STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of AGL WELDING SUPPLY CO., 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 Period September 1, 1984 through May 31, 1987.	:	DETERMINATION ON REMAND DTA NO. 807194

Petitioner, AGL Welding Supply Co., Inc., 600 Route 46 West, Clifton, New Jersey 07150, 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 period September 1, 1984 through May 31, 1987.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 21, 1992 at 1:15 P.M., with all briefs to be submitted by January 11, 1993. Petitioner, appearing by Orbe, Nugent, Collins & Darcy, Esqs. (John F. Darcy, Esq., of counsel), submitted a brief on November 30, 1992. The Division of Taxation, appearing by William F. Collins, Esq. (James Della Porta, Esq., of counsel), submitted a responding brief on December 30, 1992. Petitioner submitted its reply brief on January 11, 1993.

On July 1, 1993, the Administrative Law Judge issued a determination holding that the industrial gas cylinders provided by petitioner to its customers had been purchased for resale within the meaning of Tax Law § 1101(b)(4)(i) and (5) and thus were not subject to sales tax when purchased. In view of this conclusion, the Administrative Law Judge deemed moot and did not address the issues of (a) whether the Division of Taxation should be estopped from assessing the tax at issue based on its priordetermination not to impose tax on cylinders purchased in an earlier period and (b) whether penalty should be abated.

The Division of Taxation filed an exception to the determination of the Administrative Law Judge. Both the Division of Taxation and petitioner filed briefs on exception. The

Division of Taxation also filed a letter brief in reply. Oral argument before the Tax Appeals Tribunal, requested by the Division of Taxation, was denied.

On April 28, 1994, the Tax Appeals Tribunal issued a decision reversing the Administrative Law Judge and holding that petitioner had failed to establish that all of the cylinders it purchased (or rented) were to be used exclusively for resale as claimed. In addition, the Tribunal held that since the cylinders were used interchangeably and petitioner had not identified what portion, if any, of the cylinders were used exclusively for resale purposes, then all of the cylinders at issue were subject to tax. Finally, the Tribunal remanded the matter to the Administrative Law Judge for a determination on the estoppel and penalty issues noted above.

ISSUES

I. Whether the Division of Taxation should be estopped from assessing tax on petitioner's purchases of industrial gas cylinders during the period at issue based on its prior determination not to impose tax against petitioner on certain cylinders purchased in an earlier period.

II. Whether, assuming estoppel is not warranted and tax is due, petitioner has established sufficient basis to allow for reduction or abatement of penalties.

FINDINGS OF FACT[1]

Petitioner, AGL Welding Supply Co., Inc. ("AGL"), is engaged in the business of selling industrial and medical gases, as well as hard goods for welding such as rods, wire, cable and welding machines. Petitioner also sells medical breathing assistance devices. The industrial and medical gases sold by petitioner are delivered in compressed gas cylinders which have substantial steel walls allowing the gas to be contained under pressure. As more fully detailed hereinafter, petitioner sells gas to various customers in those customers' own cylinders, and also sells gas contained in cylinders owned (or rented) by petitioner.

On May 2, 1989, the Division of Taxation ("Division") issued to petitioner two notices

[1]For purposes of background and ease of reference, the full Findings of Fact found in the original determination, changed only to reflect the Tribunal's modification to Finding of Fact "5", are set forth herein. Additional Findings of Fact relevant to the issues on remand are also set forth.

of determination and demands for payment of sales and use taxes due. The first of such notices assessed sales tax due for the period September 1, 1984 through May 31, 1987 in the amount of $47,187.00, plus penalty and interest. The second such notice assessed omnibus penalty (only) in the amount of $2,934.50 for the period September 1, 1985 through February 28, 1987. Petitioner had previously executed a series of consents extending the period of limitations on assessment whereby assessment for the period September 1, 1984 through February 28, 1986 could be made at any time on or before June 20, 1989.

Neither the audit methodology employed by the Division nor the mathematical accuracy of the resulting dollar amount of tax as calculated

are contested. In fact, petitioner has conceded and paid $2,385.00 against the above assessment, relating to certain nontaxable sales disallowed upon audit. Therefore, remaining at issue herein is the sum of $44,802.00 assessed on petitioner's purchases (or rentals) of gas cylinders, plus related penalties and interest.

As described, petitioner sells industrial and medical gases to customers who do not lease cylinders from petitioner. Petitioner also leases empty cylinders to one customer (IBM) who does not purchase its gas from petitioner. This latter transaction involves the leasing of approximately 735 cylinders. However, most of petitioner's customers obtain from petitioner industrial or medical gases contained in cylinders owned (or rented) by petitioner.

Petitioner invoices its customers separately for gas purchases and for cylinder rentals. Petitioner ships or delivers filled cylinders to its customers and takes back empty cylinders in return. Petitioner's customers are billed on the 25th day of each month for all cylinders then in their possession. The charge for each cylinder depends on the type of cylinder involved. A customer who purchased no gas in the rental period would nonetheless be charged a rental fee for all cylinders in its possession on the 25th day of the month. As described in testimony, a customer could, in theory, avoid a rental charge by returning all cylinders in its possession before the 25th day of the month. However, in contrast, a party who took an initial delivery of

cylinders on the 24th day of the month would be billed for possession of those cylinders on the 25th day of the month (i.e., the next day). It would appear that, in practice, those customers who purchased gas contained in petitioner's cylinders did so on an ongoing "rollover" or "running count" basis, as evidenced by petitioner's accounting/invoicing system for cylinders (i.e., cylinders delivered beginning balance, plus cylinders delivered during the month, minus cylinders returned, equals ending balance of cylinders [as of the 25th of each month]). At hearing, petitioner produced actual invoices issued to one of its customers, together with a "monthly cylinder rental invoice", which provided the following transaction information for the month ended April 25, 1986:

	Cylinders Received	Cylinders Returned	Balance
Beginning balance at March 25, 1986	--	--	23
April 1, 1986	10	12	21
April 8, 1986	13	12	22
April 23, 1986	14	15	21
	37	39	
Ending Balance on April 25, 1986	--	--	21[2]

Petitioner had total sales of $13,492,223.85 for the year 1986, out of which gas sales totalled $5,096,929.88, and cylinder rental fees totalled $1,963,436.76. From these figures, petitioner calculates cylinder rental fees as 14.5% of total sales, and 38.5% of the amount of gas sales.

Petitioner collected from its customers and paid to the Division sales tax on all of its rental charges for cylinders (except where such rentals were otherwise exempt, e.g., to tax-exempt organizations). It did not, however, pay sales tax on its own purchases (or rentals) of such cylinders, as it considered the same to be purchases for resale (by

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[2] The Tribunal modified the Administrative Law Judge's Finding of Fact "5" by deleting the words "a full month's" immediately preceding the word "possession" in the seventh sentence and by adding the last sentence and chart to more clearly reflect the record.

rental).

The reverse side of each of petitioner's cylinder rental invoices, at paragraphs "5", "6" and "7", contains the following language:[3]

> "5. Buyer agrees that gas cylinders remain the property of Seller and are loaned on rental and not sold; that gas cylinders appreciate rather than depreciate in value through age or usage. Buyer therefore agrees to pay Seller at Seller's then current price, as shown in Seller's monthly cylinder rental invoice and monthly cylinder master file book, for any loss, destruction, or damage beyond repair of any cylinder, fitting or equipment resulting from any cause after delivery to the Buyer. In case of damage permitting repairs, Buyer agrees to pay the actual cost of repair incurred by Seller plus cost of transportation and any other charges. Failure to return any cylinder after ninety (90) days shall be deemed to be a loss within the meaning of paragraph 5. No claim that cylinders have been returned by Buyer will be valid unless Buyer holds a valid signed receipt on the form provided by Seller evidencing such return. The refilling of cylinders by another supplier without Seller's written consent is prohibited, a violation of law, and a breach of this agreement.
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> "6. It is agreed that, until all cylinders loaned by the Seller to the Buyer are returned to Seller, any loss or damage except ordinary wear and tear to such cylinders or to any part or accessory thereof, are assumed by Buyer even though such loss or damage is attributable to an act of God or other catastrophic occurrence. The quantity of cylinders and applicable rental charges set forth on Seller's monthly rental statement shall be conclusively presumed to be correct unless, with respect to any such monthly statement, Buyer shall notify Seller in writing, within thirty (30) days of receipt thereof, that Buyer disputes the correctness thereof and sets forth in such notice, in reasonable detail, the facts upon which dispute is based. Until such cylinders are returned or until the cylinders are paid for if lost, Buyer shall be responsible for payment of rent on the cylinders and compounded Finance Charges on any unpaid rental charges, charges for lost cylinders, charges for product, and unpaid Finance Charges.
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> "7. Payment of Cylinder Rental invoices acknowledges that the total cylinders shown in Buyer's possession on the date shown is correct. Buyer therefore agrees that if legal proceedings are insitututed [sic] to collect charges for lost cylinders, proof of cylinders shipped and returned need only commence with the last Cylinder Rental Invoice which was paid in full."

Petitioner noted that the one customer who rented empty cylinders on a monthly basis

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[3]The quoted language appears in the record in a rider attached to the petition (and is also repeated in petitioner's brief). While actual invoices carrying such language were not offered in evidence, there does not appear to be any dispute that such language in fact appears on petitioner's cylinder rental invoices.

(IBM) was charged the same cylinder rental fees as were petitioner's other customers. Petitioner also noted that approximately 5% of its gas sales were not sales of gas contained in petitioner's cylinders (i.e., a customer would bring in its own cylinders for fill-up). In these instances, petitioner charged the same price for the gas as was charged for gas delivered in petitioner's cylinders.

During the year immediately preceding the start of the period in question here, the Division had assessed sales tax liability against petitioner with respect to cylinders petitioner was acquiring as part of its bulk sale acquisition of another entity. Petitioner notes, and placed in the record evidence to support, the Division's withdrawal of such assessment upon the conclusion that petitioner was purchasing such cylinders for resale via re-rental. In turn, petitioner maintains that the Division must be "judicially estopped" from changing its position and assessing tax as it has herein. Petitioner also maintains, in any event (assuming tax is due and estoppel does not apply), that penalties are inappropriate and must be abated given the Division's change of position.[4]

The specific documentary evidence submitted in connection with the prior period assessment and petitioner's estoppel claim is as follows:

(a) A March 20, 1984 notice of determination assessing tax in the amount of $21,000.00 against petitioner for the sales tax quarterly period ended November 30, 1983. This notice also includes the assessment of interest but not penalty.

(b) A petition challenging the above notice of determination together with attached documents setting forth petitioner's claim that its purchase of gas cylinders (as part of its bulk acquisition of another company, Airgenics Industries, Inc.) was made with the intent to rent such cylinders to its customers on a monthly basis in the regular course of its

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[4]Finding of Fact "10" from the Administrative Law Judge's determination was specifically omitted from the Tribunal's Findings of Fact, presumably because such finding was not germane to deciding the cylinder rental issue. In that such finding is relevant to the issues herein, it is included as a fact.

cylinder rental business.

(c) A letter dated November 29, 1984 indicating that the case was scheduled for a pre-hearing conference on January 10, 1985 before the conference unit of the former State Tax Commission's Tax Appeals Bureau.

(d) Letters dated January 16, 1985, January 18, 1985 and January 23, 1985, from the Division, the prehearing conferee and petitioner's representative, respectively, together with executed withdrawal of petition forms. Taken together, these documents show that based on the Division's research, including a review of Matter of Albany Calcium Light Co. v. State Tax Commn. (44 NY2d 986, 408 NYS2d 333), and information submitted by petitioner's counsel at conference, the Division accepted that the gas cylinders in question had been purchased for resale, and that tax assessed thereon would be (and was) cancelled.

With regard to its estoppel claim, petitioner argues that the Division has taken a position which is totally inconsistent with its earlier decision to cancel the assessment of tax on gas cylinders purchased. Specifically, petitioner maintains:

> "We relied on what [the Division] did in 1983, and I think we had a right to rely on it. And I think when they withdrew that position that they had taken and entered into that agreement on that case, they frustrated, in a sense, our right to get a ruling on this issue from the Division of Tax Appeals or from some other adjudicatory agency or court. And, then, they turned around and for the same period of time, they just took the same position all over again."[5]

Petitioner raised no specific argument(s) challenging the imposition of penalty. Petitioner does, however, argue that the assessment has no basis in law or fact, and is requesting the imposition of costs and attorneys fees against the Division.

CONCLUSIONS OF LAW

A. There remain two issues to be decided in this case, to wit, (a) whether the Division

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[5] In fact, the earlier bulk sale assessment was for the period ended November 30, 1983, while the assessment herein commences with the period ended November 30, 1984. Thus, the Division did not change its position for the same period.

should be estopped from assessing tax against petitioner and (b) whether the imposition of penalty should be sustained. As to the former issue, the well-established general rule is that the doctrine of estoppel does not apply to governmental acts "absent a showing of exceptional facts which require its application to avoid a manifest injustice" (Matter of Harry's Exxon Service Station, Tax Appeals Tribunal, December 6, 1988, citing Matter of Sheppard-Pollack, Inc. v. Tully, 64 AD2d 296, 298, and Matter of Turner Construction Co. v. State Tax Commn., 57 AD2d 201, 203, 394 NYS2d 78). The doctrine should be applied with the "utmost caution and restraint" and only in situations where a "profound and

unconscionable injury" has resulted from reliance upon the government's action (see, Schuster v. Commr., 312 F2d 311, 317). This general rule is particularly applicable with respect to the Division, for public policy favors full and uninhibited enforcement of the Tax Law (Matter of Glover Bottled Gas Corp., Tax Appeals Tribunal, September 27, 1990; Matter of Turner Construction Co. v. State Tax Commn., supra, 394 NYS2d at 80). With reference to tax matters, the court in Schuster v. Commr. (supra) stated as follows:

> "It is conceivable that a person might sustain such a profound and unconscionable injury in reliance on the Commissioner's action as to require, in accordance with any sense of justice and fair play, that the Commissioner not be allowed to inflict the injury. It is to be emphasized that such situations must necessarily be rare, for the policy in favor of an efficient collection of the public revenue outweighs the policy of the estoppel doctrine in its usual and customary context" (id., at 317).

B. In order to determine whether there should be an estoppel, the Tax Appeals Tribunal has utilized a test which asks if there was a right to rely on the Division's representation, whether there was such reliance and whether the reliance was to the detriment of the party who relied upon the representation (see, Matter of Harry's Exxon Service Station, supra). As set forth in the record of this case, petitioner's estoppel argument is not entirely clear. However, it appears as though petitioner claims the Division's decision to cancel and not pursue its assessment of tax on petitioner's prior bulk sale acquisition of cylinders was an action upon which petitioner was entitled to rely for purposes of any future acquisition of cylinders. The inference following would be that petitioner did rely on such determination in not paying tax

with regard to the cylinders at issue in this proceeding, and that in the face of such circumstances, sustaining the subject assessment and requiring petitioner to pay tax would constitute an unwarrantable, unconscionable and profound detriment to petitioner.

C. Based on the facts of this case, application of the doctrine of estoppel is not warranted. In fact, the estoppel argument here is somewhat similar to that raised in Matter of Maximilian Fur Co. (Tax Appeals Tribunal, August 9, 1990). In Maximilian, the petitioner claimed its reliance upon a conferee's determination in a prior audit that certain export certificates were satisfactory proof of delivery of items outside of New York State should estop the Division's assessment of tax for a subsequent period where the petitioner continued to use the same form of export certificate. The Tribunal rejected the petitioner's claim, holding that a conferee's determination is not binding on the Division for all subsequent disputes involving the same parties and issues. The Tribunal went on to state that the petitioner also failed to establish its actual reliance on the conferee's determination in the prior audit as the basis for its continued delivery practices (i.e., using the same export certificates), and finally that the petitioner had failed to show that manifest injustice would result unless estoppel was applied.[6]

In contrast to Maximilian, the Division here voluntarily cancelled its prior assessment against petitioner, based on its review of the existing case law in comparison to information supplied by petitioner's counsel at a conference (see, Finding of Fact "11[d]"), and did so before the conferee rendered a determination. Petitioner offers no authority nor is any apparent (especially in light of the Tribunal's holding in Maximilian) in

support of the claim that such a cancellation binds the Division to the same position for future periods. To accept petitioner's claim would, at best, compel the Division to continue to adhere to what it considers to be an erroneous prior decision for no better reason than simple

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[6]On this latter point, the Tribunal rejected the petitioner's claim that reliance on the conferee's determination as to export certificates allowed the petitioner not to obtain and keep supplementary out-of-state delivery records.

consistency. In addition, there is no claim of actual reliance causing petitioner to change, as opposed to simply continuing with, its business practices with regard to cylinder acquisitions. The nearest argument in this regard is that petitioner might have changed its practices, but that petitioner's reliance on the Division's cancellation deprived petitioner of its right to proceed through full adjudication of the cylinder rental issue for the prior period (and thus deprived petitioner of ultimately determining whether any change was needed). This claim, however, must be balanced against the fact that the Division's cancellation allowed petitioner the immediate benefit of paying no tax on its bulk sale acquisition of cylinders.

It is important to bear in mind the result of this case. Simply put, petitioner is being required to pay tax held lawfully due on its acquisition of certain items of tangible personal property. Given that the same conclusion might well have been reached had the prior assessment been carried through to final adjudication (the risk of loss always inherent in litigation), it cannot be said that petitioner acted in reliance on the Division's prior cancellation in such a manner as to have suffered an unwarrantable and unconscionable subsequent loss. In fact, if either party can be said to have been damaged, it would be the Division which by its own act gave up the ability to collect tax for the earlier period. Accordingly, the elements of estoppel have not been met in this case and petitioner has not established entitlement to application of the doctrine as required to avoid a "manifest injustice".

D. While it would be inappropriate to cancel the assessment of tax herein based on the doctrine of estoppel, it is appropriate to abate penalty. In this regard, petitioner's nonpayment of tax upon its acquisition of cylinders in this case is a supportable position in light of the Division's prior conclusion that petitioner was acquiring cylinders for the purpose of rerental and hence would be entitled to the resale exclusion based thereon. In fact, the relevance of such prior cancellation to the issue of penalty herein was admitted to by the Division's representative during colloquy regarding admissibility of evidence relating to the earlier period cancellation (see, Transcript of Proceedings, 9/21/92 at pp. 20, 21). Finally, it is of some note that no penalty was assessed on the prior period notice (see, Finding of Fact "11[a]"). All of these

factors, taken together, support abatement of penalty (cf., Matter of BAP Appliance Corp., Tax Appeals Tribunal, June 22, 1989).

E. While not specifically indicated as an issue remaining, petitioner's claim for costs and attorneys' fees under the New York State Equal Access to Justice Act (CPLR art 86) has been raised. However, petitioner offers no theory or explanation under which an administrative proceeding in the Division of Tax Appeals would be included within the definition of an "action" under which fees and expenses may be recovered per CPLR article 86 (see, CPLR 8602[a]). Further, petitioner does not point to any other authority in CPLR article 86, under Tax Law § 2000, et seq. or elsewhere providing for the imposition of costs or fees by the Division of Tax Appeals. In fact, petitioner's only argument is that costs and fees are appropriate because it has been required to twice defend against an assessment "without basis in law or fact." This argument must be rejected given that the Tribunal has sustained the assessment of tax against petitioner on cylinder acquisitions as valid. Accordingly, petitioner's request for costs and fees is rejected.

F. The petition of AGL Welding Supply Co., Inc. is granted to the extent indicated in Conclusion of Law "D"; the notices of determination dated May 2, 1989 are to be modified to reflect the elimination of penalties (thus serving to cancel the one notice which assesses omnibus penalty only); and, except as so granted, the petition is denied.

DATED: Troy, New York
June 9, 1994

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE