STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

**GLOVER BOTTLED GAS CORP.**

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

In the Matter of the Petition

of

**BOTTLED GAS SERVICE, INC.**

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

DECISION

In the Matter of the Petition

of

**NEW YORK PROPANE CORPORATION**

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

In the Matter of the Petition

of

**VOGEL'S, INC.**

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

Petitioner, Glover Bottled Gas Corp., 175 Price Parkway, Farmingdale, New York 11735, filed an exception to the determination of the Administrative Law Judge issued on December 14, 1989 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ending November 30, 1980, February 28, 1981 and May 31, 1981 (File No. 803127).

Petitioner, Bottled Gas Service, Inc., 175 Price Parkway, Farmingdale, New York 11735, filed an exception to the determination of the Administrative Law Judge issued on December 14, 1989 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ending May 31, 1977 and November 30, 1977 (File No. 803128).

Petitioner, New York Propane Corp., 175 Price Parkway, Farmingdale, New York 11735, filed an exception to the determination of the Administrative Law Judge issued on December 14, 1989 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ending February 29, 1980, November 30, 1980, February 28, 1981, May 31, 1981, August 31, 1981 and November 30, 1981 (File No. 803129).

Petitioner, Vogel's Inc., 175 Price Parkway, Farmingdale, New York 11735, filed an exception to the determination of the Administrative Law Judge issued on December 14, 1989 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ending February 29, 1980, November 30, 1980, February 28, 1981, August 31, 1981, and February 28, 1982 (File No. 803130).

Petitioners appeared by Samuel R. Dolgow, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

Petitioners filed a brief on exception. The Division did not. Petitioners' request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

## *ISSUES*

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

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

III. Whether the Department of Taxation's levy on petitioners' bank accounts without any specific notice was wrong and unfair.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except that we modify findings of fact "8" and "9" and add certain additional facts. The Administrative Law Judge's findings of fact, the modified facts and the additional facts are set forth below.

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

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

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

(a) Glover Bottled Gas Corp.

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

(b) Bottled Gas Service, Inc.

| Quarter Ending | |
|---|---|
| May 31, 1977 | Return was misplaced and not mailed. |
| November 30, 1977 | Return was misplaced and not mailed. |

(c) New York Propane Corporation

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

(d) Vogel's, Inc.

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

The Division of Taxation issued notices and demands with respect to sales and use taxes owing by the petitioners. The notices and demands for the periods at issue are not in the record.

However, petitioners concede that the last notice and demand issued was issued on May 10, 1982.[1]

We also find additional facts as follows:

> Petitioner Glover Bottled Gas Corp. sent three letters dated October 22, 1982 to the Department of Taxation requesting abatement of penalties assessed for the periods ending November 30, 1980, February 28, 1981, and May 31, 1981.
>
> Petitioner New York Propane Corporation mailed two letters dated May 12, 1982 and October 27, 1982 to the Department requesting abatement of penalties assessed
>
> for the periods ending February 28, 1980, November 30, 1980, February 28, 1981, May 31, 1981, August 31, 1981, and November 30, 1981.
>
> Petitioner Vogel's, Inc. sent two letters dated October 11, 1982 and November 22, 1982 to the Department requesting abatement of penalties assessed for the periods ending August 31, 1981, November 30, 1980, and February 28, 1981. On November 3, 1983, petitioner Vogel's mailed a two page letter to the Department requesting abatement of penalties for all three periods.

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

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

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

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

withholding quarters on the basis that petitioners had shown reasonable cause for such cancellation. The following penalties were cancelled:

***SALES AND USE TAX***

| | |
|---|---|
| Glover Bottled Gas Corp.: | Quarters ending August 31, 1981, November 30, 1981, February 28, 1982, May 31, 1982 |
| Bottled Gas Service, Inc.: | Quarter ending May 31, 1981 |
| Vogel's, Inc.: | Quarter ending May 31, 1981 |
| PCA Distributors, Inc.: (Apparently a non-petitioning affiliate) | Quarter ending February 28, 1981 |

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

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

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> On November 4, 1983, members of petitioners' staff met with Division of Taxation personnel in the Mineola District Office regarding abatement of penalties and possible claims for refund. Petitioners' representatives were told that they had "three years" in which to file a claim for refund and understood that the three years ran from the date of the levy. Petitioners' representatives were in communication with Division of Taxation personnel discussing the claims for refund throughout 1984 and until April 23, 1985.[3]

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[3] The Administrative Law Judge's finding of fact "8" read as follows:

> "On November 5, 1983, members of petitioners' staff met with Division of Taxation personnel in the Mineola District Office regarding abatement of penalties and possible claims for refund. Petitioners' representatives were told that they had "three years" in which to file a claim for refund and understood that the three years ran from the date of the levy. Petitioners' representatives were in communication with Division of Taxation personnel discussing the claims for refund throughout 1984 and until April 23, 1985."

We modified this finding of fact because the record clearly indicates that the meeting in the Mineola District Office took place on November 4, 1983 rather than on November 5, 1983.

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

> On May 28, 1985, petitioners filed applications for credit or refund of the penalties and interest obtained by the Division pursuant to the October 31, 1983 levy against the Chemical Bank accounts. The claims were denied on December 31, 1985 on two grounds:
>
> (a) that the claims had not been filed within three years of the time the tax was payable (i.e. when the notices and demands were issued) and;
>
> (b) that petitioners had not shown reasonable cause.[4]

***OPINION***

In the determination below, the Administrative Law Judge held that employees of the Division of Taxation (hereinafter the Division) do not have the authority to orally extend the time period for a taxpayer's filing of an application for a refund. Therefore, despite the fact that petitioners had communicated with the Division at various times from late 1982 to early 1985 and might, in fact, have been erroneously advised by a Division employee regarding the period for filing an application for refund, the applications dated May 28, 1985 were found to be untimely.

Even if the applications for refund had been timely filed, the Administrative Law Judge concluded that petitioners have not shown that the instances of late filing and late payment were due to reasonable cause and not willful neglect. He stated that petitioners' failures to make

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[4] Finding of Fact "9" of the Administrative Law Judge's determination read as follows:

> "9. On May 28, 1983, petitioners filed applications for credit or refund of the penalties and interest obtained by the Division pursuant to the October 31, 1983 levy against the Chemical Bank accounts. The claims were denied on December 31, 1985 on two grounds:
>
> "(a) that the claims had not been filed within three years of the time the tax was payble (i.e. when the notices and demands were issued) and;
>
> "(b) that petitioners had not shown reasonable cause."

We modified this fact to indicate that the refunds were filed on May 28, 1985, not May 28, 1983. This was apparently a typographical error in the Administrative Law Judge's determination.

timely filings and payments, while apparently attributable to problems connected with corporate acquisitions and staff turnovers, were not merely isolated aberrations, but continued for an unreasonably long period of time.

The Administrative Law Judge further determined that the fact that the Division cancelled other penalties for reasonable cause does not mean that the penalties for the quarters at issue should be cancelled as well.

On exception, petitioners state that they made numerous written demands for the abatement of penalties well before the expiration of the statute of limitations period for application of refund. They also maintain that the Division informed them that the penalties in question would be abated. They insist that but for the Division's misrepresentations, their formal applications for refund would had been filed in a timely manner.

Petitioners then argue reasonable cause exists for their failure to make timely filings and payments because their belated efforts were the consequence of rapid growth and significant personnel turnovers. Petitioners also contend that since the grounds advanced in this case for abatement of penalties were identical to those on which the Division previously found reasonable cause and granted numerous abatements, the Division was estopped from asserting that petitioners did not establish reasonable cause for abatement of the instant penalties.

Finally, petitioners argue that given their good faith efforts to cooperate with the Division in resolving outstanding tax liabilities, the Division's levy upon petitioners' bank account, without any prior notice, was wrong and unfair. Accordingly, petitioners request this Tribunal to direct the Division to return all of the withdrawn penalties.

We affirm the determination of the Administrative Law Judge for the reasons stated below.

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

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

> payable under this article . . . Such application shall be in such form as the tax commission shall prescribe. . . ."

We will first address petitioners' argument that their applications were timely even though they were filed subsequent to expiration of the three years statute of limitations. Petitioners argue that they have made numerous written demands for the abatement of penalty well before the statute of limitations period had expired and that these letters gave clear notice of their demand and the factual basis for such demands. Thus, petitioners maintain that their applications for refund should be deemed to be timely filed.

Section 1139(a) of the Tax Law requires that an application for refund be made "in such form as the [Department of Taxation] shall prescribe" (emphasis added). The use of the phrase "in such form" rather than "on such form" indicates that the application shall be made following certain procedures and format rather than being made on a specific preprinted document. More explicitly, the regulation in 20 NYCRR 534.2 states that an application for refund need only contain certain pertinent pieces of information. There is, however, no language which requires that such refund claims be made on preprinted application forms even though these forms are available from the Division (20 NYCRR 534.9).

Moreover, in determining the validity of refund claims, the federal courts have often held that a timely claim for refund can be made in an informal manner and we have applied this policy to New York taxes (Matter of Laurance B. Rand as Guardian of Hope Sayles, Tax Appeals Tribunal, May 10, 1990). An informal claim need only be a written document which adequately apprises the taxing authority that a refund is sought and the tax period in question. It must contain sufficient information to enable the taxing unit to begin an investigation of the matter, if it so chooses (Wall Industries v. United States, 10 Cl Ct 82, 86-1 USTC ¶ 9438, at 84,028; American Radiator & Std. Stationery Corp. v. United States, 318 F2d 915, 63-2 USTC 9525, at 89,179). The Supreme Court, in upholding the legal effect of informal claim for refund, wrote:

> "[A] notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not not comply with formal requirements of the statute

> and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period" (United States v. Kales, 314 US 186, 41-2 USTC ¶ 9785, at 1,041).

In this case, petitioner, Glover Bottled Gas Corp., (hereinafter Glover) received notices and demand for the periods ending November 30, 1980, February 28, 1981, and May 31, 1981. While not all the notices and demand for the periods at issue are in the record, Glover conceded that the last notice and demand was issued on May 10, 1982. The latest the penalty became payable was at the time the last notice and demand was issued. Thus, based on § 1139(a)(ii) of the Tax Law, petitioner had, at the latest, until three years from May 10, 1982 to file an application for refund.

While an informal request for refund filed within the three year statutory period may be deemed as a proper demand, § 1139(a)(ii) expressly provides that the right to request a refund can exist only if the assessed penalty has been "collected or paid". Glover wrote to the Division on October 22, 1982 requesting abatement of penalties assessed for the quarters ending on November 30, 1980, February 28, 1981, and May 31, 1981. However, at that time Glover had not paid any of the penalties assessed. Hence, it had no right under § 1139(a)(ii) of the Tax Law to demand a refund.

When the warrant was issued and the tax was levied upon Glover's bank account on October 31, 1983, the assessed tax, interest, and penalties for the three quarters had then been "collected" as provided in § 1139(a)(ii) and Glover's right to apply for refunds was simultaneously triggered. However, Glover did not make any written requests for refund subsequent to the levy and prior to expiration of the statutory period. The application for refund was not mailed until May 28, 1985, which was after the three year time period had expired. Accordingly, Glover's application for refund of the penalties relating to the three tax periods in question was untimely.

We come to the same conclusion, for the same reasons, with respect to the refund claim of petitioner, New York Propane Corporation, (hereinafter New York Propane). New York Propane wrote to the Division on May 12, 1982 and on October 27, 1982 requesting abatement

of penalties, however, New York Propane had not paid the penalties when these written requests were made. The Division issued warrants and levied on New York Propane's bank account for the amount of the assessed penalties on October 31, 1983. This payment triggered New York Propane's right to claim a refund, but no application was made until May 28, 1985. Thus, the application was untimely.

With respect to petitioner, Bottled Gas Service, Inc., (hereinafter Bottled Gas), penalties were assessed for the periods ending on May 31, 1977 and November 30, 1977. Bottled Gas also conceded that the last notice and demand for payment was issued on May 10, 1982. Thus, the latest petitioner could have filed an application for refund was on May 10, 1985, i.e., three years from the date when the penalties became payable (Tax Law § 1139[a][ii]). Bottled Gas failed to submit any written request for abatement or a demand for a refund until May 28, 1985. Hence, the application was untimely.

We reach a different result with respect to petitioner, Vogel's, Inc., (hereinafter Vogel). Here, penalties were assessed against Vogel for the periods ending August 31, 1981, November 30, 1980, and February 28, 1981. Vogel sent letters dated October 11, 1982 and November 22, 1982 to the Division requesting abatement of penalties imposed. Again, looking at § 1139(a)(ii), these letters were ineffective as the basis for claiming refund because the penalties were not "collected or paid" at the time the letters were sent. However, on October 31, 1983, the Division levied on Vogel's bank account for the amount of the assessed penalties. Accordingly, penalties had been collected on that date and any applications for refunds filed afterward would be proper under § 1139(a). On November 3, 1983, prior to the lapse of the statutory period, Vogel wrote another letter to the Division requesting abatement of penalties assessed for the above periods. Although the letter was drafted as a request for abatement of penalties, it was apparent that Vogel was seeking a refund because the amount had already been collected by then.

The letter plainly specified the tax periods in question and reasons for seeking refund as well as all other pertinent information which the Division would need to commence an inquiry.

The informal written demand for refund provided the Division with ample notice that a right was being asserted on the levied amount. Therefore, we conclude Vogel's application for refund was timely filed.

Alternatively, Glover, Bottled Gas, and New York Propane contend that because Division personnel had informed them that applications for abatement of penalties filed by May 28, 1985 would be timely, the Division is estopped from asserting that their applications were untimely even though the statute of limitations had ran by May 10, 1985. Petitioners argue that their applications should be considered timely as a matter of law. We disagree.

As a general rule, the doctrine of estoppel cannot be invoked against the State or its governmental units unless such exceptional facts exist as would require its application in order to avoid "manifest injustice" (see, Matter of Wolfram v. Abbey, 55 AD2d 700, 388 NYS2d 952, 954; Matter of Sheppard-Pollack, Inc. v. Tully, 64 AD2d 296, 409 NYS2d 847, 848). This rule is particularly applicable with respect to a taxing authority because sound public policy favors full enforcement of the tax law (Matter of Turner Construction Co. v. State Tax Commn., 57 AD2d 201, 394 NYS2d 78, 80). Thus, the application of the estoppel doctrine against a taxing authority must be limited to truly unusual fact situations (Schuster v. Commr., 312 F2d 311, 62-2 USTC 12,121 at 86,585).

Our analysis of the estoppel issue begins with the question of whether petitioners could reasonably rely on the purported representation by an agent of the Division that an application filed by May 28, 1985 would have been timely. Even if we assumed that petitioners were told by the Division's agent that their applications for refund would be timely so long as they were filed on or before May 28, 1985, we could not hold that it was reasonable for petitioners to rely on this statement.

Petitioners maintain that Mr. Aronson, a Division employee, had advised them that the last permissible filing date for application of refund would be May 28, 1985. By petitioners' own admission, the advice was communicated over the telephone. Its content contradicted the explicit language of § 1139(a)(ii) of the Tax Law, which provides that an application for refund

must be filed within three years after the date when such amount was payable. The statute of limitations provided in this section is clear and unequivocal. Therefore, we conclude that it was unreasonable for petitioners to rely on the purported advice that they could file their applications for refund at any time before or on May 28, 1985. Given our holding on this element of the estoppel issue, we find it unnecessary to rule on the questions of whether petitioners actually relied on the advice and whether petitioners have relied on it to their detriment such that the absence of equitable relief would be unconscionable. Accordingly, we find that the applications for refunds of petitioners Glover, Bottled Gas and New York Propane were untimely even as a matter of law.

We turn next to petitioners' argument that many of the belated payments and filings in dispute were preceded by earlier and timely efforts to make required payments and file pertinent returns. Petitioners maintain that due to their internal administrative "snafus", errors of the Postal Service, and the Division's processing mistakes, they missed the statutory deadline for timely filings and payments. Alternatively, petitioners argue that they have established reasonable cause since the belated payments and filings were not the result of gross negligence or willful intent to disobey the tax law but rather the result of rapid corporate expansion. We find neither argument has merit.

Tax Law § 1145(a)(1)(i) authorizes the imposition of a penalty plus interest at the rate specified therein for failure to file a return or to pay or pay over any tax in a timely manner. However, these charges are to be cancelled if "reasonable cause" is affirmatively shown by the taxpayer (Tax Law § 1145[a][1][ii], former 20 NYCRR 536.1[b], see also, 20 NYCRR 536.5[b]). The regulation in former 20 NYCRR 536.1(b) provides, in pertinent part, that reasonable cause, where clearly established, may encompass the following:

> "(3) Timely prepared returns misplaced by a responsible employee and discovered after the due date.
>
> * * *
>
> "(6) Any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful

> intent to disobey the taxing statutes. Past performance will be taken into account. Ignorance of the law, however, will not be considered reasonable cause."

Other than their assertion that most of the belated payments and filings were prepared prior to the due date, petitioners offered no evidence to show that the returns in question were prepared on time. Nor did petitioners prove that these returns were subsequently misplaced by a responsible employee and that such error was not discovered until after the due date. Petitioners posit that their unsuccessful attempt to make the required payments and file returns were caused by internal administrative problems, errors of the Postal Service, and the Division's processing mistakes. These unproven factual contentions, however, in no way demonstrate that the returns had actually been misplaced by a responsible employee and that such mistake was not found until after the due date. Similarly, petitioners' testimony at the hearing and their letters to the Division, stating that the reason for their delinquencies were due to unusual personnel turnover, were insufficient to prove that they had, in fact, timely prepared their returns and that the returns were subsequently misplaced by a responsible employee and not discovered after the due date.

We also agree with the Administrative Law Judge that the cause for petitioners' belated filings and payments was not one that appears to a person of ordinary prudence and intelligence as a reasonable cause. The various instances of late filing and payments in dispute relate to 12 independent tax quarters which stretched over a period of two years from December 1, 1979 through November 30, 1981, plus two additional quarters in 1977. Moreover, penalties which had been assessed and subsequently set aside indicated that petitioners' reporting and payment problems persisted into 1982. While petitioners have established that high staff turnover and the rapid growth of their business resulted in their failure to file returns and pay when due, they did not show that it was reasonable to take two years to rectify the problem. Therefore, we rule that petitioners did not satisfy their burden to prove that the cause for their delinquency was one which appears to one of ordinary prudence and intelligence as a reasonable cause.

Finally, petitioners argue that because the grounds advanced in the present case are identical to those on which the Division previously granted penalty abatements in connection with tax imposed during the same general period of time, a finding of reasonable cause is compelled based on the grounds proffered here. We are unable to agree.

With respect to all the previous assessments which had been cancelled, the record reveals only that reasonable cause had been established; it does not say anything about how or why those assessments were so determined. As a result, we do not know, and petitioners did not show, on what grounds the Division had found reasonable cause and granted abatement of penalties for those prior assessments. Petitioners, therefore, cannot succeed in asserting that the grounds on which the Division had previously found reasonable cause were the same as the one being raised in the present case. We conclude that petitioners failed to establish reasonable cause for their belated filing of returns and payment of taxes.

In their brief, Glover, Bottled Gas, New York Propane, and Vogel also contend that the Division acted in bad faith when, without any notice, it levied on petitioners' bank account while discussions between petitioners and the Division on the issue of whether or not penalties should be abated were proceeding. Petitioners maintain that the Divisions's actions have done great harm to their reputation and that as a means of deterring the Division from doing the same in the future, this Tribunal should direct the Division to return all of the withdrawn penalties. We reject this argument.

Petitioners do not deny that the Division issued notices and demand for the taxes, interest and penalty due, prior to the issuance of the warrants and the levy on petitioners' bank accounts (petitioners' brief p. 3). The issuance of a Notice and Demand is the Division's normal procedure for billing an amount that is due because the taxpayer filed the return and payment late or filed a return with no remittance of tax (see, 20 NYCRR 533.3[6]). Petitioners would require that the Division give an additional notice prior to levying on the taxpayer's assets.

Tax Law § 1141 provides for the collection of tax, interest and penalty, in pertinent part, as follows:

> "(a) Whenever any person required to collect tax shall fail to collect or pay over any tax, penalty or interest imposed by this article as therein provided . . . the attorney general shall, upon the request of the [Department of Taxation], bring or cause to be brought an action to enforce the payment of the same . . .
>
> "(b) As an additional or alternate remedy, the [Department of Taxation] may issue a warrant, directed to the sheriff of any county commanding him to levy upon and sell the real and personal property of any person liable for the tax, which may be found within his county, for the payment of the amount thereof, with any penalties and interest . . . The sheriff shall within five days after the receipt of the warrant file with the county clerk a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. Such lien shall not apply to personal property unless such warrant is filed in the department of state. The sheriff shall then proceed upon the warrant, in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record . . . In the discretion of the tax commission a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of taxation and finance . . . Upon such filing of a copy of a warrant, the tax commission shall have the same remedies to enforce the amount due thereunder as if the state had recovered judgment therefor."

We see no requirement in these provisions of the Tax Law for an additional private notice to the taxpayer (as opposed to the public notice given by the filing of the warrant) prior to a levy and petitioners have not cited any authority for their proposition in the Tax Law or elsewhere. Therefore, we see no basis for imposing such an administrative burden on the Division.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioners, Glover Bottled Gas Corp., Bottled Gas Service, Inc., New York Propane Corporation, Vogel's, Inc., is denied;

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

3. The petitions of Glover Bottled Gas Corp., Bottled Gas Service, Inc., New York Propane Corporation, Vogel's, Inc., are denied; and

4. The denials of the claims for refund are sustained.

DATED: Troy, New York
September 27, 1990

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

/s/Maria T. Jones
Maria T. Jones
Commissioner