 810, 621 NYS2d 519), petitioner was entitled to a hearing on the merits with respect to the Notice and Demand which "requested the $300,000.00 in self-assessed tax set forth on the FT-945 filed for January 1991, together with penalty and interest" (Determination, conclusion of law "A"). The Division did not file an exception to the Administrative Law Judge's determination; therefore, we will not address this conclusion.

Although the Administrative Law Judge concluded that petitioner was entitled to a hearing on the Notice and Demand, the Administrative Law Judge determined that "petitioner

never claimed the credit for bad debts on the FT-945 filed for January 1991 and, therefore, no justiciable issue presents itself for adjudication" (Determination, conclusion of law "A").

Petitioner responds that it "undeniably raised the issue of the deductibility of sales taxes due to bad debts when it timely protested the Notice and Demand" (Petitioner's brief on exception, p. 5). Further, petitioner argues that this is a justiciable controversy because it involves "a substantial sales tax assessment issued to Petitioner which Petitioner vigorously contests" (Petitioner's brief on exception, p. 5).

We agree with petitioner. Petitioner filed a petition protesting the Notice and Demand. In this petition, petitioner stated that it did not pay all of the tax reported on its January 1991 return due to its "position that, since it had overpaid its sales tax liability with respect to its sales to Tunyung and Decopen, it was entitled to treat these prior payments as overpayments" (Petition, dated February 9, 1993). We see nothing hypothetical or abstract about this conflict which would render it nonjusticiable (see, Black's Law Dictionary 777 [5th ed 1979]). In addition, the essence of the Administrative Law Judge's ruling is to impose a requirement that the taxpayer state its grounds to oppose an assessment on the return that prompted the assessment. We are not aware of the basis for such a requirement which would severely limit the grounds that could be advanced by a taxpayer in response to an assessment in the Division of Tax Appeals. Therefore, we reverse the Administrative Law Judge's conclusion on this point.

Next, the Administrative Law Judge held that even if the petition in response to the Notice and Demand presented a justiciable issue, petitioner would not be entitled to the credit because "the credit claimed was previously claimed by petitioner on its return for April 1989, disallowed by the Division and ultimately became the basis for the issuance of a Notice of Determination and Demand . . . assessment number S900131250C" which petitioner did not protest; therefore, the Administrative Law Judge concluded that petitioner was prohibited by

section 1139(c) of the Tax Law from protesting the subsequent Notice and Demand (Determination, conclusion of law "A").

Section 1139(c) of the Tax Law provides, in part, as follows:

> "A person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section eleven hundred thirty-eight where all opportunities for administrative and judicial review as provided in article forty of this chapter have been exhausted with respect to such determination."

In our view, the tax that was determined to be due by the failure to protest Notice S900131250C was the tax due for the month of April 1989 and section 1139(c) would prohibit petitioner from obtaining a credit or refund of this tax. In contrast, the Notice and Demand was demanding that petitioner pay the tax reported but not remitted with its return for January 1991. We cannot see how the failure to protest the Notice of Determination relating to April 1989 can be held to preclude petitioner from protesting the Notice and Demand relating to the subsequent period. Further, the Administrative Law Judge's construction of the statute would, as petitioner points out, lead to the result that if a taxpayer prematurely claimed a credit for a bad debt, i.e., before the debt was worthless for Federal income tax purposes (see, 20 NYCRR 534.7[a][1] and [b][1]), and the Division issued a Notice of Determination for this reason, the taxpayer would be precluded from claiming the credit at the proper time. Therefore, we conclude that the failure to protest the tax assessed by the Notice of Determination relating to April 1989 does not preclude petitioner from protesting the Notice and Demand at issue relating to the January 1991 return.[5]

Turning next to address Notice number S910424951C, which related to the periods of November and December 1990, the Administrative Law Judge applied the same rule as he applied to the Notice and Demand, i.e., that petitioner was precluded from challenging this assessment because of its failure to challenge the tax assessed in the Notice of Determination

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[5]Although it does not affect the outcome of this case, we agree with the Administrative Law Judge that petitioner did not protest the tax assessed on Notice number S900131250C. We reject petitioner's contention that its protest of its motor fuel tax assessment put the Division on notice that petitioner also intended to protest the sales tax assessment (see, Matter of Crispo, Tax Appeals Tribunal, April 13, 1995).

relating to the April 1989 return. For the reasons set forth above, we conclude that the Administrative Law Judge erred in this conclusion.

Because the Administrative Law Judge found procedural barriers, he never addressed the merits of whether the Notice and Demand and Notice number S910424951C properly disallowed petitioner a bad debt credit for prepaid sales tax on motor fuel. With respect to assessment number S910604950C, which related to the bad debt credit of $192,785.68 taken by petitioner on its February 1991 return and which arose from transactions between petitioner and Decopen Enterprises, Inc., the Administrative Law Judge found no procedural barriers to considering this issue and found against petitioner on the merits. The Administrative Law Judge held that the tax that was required to be prepaid pursuant to section 1102 of the Tax Law could not be the subject of a credit for bad debts under section 1132(e) of the Tax Law. The rationale of the Administrative Law Judge was that section 1120 of the Tax Law was specifically enacted to provide for refunds and credits with respect to motor fuel and this section does not include a credit for bad debts. The Administrative Law Judge stated that the Legislature "chose to differentiate between the refund and credits available generally under Tax Law §§ 1132(e) and 1139 and those available only with respect to motor fuel (Tax Law § 1120)" and that Tax Law § 1120 "is clear and unambiguous as to those instances when a credit or refund may be allowed with respect to motor fuel and there is no basis to expand upon its provisions" (Determination, conclusion of law "C").

In his analysis of this issue, the Administrative Law Judge did not consider the provisions of section 1102(b) of the Tax Law. This section provides as follows:

> "The taxes required to be prepaid pursuant to this section shall be administered and collected in a like manner as the taxes imposed by sections eleven hundred five and eleven hundred ten of this article. All the provisions of this article relating to or applicable tothe administration, collection and disposition of the taxes imposed by such sections shall apply to the tax required to be prepaid under this section so far as such provisions can be made applicable to such prepayments of tax with such limitations as set forth in this article and such modifications as may be necessary in order to adapt such language to the tax so imposed, provided, however, that the provisions of paragraph one of subdivision (c) of section eleven hundred thirty-seven of this article and the references in section eleven hundred thirty-

> seven-A of this article to such paragraph one of subdivision (c) of section eleven hundred thirty-seven shall not be applicable to such tax required to be prepaid under this section. Such provisions shall apply with the same force and effect as if the language of those provisions had been set forth in full in this section except to the extent that any provision is either inconsistent with a provision of this section or is not relevant to the tax required to be prepaid by this section. For purposes of this section, any reference in this article to the tax or taxes imposed by this article shall be deemed to refer to the tax required to be prepaid pursuant to this section unless a different meaning is clearly required. Provided, further, that, except as otherwise provided in subdivision (j) of section eleven hundred fifteen of this article and except as otherwise provided in paragraph five of subdivision (b) of section eleven hundred sixteen of this article, the exemptions provided in such sections (other than that provided in paragraph nine of subdivision (a) of such section eleven hundred fifteen with respect to purchases of kero-jet fuel) shall not apply to the tax required to be prepaid under this section."

Section 1102(b) indicates to us, contrary to the Administrative Law Judge's holding, that the provisions of Article 28 are intended to apply to the tax required to be prepaid pursuant to section 1102(a) unless the provision is inconsistent or not relevant to the tax required to be prepaid. We do not see how a credit for bad debts is either inconsistent or irrelevant to the prepaid tax. The distributor who is required to prepay the tax but who has not been paid by his customer is in the same economic position as the retail vendor who has paid over the sales tax to the Division but who has not been paid by his customer. The distributor and retail vendor are each required to pay the tax to the Division and are required to collect the tax from their customer (Tax Law §§ 1102[c] and 1132[a]; see also, 20 NYCRR 561.1[b][1]). If the customer does not pay, the distributor and the retail vendor are each left bearing the burden of the tax contrary to the scheme intended by Article 28. Thus, in each case the credit for bad debts would act to remove a tax burden which has come to rest in the inappropriate place in the chain of transactions.

Another aspect of section 1102(b) which supports our conclusion that section 1132(e) does apply to the prepaid tax is that section 1102(b) specifically enumerates exceptions to its general rule that the provisions of Article 28 apply to the prepaid tax, e.g., section 1102(b) specifies that certain exemptions contained in sections 1115 and 1116 of the Tax Law do not apply to the tax required to be prepaid by section 1102. These specific exceptions indicate that

when the Legislature intended to limit the sections of Article 28 that were made applicable by section 1102(b) to the prepaid tax, the Legislature expressly so stated.

Another weakness in the Administrative Law Judge's conclusion that section 1120 of the Tax Law sets forth the exclusive grounds for the credit or refund of the prepaid tax is that this would mean that a credit or refund, pursuant to section 1139(a) of the Tax Law, for tax that was illegally or unconstitutionally collected or paid would not be available for the section 1102 prepaid tax. This result would also appear to be contrary to the legislative intent expressed in section 1102(b) to generally apply the provisions of Article 28 to the prepaid tax.

For all of the above reasons, we conclude that the Administrative Law Judge erred in determining that the credit for bad debts provided by section 1132(e) of the Tax Law does not apply to the tax required to be prepaid on motor fuel by section 1102(a) of the Tax Law. Our conclusion does not, however, mean that the petitions of petitioner are granted in their entirety. The facts state that petitioner had an uncollectible debt with respect to the Tunyung sales in the amount of $376,224.30 but as the Division points out, petitioner claimed credits based on the Tunyung sales in the amount of $442,536.69 against its November and December 1990 returns, resulting in Notice number S910424951C, and in the amount of $300,000.00 against its January 1991 return, resulting in the Notice and Demand. Obviously, petitioner's credit cannot exceed the amount of the bad debt; therefore, the $376,224.30 bad debt arising from the Tunyung sales should be applied to Notice number S910424951C. Because the credit is not sufficient to satisfy all of Notice number S910424951C, petitioner must pay the remainder of this assessment as well as the entire amount of the Notice and Demand relating to the January 1991 return. Further, because petitioner has not advanced any reasonable explanation as to why it claimed credits in excess of the amount of the Tunyung bad debt, we sustain the penalties imposed on the remainder of assessment S910424951C and on the entire amount of the Notice and Demand.

With respect to the Decopen bad debt, petitioner did not claim a credit in excess of the amount of the bad debt; therefore, the entire assessment relating to this claimed credit, Notice number S910604950C is satisfied by application of the bad debt credit.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of New York Fuel Terminal Corp. is granted to the extent that the credit of $376,224.30 is applied to Notice of Determination number S910424951C and that the credit of $192,785.68 is applied to Notice of Determination number S910604950C, but the exception is otherwise denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above, but is otherwise affirmed;

3. The petitions of New York Fuel Terminal Corp. are granted to the extent indicated in paragraph "1" above, but are otherwise denied; and

4. The Division of Taxation is directed to modify Notice of Determination number S910424951C in accordance with paragraph "1" above and to cancel Notice of Determination number S910604950C. Notice of Determination number S910424951C is otherwise sustained as is the Notice and Demand number S9103270032.

DATED: Troy, New York
October 26, 1995

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

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