STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **NEW YORK FUEL TERMINAL CORPORATION** for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Period March 1, 1984 through April 30, 1984.	:	
In the Matter of the Petition of **NEW YORK FUEL TERMINAL CORPORATION** for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Period April 1, 1989 through April 30, 1989.	:	DECISION DTA NOS. 810139, 810140 AND 810253
In the Matter of the Petition of **NEW YORK FUEL TERMINAL 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 Period April 1, 1989 through April 30, 1989.	:	

The Division of Taxation and petitioner New York Fuel Terminal Corporation, c/o Carl S. Levine & Associates, P.C., 1800 Northern Boulevard, Roslyn, New York 11576, each filed an exception to the determination of the Administrative Law Judge issued on February 20, 1997. Petitioner appeared by Carl S. Levine & Associates, P.C. (Carl S. Levine, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in support of its exception and a brief in opposition to the Division of Taxation's exception. Petitioner's request for oral argument was denied. Thereafter, petitioner filed a motion to recuse Commissioners Jenkins and DeWitt and, upon granting said motion, to dismiss all of the notices of determination issued herein on the basis that the Tax Appeals Tribunal is without jurisdiction to hear and decide any appeal without a quorum or, in the alternative, hold these matters in abeyance until there is a quorum of unbiased commissioners. The Division of Taxation filed a response in opposition.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner DeWitt took no part in the consideration of this decision.

ISSUES

I. Whether petitioner, a registered motor fuel distributor, has shown it is entitled to a motor fuel tax credit for motor fuel it sold to a dealer who resells motor fuel to exempt agencies.

II. Whether petitioner's and the dealer's failure to follow the procedural regulations (i.e., 20 NYCRR former 411) to obtain a motor fuel tax credit for exempt sales bars petitioner from taking the credit.

III. Whether petitioner may take a credit against its motor fuel tax liability for prepaid motor fuel tax on motor fuel sales deemed uncollectible bad debts.

IV. Whether petitioner established reasonable cause for taking a credit on its April 1989 return for prepaid sales tax on motor fuel sales deemed uncollectible bad debts.

V. Whether petitioner's motion to recuse two commissioners of the Tax Appeals Tribunal should be granted.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, New York Fuel Terminal Corporation ("NYFT"), was a registered New York State motor fuel distributor during the relevant period in question. It was engaged in the importing, storage, distribution, purchase and sale of gasoline and other petroleum products.

DTA No. 810139

From January 1984 through April 1984, NYFT had made sales of motor fuel to Tunyung Oil Corporation ("Tunyung"), an unregistered dealer in motor fuel which resold motor fuel to municipalities and other customers which were exempt from Article 12-A tax.

On its motor fuel distributor reports (Form MT-104) for the month of March 1984 and for the month of April 1984, NYFT listed on line 18 of each report as net taxable sales 1,077,856 gallons in March 1984 and 887,574 gallons as net taxable sales in April 1984. In brief, petitioner asserted that these gallons represented the total number of gallons sold to Tunyung during this period. On line 22A of each report, NYFT listed 1,030,970 gallons and 370,069 gallons for March 1984 and April 1984, respectively, of motor fuel attributable to dealer sales to the State and municipalities. NYFT asserted that the listed credit on line 22A related to motor fuel sold during the months of March and April of 1984 to Tunyung that was resold by Tunyung to agencies exempt from Article 12-A tax.

On its delivery invoices to Tunyung for the months of January through April of 1984, NYFT would include all taxes in its charges for motor fuel purchased by Tunyung. Underneath NYFT's name and address on the delivery invoices, is a blank space next to the heading "delivered to" and Tunyung's name and address next to the heading "sold to". NYFT's delivery invoices for Tunyung indicate that for the months of January through March of 1984, NYFT charged Tunyung for 713,927 gallons of no-lead gasoline, 397,983 gallons of regular gasoline, 1,999 of super no-lead gasoline and 2,999 gallons of oil (1,116,908 gallons). The delivery invoices for the month of April 1984 indicate NYFT charged Tunyung for 193,952 gallons of no-lead gasoline and 50,467 gallons of regular gasoline (244,419 gallons).

Tunyung presented to NYFT Forms MT-338 reporting sales of motor fuel to exempt entities for the months of March and April of 1984 along with exemption certificates from those

entities. The MT-338 forms list NYFT as the distributor for those sales and the reports are signed by John Quock, Tunyung's principal. Tunyung reported sales to government agencies on its MT-338 forms for the separate months of January, February, March and April of 1984, in the following amounts:

January 1984	351,772.0 gallons
February 1984	333,914.4 gallons
March 1984	345,284.0 gallons
April 1984	370,069.0 gallons

The sum of the gallons listed on the MT-338 Forms for January 1984 through March 1984 is 1,030,970.0. Listed on Form MT-338 for the month of March were sales made in February and January; and listed on Form MT-338 for the month of April were sales made in January, February and March.

The exemption certificates attached to the MT-338 forms correspond to the amount of motor fuel gallons listed for the individual organizations on the MT-338 forms for the months of January, February and March of 1984. However, the only exemption certificates attached to the MT-338 form for the month of April 1984 to verify the sales by Tunyung to those organizations were the following:

gallons	governmental agency
14,837.0	N.Y.C. Dept. of Environmental Protection
22,678.0	N.Y.C. Dept. of General Services
486.0	N.Y.C. Canarsie Cemetery
128,159.0	N.Y.C. Police Department
500.0	N.Y.C. Brooklyn Botanical Garden
1,544.0	N.Y.C. Brooklyn Public Library
12,955.0	N.Y.C. Fire Department
29,611.0	N.Y.C. Emergency Medical Service
4,199.0	N.Y.C. Sanitation Deparment
6,326.0	N.Y.C. Dept. of Transportation
13,191.0	N.Y.C. Parks Department
1,420.0	N.Y.C. Staten Island Rapid Transit Operating Auth.
16,500.0	N.Y.C Transit Authority
252,406.0	total

Although NYFT would bill Tunyung for all taxes on the delivery invoices, NYFT would credit Tunyung for the taxes on motor fuel sold to exempt organizations, as indicated on the MT-338 forms, by reducing Tunyung's receivable and sales accounts on NYFT's books.

At hearing, Abbey Blatt testified on behalf of petitioner. Mr. Blatt is a certified public accountant who assisted NYFT in setting up its books and records and has represented NYFT since 1981 as well as its affiliates since 1964. Mr. Blatt gave direct testimony concerning NYFT's delivery of motor fuel sold to Tunyung as follows:

> "Q. Now, are you personally familiar with how the product sold by New York Fuel to Tunyung as is reflected on these various documents was in fact delivered, physically delivered to the municipalities?
>
> "A. I believe that Tunyung used M & Q Trucking to make those deliveries, to the best of my recollection.
>
> "Q. You were there at the time?
>
> "A. Yes. M & Q Trucking was the entity that provided service to deliver gasoline to various customers of New York Fuel.
>
> "Q. It was a trucking company?
>
> "A. That's correct.
>
> "Q. They had a -- do you recall how many trucks they had, approximately?
>
> "A. Probably around 14, 15.
>
> "Q. And M & Q Trucking was one of your clients; was it not?
>
> "A. Yes, they were.
>
> "Q. Was that a way, then, by controlling the delivery, was that not a way for New York Fuel to make sure that the product sold to Tunyung in fact was delivered to municipalities rather than sold off to somebody else where there would be a problem with the taxes?
>
> "A. I believe that they became aware of where it was going because their trucks delivered it; but I can't be guaranteed all of them. They received supporting documents, is what they based it on.
>
> "Q. At the time New York Fuel was satisfied that the documents that it was receiving, that it accepted those in good faith at the time that in fact the resales were to the City of New York?
>
> "A. That's correct." (Tr. pp. 50-51.)

M & Q Trucking was an affiliate of NYFT. NYFT could not sell the motor fuel directly to the exempt organizations itself because the municipalities awarded the various sales contracts by bid to Tunyung.

The Division of Taxation ("Division") conducted an audit of NYFT's March 1984 MT-104 Motor Fuel Distribution Report and of NYFT's April 1984 MT-104 Motor Fuel Distribution Report. It appears that during this audit the Division reviewed the MT-338 forms signed by Tunyung's principal along with attached exemption certificates.

The Division issued to petitioner a Notice of Determination (number 2429), dated November 9, 1984, for Article 12-A motor fuel tax due in the total amount of $55,579.96, plus a $5,558.00 penalty, for the total amount of $61,137.96. On that notice, the Division indicated that the 370,069 gallons reported on line 22A (Dealer Sales to State and Municipalities) on Form MT-104 for April of 1984 was disallowed because credit was taken without approval. In the notice, the Division stated that at eight cents per gallon for 370,069 gallons, petitioner owed tax due in the amount of $29,605.52 with respect to this disallowance.

The Division also issued to petitioner a Notice of Determination (number 2624), dated March 21, 1985, for Article 12-A motor fuel tax due in the total amount of $86,082.90, plus $12,912.44 in penalties, for the total amount of $98,995.34. On that notice, the Division stated that petitioner had taken credit without approval on line 22A (Dealer Sales to State and Municipalities) on Form MT-104 for March 1984 and on line 4B of the March 1984 return. The Division asserted State tax due on 1,030,970 gallons at eight cents a gallon in the amount of $82,477.60 and New York City tax due on 360,530 gallons at one cent per gallon in the amount of $3,605.30. On the bottom of the notice, was the statement "For details refer to our letter of March 21, 1985."

The Division submitted into the record a March 21, 1985 letter addressed to NYFT from Arthur Bouchard of the Central Office Audit Bureau. The Division's counsel stated that the letter was found in the Division's case file on this case. The letter is not on Division letterhead and does not contain the signature of Arthur Bouchard. In the letter, an explanation is provided for the Division's disallowances of credit on Forms MT-104 for March and April of 1984. The following statements were included in that letter:

> "You have entered a deduction of 1,030,970 gallons at Line #22A of the March return covering dealer sales to exempt agencies by Tunyung Fuel Oil Corp.

> Enclosed is an assessment covering this entry. Our records do not indicate that this transaction received prior approval from our department and further, credit for the bulk of this transaction was given Tuny ung [sic] Fuel Oil Corp. during a field audit. Therefore, no credit should be taken on your return nor should you allow credit to them.
>
> "The 370,069 gallons reported at Line #22A of your April return was included in our assessment #2429 since our department had not given prior approval. No credit for this gallonage was given Tuny ung [sic] Fuel Oil Corp. It is suggested that you advise them to forward to us for approval, both the original and duplicate of Form MT-338, the original exemption certificates and the original forms 1094. Note that the copies included with your return are not completed. Several of the 1094 forms necessary for sales to agencies of the United States Government are missing and many of the exemption certificates are not signed."

Petitioner's counsel, Carl Levine, objected to the admission of the March 21, 1985 letter on the ground that no foundation was laid for the admission of the evidence; that the letter was not signed and was not on the Division's letterhead; that he had no way of knowing how the letter got into the Division's file; and that Mr. Bouchard was not available for cross examination. The following discussion took place during the hearing:

> "Administrative Law Judge ("ALJ"): Are you also stating you never received or have not seen this letter?
>
> "Mr. Levine: I think I have seen something that looks very similar to this. I don't know if this is the letter.

The Administrative Law Judge permitted the Division to submit a post-hearing affidavit concerning the March 21, 1985 letter.

The Division's counsel, Mr. Matthews, submitted a post-hearing affidavit signed by Cliff Merchant, supervisor of the Fuel Desk Audit Unit of the Division's Transaction and Transfer Tax Bureau, who stated that he has knowledge of the past and current practices of the unit. In the affidavit, Mr. Merchant stated that Mr. Bouchard was no longer employed with the Division. He also explained that at the time the March 21, 1985 letter was written, it was the practice of the Fuel Unit to reference such letters on the notices issued, to mail a signed original of the letter to the taxpayer by regular mail, and to place an unsigned copy in the taxpayer's folder. Mr. Merchant also noted that because copies of letters at that time were made by means of carbon paper, the Division's letterhead did not appear on the copy.

By letter dated January 8, 1985, NYFT's counsel requested a copy of all the Division's workpapers and other documents upon which the Division based its determination of motor tax due in the November 9, 1984 notice concerning the MT-104 statement for April 1984. Petitioner alleged in a subsequent petition it filed with the Division of Tax Appeals that the Division has not complied with this request by mailing workpapers to petitioner. In its answer to the petition, the Division asserted that it lacks knowledge or information sufficient to form a belief as to the truth of the allegation.

After a conciliation conference, the conferee issued to petitioner a conciliation order, dated August 9, 1991, cancelling the penalties and interest on both notices, and sustaining the fuel tax due for March 1984 in the amount of $86,082.90 (notice number 2624) and for April 1984 in the amount of $29,605.22 (notice number 2429).

Petitioner filed a petition, dated November 6, 1991, alleging, ***inter alia***, that NYFT paid all motor fuel taxes owed to the Division for March and April of 1984; that any underpayment that did exist, when balanced with NYFT's overpayments in prior and subsequent months, resulted in a net overpayment to the Division; that the motor fuel sold to Tunyung was resold to tax exempt purchasers and no motor fuel tax was due on such sales; that the Division's assessments are procedurally invalid because the notices failed to state that petitioner's tax returns had either not been filed or were incorrect or insufficient; and that petitioner's due process rights had been violated by the Division's failure to provide adequate notice of the methods and basis of its tax determination. Petitioner alleged that with the exception of the notices, the Division failed to provide NYFT with adequate notice of the method(s) and basis(es), if any, of the determination of taxes due; that only after a telephone conversation with Mary Lou Paley and Arthur Bouchard, the Division's auditors, did NYFT have an inkling as to the reason(s) for the alleged deficiencies; that the manner in which the Division provided notice to it of the alleged deficiencies has seriously prejudiced NYFT's ability to fully respond to the notices.

In the petition, NYFT alleged that according to Mr. Bouchard, Tunyung had previously been a licensed New York State motor fuel distributor who purportedly failed to pay to the Division more than a $100,000.00 in motor fuel taxes, and that rather than crediting NYFT with the motor fuel taxes that were not owed on sales to Tunyung for resale to exempt organizations, the Division applied these monies to satisfy this separate tax debt of Tunyung's to the Division.

In its answer, dated January 14, 1994, the Division denied the allegation that it applied the credit owed to NYFT to satisfy a prior tax debt of Tunyung's. The Division also affirmatively stated that Tunyung was not a registered distributor of motor fuel in the State of New York and that petitioner was not permitted to sell motor fuel to an unregistered distributor without collecting the motor fuel tax due from the purchaser; that petitioner's March and April 1984 MT-104 reports did not disclose any sales of fuel during those months to Tunyung; that Tunyung did not get the proper approval under the Division's regulations for petitioner to credit Tunyung's account for motor fuel taxes owed.

DTA Nos. 810140 and 810153

In March and April of 1988, NYFT sold approximately 7,000,000 gallons of motor fuel to Tunyung. For these sales, petitioner billed Tunyung approximately $4,300,000.00 for the motor fuel, plus $547,235.30 in motor fuel taxes and $376,224.30 in sales tax. Under Tax Law §§ 284 and 1102, NYFT was required to prepay the eight cents per gallon for motor fuel tax and applicable sales taxes (First Import Law, L 1985, ch 44). Accordingly, in 1988, petitioner prepaid approximately $547,235.30 in motor fuel taxes.

Tunyung defaulted on its payment for the motor fuel. Tunyung made one payment in March or April of 1988 in the amount of $102,931.25. Mr. Blatt, NYFT's accountant, applied the payment to the earliest invoice in March 1988 thereby reducing by $8,057.38 the sales tax Tunyung owed to NYFT leaving unpaid sales tax owed to NYFT in the amount of $376,224.30. By April 1989, Mr. Blatt determined that based on the lack of activity on the Tunyung account for over a year, Tunyung's debt for the March and April 1988 motor fuel sales was uncollectible and should be considered a bad debt.

On May 11, 1989, NYFT served Tunyung with a summons commencing an action to enter judgment against Tunyung on the bad debt. On August 21, 1989, the judgment was entered in New York State Supreme Court, Kings County, for NYFT in the amount of $5,343,818.67, plus interest and costs, for the total amount of $7,277,169.72. NYFT was not able to collect any monies on that judgment.

NYFT filed a MT-104 return, dated May 16, 1989, for the month of April 1989 reporting a credit, in the amount of $547,235.30, against a $427,760.56 motor fuel tax liability for April 1989. NYFT also filed an FT-945 form, dated May 16, 1989, wherein NYFT took a credit, in the amount of $376,224.30 for the sales tax NYFT prepaid in 1988 due to Tunyung's bad debt, against its prepaid sales tax liability ($347,315.02) for the month of April 1989. The Division submitted into the record a letter, dated May 31, 1989, on Division letterhead to NYFT from James F. Bennett. The letter was unsigned. In that letter, Mr. Bennett advised NYFT that it improperly took a credit adjustment on its motor fuel tax return for April 1989 in the amount of $547,235.30 covering bad debts made to Tunyung in prior months. Mr. Bennett noted that under Article 12-A, there was no provision for recovery of motor fuel tax included in bad debts.

NYFT filed its 1988 U.S. Corporation Income Tax return (Form 1120), dated February 15, 1990, reporting Tunyung's debt to NYFT for March and April of 1988 as an uncollectible bad debt.

The Division issued to petitioner a Notice of Determination, dated January 8, 1990, for motor fuel tax due in the amount of $427,760.54, plus a $28,261.39 penalty and $72,719.25 in interest, for the total amount of $528,741.20. The Division submitted into the record a letter, dated January 8, 1990, to NYFT on the Division's letterhead from James F. Bennett. The letter was unsigned. In that letter, he stated that petitioner improperly took a credit adjustment for bad debts to Tunyung inasmuch as there is no provision under Article 12-A for recovery of motor fuel tax included in bad debts. Mr. Bennett explained that because the April 1989 motor fuel return reflected a $427,760.56 tax due before NYFT took the credit in error, there was additional tax due for that amount plus penalty and interest.

Petitioner's counsel objected to the admission of the January 8, 1990 letter and the May 31, 1989 letter from James Bennett on the ground that they were unsigned and no foundation was laid for their admission. The Administrative Law Judge allowed the Division to submit a post-hearing affidavit with respect to the letters.

The Division submitted a post-hearing affidavit signed by James F. Bennett in which he stated that during the time he was assigned to the Transaction and Transfer Tax Bureau, he conducted a desk audit of NYFT's motor fuel return for the month of April 1989. He stated that he explained the results of the audit to NYFT in the letters dated May 31, 1989 and January 8, 1990; that to the best of his knowledge these letters were mailed to the taxpayer by regular mail; and that it was his practice to place an unsigned copy of letters sent to a taxpayer in the taxpayer's permanent folder.

The Division also issued to petitioner a Notice of Determination, dated January 31, 1990, for sales and use tax due on motor fuel sales in the amount of $347,315.02, plus a $59,043.55 penalty and interest of $26,660.77, for the total amount of $433,019.34 for the period April 1, 1989 through April 30, 1989.

By letter dated December 21, 1990, petitioner's counsel, Carl Levine, requested the Division to abate the penalties and reduce the interest asserted in the Notice of Determination for sales tax due. In the letter, Mr. Levine also enclosed payment of the sales tax due in the amount of $415,592.69 which included the entire tax due and interest but did not include the penalty. In that letter, Mr. Levine stated that NYFT disagreed with the Notice of Determination but, at the same time, recognized that there had been some "procedural problems in connection with the initial taking of the now disallowed credit. . . ."

NYFT thereafter filed FT-945 forms claiming a credit for prepaid sales tax against its sales tax liability for the months of November and December of 1990. This claim involved the same uncollectible debt that petitioner had claimed as a credit on its FT-945 form for the month of April 1989. The Division again rejected petitioner's bad debt credit and issued to petitioner a notice of determination for sales tax due for the months of November and December of 1990.

This notice became the subject of review in ***Matter of New York Fuel Terminal Corp***. (Tax Appeals Tribunal, October 26, 1995). The Tribunal held that NYFT could credit the prepaid sales tax against its sales tax liability for the months of November and December of 1990 because the prepaid tax constituted an uncollectible bad debt.

By letter dated April 4, 1991, the Division responded to Mr. Levine's December 20, 1990 letter stating that his disagreement with the assessment in the notice for sales tax due should have been addressed by requesting a conciliation conference which was not done within the required 90 days of the notice. The Division informed petitioner that as of the date of the letter the current amount due was $98,068.66, which included only the penalty and interest inasmuch as petitioner had paid the sales tax liability.

After a conciliation conference with the Bureau of Conciliation and Mediation Services, the conferee issued a conciliation order, dated August 9, 1991, sustaining the Notice of Determination, dated January 8, 1990, which asserted motor fuel tax due. However, the Bureau of Conciliation and Mediation Services issued a conciliation order, dated August 30, 1991, denying a request for a conciliation conference with respect to the Notice of Determination, dated January 31, 1990, for sales and use tax due on the ground that the request for a conference was not received until July 1, 1991, a date in excess of the 90 days required for filing such a request.

NYFT filed a petition (DTA No. 810140), dated November 4, 1991, arguing that its claim for credit due to an uncollectible bad debt against the April 1989 motor fuel tax was supported by the statutes and regulations. In the alternative, petitioner argues that if it is not entitled to the credit, then the penalty should be abated.

The Division filed an answer, dated November 10, 1993, affirmatively stating that there is no entitlement to a refund or credit of motor fuel tax for uncollectible debts and that petitioner must establish reasonable cause for failing to pay the motor fuel tax for April 1989 in order to have the penalty abated.

Petitioner filed a reply, dated December 6, 1993, asserting the affirmative defenses that the answer was improperly and untimely served.

NYFT also filed a petition (DTA No. 810253), dated November 25, 1991, arguing that that it has demonstrated reasonable cause for nonpayment of the sales tax for April 1989 and, therefore, the Division of Tax Appeals should review the merits of its application to abate the penalties.

The Division filed an answer, dated November 10, 1993, affirmatively stating that petitioner improperly claimed credits against its sales tax liability for uncollectible bad debts and that petitioner did not timely request a conciliation conference to protest the penalty imposed.

Petitioner filed a reply, dated December 6, 1993, asserting the affirmative defenses that the answer was improperly and untimely served.

In a stipulation, dated April 10, 1996, signed by the parties, petitioner withdrew its affirmative defenses that the answers were untimely served and the Division withdrew its claim that petitioner's protest in DTA No. 810253 was untimely filed.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

With regard to the matter of motor fuel tax under Article 12-A for the period March 1, 1984 through April 30, 1984 (DTA No. 810139), the Administrative Law Judge determined that petitioner had demonstrated an entitlement to the exemption for sales to an exempt purchaser even though the precise requirements of the regulations had not been followed. The Administrative Law Judge found that the evidence presented supported petitioner's claim that some of the motor fuel it sold to Tunyung was resold to exempt organizations and to disregard this evidence would be to elevate form over substance and petitioner's good faith reliance on Tunyung's representations. The Administrative Law Judge allowed the credit for motor fuel taxes paid on the specific gallonage referred to in the MT-104s for the months of March and April 1984. However, in an apparent oversight, the Administrative Law Judge canceled the notices in their entirety in conclusion of law "H" without modification.

With regard to the assessment of motor fuel tax pursuant to Article 12-A for the period April 1 through April 30, 1989 (DTA No. 810140), the Administrative Law Judge noted this Tribunal's decision in ***Matter of New York Fuel Terminal Corp***. (***supra***) wherein we held that the Legislature intended to apply the provisions of Article 28 to prepaid sales tax on motor fuel under Tax Law § 1102(a) but rejected petitioner's argument that it should have received a credit for prepaid motor fuel tax due to a bad debt. Citing no comparable provisions under Article 12-A to justify a credit for a bad debt with regard to prepaid motor fuel tax as exists in Article 28, the Administrative Law Judge found that there is no statutory authority for petitioner to receive a credit for prepaid motor fuel tax as there is for prepaid sales tax.

With regard to the issue of penalty on the failure to pay tax in a timely manner due to taking the credit for prepaid motor fuel tax, the Administrative Law Judge found that petitioner had no statutory basis for claiming the credit because no such provisions existed and, therefore, could not be the basis for finding reasonable cause for not paying the tax. The Administrative Law Judge also did not find convincing petitioner's reliance on the advice of its accountant, citing ***Matter of Auerbach v. State Tax Commn***. (142 AD2d 390, 536 NYS2d 557).

Regarding the issue of reasonable cause for the abatement of penalty related to the bad debt credit taken on the April 1989 return, the Administrative Law Judge found that since petitioner did not report the debt on its 1988 U.S. Corporation Income Tax Return until it filed same in February of 1990 it was not entitled to take the bad debt credit on its April 1989 return. Since the regulations placed petitioner on notice of the conditions for claiming the credit, and petitioner did not satisfy those conditions, the Administrative Law Judge found that it had not established reasonable cause to abate the penalty.

ARGUMENTS ON EXCEPTION

Petitioner has taken exception to the Administrative Law Judge's conclusion that the Division properly disallowed bad debt credits taken by petitioner for motor fuel taxes where the underlying debt attributable to the sale of motor fuel was reported as uncollectible and the

penalties assessed thereon. Petitioner has also excepted to the imposition of penalties on a bad debt credit for prepaid sales taxes relating to the period April 1989.

Petitioner argues that it has proved that it is entitled to a credit for prepaid motor fuel taxes where the underlying debt attributable to NYFT's sales of motor fuel was uncollectible, citing our holding in ***Matter of New York Fuel Terminal Corp***. (***supra***) in support of its position. Petitioner relies on our concerns in that matter relative to the burdens on distributors and retail vendors who bear the burden of tax when a customer fails to pay.

Petitioner contends that this language is applicable to motor fuel taxes as well as sales taxes and believes that the similarity in taxing schemes set forth in Tax Law §§ 284 and 1102 are virtually identical and that, based on the plain words of Tax Law § 289-f, the sales tax and motor fuel tax are inextricably linked and the Tax Law and regulations are bereft of any provisions prohibiting a distributor from claiming a credit for prepaid motor fuel taxes where the underlying transactions are uncollectible.

Petitioner claims it should not be liable for penalties on the tax relating to the bad debt credits taken because there were no published decisions, statutes or regulations on the issue of whether taking such credits was permissible. Petitioner believes that, in the absence of such provisions, it acted reasonably and in good faith in following the advice of its accountant.

Finally, petitioner maintains that it established reasonable cause for claiming the bad debt credit for prepaid sales taxes for the period of April 1989. Petitioner disagrees with the Administrative Law Judge's conclusion that it claimed the bad debt credit before it actually took the bad debt for Federal income tax purposes, stating that just because it did not file its return for 1988 until 1990 has no bearing on when it was entitled to take the credit for sales tax purposes and that courts have held that the physical act of filing a return is not dispositive of when the debt is deemed uncollectible. Further, petitioner claims that it followed the provisions of the regulations and that it ascertained that the Tunyung sales were uncollectible bad debts before it took the credits and that this Tribunal has never held that a debt must be actually

charged off for Federal income tax purposes before a bad debt credit may be claimed on a state return.

The Division excepted to the Administrative Law Judge's determination in so far as it granted petitioner the credits it claimed on its MT-104s for the months of March and April 1984 for exempt sales made by Tunyung to exempt entities and recorded on MT-338 forms.

In the first instance, the Division argues that the Administrative Law Judge only allowed that portion of the sales which were supported by documentation in conclusion of law "C," but then canceled the notices of determination in their entirety in conclusion of law "H" without modification.

The Division argues that the credit claimed is a form of exemption to which petitioner must prove entitlement and in this case has not. The Division maintains that it was incumbent upon petitioner to prove that the Division did not allow Tunyung the bulk of the credit underlying petitioner's claimed credit for the periods in issue and that the remaining transactions underlying the claimed credit were properly documented. The Division argues that petitioner has not met its burden of proof since the same documentation had been rejected previously, none of the documents were originals, some documents were missing or unsigned and there is no longer an opportunity for the Division to audit the underlying transactions. The Division points out that petitioner did not comply with the March 21, 1985 letter from the Division per Mr. Bouchard and is now reaping the problems resulting from its failure to follow the Division's instructions and the applicable regulations.

Opinion

We deal first with petitioner's motion to recuse Commissioners DeWitt and Jenkins. Commissioner DeWitt prepared the answers to the petitions in these matters and had extensive knowledge of the facts of the case. Therefore, Commissioner DeWitt, on his own motion, has recused himself from any involvement in these matters and petitioner's motion to recuse him is rendered moot.

The motion to recuse Commissioner Jenkins is denied. Petitioner argues that Commissioner Jenkins should be recused on the basis that he has a personal bias or prejudice concerning the principals of petitioner based on his involvement in a prior unrelated case before the Division of Tax Appeals, citing Canon 3 of the Code of Judicial Conduct. However, in ***Matter of Manhattan & Queens Fuel Corp***. (Tax Appeals Tribunal, May 22, 1997), we dealt with a similar motion to recuse which we find controlling herein.

In fact, petitioner argues that it was Commissioner Jenkins' advocacy in a prior ***Manhattan & Queens*** matter at the Administrative Law Judge level (Division of Tax Appeals, April 16, 1996) which makes him ineligible herein. We held in the prior recusal motion that there was no showing of bias and the facts of the prior matter were totally unrelated to that action, and the same holds true herein. In the ***Manhattan & Queens*** matters there was an identity of petitioners not present herein. The only relationship cited by petitioner was the mention of a name of an individual who was involved in both Manhattan & Queens and New York Fuel Terminal, but this does not rise to the level supporting the allegation that the cases were related.

Additionally, petitioner has not provided any evidence of prejudice or prejudgment by Commissioner Jenkins to support its bias claim herein. The mere allegations by petitioner, standing alone, do not establish bias (Matter of Warder v. Board of Regents, 53 NY2d 186, 440 NYS2d 875, ***cert denied*** 454 US 1125). We believe that Commissioner Jenkins' role as an advocate in a prior, unrelated licensing matter involving another petitioner does not impair his ability to render an impartial decision in this matter.

As we stated in our decision in the ***Manhattan & Queens*** matter:

> "Commissioners of the Tribunal are under a duty to reach a decision by applying the law to the facts presented without prejudgment or prejudice. We are firm in our conviction that this elemental fairness be maintained in all matters that come before us and we believe that petitioner has received the same fair and impartial treatment herein" (***Matter of Manhattan & Queens Fuel Corp., supra***).

Finally, even if petitioner had made a bona fide demonstration of bias, we would not have granted the motion to recuse Commissioner Jenkins since doing so would have rendered the

Tribunal incapable of issuing a decision. Our rationale for this alternative conclusion was thoroughly discussed in our decision in ***Matter of Manhattan & Queens Fuel Corp***. (***supra***) and will not be restated herein, except to reaffirm our belief that ***Matter of General Motors Corp. v. Rosa*** (82 NY2d 183, 604 NYS2d 14) provides the authority to hear matters where the dispute cannot otherwise be heard due to the disqualification of the adjudicative body. Without the authority to appoint deputies to act in the place of disqualified commissioners (Tax Law §§ 2002, 2004 and 2006), the Tribunal would be justified in raising the Rule of Necessity.

We now turn to the merits of this matter.

The Administrative Law Judge determined that petitioner was entitled to a substantial portion of the exempt sales claimed on its MT-104s even though Tunyung did not obtain prior approval of its exempt sales as directed by the regulations in effect during the audit periods (20 NYCRR former 411.5). The Administrative Law Judge found the evidence submitted by petitioner to be adequate to establish the exempt nature of Tunyung's sales and granted those sales which were documented. The Division continues to argue that the regulations were more than a disposable formality and contend that petitioner be held to the requirements therein.

We do not disregard the plain meaning of regulations and will not condone the actions of those who do. However, under certain circumstances, mindless elevation of form over substance cannot be considered anything other than an arbitrary and capricious exercise of power (***Matter of Riluc Co. v. Tax Appeals Tribunal***, 169 AD2d 988, 565 NYS2d 265).

Although petitioner ignored the clear provisions of 20 NYCRR former 411.5 and condoned Tunyung's disregard as well, the evidence it submitted -- well documented in the determination below -- established certain exempt sales made by Tunyung and established also that it was the motor fuel from petitioner being sold in those transactions. The Bouchard letter of March 21, 1985 concerning an audit of Tunyung -- evidence of which is nonexistent -- did little to resolve this matter. It states the obvious regarding prior approval and then refers to an audit of Tunyung, the details of which were never disclosed to petitioner or this forum. Even if we were to accept Mr. Bouchard's reference to an audit, we cannot understand why the Division

would not have contacted petitioner immediately upon learning of the failure to obtain pre-approval instead of examining the sales and granting Tunyung a credit for tax it already had received credit for. In fact, the reference to the Tunyung audit raises many more questions then it answers. What it does reveal, however, is that the Division had prior notice of the noncompliance with the regulations and did not disclose this information to the severe detriment of petitioner rather than confront the parties, command literal compliance and assure proper documentation of the exempt sales. In addition, the Division conceded the exempt status of substantially all the March sales and petitioner offered credible proof of the April sales.

From the evidence before the Administrative Law Judge, it was a reasonable conclusion to allow for exempt sales to the extent substantiated. We affirm the determination by allowing for substantiated exempt sales and modify conclusion of law "H" in so far as it canceled the notices in their entirety.

With regard to the remaining issues concerning (1) petitioner's claim for credit for prepaid motor fuel tax based upon a bad debt and the penalty assessed for failure to pay the tax due after disallowance of the credit and (2) the issue of whether reasonable cause for the abatement of penalty was established where petitioner took a bad debt credit not claimed on its Federal return, we have reviewed the arguments of the parties and find them to be the same as those argued before the Administrative Law Judge. Since the Administrative Law Judge thoroughly and correctly decided the issues below, we affirm the determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted to the extent that conclusion of law "H" is modified as set forth above, but in all other respects is denied;

2. The exception of New York Fuel Terminal Corporation is denied;

3. The determination of the Administrative Law Judge is modified in part and affirmed in part, consistent with our opinion;

4. The petition of New York Fuel Terminal Corporation (DTA No. 810139) is granted in accordance with paragraph "3" above, but is otherwise denied;

5. The petitions of New York Fuel Terminal Corporation (DTA Nos. 810140 and 810253) are denied; and 6. The notices of determination are sustained in accordance with paragraph "3" herein.

DATED: Troy, New York
February 12, 1998

_____
Carroll R. Jenkins
Commissioner

_____
Joseph W. Pinto, Jr.
Commissioner