

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

GLOVER BOTTLED GAS CORP. :

for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Periods Ending :  
November 30, 1980, February 28, 1981 and :  
May 31, 1981. :

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In the Matter of the Petition :

of :

BOTTLED GAS SERVICE, INC. :

for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Periods Ending May 31, :  
1977 and November 30, 1977. :

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DETERMINATION

In the Matter of the Petition :

of :

NEW YORK PROPANE CORPORATION :

for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Periods Ending :  
February 29, 1980, November 30, 1980, :  
February 28, 1981, May 31, 1981, August 31, :  
1981 and November 30, 1981. :

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In the Matter of the Petition :

of :

VOGEL'S, INC. :

for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Periods Ending :  
February 29, 1980, November 30, 1980, :  
February 28, 1981 and August 31, 1981. :

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Petitioner, Glover Bottled Gas Corp., 175 Price Parkway, Farmingdale, New York 11735, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ending November 30, 1980, February 28, 1981 and May 31, 1981 (File No. 803127).

Petitioner, Bottled Gas Service, Inc., 175 Price Parkway, Farmingdale, New York 11735, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ending May 31, 1977 and November 30, 1977 (File No. 803128).

Petitioner, New York Propane Corp., 175 Price Parkway, Farmingdale, New York 11735, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ending February 29, 1980, November 30, 1980, February 28, 1981, May 31, 1981, August 31, 1981 and November 30, 1981 (File No. 803129).

Petitioner, Vogel's, Inc., 175 Price Parkway, Farmingdale, New York 11735, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ending February 29, 1980, November 30, 1980, February 28, 1981, August 31, 1981, and February 28, 1982 (File No. 803130).

A consolidated hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 19, 1988, at 1:45 P.M., with all briefs filed by April 3, 1989. Petitioners appeared by Samuel R. Dolgow, Esq. The Division of Taxation appeared by William F. Collins, Esq., (Angelo A. Scopellito, Esq., of counsel).

### ISSUES

I. Whether petitioners made timely applications for credit or refund of sales and use taxes.

II. Whether petitioners established reasonable cause to justify cancellation of penalties for failure to file timely returns or to pay over the taxes due.

### FINDINGS OF FACT

Petitioners, Glover Bottled Gas Corp., Bottled Gas Service, Inc., New York Propane Corporation and Vogel's, Inc., are affiliated corporations sharing common administrative offices and personnel with other affiliated corporations not parties hereto.

The affiliated group is based on a business which was located in Brooklyn from 1931 to 1977 and which grew rapidly by acquisition in the late 1970's. In 1977, the group moved its headquarters to its present location in Farmingdale, New York. By 1980, there were 28 individual corporations in the group, 8 to 10 of which were operating corporations. In December 1981, a major acquisition was made increasing the size of the business substantially. The rapid growth caused problems in the administration of the affiliated corporations which problems were aggravated by a high turnover of personnel in the group's Accounting Department.

The administrative and turnover problems within the group caused petitioners to fail to properly file certain sales and use tax returns and withholding tax returns and to fail to pay certain sales and use taxes and withholding taxes due. Questions relating to all of the withholding tax matters and to some of the sales and use tax matters have been resolved. The only issues remaining pertain to sales and use taxes for the following periods:

(a) Glover Bottled Gas Corp.

Quarter Ending

November 30, 1980	Return filed, check for the month of November 1980 for \$4,486.88 was drawn by petitioner but not received by the Division of Taxation.
February 28, 1981	Return filed, check for the month of September 1981 for \$5,820.33 was drawn by petitioner but not received by the Division of Taxation.
May 31, 1981	Return was misplaced and not mailed.

(b) Bottled Gas Service, Inc.

Quarter Ending

May 31, 1977	Return was misplaced and not mailed.
November 30, 1977	Return was misplaced and not mailed.

(c) New York Propane Corporation

Quarter Ending

February 28, 1980	Return was misplaced and not mailed.
November 30, 1980	Return was misplaced and not mailed.
February 28, 1981	Return was misplaced and not mailed.
May 31, 1981	Return was misplaced and not mailed.
August 31, 1981	Return was misplaced and not mailed.
November 30, 1981	Return was misplaced and not mailed.

(d) Vogel's, Inc.

Quarter Ending

August 31, 1981	Return not received by the Division of Taxation. Check for \$17,287.84 drawn but not received by the Division of Taxation.
November 30, 1980	Return was misplaced and not mailed.
February 28, 1981	Return was misplaced and not mailed.

The Division of Taxation issued notices and demands with respect to sales and use taxes owing by the petitioners. The notices and demands for the periods at issue are not in the record. However, petitioners concede that the last notice and demand issued was issued on May 10,

1982.<sup>1</sup>

Petitioners paid the taxes due, as well as part of the interest asserted on the notices and demands. It appears that in some cases the amounts due were paid shortly after receipt of the notices and demands, but in other cases, months later, after warrants had been issued.<sup>2</sup> Petitioners did not pay any of the penalties asserted.

Petitioners' accounting and tax personnel had numerous conversations, either by telephone or in person, with Division of Taxation personnel in both Albany and the Mineola District Office from late 1982 to May 5, 1983 regarding abatement of penalties. These conversations included the periods at issue and other sales tax quarters as well as income tax withholding assessments. There is also substantial correspondence in the record between petitioners and the Division of Taxation regarding such abatement of penalties. Consequently, the Division of Taxation abated the penalties for numerous sales tax quarters and income tax withholding quarters on the basis that petitioners had shown reasonable cause for such cancellation. The following penalties were cancelled:

Sales and Use Tax

Glover Bottled Gas Corp.: Quarters ending August 31, 1981, November 30, 1981, February 28, 1982, May 31, 1982

Bottled Gas Service, Inc.: Quarter ending May 31, 1981

Vogel's, Inc.: Quarter ending May 31, 1981

PCA Distributors, Inc.: Quarter ending February 28, 1981  
(Apparently a non-petitioning affiliate)

Withholding Tax

At least 17 withholding tax assessments were cancelled, including 2 against Glover Bottled Gas Corp., 6 against New York Propane, 7 against Vogel's, Inc., and 2 against PCA Distributors, Inc.

On October 31, 1983, the Division of Taxation levied against petitioners' accounts at Chemical Bank with respect to penalties and additional interest owing.

On November 5, 1983, members of petitioners' staff met with Division of Taxation personnel in the Mineola District Office regarding the abatement of penalties and possible

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<sup>1</sup>In correspondence, petitioner Vogel's, Inc. claimed that the first notice it had of an assessment for the quarter ending August 31, 1981 was a warrant received on September 9, 1982. However, this was not claimed at the hearing.

<sup>2</sup>Glover Bottled Gas Corp.'s taxes and partial interest for the quarters ending November 30, 1980 and February 28, 1981 were paid by a check dated October 22, 1982.

claims for refund. Petitioners' representatives were told that they had "three years" in which to file a claim for refund and understood that the three years ran from the date of the levy. Petitioners' representatives were in communication with Division of Taxation personnel discussing the claims for refund throughout 1984 and until April 23, 1985.

On May 28, 1983, petitioners filed applications for credit or refund of the penalties and interest obtained by the Division pursuant to the October 31, 1983 levy against the Chemical Bank accounts. The claims were denied on December 31, 1985 on two grounds:

- (a) that the claims had not been filed within three years of the time the tax was payable (i.e. when the notices and demands were issued) and;
- (b) that petitioners had not shown reasonable cause.

### CONCLUSIONS OF LAW

A. That Tax Law § 1139(a)(ii) provides that a refund or credit of any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid shall be made:

"if application therefor shall be filed with the tax commission... (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article".

B. That the penalties at issue became payable upon issuance of the respective notices and demands to petitioners<sup>3</sup>, the latest of which was issued on May 10, 1982.

C. That despite the fact that petitioners were in communication with the Division of Taxation from late 1982 until May 5, 1983 and from November 5, 1983 to April 23, 1985, and may in fact, have been incorrectly advised by Division personnel as to the time for filing of an application for refund, the applications were untimely. No employee of the Division of Taxation has the authority to orally extend the time period specified by statute (see, Matter of Connie's Delicatessen, State Tax Commn., February 18, 1986).

D. That even if the applications for refund had been timely filed, petitioners have not shown that the instances of late filing and/or late payment were due to reasonable cause and not willful neglect. The periods at issue span two years, from December 1, 1979 through November 30, 1981, plus two additional quarters in 1977. Moreover, penalties which had been asserted and then cancelled show that petitioners' reporting and/or payment problems continued into 1982. While corporate acquisitions and staffing problems were apparently the underlying cause of the late filings and/or payments, the failures were not merely isolated aberrations, but continued for a substantial period of time. It was unreasonable for petitioners not to have corrected their problems much earlier. It should be noted that the mere fact that the Division of Taxation cancelled other penalties for reasonable cause does not mean that the penalties for the

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<sup>3</sup>The Notice and Demand for Payment of Sales and Use Taxes Due is the document issued when (1) a return is filed but the amount of tax shown to be due is not paid with the return, (2) a return showing the amount of tax due was filed late, (3) the return contains one or more mathematical errors, or (4) a taxpayer has, after audit, agreed to the amount of tax due (see 20 NYCRR 535.6, 533.3[6]).

quarters at issue should be cancelled as well.

E. That the petitions of Glover Bottled Gas Corp., Bottled Gas Service, Inc., New York Propane Corporation and Vogel's, Inc. are denied and the denials of the claims for credit or refund are sustained.

DATED: Troy, New York  
December 14, 1989

/s/ Robert F. Mulligan  
ADMINISTRATIVE LAW JUDGE