STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AGL WELDING SUPPLY CO., INC.	:	DECISION DTA No. 807194
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.	:	

Petitioner AGL Welding Supply Co., Inc., 600 Route 46 West, P.O. Box 1707, Clifton, New Jersey 07015, and the Division of Taxation each filed an exception to the determination on remand of the Administrative Law Judge issued on June 9, 1994. Petitioner appeared by Orbe, Nugent & Darcy, Esqs. (John F. Darcy, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Petitioner and the Division of Taxation each filed a brief on exception. The six-month period to issue this decision began on November 18, 1994, the date by which petitioner or the Division of Taxation could have submitted a reply brief. Both petitoner's and the Division of Taxation's requests for oral argument were denied.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

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]

We find the facts as determined by the Administrative Law Judge in his determination on remand. These facts are set forth below.

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 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.

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[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.

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 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

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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.

[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.

> 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.
>
> "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 (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]

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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.

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 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 pre-hearing 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.

OPINION

The Administrative Law Judge rejected petitioner's claim of estoppel against the Division finding that the elements of estoppel have not been met in this case.

The Administrative Law Judge determined, however, that:

> "it is appropriate to abate penalty [in that] 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 . . . . All of these factors, taken together, support abatement of penalty (cf., Matter of BAP Appliance Corp., Tax Appeals Tribunal, June 22, 1989)" (Determination, conclusion of law "D").

On exception, petitioner asserts that the Administrative Law Judge, in preparing his determination on remand, erred in finding the facts as modified by the Tribunal. Petitioner reasserts its position that the estoppel doctrine is properly applicable in this case and, in response to the Division's exception, that the Administrative Law Judge properly abated penalty.

On exception, the Division asserts that the Administrative Law Judge erred in abating penalty and that he was correct in determining that the doctrine of estoppel was not applicable.

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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.

We deal initially with petitioner's assertion that the Administrative Law Judge, in preparing his determination on remand, erred in finding the facts as modified by the Tribunal. Petitioner asserts that such action "removes the impartiality and independence of the ALJ on remand. This is most significant when the Tribunal's change has actually distorted the facts in the record, i.e., a customer who receives a cylinder on the 24th of the month will, as of the 25th of the month, be charged rental for a full month even though he only had the cylinder in his possession for one day" (Exception, ¶ 1).

We do not agree.

First, in our decision, we modified the facts found by the Administrative Law Judge to reflect the information on the invoices submitted at hearing by petitioner. In brief, the issue was whether the gas cylinders owned and rented by petitioner were purchased exclusively "for resale," thus rendering these purchases exempt from sales tax, or whether some or all of the cylinders were used incidentally by petitioner in rendering a taxable service, i.e., the selling of gas. The critical question was whether petitioner's customers were required, under all factual circumstances, to pay a separate rental fee for the cylinders or whether the possibility existed that customers could return the cylinders without having to pay any rental fee for their use. This possibility was pivotal in Matter of Valley Welding Supply Co. v. Chu (131 AD2d 917, 516 NYS2d 366), where the Court concluded that the petitioner could not demonstrate that all of its cylinders were purchased exclusively for resale.

In his determination, the Administrative Law Judge concluded that petitioner showed all the cylinders were purchased for resale. Our review of the actual invoices produced by petitioner indicated a contrary result. We modified finding of fact "5" of the determination of the Administrative Law Judge by inserting the following chart to indicate the results of our review.

	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

Based on our review, we concluded that:

> "the table illustrates that 37 cylinders were received during this month-long cycle. However, petitioner collected a fee for only the 21 cylinders in the customer's possession on April 25, 1986. This arrangement resulted in the customer having use of 16 cylinders during this period without charge. Because of this fact, together with the contract term present in this case, we hold that all of petitioner's purchases during the period at issue were not exclusively for the purpose of resale (Matter of Micheli Contr. Corp. v. New York State Tax Commn., 109 AD2d 957, 486 NYS2d 448; Matter of Valley Welding Supply Co. v. Chu, supra). Moreover, because petitioner's cylinders were apparently used interchangeably and petitioner failed to demonstrate what portion, if any, of its cylinders were used exclusively for resale purposes, we conclude that the purchases of all the cylinders at issue were subject to sales tax (see, Matter of Valley Welding Supply Co. v. Chu, supra, 516 NYS2d 366, 368)" (Matter of AGL Welding Supply Co., Tax Appeals Tribunal, April 28, 1994).

Second, this case was remanded to the Administrative Law Judge to deal with two issues he did not deal with in his determination, i.e., estoppel and abatement of penalty. The modified finding of fact had nothing to do with either of these issues, but dealt with the substantive issue of whether the cylinders were purchased exclusively for resale. Moreover, even if it was relevant to the issues remanded to the Administrative Law Judge, our modified finding of fact would bind the Administrative Law Judge (Tax Law § 2006[7]; 20 NYCRR 3000.11). In short, petitioner's assertion concerning the impairment of the impartiality of the Administrative Law Judge is totally without merit.

We deal next with petitioner's assertion that the Administrative Law Judge erred in finding that the doctrine of estoppel was not applicable.

The crux of petitioner's assertion is that petitioner:

> "was entitled to rely upon and did detrimentally rely upon the Division of Taxation's prior audit concluded in 1985 where the Division agreed that Petitioner's daily use of cylinders in its business activities fell within an exception to the sales and use tax imposed under Tax Law Articles 28 and 29. First and foremost, requiring the Petitioner to pay back taxes equivalent to approximately forty-five thousand dollars ($45,000.00) almost ten years later, is a surprising and unwarranted intrusion into their business practice based on the prior proceeding. Second, if the Tax Division had forewarned Petitioner of the possible tax implications of their known business practice, the company could have changed its business practices to include the cost of a sales or use tax on its acquisition of the cylinders. When the Division suddenly changed its position and imposed tax on Petitioner, the adverse effect on Petitioner was inevitable. There can be no doubt that the imposition of this sales and use tax will severely injure Petitioner's business operations" (Petitioner's brief, pp. 5-6).

Petitioner distinguishes this case from Matter of Maximilian Fur Co. (Tax Appeals Tribunal, August 9, 1990), relied upon by the Administrative Law Judge, stating that here:

> "the Division did not settle the case but rather totally withdrew its assessment and claim and abandoned its position, conceding that it was wrong on the facts and on the law. At a minimum, one would expect, applying a standard of fundamental fairness, that the Division would give the taxpayer reasonable advance notice of a change in its substantive position. Certainly, in light of these facts, Petitioner was justified in relying on the Division's determination" (Petitioner's brief, p. 8).

We affirm the determination of the Administrative Law Judge.

In order for the doctrine of estoppel to be applicable, petitioner must show that it was entitled to rely on the Division's cancellation of the assessment for a prior audit period; that, in fact, there was such reliance; and that such reliance was to the detriment of petitioner (Matter of Harry's Exxon Serv. Sta., Tax Appeals Tribunal, December 6, 1988).

We reject petitioner's assertion that it was entitled to rely on the Division's cancellation of the assessment in the pre-hearing conference procedure under the former State Tax Commission for the prior audit period. First, nothing in the regulations establishing that procedure provides a basis for us to conclude that the action of the Division or petitioner with respect to the audit period at issue therein is binding on subsequent periods. In this context, the Administrative Law Judge properly relied on Matter of Maximilian Fur. Co. (supra) for guidance in this case. In Maximilian, the taxpayer asserted that it relied to its detriment upon a conferee's determination in a pre-hearing conference proceeding under the former State Tax Commission

for a prior audit. Our review of the statutory and regulatory framework concerning the pre-hearing conference procedure indicated that its purpose was to provide the taxpayer and the Division with a means of settling their disputes expeditiously and inexpensively, without the formality of the full hearing process. We found no basis to conclude that the conferee's determination was intended to be binding on the Division for subsequent disputes concerning the same parties and the same issues. "To argue that the disposition of a prior conference is binding upon the [Division] as petitioner does here, in light of the settlement nature of the conference proceeding and in the absence of any statutory or regulatory authority, strains logic and common sense" (Matter of Maximilian Fur. Co., supra). In the instant case there is no order by the conferee but instead a cancellation of the assessment by the Division. In our view, however, that does not alter the basic nature of the pre-hearing conference procedure, i.e., to settle disputes. As in Maximilian, we find nothing in this case to lead us to conclude that the Division's cancellation of the assessment and the taxpayer's withdrawal of its petition for the prior audit period as the result of a pre-hearing conference has any implication for the periods at issue here.

Second, the effect of petitioner's assertion is that the Division cannot, because of its cancellation of the assessment for the prior period, take into account facts determined in a subsequent audit. We cannot agree. Two factors are relevant to determining the taxable status of petitioner's purchases: the facts surrounding the transactions and the applicable law. If the relevant facts change from a prior audit period to a subsequent period, then the law as applied to those facts may render a different result concerning the taxability of the transactions.

The nub of the matter in this case is that the cylinders had to be purchased exclusively for resale in order to be exempt from tax (Matter of Albany Calcium Light Co. v. State Tax Commn., supra). In the prior period, the Division made the decision to cancel the assessment based on the application of the law to the facts as it understood them at the time, i.e., that the cylinders acquired by petitioner were acquired exclusively for resale. On the subsequent audit, the Division found that the cylinders were not acquired exclusively for resale and, thus, were

not exempt from tax. In other words, the Division found different facts. Case law is clear that taxing authorities may take into account a variety of factors in determining the application of the tax law to specific transactions and may alter interpretations of the tax law prospectively (Matter of National Elevator Indus. v. New York State Tax Commn., 49 NY2d 538, 427 NYS2d 586) and, under certain circumstances, retroactively (Matter of Varrington Corp. v. City of New York Dept. of Finance, 85 NY2d 28, ___ NYS2d ___; Matter of American Tel. & Tel. Co. v. State Tax Commn., 61 NY2d 393, 474 NYS2d 434). Clearly, the Division can take into account these facts in determining whether the purchases were taxable.

Since petitioner did not have the right to rely upon the results of the pre-hearing conference for the prior audit period, petitioner's estoppel argument fails. However, in order to provide a full record in this matter, we will deal with whether petitioner has shown detrimental reliance on the actions of the Division. The Administrative Law Judge determined that:

> "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.
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> "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'" (Determination on remand, conclusion of law "C").

Petitioner takes issue with the Administrative Law Judge's determination that: "there [was] no actual claim of reliance causing Petitioner to change, as opposed to simply continuing

with, its business practices with regard to cylinder acquisitions." Petitioner asserts that this observation by the Administrative Law Judge is inconsistent with the facts found by the Administrative Law Judge and that "[t]he implication that simply continuing one's practices does not rise to the level of reliance defies common sense. If the Division had not conceded the facts and the law in the prior matter, Petitioner would have changed its business procedure to pay tax when it itself purchased or rented cylinders for resale, and then passed this cost of doing business onto its customers in the form of an increased re-rental price to them" (Exception, ¶ 2).

We agree with petitioner that its continued purchase of the cylinders without payment of sales tax may reasonably be attributed to its reliance on the cancellation of the assessment by the Division. We also agree with petitioner that such reliance was detrimental in that petitioner did not, because of such reliance, alter its business practice and pay tax on the purchase of the cylinders and pass the cost onto its customers. The payment of the tax now clearly has an unexpected economic impact on petitioner for which it has not had the opportunity to plan because of its reliance on the prior pre-hearing conference results. However, as we noted, this detrimental reliance is not relevant since petitioner has not shown that it had the right to rely on the pre-hearing conference.

We deal next with petitioner's assertion that "it is entitled to an award for the costs to defend itself in this proceeding" under Article 86 of the CPLR (Petitioner's brief, p. 10).

In his determination on remand, the Administrative Law Judge rejected petitioner's argument on the basis that:

> "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" (Determination, conclusion of law "E").

On exception, petitioner asserts that:

> "[a]s a matter of simple deduction, an administrative proceeding should be encompassed by the statute. An administrative action is a litigated matter in which a party is required to defend himself. Here, Petitioner has been called forth in a 'civil proceeding' before an administrative judicial officer and the Tax Appeals Tribunal, to defend an 'action' commenced by the 'state,' the Division of Taxation. Consequently, Petitioner is entitled to attorney's fees and costs pursuant to the New York Equal Access to Justice Act, CPLR 8600" (Petitioner's brief, p. 10).

We find petitioner's argument to be without merit.

Article 86 is intended to "create a mechanism authorizing the recovery of counsel fees and other reasonable expenses in certain actions against the state of New York, similar to the provisions of federal law contained in 28 U.S.C. § 2412(d) and the significant body of case law that has evolved thereunder" (CPLR § 8600).

Section 8601(a) deals with when awards under the act can be made. It provides, in relevant part, that "a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust" (CPLR § 8601[a]).

Taking the key terms of the statute sequentially, we make the following observations: 1) The Tax Appeals Tribunal is an administrative agency of the State of New York, it is not a "court" within the purview of section 8601(a); 2) Petitioner is not a "prevailing party" and, thus, does not come within the purview of the statute; 3) The term "action" means "any civil action or proceeding brought to seek judicial review of an action of the state as defined in subdivision (g) of this section, including an appellate proceeding, but does not include an action brought in the court of claims" (CPLR § 8602[a]). Petitioner offers no reason for us to conclude that the term "judicial review" as used in section 8601(a) includes the hearing and administrative appeal functions carried out by the Division of Tax Appeals/Tax Appeals Tribunal. In this context, we note that Tax Law § 2016, entitled "Judicial review," provides that decisions of the Tribunal are final unless the taxpayer "petitions for judicial review in the manner provided in article seventy-eight of the civil practice law and rules." We suspect that this is the type of "judicial review" contemplated by the statute; and 4) Petitioner offers no

reason as to why the position of the Division was not "substantially justified." On this point, we refer petitioner to Pierce v. Underwood (487 US 552).

We deal finally with the issue of whether the Administrative Law Judge erred in abating penalty. The Administrative Law Judge dealt fully and correctly with this issue and we affirm his determination for the reasons stated in his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of AGL Welding Supply Co., Inc. is denied;

2. The exception of the Division of Taxation is denied:

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

4. The petition of AGL Welding Supply Co., Inc. is granted to the extent indicated in conclusion of law "D" of the Administrative Law Judge's determination on remand; and

5. The notices of determination dated May 2, 1989 are to be modified to the extent indicated in conclusion of law "F" of the Administrative Law Judge determination on remand, but are otherwise sustained.

DATED: Troy, New York
May 11, 1995

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner