STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NAUGHTON ENERGY CORPORATION	:	DECISION DTA NO. 823470
for Revision of a Determination or for Refund of Tax on Gasoline and Similar Motor Fuel and Tax on Petroleum Businesses under Articles 12-A and 13-A of the Tax Law for the Period December 1, 2003 through June 30, 2004.	:	

Petitioner, Naughton Energy Corporation, filed an exception to the determination of the Administrative Law Judge issued on August 11, 2011. Petitioner appeared *pro se*. The Division of Taxation Appeared by Mark Volk, Esq. (Michele Helm, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on June 13, 2012 in New York, New York.

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

ISSUE

Whether petitioner has established any basis warranting reduction or elimination of the penalties imposed.

FINDINGS OF FACT

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

During the period at issue, petitioner, Naughton Energy Corporation, was a registered fuel distributor in New York. As such, petitioner was required to file monthly petroleum business tax returns, form PT-100, with the Division of Taxation (Division), and to pay the taxes on gasoline and similar motor fuels and the tax on petroleum businesses imposed by Tax Law §§ 284 and 301.

Petitioner timely filed petroleum business tax returns for the period December 1, 2003 through June 30, 2004 indicating zero tax due. Petitioner failed to file a petroleum business tax return for the month of July 2004. In August 2004, the employee responsible for the filing and payment of the tax returns was dismissed due to her failure to timely file tax returns, and the new bookkeeper discovered that the tax returns for the period at issue had been filed incorrectly. On November 29, 2004, an auditor of the Division contacted petitioner concerning its failure to file a return for the month of July 2004. The new bookkeeper stated that the December 2003 through June 2004 zero tax returns were incorrect, and that she was in the process of filing amended returns to reflect the proper amount of tax due. In December 2004, petitioner late filed and late paid the petroleum business tax return for the month of July 2004.

On May 3, 2005, due to the failure of petitioner to file the corrected returns, the auditor spoke by telephone and wrote a letter to petitioner's bookkeeper again requesting that the corrected returns and tax payments for the period at issue be made.

On June 8, 2005, the Division sent a Demand for NYS Petroleum Tax Returns and/or Payment of Taxes Due Pursuant to Articles 12-A, 13-A, 28 and 29, which stated that the corrected returns had still not been filed and that petitioner's registration under Articles 12-A and 13-A might be canceled if the corrected returns and payments were not received within 10 days of the date of the letter.

Petitioner filed the corrected returns on June 17, 2005. No payment was received with the returns, although petitioner did request a payment plan for the total amount of taxes shown due.

Upon receipt of the amended returns, the Division issued to petitioner, on July 25, 2005, two notices of determination assessing tax, penalty and interest due for tax on gasoline and similar motor fuel, and tax on petroleum businesses. Petitioner did not timely protest the Notices of Determination.

On November 14, 2005, the Division issued to petitioner two notices and demands for payment of tax due for the unpaid motor fuel taxes and unpaid taxes on petroleum businesses for the period at issue. Petitioner was eventually granted an installment payment agreement and fully paid the amount of taxes, penalty and interest due in February 2008.

On August 6, 2008, petitioner filed a refund claim in the amount of $119,162.94 for penalties paid for the period at issue. On December 29, 2008, the Division issued a letter to petitioner denying the refund claim in full.

As of the year 1990 and continuing through the date of the hearing, the Division had issued to petitioner over 85 notices of determination and notices and demands for taxes on petroleum businesses, sales and use taxes and corporation franchise taxes. Most of the notices were for the late filing or late payment of the relevant taxes. The Division's records indicate that all of the notices are marked closed, either having been paid in full or the penalty abated.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the subject penalty statutes and the standard for the abatement of penalty. In so doing, the Administrative Law Judge noted that petitioner must establish reasonable cause for the non-filing and non-payment of tax. The Administrative Law

Judge also noted that the burden weighs heavily against the taxpayer where penalties are statutorily prescribed.

The Administrative Law Judge determined that the record lacked sufficient evidence to support the abatement of penalties. The Administrative Law Judge reviewed the events giving rise to the instant refund claim, and determined that petitioner's conduct, in particular, its late filing and nonpayment of taxes due, did not establish cause for the abatement of penalties. The Administrative Law Judge noted that petitioner's inaction does not establish sufficient effort to comply with its obligations under the Tax Law. Accordingly, the Administrative Law Judge sustained the refund denial.

ARGUMENTS ON EXCEPTION

At oral argument, petitioner attempted to submit additional evidence into the record. As the record in this matter was closed below by the Administrative Law Judge, this submission was returned to petitioner and was not considered by the Tribunal in the rendering of this decision.

On exception, petitioner argues that its conduct would permit the abatement of, or alternatively, a downward adjustment in penalties. Petitioner argues that it initiated contact with the Division upon discovering that it had filed incorrect tax returns and failed to pay taxes for the period of December 2003 through June 2004. Petitioner further contends that it engaged in discussions with the Division regarding a payment plan for the back taxes owed; however, the Division nonetheless issued the Notices against petitioner and threatened to cancel its petroleum license. While petitioner concedes that it was late in filing proper returns and late in remitting payment, it argues that its cooperation with the Division should permit the abatement of penalties.

The Division argues that petitioner failed to adduce any evidence sufficient to abate or reduce penalties imposed pursuant to Tax Law §§ 289-b (1) (a) and 315 (a). In addition, the Division contends that, contrary to petitioner's assertions, it was the Division that contacted and requested petitioner to correct its returns that listed no taxes due. The Division argues that, even after correcting its returns, petitioner refused to make payments until it was granted an installment payment plan.

OPINION

We affirm the determination of the Administrative Law Judge.

The instant matter involves penalties imposed under Tax Law §§ 289-b (1) (a) and 315 (a). A provision of Article 12-A, Tax Law § 289-b (1) (a) provides, in relevant part, the following:

> "A distributor or other person who or which fails to file a return or to pay any tax within the time required by or pursuant to this article (determined with regard to any extension of time for filing or paying) shall be subject to a penalty of ten per centum of the amount of tax determined to be due as provided in this article plus one per centum of such amount for each month or fraction thereof during which such failure continues after the expiration of the first month after such return was required to be filed or such tax became due, not exceeding thirty per centum in the aggregate."

Tax Law § 315 (a) provides, in relevant part, the following:

> "The provisions of . . . article twelve-A of this chapter, including those provisions of such article twelve-A relating to penalty and interest, shall apply to the administration of and procedure with respect to the tax imposed under this article in the same manner and with the same force and effect as if the language of . . . article twelve-A had been incorporated in full into this article and had expressly referred to the tax under this article . . . ."

In establishing reasonable cause for the abatement of penalty, the taxpayer faces an onerous task (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). By imposing penalties under Tax Law §§ 289-b (1) (a) and 315 (a), the Legislature evidenced its

intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation (***see e.g. Matter of MCI Telecom. Corp.***, Tax Appeals Tribunal, January 16, 1992, ***confirmed Matter of MCI Telecom. Corp. v New York State Tax Appeals Trib.*** 193 AD2d 978 [1993] [referring to sales tax under Articles 28 and 29]).

We find that the Administrative Law Judge properly determined that petitioner failed to establish either reasonable cause for the late filing or an absence of willful neglect (***see generally*** 20 NYCRR 2392.1). Petitioner conceded that it filed late returns and failed to timely remit payment of the taxes it knew to be due. The record indicates that petitioner was aware that there were filing issues as early as August 2003 and, despite communications from the Division, petitioner did not file proper returns for the months at issue until June 17, 2005. As such, petitioner failed to established that its failure to timely file was due to reasonable cause and not due to "an absence of willful neglect," as required by regulation (20 NYCRR 2392.1 [d] [5]).

Petitioner's arguments to the contrary fail to persuade. While it contends that its late filings and payments were the fault of a single employee, the record does not contain any evidence establishing this point. Furthermore, even if true, these actions do not explain the significant gap between the discovery of the error and the filing of correct returns. We note that petitioner has a robust history of late filing with tax returns and the associated taxes.

We also reject petitioner's attempt to introduce additional evidence at oral argument. We have held that a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record (***see Matter of Purvin***, Tax Appeals Tribunal, October 9, 1997; ***see also Matter of Schoonover***, Tax Appeals

Tribunal, August 15, 1991). As such, we conclude that the Administrative Law Judge properly determined that there were no grounds to abate or otherwise reduce the penalties in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Naughton Energy Corporation is denied;

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

3. The petition of Naughton Energy Corporation is denied; and

4. The Division's denial of petitioner's refund claim, dated December 29, 2008, is sustained.

DATED: Albany, New York
November 29, 2012

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

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