STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
NEW YORK FUEL TERMINAL CORP.	:	AMENDED DETERMINATION DTA NOS. 811653 AND 811678
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.	:	

Petitioner, New York Fuel Terminal Corp., 251 Lombardy Street, Brooklyn, New York 11222, filed petitions 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.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 18, 1993 at 1:15 P.M., with all briefs submitted by March 14, 1994. Petitioner appeared by Diane J. Moffet, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

ISSUES

I. Whether petitioner was entitled to a hearing where the assessment document it protested was a Notice and Demand for Payment of Sales and Use Taxes Due based upon a return filed by petitioner without remittance of the tax stated as due and owing.

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

III. 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

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 in Finding of Fact "3" 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 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.
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> "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.
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> "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 . . .'

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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.

"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]

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

[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.

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 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.

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

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 in Finding of Fact "6".

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that it should not be penalized for failing to protest the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated January 31, 1990, because it arose from the same transactions which gave rise to a motor fuel tax assessment which was timely petitioned by petitioner. Petitioner reasons that the Division should have known that it contested the sales tax liability resulting from the same transactions.

Petitioner also contends that it should not be prohibited from taking a credit for bad debts despite the lack of a provision for such a credit with regard to sales tax on motor fuel in Tax Law § 1120. Petitioner argues that the sales tax provisions of Tax Law §§ 1132 and 1139 and the regulations promulgated thereunder apply to the instant circumstances and entitle it to a credit or refund.

Finally, petitioner asserts that penalties should be abated because the issue of taking a credit for bad debts is one of first impression in the area of motor fuel and it therefore established reasonable cause for the abatement of penalties.

Further, petitioner asserts that it relied on the professional advice of its accountants in deducting the sales taxes associated with bad debts and therefore believes that it has established additional reasonable cause for abatement of penalties.

The Division believes that petitioner self-assessed sales tax on motor fuel in its FT-945 for the month of January 1991, with which it only remitted $117,320.18, $300,000.00 less than the amount stated as due and owing. Petitioner was sent a bill, a Notice and Demand for

Payment of Sales and Use Taxes Due, requesting payment of the additional self-assessed tax. The Division contends that petitioner has no right to hearing before the Division of Tax Appeals on the tax assessed.

The Division also argues that petitioner is not entitled to claim a credit for bad debts on its Report of Sales Tax Prepayment on Motor Fuel because (a) the tax for which it seeks a credit was already determined fixed and final and (b) there is no provision for a credit for bad debts pursuant to Tax Law § 1120.

Finally, the Division believes that petitioner has not established reasonable cause for the abatement of penalty. It argues that NYFT's reliance on its accountants was not in good faith and petitioner had tried to claim the credit for bad debts in April of 1989, but said claim was rejected at that time as well. Therefore, petitioner was on notice of the Division's position prior to the year in issue.

CONCLUSIONS OF LAW

A. With regard to the first matter in dispute, DTA No. 811653, the issue is whether the Division of Tax Appeals has jurisdiction to hear the merits of the matter.

The facts establish that petitioner filed a Form FT-945, Report of Sales Tax Prepayment on Motor Fuel, for January 1991 in which it stated that its total prepayment due was $422,244.89, less credits for sales to exempt purchasers or out-of-state deliveries of $342.00 and other credits or casualty losses of $4,582.71, for a net prepayment due of $417,320.18. Petitioner remitted only $117,320.18. The report did not state any credit claimed for "bad debts".

By Notice and Demand for Payment of Sales and Use Taxes Due, dated March 27, 1991, the Division requested the $300,000.00 in self-assessed tax set forth on the FT-945 filed for January 1991, together with penalty and interest. Said demands are issued where a return is filed but the amount of tax stated thereon was not paid with the filing of the return (see, 20 NYCRR former 535.6 [in effect for the period in issue, repealed, effective April 1, 1992]).

Petitioner was required to file a monthly return accompanied by the prepaid tax stated

thereon on or before the 20th day of each month (see, Tax Law § 1102; 20 NYCRR 561.3[a][3]). Further, Tax Law § 1137(e)(1) provides, in part, as follows:

> "The amount so payable to the tax commission for the period for which a return is required to be filed shall be due and payable to the tax commission on the date limited for the filing of the return for such period . . . ."

Petitioner never addressed the issue of its nonpayment of the prepaid tax, thereby relying on the arguments set forth in its petition. Unfortunately, the arguments therein rely upon a misinterpretation of the source of the tax assessed. Further, petitioner alleged in the petition that it claimed credits for bad debts on the January 1991 FT-945, which, in fact, it did not. Petitioner also advances the argument that its "credit" taken for bad debts was a reasonable construction and therefore penalty should be abated. Given petitioner's misinterpretation of the circumstances regarding the notice and demand, assessment number S9103270032, its arguments are without merit.

Petitioner filed its request for a conciliation conference to contest the notice and demand, issued as a result of its failure to remit tax with its FT-945 for the period ended January 31, 1991. Although, until recently, petitioner would not have been entitled to a hearing on the merits of this matter (see, Matter of Hall v. New York State Tax Commn., 108 AD2d 488, 489 NYS2d 787 [the court reaffirmed the holding of the Court of Appeals in Matter of Parsons v. State Tax Commn. (34 NY2d 190, 356 NYS2d 593), stating that where a correct and sufficient return was filed, but no payment made, Tax Law § 1138, among other statutes, does not confer administrative jurisdiction on the State Tax Commission to recover the unpaid taxes]), it appears that the Appellate Division, Third Department, has ruled that petitioner does have that right (see, Matter of Meyers v. Tax Appeals Tribunal, ___ AD2d ___ [July 28, 1994]). Therefore, the Division of Tax Appeals does have jurisdiction to hear this matter with regard to the tax due.

However, as mentioned above, 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. Even if it were assumed the issue could be raised for the first time on appeal in

response to the notice and demand, 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 for Payment of Sales and Use Taxes Due, assessment number S900131250C.[5] Petitioner conceded that it did not petition the assessment (see, Finding of Fact "11") which became irrevocably fixed after 90 days pursuant to Tax Law § 1138(a)(1) and which petitioner partially paid by check on December 21, 1990.

Tax Law § 1139(c) (refunds) states, in pertinent 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."

Therefore, based upon the instant circumstances, petitioner would not have been entitled to a credit even if the issue was found to be properly justiciable.

With regard to the penalty imposed, petitioner asserted that its argument for a claim of credit (not set forth on its FT-945 for January 1991) based upon its bad debts was a reasonable interpretation, supported by statute, and it therefore has established reasonable cause for the abatement of penalty. Additionally, petitioner asserts that the bad debts issue is one of first impression and that it relied on the expert advice of accountants in filing its returns as it did.

Tax Law § 1145(a)(1) provides for the imposition of penalty on any person failing to file a return or to pay or pay over any tax within the time required. Tax Law § 1145(c) provides for the imposition of a penalty equal to the amount of tax which was to have been prepaid in accordance with the provisions of Tax Law § 1102, where the return was not filed or tax required to be prepaid was not so paid within the time limits set forth in Article 28. Both of the preceding sections provide that if the Tax Commission determines that the failure to file the

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[5]See also the discussion of the same issue which arose in a subsequent assessment in Conclusion of Law "B" below.

return or pay over the tax was due to reasonable cause and not willful neglect, all or part of the penalty may be remitted. The regulation promulgated pursuant to Tax Law § 1145(a) at 20 NYCRR 536.5 provides for the abatement of penalty where a taxpayer demonstrates that its failure to file a return or pay the tax due, or prepaid tax due in the case of motor fuel, was due to reasonable cause and not willful neglect.

Petitioner highlighted 20 NYCRR 536.5(c)(5), which provides that reasonable cause can also include any other cause for delinquency 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.

The difficulty with petitioner's arguments with respect to the report filed for January 1991 is that petitioner never claimed the credit for bad debts for that period and, therefore, has not demonstrated a reasonable cause for its failure to pay the tax it stated was due on the report.[6]

It is determined that petitioner owes the penalty assessed by notice number S9103270032.

B. The second petition filed by NYFT challenged two assessments, S910604950C and S910424951C. With regard to assessment number S910424951C, there was a jurisdictional problem related to petitioner's claim for credit based on the Tunyung Oil Corporation sales. Regardless of the validity of the argument that the bad debts should have been allowed as credits, it remains that petitioner first claimed these credits on its April 1989 Report of Sales Tax Prepayment on Motor Fuel. Simultaneously with the filing of its April 1989 FT-945, petitioner applied for a credit or refund of sales taxes in the sum of $28,909.28. These two actions were taken prior to petitioner taking a judgment against Tunyung Oil Corporation.

The Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for April 1989 which was based upon a desk audit of petitioner's April 1989 FT-945. The notice stated that the liability was due to a disallowance of the bad debts taken as

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[6]Please note that penalty is sustained on this notice on the narrow grounds that the credits were not taken, thereby leaving no basis for abatement of the penalties asserted. Conclusion of Law "E" below deals with the penalty issue in greater detail where the issue of bad debts was determined.

credits against the tax due.

Although petitioner weakly raises an issue of receipt, it can be safely assumed from its December 21, 1990 letter to Tax Compliance that it had received the notice by that time and conceded its liability for the tax and interest by its payment of $415,592.69 on the same date. It disputed the

penalty assessed and filed a petition for conciliation conference and subsequently, on December 2, 1991, a petition for hearing on the issue of the penalty assessed pursuant to notice number S900131250C. That case was assigned DTA No. 810253, now pending in the Division of Tax Appeals.

Petitioner further conceded that it had never petitioned the sales tax assessment number S900131250C; rather it contends that the petition it filed in response to a separate notice on January 30, 1990 should be held to constitute a protest of the notice issued the following day. This argument fails on numerous grounds. First, petitioner did not submit any evidence of another assessment or its petition filed in response thereto. Based upon the chronology of events, any petition filed prior to the issuance of the notice was premature and would not be valid (see, Matter of Yegnukian, Tax Appeals Tribunal, March 22, 1990; Matter of West Mountain v. Dept. of Taxation & Fin., 105 AD2d 989, 482 NYS2d 140, affd 64 NY2d 991, 489 NYS2d 62). Even assuming petitioner received the notice when it conceded it had received it in its December 21, 1990 letter, it failed to file a petition within 90 days of said assumed receipt date, and the notice, number S900131250C, became irrevocably fixed and final, pursuant to Tax Law § 1138(a)(1). Where date of mailing is not or cannot be established, the date of receipt or delivery may be used as the date from which to count the 90-day period for filing a petition (see, Matter of Avlonitis, Tax Appeals Tribunal, February 20, 1992; Matter of Kimmey, Tax Appeals Tribunal, December 23, 1993). Since petitioner herein did not file a petition within 90 days from December 21, 1990, the assessment for the period April 1989 became irrevocably fixed and final.

Therefore, petitioner was not entitled to claim the same credits on its November 1990 FT-945 and in its application for refund dated December 20, 1990 previously disallowed by the Division and which became fixed by reason of petitioner's failure to timely file a petition within 90 days of receipt (see, Tax Law § 1139[c], set forth in pertinent part above in Conclusion of Law "A"). Assessment number S910424951C is sustained together with the penalty and interest imposed.

With regard to assessment number S910424951C, penalty is sustained because petitioner merely disregarded the prior disposition and disallowance of the credits taken and, therefore, failed to timely pay the tax when due as required by Tax Law § 1145(a)(1) and 20 NYCRR 536.1(b).

C. The second assessment in issue in the petition with DTA No. 811678, notice number S910604950C, related specifically to the disallowance of a credit in the sum of $192,785.68, which was based on a bad debt arising from transactions with Decopen Enterprises, Inc. in July and August 1990. This disallowance resulted in additional tax due of $148,120.68 for the month of February 1991.

The issue with regard to the credit taken for the period February 1991 is whether a credit for bad debts may be claimed against sales tax prepayments on motor fuel.

Tax Law § 1102 was enacted as part of a comprehensive proposal to enhance enforcement of the motor fuel and sales and use taxes. Although section 1102 was specifically enacted to provide for prepayment by distributors of the sales tax upon the importation, manufacture or sale of motor fuel, it was part of a greater scheme to protect the State and local revenues derived from petroleum taxes and an effort by the government to protect the legitimate businessmen competing with those selling untaxed gasoline. Specifically, the effort was aimed at defeating a scheme utilized by less than scrupulous distributors "whereby, through a complicated chain of paper transactions, the tax imposed was not paid over (the so-called 'daisy chain') and the existence of a pattern of bootleg importation of gasoline into the State on which no taxes were paid" (Letter of Tax Commission, April 12, 1985, Governor's Bill Jacket, L 1985,

ch 44).

There is no direct mention of credits allowed against the prepaid tax in Tax Law § 1102. However, Tax Law § 1119(a) was amended by the Laws of 1985 (ch 44) to restore the refund and credit provisions with respect to motor fuel. Additionally, the same enactment added Tax Law § 1120 to provide for refunds and credits with respect to motor fuel in specific instances (see also, 20 NYCRR 561.9). The regulation at 20 NYCRR 561.10, entitled "Refund and credits allowable", sets forth the credits allowable to sellers and users of motor fuel, to wit: a credit to the extent that prepaid tax paid or passed through to it exceeds the amount of sales tax required to be collected and paid over to the Department upon the retail sale of the fuel; a credit of prepaid tax paid on the purchase of motor fuel it sells at retail to purchasers who are not required to pay sales tax on retail purchases of motor fuel; a credit for prepaid tax paid on motor fuel it sells for immediate export from New York State without passing the prepaid tax through to the purchaser; and a claim for credit of the prepaid tax paid by a person required to pay use tax against the amount of use tax owing on said fuel (Tax Law § 1120; 20 NYCRR 561.10[a][1]-[4]).

The Division based its disallowance of petitioner's claim for credit on the fact that bad debts were not included in the provisions of Tax Law §§ 1119 or 1120 and the regulations at 20 NYCRR 561.10 which delineated certain refunds and credits permitted against the tax required to be prepaid pursuant to Tax Law § 1102.

Petitioner argues that the sale of motor fuel should be equated with the sale of all other tangible personal property and subject to the same provisions of article 28 of the Tax Law, most specifically the refund and credit provisions relative thereto, which have been interpreted to include bad debts such as those claimed by petitioner (see, Tax Law § 1132[e]; 20 NYCRR 534.7). However, there are very sound reasons for finding to the contrary.

First, Tax Law § 1119(a) was amended in 1985 by the Legislature to restore the refund and credit provisions to those in effect prior to the 1982 amendments to the sales tax with respect to motor fuel. The same enactment added Tax Law § 1120 to provide for refunds and

credits with respect to motor fuel (see, L 1985, ch 44). Clearly, the Legislature acted to add provisions for refunds and credits with respect to motor fuel which did not exist in the law previously, as petitioner's argument would have one believe. The fact that Tax Law § 1120 does not list bad debts as a basis for credit or refund against the sales tax on motor fuel is an indication that its exclusion was intended (McKinney's Cons Laws of NY, Book 1, Statutes § 74). Further, it is generally considered that where a law expressly describes a particular thing to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded (McKinney's Cons Laws of NY, Book 1, Statutes § 240).

Additionally, it is important to view the enactment of the amendment to Tax Law § 1119(a) and the creation of Tax Law §§ 1102 and 1120 as provisions which must be read and construed together to determine the true legislative intent (McKinney's Cons Laws of NY, Book 1, Statutes § 97). The enactment in issue (L 1985, ch 44) was enacted to impose Article 12-A motor fuel tax and require the prepayment of State and local sales taxes at the time the motor fuel was imported into or caused to be imported into New York State. Therefore, the Legislature differentiated between the payment of tax on the sale of tangible personal property generally (see, Tax Law § 1137) and the payment of tax on the importation of motor fuel. Similarly, it 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). Given the rules of construction discussed above, it would frustrate the legislative intent to provide specific provisions for the refunds or credits with respect to motor fuel if one were to accept petitioner's argument to expand those instances where a credit or refund is permitted. It is determined that Tax Law § 1120, as part of the enactment of Laws of 1985 (ch 44), 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.

D. It is noted that the Form FT-945, Report of Sales Tax Prepayment on Motor Fuel, provides for certain credits to be deducted from the total sales tax prepayment. The form

specifically provides for credit for sales to exempt purchasers or out-of-state deliveries (both provided for in Tax Law § 1120) and also for "other" credits including casualty losses. The instructions for said form[7] indicate that a credit will be allowed to the extent of the amount of tax prepayment on motor fuel lost due to evaporation or other causes, including casualty losses (lost or destroyed

due to an accident [like fire] which occurs when the motor fuel is being held or transported for sale other than at retail). Neither evaporation nor casualty loss is provided for in the statutes at Tax Law § 1120 or in the regulations at 20 NYCRR 561.10. However, irrespective of whether there is statutory or regulatory authority for these credits on FT-945, it does not form the basis for expanding the provisions of the law or regulations to include bad debts within the meaning and intent of Laws of 1985 (ch 44) (Tax Law § 1120) or the regulations promulgated thereunder (20 NYCRR 561.10).

E. Petitioner argues that penalty should be abated because this is a case of first impression and it relied on the expert advice of its accounting professionals in taking the position it did in this matter. At the very least, petitioner believes that penalty should be abated based upon its showing of reasonable cause. Petitioner relies upon 20 NYCRR 536.5(c)(5) which states, in pertinent part, as follows:

> "Any other cause for delinquency 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."

Petitioner's arguments fail for several reasons. It is well established that reliance on a tax advisor does not necessarily constitute reasonable cause for the remission of penalties (see, Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557; Matter of LT & B Realty v. State Tax Commn., 141 AD2d 185, 535 NYS2d 121). In order to establish reasonable

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[7]Official notice is taken of the instructions pursuant to State Administrative Procedure Act § 302.

cause, the reliance itself must be reasonable (Matter of BAP Appliance Corp., Tax Appeals Tribunal, June 29, 1989). In evaluating whether the reliance was reasonable, the taxpayer is required to show that he acted with ordinary business care and prudence in attempting to ascertain his tax liability (Matter of A & V Crown, Tax Appeals Tribunal, May 24, 1990). Petitioner must also demonstrate that the advice came from a competent tax advisor (id.). In this instance, the record does not contain any evidence that would establish that it was reasonable for petitioner to rely on its accountants. Therefore, petitioner has not shown that its failure to pay the tax was due to reasonable cause.

It is of no import that the issue was one of first impression. The fact of the matter is that petitioner has chosen to interpret the laws and regulations in a rather novel fashion, but one which does not comport with the clear and unambiguous language of the statute or the legislative intent. It has been held:

> "The failure to pay a tax due to a different legal interpretation of a statute need not be considered 'reasonable cause'. In fact, if it were so considered, [the Commissioner] would rarely if ever be entitled to levy such penalties" (Matter of Auerbach v. State Tax Commn., Sup Ct, Albany County, July 7, 1987, Williams, J., affd 147 AD2d 390, 536 NYS2d 557).

Petitioner claims that it claimed the credit essentially because it did not interpret the laws and regulations in a manner consistent with the Division. However, as stated above, this is not reasonable cause for the abatement of penalty. Therefore, the Division's imposition of penalty in this matter is determined to have been proper.

F. The petitions of New York Fuel Terminal Corp. are denied and the Notice and Demand for Payment of Sales and Use Taxes Due, dated March 27, 1991, is sustained with respect to the penalties only as discussed in Conclusion of Law "A", and the notices of determination and demands for payment of sales and use taxes due, dated April 24, 1991 and

June 4, 1991, are hereby sustained.

DATED: Troy, New York
October 20, 1994

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE