STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SCHENECTADY TURBINE SERVICES, LTD.	:	DETERMINATION DTA NO. 809757
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Year Ended January 31, 1978.	:	

Petitioner, Schenectady Turbine Services, Ltd., R.D. #2, Route 50, Ballston Spa, New York 12020, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal year ended January 31, 1978.

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 May 11, 1992 at 9:15 A.M., with post-hearing documents to be submitted by June 30, 1992 and post-hearing briefs to be submitted by September 1, 1992. Petitioner, appearing by Ertel, Kristel and Sicilia, P.C. (Daniel Ertel, C.P.A.), submitted a brief on June 22, 1992. The Division of Taxation, appearing by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel), submitted post-hearing documents on June 30, 1992, followed by a brief on August 20, 1992. Petitioner submitted a reply brief on September 1, 1992.

ISSUES

I. Whether the Division of Taxation had agreed to waive penalties imposed against petitioner for the fiscal year ended January 31, 1978 in exchange for petitioner's payment of interest due on its late payment of tax due for such year.

II. Whether, if such an agreement existed, the Division of Taxation must be estopped in its assertion of such penalties.

III. Whether, assuming no agreement was made and estoppel does not apply, petitioner is entitled to a refund of its interest payment, followed by issuance of a Notice of Deficiency for

interest and penalty such that petitioner may then challenge both the interest and penalty portions of such a deficiency.

IV. Whether, assuming proper assertion of penalties has been made, petitioner has nonetheless established sufficient basis to excuse its late filing and late payment for the fiscal year at issue thereby warranting abatement of the penalties in question.

FINDINGS OF FACT

Petitioner, Schenectady Turbine Services, Ltd., is a wholly-owned subsidiary of Charlton Industries, Inc. ("Charlton"). Petitioner is engaged in the business of selling new and used turbine parts.

On or about April 17, 1984, following an Internal Revenue Service ("IRS") audit examination, Charlton received an IRS examination report reflecting and explaining proposed deficiencies in tax for each of its fiscal years ended January 31, 1977 through January 31, 1981, inclusive. Charlton apparently disagreed with the results of the audit examination for at least some of the years audited, as reflected by the IRS's June 30, 1985 issuance of a Notice of Deficiency to Charlton asserting additional tax due for the fiscal years ended January 31, 1977, 1979, 1980 and 1981.[1]

In turn, this asserted deficiency was resolved on December 29, 1986, via a Tax Court approved negotiated settlement between the IRS and Charlton.

Upon receiving information from the IRS that Charlton's Federal taxable income had been changed for the FYE 1977 through 1981, the Division of Taxation ("Division") issued a letter to Charlton on June 10, 1987, requesting that such Federal changes be reported to New York State on the requisite Form CT-3360 ("Report of Change of Federal Taxable Income"). When no response was received, a second, similar letter, dated January 8, 1988, was also sent to petitioner. Again, there was no response from either Charlton or from petitioner.

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[1]The term "fiscal year (or years) ended" is sometimes abbreviated hereinafter as "FYE".

Since no response had been received with regard to either of the above letters, an assessment was issued against Charlton on March 17, 1988, seeking corporation franchise tax due, as based on the Federal changes, from Charlton.[2]

Thereafter, on or about December 21, 1989, Forms CT-3360 for the FYE January 31, 1977 through January 31, 1980 were filed with the Division on behalf of petitioner, Schenectady Turbine Services, Ltd. These forms were accompanied by full payment of the tax computed as due thereon, together with a letter dated December 21, 1989 advising the Division that its assessment against Charlton should properly be imposed against petitioner. Petitioner's Form CT-3360 filed for the FYE January 31, 1978 reflects tax due to New York State (based on the Federal changes) in the

amount of $106,963.00.[3] This form lists, on its face, May 28, 1985 as the "date of notice of final Federal determination." A copy of the final Federal adjustments for the FYE January 31, 1978 was not attached to Form CT-3360 as offered in evidence.

Since the Federal changes had not been reported to New York State within 90 days of final Federal determination, the Division determined that penalties for late filing and negligence, and interest based on late payment of tax, were owed. In turn, a Statement of Audit Adjustment dated July 9, 1990 was issued to petitioner, reflecting for the FYE January 31, 1978 interest due in the amount of $219,783.71, plus penalties due in the aggregate amount of $30,989.00. The amounts of interest and penalties shown represent amounts calculated after allowing petitioner credit for the $106,963.00 tax amount paid with Form CT-3360, as well as

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[2]A copy of the "assessment" issued to Charlton is not included in the record. However, correspondence offered in evidence by both parties clearly references the issuance of an "assessment" against Charlton on March 17, 1988 (see Exhibits "H", "6").

[3]It is noted that the FYE January 31, 1978 was not included on the June 30, 1985 IRS Notice of Deficiency. However, the IRS examination report in evidence shows a disallowed partnership loss for Charlton's FYE January 31, 1978, as well as a tax deficiency of $1,181,971.00 for such year (see Exhibit "7").

other adjustments not relevant here. The Statement of Audit Adjustment also specified that the penalties in question were those provided for under Tax Law § 1085(a) and (b) (late filing and negligence).

On July 19, 1990, a Notice of Deficiency was issued to petitioner. This notice pertained to petitioner's FYE January 31, 1978 and asserted penalties due in the amount of $309.89 plus interest due in the amount of $2,204.46.

The Division alleges that the July 19, 1990 Notice of Deficiency, described above, corresponds to the July 9, 1990 Statement of Audit

Adjustment, also described above, noting that these documents bear matching assessment numbers (C900709130N). However, the Division maintains that the July 19, 1990 Notice of Deficiency is facially incorrect as the result of a key punching error. More specifically, the Division alleges that the last two digits of the actual amounts due as shown on the July 9, 1990 Statement of Audit Adjustment were accidentally eliminated, with the decimal point moving two places to the left thereby resulting in the July 19, 1990 Notice of Deficiency reflecting much lower amounts than were in fact due.[4] The Division's apparent error was corrected on its accounts receivable system by way of July 20, 1990 adjusting entries to the penalty and interest amounts shown on the Notice of Deficiency, such that the adjusted totals were revised to $30,989.00 for penalty and $219,783.71 for interest (i.e., the accounts receivable system was adjusted to re-enter the amounts as shown on the July 9, 1990 Statement of Audit Adjustment).

On August 29, 1990, petitioner paid in full the aggregate amount of penalty and interest ($2,514.35) shown on the July 19, 1990 Notice of Deficiency.

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[4]The difference between the interest amounts on the Statement of Audit Changes versus the Notice of Deficiency, according to the Division, represents the increase or accumulation of interest between the July 9, 1990 date of the Statement of Audit Adjustment and the July 19, 1990 date of the Notice of Deficiency, during which time the amount of accumulated interest apparently increased from $219,783.71 to $220,446.00 (such latter figure reflects correction of the decimal point placement).

On or about November 20, 1990, the Division issued to petitioner a Notice and Demand for Payment of the interest and penalty allegedly

remaining due, as corrected, in the amount of $259,151.05.[5] Petitioner was also contacted by Division employee Lorraine Alford, and was advised that a balance was still due for the fiscal year in question, consisting of interest in the amount of approximately $230,000.00, plus penalties of approximately $31,000.00. Ms. Alford was referred to petitioner's representative, Daniel Ertel, C.P.A. According to Mr. Ertel, he suggested that petitioner would pay the interest amount allegedly due if, in return, the Division would agree to waive the penalties. By a letter dated December 21, 1990, Ms. Alford advised Mr. Ertel of the basis upon which penalties were assessed, noting that said penalties "stand as assessed."

On February 6, 1991, Ms. Alford issued a letter to petitioner's representative, Mr. Ertel, responding to his letter of December 26, 1990 (such December 26, 1990 letter is not a part of the record herein). Ms. Alford's letter notes that the Division had no record of receiving any payments or reports (of Federal changes) from petitioner concerning the Federal adjustments prior to petitioner's December 21, 1989 filing of Forms CT-3360. This letter details the bases upon which interest and penalties were imposed. There is no mention in Ms. Alford's February 6, 1991 letter of an agreement to abate penalty based on petitioner's payment of interest amounts.

Included in evidence is a letter dated February 15, 1991 from Mr. Ertel to one Charles Mothon.[6] This letter makes reference to the matter at issue, including statements of the amount

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[5]A copy of this Notice and Demand could not be located by the Division and is, consequently, not included among the documents in evidence. However, there appears to be no dispute between the parties that such Notice was issued to and received by petitioner (see Exhibit "N"; see also, petitioner's reply brief, p. 4).

[6]Charles Mothon is apparently an officer or employee of either petitioner or its parent, Charlton.

of interest and penalty at issue as of the date of the letter. Mr. Ertel's letter also states, in separate paragraphs, that the State had agreed to waive the penalties and that:

> "I believe that payment of the 1/31/79 and 1/31/80 liabilities, excluding the penalties, and getting a receipt for full payment for these years, will formalize the State's agreement to waive the penalties for all years."

On February 27, 1991 petitioner, by its representative, Mr. Ertel, delivered a payment to the Division in the amount of $230,051.66, representing interest alleged to be due for petitioner's FYE January 31, 1978. Accompanying this payment was a letter, dated February 27, 1991, in which petitioner's representative stated:

> "The taxpayer waives its right to Notices of Deficiency [for the years 1/31/78 and 1/31/81], and makes full payment thereof, based on the abatement of the assessed penalties" (emphasis added).

By a letter dated April 5, 1991, the Division replied to petitioner's February 27, 1991 letter and payment. The Division's letter describes the foregoing background regarding issuance of a Statement of Audit Adjustment, issuance of a mathematically erroneous Notice of Deficiency, correction thereof via accounts receivable adjusting entries, and issuance of a Notice and Demand for the corrected balance of interest and penalty due. The Division's letter also notes petitioner's payment of the July 19, 1990 Notice of Deficiency, and goes on to provide as follows:

> "[a]s the notice and demand does not avail you of petition rights, we are cancelling the notice and demand and issuing a notice of deficiency for January 31, 1978 for which you will have 90 days to file a petition."

The letter also provides, with regard to the issue of abatement of the penalty, as follows:

> "since the information you recently submitted has not changed the facts as originally presented, we cannot recommend the abatement of penalties that were assessed against Schenectady Turbine Systems [sic], Ltd."

As promised in its April 5, 1991 letter, the Division issued a second Notice of Deficiency to petitioner for the fiscal year ended January 31, 1978. This notice, dated April 19, 1991, asserts penalty due in the amount of $30,989.00 together with accrued interest thereon in

the amount of $1,041.00 resulting in an asserted total amount due of $32,030.00. The Division also issued a Statement of Audit Adjustment, dated April 19, 1991, providing information regarding the manner in which the dollar amount asserted as due by the Notice of Deficiency was calculated, as follows:

"Balance Due $32,030.00

Explanation	
Deficiency per 3360	$106,963.00
Amount credited from 1/77 3360	3,666.00
Adjusted deficiency	103,297.00
Interest from 4/15/78 to 12/27/89	209,568.00
Penalty (30%)	30,989.00
Total	343,854.00
Amount paid with 3360	106,963.00
Amount paid with 3360 for 1/77	387.00
Deficiency (interest & penalty)	236,504.00
Plus interest to 8/29/90	15,746.00
Total	252,250.00
Less amount paid on 8/29/90	2,514.00
Balance	249,736.00

Interest to 2/27/91	12,331.00
Total	262,067.00
Less amount paid on 2/27/91	230,052.00
Balance	32,015.00
Interest to 4/19/91	15.00
Net deficiency (interest & penalty)	32,030.00

"The above deficiency is based on the CT-3360 filed less any payments made through 2/27/91.

"Penalty is due based on Article 27 of the NYS Tax Law Sections 1085(a) & (b)."

As shown on the above calculations, credit was allowed for the ($230,052.00) interest payment made by petitioner on February 27, 1991, thus leaving only penalty, together with accrued interest thereon, asserted as due per the April 19, 1991 Notice of Deficiency.

By a letter dated May 3, 1991, the Division advised Mr. Ertel of its position that no agreement to waive penalties had been reached with respect to petitioner's case. This letter goes on to advise petitioner's representative that a request for refund (of its interest payment) might be undertaken by the filing of Form CT-8 ("Claim For Credit or Refund").

Petitioner has not paid the balance shown as due on the April 19, 1991 Notice of Deficiency, nor has petitioner filed a claim for refund for any of the payment amounts, including interest, made to date. Petitioner did, however, file a petition contesting the second (April 19, 1991) Notice of Deficiency.

SUMMARY OF THE PARTIES' POSITIONS

The Division argues first that petitioner has provided no reasonable explanation as to why a Form CT-3360 was not filed to report the Federal change to taxable income for the fiscal year at issue within 90 days of finalization of such change. Thus, the Division maintains that penalties imposed are appropriate and should be sustained. Petitioner, by contrast, alleges that reasonable cause to abate such penalties exists, in that the Division has provided no evidence that the Form CT-3360 was filed more than 90 days after finalization of a Federal change for the FYE January 31, 1978, or that a Federal audit change was, in fact, ever made for the FYE January 31, 1978. This statement is apparently premised on the fact that the December 29, 1986 Tax Court approved settlement makes no reference to the FYE January 31, 1978, and that such

year is not included on the Federal Notice of Deficiency. Petitioner also argues that because the alleged late filing of the Form CT-3360 was not directly petitioner's fault but rather was admittedly due to "oversight" by its representative, and that because the Division cannot firmly establish the date by which any such filing was due and, finally, because petitioner upon learning of the alleged required filing acted in a responsible manner and filed Form CT-3360, sufficient grounds exist to abate the penalties based on reasonable cause.

Petitioner also argues that the Division's issuance of a Notice of Deficiency on April 19, 1991 represents vitiation of an implied agreement whereunder petitioner voluntarily rendered payment of interest allegedly due on the condition that the Division would waive penalties for the FYE January 31, 1978. Petitioner maintains that the Division's acceptance of petitioner's February 27, 1991 "voluntary" payment of interest allegedly due must therefore estop the Division from imposing or collecting penalties. Petitioner asserts that any other conclusion denies petitioner its right to a Notice of Deficiency and its accompanying right to contest an asserted deficiency prior to payment. Petitioner goes on to allege that the Division is at least required to refund the February 27, 1991 interest payment pending issuance of a Notice of Deficiency for such amount. Petitioner argues that, although there is no formal writing between the parties memorializing an agreement to abate or not impose penalties, an implied agreement to that effect was created by the Division through its acceptance of petitioner's "voluntary" payment of interest.

The Division disputes petitioner's claim that there existed an agreement to abate penalties, whether premised upon "voluntary" payment of interest, or otherwise. The Division also argues that petitioner's position, if based on the theory of estoppel, should be rejected. The Division maintains that it defies common sense to accept that petitioner did not understand that amounts in excess of those shown on the July 19, 1990 Notice of Deficiency were owed. The Division further points out that petitioner never alleged that tax for the fiscal year ended January 31, 1978 was not owed, or that Federal changes were reported and tax was paid in a timely manner. In this vein, the Division points out that the amount of tax paid equalled the

amount shown on the Form CT-3360 as filed by petitioner, and that interest owing was in turn computed on such amount. The Division argues finally that petitioner's claim that there may never have been a Federal change for 1978 is entirely unbelievable, pointing out not only that Exhibit "7", presented in evidence by petitioner, indicates the Federal deficiency for such year but also that petitioner's representative herein participated as petitioner's representative in the IRS audit through the time of the Tax Court approved disposition of the matter. As to detrimental reliance, the Division notes that petitioner's payment of interest on February 27, 1991 in fact minimized petitioner's potential interest liability and therefore benefited, as opposed to caused detriment, to petitioner.

CONCLUSIONS OF LAW

A. Tax Law § 211(1) imposes a duty upon every taxpayer required to file a report under Article 9-A of the Tax Law to transmit whatever reports, facts and information the Commissioner of Taxation may require for the administration of Article 9-A. Tax Law § 211(3) states that a taxpayer whose taxable income has been changed or corrected by the IRS must report the change or correction to the Division within 90 days after the final determination of such change or correction. Under this authority, the former State Tax Commission duly promulgated 20 NYCRR 6-3.1(b), which provides in relevant part:

> "A change in Federal taxable income must be reported on Form CT-3360. Form CT-3360 must be accompanied by a copy of the revenue agent's report and copies of all other pertinent information.

B. Tax Law § 1085(a) and (b) impose penalties upon a taxpayer for failure to file a return in a timely manner and for negligence. These penalties may be abated upon a showing that the failures in question were "due to reasonable cause and not due to willful neglect." The standard to be applied under this circumstance is set forth in 20 NYCRR former 46.1(d)(4), which defines "reasonable cause" as:

> "Any . . . cause . . . which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause."

C. In this case, Form CT-3360 reporting the Federal change to petitioner's taxable

income for the fiscal year ended January 31, 1978 was not filed in a timely manner. Petitioner's representative raises an argument that there might not have been a Federal change for the year at issue (apparently in reference to the fact that the FYE January 31, 1978 was not included on the IRS June 30, 1985 Notice of Deficiency [see Finding of Fact "2"]). However, petitioner's own Exhibit "7" provides evidence of a disallowed partnership loss for 1978 as well as a $1,181,971.00 deficiency for such year per the IRS examination report. There is no specific explanation as to why the IRS Notice of Deficiency did not include 1978. It may be that petitioner agreed with and did not contest the proposed Federal adjustment for such year. In this regard, Form CT-3360 as filed by petitioner reports a liability for the FYE January 31, 1978 based on a Federal change and specifies, on its face, May 28, 1985 as the date of notice of final Federal determination. Since the IRS Notice of Deficiency was issued on June 30, 1985 and included all of the fiscal years examined save for the FYE January 31, 1978, the most reasonable assumption is that the audit change(s) for the FYE January 31, 1978 was agreed to and finalized, as listed, on May 28, 1985, and thus the FYE January 31, 1978 was not included on the IRS Notice of Deficiency. While the record does not disclose how the changed New York tax liability was computed (perhaps involving carrybacks/ carryforwards from the other deficiency years), it remains that petitioner calculated and reported a change for the FYE January 31, 1978 and paid the tax due in connection therewith. Given these actions, coupled with the fact that petitioner's representative participated in the IRS audit from which the changes resulted, it is simply implausible to accept that there was no change in Federal taxable income for the FYE January 31, 1978. Form CT-3360 filed for such year lists the date of final Federal determination as May 28, 1985, yet such determination was not reported to New York State until December 21, 1989, some four and one-half years later. There is no evidence of any reporting of the Federal change prior to December 21, 1989. Thus, Form CT-3360 was clearly late filed and the Division was entitled to impose interest and penalties against petitioner.

D. Treated next is the claim of an agreement whereunder petitioner would pay interest due in return for which the Division would not impose penalties. While petitioner asserts the

Division made and then breached such an agreement, the evidence falls short of establishing that such an agreement was in fact made. There is no unequivocal statement in writing evidencing such agreement, nor is there compelling testimony in the same vein. The correspondence between the parties indicates at best petitioner's representative's belief that interest payment would avoid penalties, versus the Division's position that the facts would not support non-imposition or abatement. Specifically, the testimony by petitioner's representative as well as the correspondence in the record reveals that he "believed" the "Division would agree" even though he understood the agent with whom he spoke did not have the authority to abate penalty. In short, the evidence does not support the existence of a bilateral understanding upon which petitioner relied to its detriment (compare, Matter of Kayton Specialty Shop, Tax Appeals Tribunal, January 17, 1991; see also, Matter of Harry's Exxon, Tax Appeals Tribunal, December 6, 1988). Any detriment here resulted from petitioner's own late-filing actions and its own misplaced reliance or hope for abatement.

E. Turning to the procedural morass presented herein, the starting point for unraveling the same is petitioner's filing of Form CT-3360 accompanied by the payment of tax with respect to Federal changes for the FYE January 31, 1978. The amount of tax calculated and paid has not been challenged by petitioner (except to the extent raised and dismissed in Conclusion of Law "C"). Pursuant to Tax Law § 1082(a)(2), the admitted tax liability amount is deemed assessed on the date the Form CT-3360 is filed (here December 21, 1989).[7] Left thereafter, however, was interest due, plus penalties the Division sought to impose. Tax Law §§ 1084(a) and 1085(a)(1) and (b) provide, respectively, for the imposition of the interest and penalties in question here. In turn, Tax Law §§ 1084 (f) and (g) (relating to interest and interest on penalties), and 1085(h) (relating to penalties) provide that interest and penalties are assessed in the same manner as tax (i.e., deemed assessed on the date the return or report [here Form CT-

[7]In this case, the Division did not issue to petitioner a Notice of Additional Tax Due per Tax Law § 1081(e)(1), most probably because payment of the amount of tax shown as due accompanied the late filing of Form CT-3360, hence leaving no tax due.

3360] is filed). Tax Law § 1092(b) (relating to the collection of tax, penalties or interest) calls for payment of such amounts upon the Division's giving the taxpayer notice and demand therefor. In simplest terms, upon petitioner's late filing of Form CT-3360 with payment of tax, the Division was entitled to issue a Notice and Demand for the interest and penalties assessed and at issue, in essence billing petitioner for such amounts, and thereafter proceed to collection. In turn, since petition rights do not accompany notices and demands for assessed amounts (compare, Tax Law §§ 1081[b], 1082[a] and 1089[b] with Tax Law § 1092[b]; cf., Matter of Dreisinger, Tax Appeals Tribunal, July 20, 1989), petitioner would have had to pay the amounts of penalties and interest assessed and thereafter timely file a claim for refund in order to challenge the same.

F. The foregoing procedure (Notice and Demand, payment, claim for refund) did not occur. Instead, on July 9, 1990, the Division apprised petitioner of the interest and penalties it considered due via issuance of a

Statement of Audit Adjustment. Thereafter, on July 19, 1990, the Division issued to petitioner a Notice of Deficiency for interest and penalties. As described in Findings of Fact "6", "7" and "8", this notice indicated amounts much lower than those shown on the Statement of Audit Adjustment. According to the Division's explanation, this situation resulted from a keypunching error as described. In light of the evidence offered, including specifically the accounts receivable computer printout (Exhibit "N") showing adjusting (correcting) entries made one day after issuance of the Notice of Deficiency, and also noting the dollar amounts in comparison to each other,[8] it becomes clear that the Notice of Deficiency as issued was erroneous in its dollar amounts. For its part, petitioner paid the amounts shown on the July 19, 1990 Notice of Deficiency promptly, and thereafter neither filed a claim for refund nor

[8]Comparing the dollar amounts of interest and penalties shown on the Statement of Audit Adjustment, the July 19, 1990 Notice of Deficiency and the adjusting entries on the accounts receivable printout, strongly supports the Division's explanation of the error (see Finding of Fact "8").

otherwise challenged the accuracy or finality of such amounts. In light of the dollar amounts shown on the July 9, 1990 Statement of Audit Adjustment, the dollar amount of tax due and paid late with the Form CT-3360, the period of time between the year at issue (FYE January 31, 1978) and the date of payment of tax with Form CT-3360 (December 21, 1989) during which period interest would accrue, and the fact that petitioner's representative was at all times involved in the Federal and State controversies, it would be entirely unreasonable to accept and conclude that petitioner believed its liability was limited to the amount shown on the July 19, 1990 Notice of Deficiency. Rather, it would

seem that petitioner made the decision to pay such amount in the hope that the Division would not detect or correct its error, or pursue petitioner further for the balance of penalties and interest deemed assessed and due and owing as of the filing date of petitioner's Form CT-3360. However, the Division did discover its error, apprise petitioner of the same and, on November 20, 1990 issued to petitioner a Notice and Demand for the balance due (allowing credits for payments made).

G. After issuance of the Notice and Demand, the parties exchanged various correspondence including, on February 27, 1991, a letter from petitioner's representative accompanied by payment of the amount of interest due. Petitioner argues that such correspondence together with the Division's acceptance of the interest payment created an implied agreement by which penalties assessed would be abated. This argument has been rejected, however, as described in Conclusion of Law "D". In sum, petitioner paid the assessed interest accrued over the period up to its filing of Form CT-3360. Petitioner has offered no challenge to the accuracy of the interest amount calculation, nor has petitioner pointed to any authority by which interest properly assessed could be abated or how, absent the filing of a timely claim for refund, such issue might be addressed. Left then, after payment of the interest, was the matter of unpaid outstanding assessed penalties plus interest thereon, as shown on the November 20, 1990 Notice and Demand.

H. After receiving petitioner's interest payment and exchanging additional correspondence, the Division cancelled the unpaid portion of the November 20, 1990 Notice and Demand and issued to petitioner a Notice of Deficiency on April 19, 1991 (sometimes referred to as the "second" Notice of Deficiency). According to the Division's correspondence, this was done specifically in order to afford petitioner protest rights with regard to the penalties, an avenue of redress not available vis-a-vis a Notice and Demand. As discussed in Conclusion of Law "E", the tax, penalties and interest herein were deemed assessed upon the filing of Form CT-3360, and thus the Division was under no obligation to issue petitioner a Notice of Deficiency, with attendant hearing rights, versus proceeding directly to issuance of a Notice and Demand and pursuing collection activities. Thus, petitioner's claim that it would not have paid interest but would have awaited a Notice of Deficiency so that it could protest both interest and penalty ignores the fact that interest and penalties were already assessed at the time of petitioner's "voluntary" payment and incorrectly assumes the Division would have been obligated to issue a Notice of Deficiency to petitioner.[9]

I. Assuming, without deciding, that the Division was not prohibited from issuing a Notice of Deficiency, leads to the question of whether petitioner has suffered any harm under the facts of this case.[10] In

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[9]In view of this conclusion, petitioner's characterization that it waived its right to a Notice of Deficiency overlooks the fact that petitioner was not, under these circumstances, entitled to receive a Notice of Deficiency.

[10]There appears to be no direct bar to the Division's issuance of a Notice of Deficiency under these facts, noting only that such issuance by the Division in effect serves to grant a taxpayer greater rights (i.e., petition rights) than are available with respect to a Notice and Demand. In the same vein, the restriction that the Division may issue only one Notice of Deficiency applies only if a petition has been filed (see, Tax Law § 1089[d][1], [4]). Since no petition contesting the July 19, 1990 Notice of Deficiency was filed, the Division was not precluded from issuing the second (April 19, 1991) Notice of Deficiency. Finally, Tax Law § 1082(d) allows for the issuance of supplemental assessments where any assessment is imperfect or incomplete in any respect. Given that the interest and penalties herein were deemed assessed, as explained (notwithstanding use of a Notice of Deficiency on July 19, 1990), supports the Division's issuance of the November 20, 1990 Notice and Demand correcting the dollar amount errors on

practical terms, the opposite has occurred and petitioner has been afforded the opportunity to exercise rights not available under a Notice and Demand. Specifically, petitioner has been given the right to protest and obtain administrative adjudicatory review without first paying the amounts assessed and initiating a claim for refund. Not only has petitioner enjoyed this right with regard to the penalties (per the April 19, 1991 Notice of Deficiency), but also with respect to penalties and interest (per the July 19, 1990 Notice of Deficiency). In the latter instance, while the dollar amounts set forth on the Notice of Deficiency were less than the amounts assessed, there is no indication that a protest to such notice would have involved any different bases argued for relief than would have been the case if the correct dollar amounts had been shown. In any event, petitioner did not exercise any protest rights under the July 19, 1990 Notice of Deficiency (see Conclusion of Law "F"). In addition, petitioner was specifically advised by Division correspondence dated May 3, 1991 (Exhibit "K") of its right to challenge the February 27, 1991 interest payment via the filing of a claim for refund (Form CT-8). Petitioner apparently chose not to file such a claim. Finally, petitioner was issued the April 19, 1991 Notice of Deficiency and has exercised its right to protest as granted thereunder (as discussed, a right petitioner was not entitled to receive absent the Division's issuance of a Notice of Deficiency). Thus, petitioner has been afforded full protest rights without fulfilling any precondition of

paying the assessed amounts as would be required if the Division had simply issued a Notice and Demand. Therefore, it cannot be said that petitioner has suffered any harm, but rather has benefited from the course of circumstances described above.

J. As to petitioner's February 27, 1991 payment of interest, there is no evidence from which to conclude that the same was not due or that the calculation thereof was in any manner erroneous. In fact, the tax due was paid late (with the filing of Form CT-3360), but the amount

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the July 19, 1990 Notice of Deficiency.

thereof is not challenged. Hence, interest due on such late payment simply follows as a mathematical computation. Although advised of the right to file a claim for refund challenging its payments, petitioner has not done so. While petitioner spoke at hearing of challenging interest, no basis for such a challenge is apparent. In any event, without challenge to the amount of underlying tax and with no challenge to the lateness of its payment, there is no apparent reasonable basis upon which to challenge the interest due thereon, nor is there any provision of law authorizing its waiver or abatement. Finally, petitioner's claim that its interest payment should be refunded and that a Notice of Deficiency should be issued for such amount is rejected (see Conclusion of Law "H").

K. Turning finally to the question of penalty (addressed herein under protest rights arising from the Division's issuance of the April 19, 1991 Notice of Deficiency), petitioner alleges abatement should be allowed. However, the facts do not warrant such relief. First, there is no question that filing and payment was not timely made. In fact, filing did not occur until some four and one-half years after the reported finalization date of the Federal changes, and not until after Division inquiries went unanswered and an assessment was issued against petitioner's parent. Petitioner noted that penalties imposed by the IRS were waived. However, such penalties followed Federal audit disallowances and were not, like here, imposed for petitioner's failure to timely report and pay as a result of the Federal changes (i.e., this is not a question of petitioner's failure to timely file and pay in the first instance, nor a question as to the manner in which petitioner's returns themselves were filed). Finally, oversight on petitioner's representative's part, though perhaps inadvertent and certainly unfortunate, is not grounds for abatement.

L. The petition of Schenectady Turbine Services, Ltd. is hereby denied and the Notice of Deficiency dated April 19, 1991 is sustained.

DATED: Troy, New York
March 25, 1993

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE