STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions 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 Periods Ended April 30, 1989; May 31, 1989; September 30, 1989 and December 31, 1989 and the Period October 1, 1990 through February 28, 1991.	:	DECISION DTA NOS. 814152 AND 814156
In the Matter of the Petitions of **JOSEPH A. MACCHIA AND LAWRENCE MACCHIA** for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period Ended December 31, 1989; and the Period October 1, 1990 through February 28, 1991.	:	DTA NOS. 814160 AND 814162
In the Matter of the Petitions of **NEW YORK FUEL TERMINAL CORPORATION, JOSEPH A. MACCHIA AND LAWRENCE MACCHIA** for Revision of Determinations or for Refunds of Motor Fuel Tax under Article 12-A of the Tax Law for the Periods September 1, 1990 through October 31, 1990 and January 1, 1991 through February 28, 1991.	:	DTA NOS. 814153, 814157 AND 814163

In the Matter of the Petition	:	
of	:	
NEW YORK FUEL TERMINAL CORPORATION	:	DTA NO. 814155
for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Periods Ended April 30, 1989 and September 30, 1989.	:	
In the Matter of the Petitions	:	
of	:	
JOSEPH A. MACCHIA AND LAWRENCE MACCHIA	:	DTA NOS. 814159 AND 814161
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period Ended February 28, 1991.	:	

Petitioners New York Fuel Terminal Corporation, Joseph A. Macchia and Lawrence Macchia, c/o Carl S. Levine & Associates, P.C., 1800 Northern Boulevard, Roslyn, New York 11576, filed an exception to the determination of the Administrative Law Judge issued on May 22, 1997. Petitioners 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).

Neither party filed a brief on exception. Oral argument, at petitioners' request, was heard on March 11, 1998 in Troy, New York. Commissioner DeWitt took no part in the consideration of this decision.

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

ISSUES

I. Whether New York Fuel Terminal Corporation failed to report and pay sales and use taxes and motor fuel taxes on motor fuel it imported or caused to be imported into New York for sale during the audited periods.

II. Whether New York Fuel Terminal Corporation is entitled to certain bad debt credits against prepaid sales taxes on motor fuel.

III. Whether New York Fuel Terminal Corporation accurately reported inventory losses and gains on sales tax and motor fuel tax returns filed during the audited periods.

IV. Whether penalties assessed against petitioners Joseph A. Macchia and Lawrence Macchia are based upon a certain sales tax assessment issued to New York Fuel Terminal Corporation.

V. Whether penalties should be canceled or abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact "13," "33," “44” and “45” which have been modified. We have also made an additional finding of fact. The Administrative Law Judge’s findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

Petitioner New York Fuel Terminal Corporation ("NYFT") was a registered distributor of motor fuel during all periods in issue. It was engaged in the importing, storage, distribution, purchase and sale of gasoline and other petroleum products. During the same periods, petitioners

Joseph A. Macchia and Lawrence Macchia were officers of NYFT. As such, they are persons under a duty to act for NYFT in complying with the requirements of Article 12-A and Article 28 of the Tax Law. NYFT's registration as a motor fuel distributor was canceled effective May 7, 1991, and it ceased doing business as a motor fuel distributor immediately thereafter. The notices of determination which are the subject of this consolidated proceeding are based upon related audits of NYFT's reports of prepayment of sales tax (forms FT-945) and motor fuel tax returns (forms MT-104) for the periods covered by the notices.

DTA Nos. 814159 and 814161

The Division of Taxation ("Division") issued identical notices of determination, each dated May 26, 1992, to Joseph A. Macchia and Lawrence Macchia. Each notice contains the following statement in explanation of the notice:

> This notice is issued because you are liable as an Officer/ Responsible person for a penalty in an amount equal to the tax, penalty and interest not paid by the business indicated below. (section 1145(e) of the New York State Tax Law).
>
> Our records indicate that you are/were an Officer/Responsible Person of New York Fuel Terminal Corporation.

The notices assessed penalties against each officer as follows:

Taxpayer	Assessment	Period Ended	Tax	Penalty	Interest
Joseph	L005694275-6	2/28/91	-0-	$646,510.87	-0-
Lawrence	L005694279-2	2/28/91	-0-	$646,510.87	-0-

The Division alleges that these assessments are associated with a sales and use tax assessment of NYFT (the "NYFT assessment") which was issued, protested and finally

determined by a decision of the Tax Appeals Tribunal (***Matter of New York Fuel Terminal Corp.***, Tax Appeals Tribunal, October 26, 1995, hereinafter, the "NYFT Decision").

The NYFT assessment was dated April 24, 1991 and was originally assigned identification number S910424951C. That number was later changed to L-005231292. The Notice of Determination by which the taxes were assessed was not placed into the record of this proceeding; however, the history of the NYFT assessment is contained in the NYFT Decision.

The Tribunal's Decision states that assessment number S910424951C covered the periods November 1990 and December 1990 and assessed additional tax due of $442,536.69 plus penalty and interest. The Tribunal found that the total amount of tax due represented tax due for November 1990 of $329,159.95 and for December 1990 of $113,376.74. The basis for the assessment was set forth in a letter from the Division to NYFT which was quoted in the Tribunal Decision. As pertinent, that letter states:

> Enclosed is a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, number S910424951C. This assessment was issued as a result of our disallowance of the credits claimed on your November and December 1990 Report of Sales Tax Prepayment on Motor Fuel, FT-945's. The credit you claimed related to an uncollectible debt which was incurred as a result of sales of motor fuel in March 1988 by your company to TunYung Oil Corp. for which your company has not been paid.
>
> * * *
>
> Section 1120 of the Sales Tax Law specifically sets forth the instances under which a refund or credit may be issued for the sales tax prepayment on motor fuel. There is no provision in this section for a refund or credit of the sales tax prepayment on motor fuel as a result of a bad debt.
>
> In addition, we have noted that you claimed the credit for this bad debt previously on your April 1989 Report of Sales Tax Prepayment on Motor Fuel. The credit was disallowed and an

> assessment, number S900131250C was issued. You fail [sic] to appeal the assessment within ninety (90) days and the assessment became final. . . .
>
> * * *
>
> Therefore, based on the above, the credits claimed on your November and December 1990 FT-945's are disallowed.

The Tribunal found that the credit for bad debts provided for in section 1132(e) of the Tax Law applies to the sales tax required to be prepaid on motor fuel by Tax Law § 1102(a). It found as a fact that petitioner had an uncollectible debt with respect to sales to TunYung Oil Corporation of $376,224.30, and it directed the Division to reduce the amount of tax assessed pursuant to assessment number S910424951C by the amount of the bad debt. This reduced the tax assessment to $66,312.39.

The Division's computer recordkeeping system includes an assessment history which shows that the notices of determination issued to Joseph A. Macchia and Lawrence Macchia (assessment numbers L005694275-6 and L005694279-2, respectively) which are the subject of this proceeding are associated with the NYFT assessment. As of November 21, 1996, the NYFT assessment was reduced on the Division's records to $66,312.39 plus penalty and interest. The assessment history also shows that the following identical adjustment was made on the Division's accounts receivable system to the assessments issued to Joseph and Lawrence Macchia.

Penalty per original bill:	$646,510.87
Interest per original bill:	0.00
Total per original bill:	646,510.87
Current tax:	66,312.39
Current penalty:	20,556.75
Current Interest:	64,594.21
Credits/payments:	0.00
Current balance due:	151,463.35

The Division's assessment history states that the filing period covered by the NYFT assessment is December 1, 1990 through February 28, 1991, although the NYFT Decision states that the NYFT assessment was for the months of November 1990 and December 1990.

In paragraphs 2 and 3 of their petitions, Joseph and Lawrence Macchia each alleged:

> 2. The Notice of Determination does not provide sufficient information to explain the basis for the claim that NYFT owes sales and use taxes, penalties and interest for the period at issue, nor does the Notice of Determination explain how the amount allegedly due was determined.
>
> 3. Upon information and belief, the purported sales tax liability of NYFT was timely protested and is now the subject of DTA No. 811678 which is pending before the Tax Appeals Tribunal.

In its answers to the petitions, the Division admitted the allegations of paragraph 3 of the petitions. In addition, the Division asserted that NYFT's sales tax liability was based upon a review of its forms FT-945 for the months of November 1990 and December 1990. A copy of the front page of each FT-945 was attached to each answer.

DTA No. 814155

The Division issued to NYFT a Notice of Determination (L-006773641-6), dated December 3, 1992, assessing motor fuel tax pursuant to Article 12-A of the Tax Law. The total amount of tax assessed by this notice is $89,034.00, the sum of the tax assessed for the period ended April 30, 1989 in the amount of $58,296.00 and the tax assessed for the period ended September 30, 1989 in the amount of $30,738.00. Penalty and interest were imposed as well. This notice was issued as a result of an audit of NYFT's motor fuel tax returns for the period August 1, 1988 through August 31, 1990.

The first audit adjustment was a determination that NYFT failed to report and pay motor fuel tax on the importation of 728,700 gallons of motor fuel in April 1989. Motor fuel tax of eight cents per gallon was applied to this amount to determine additional tax due for April of $58,296.00.

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

> The second group of adjustments relate to the assessment of $30,738.00 for the period ending September 30, 1989. The Division found that NYFT failed to report and pay tax on the importation of 421,715 gallons of motor fuel in that month. In addition, it found that NYFT made a clerical error on its July 1990 return which resulted in a failure to report the import of 7,735 gallons of motor fuel subject to tax. Finally, the auditor determined that NYFT understated its inventory losses for the period June 1, 1990 through August 31, 1990. The Division compared schedules provided to the auditor by NYFT with the motor fuel tax returns filed by NYFT. The schedules were presumed to be correct and an audit adjustment was made to conform the tax returns to the schedules. The resulting credit of 45,225 gallons was used to offset the audited additional gallonage for the month of September 1989. The three audit adjustments collectively resulted in a finding that NYFT failed to report and pay motor fuel tax on the importation of 384,225 gallons of motor fuel. The motor fuel tax rate of eight cents per gallon was applied to these gallons to calculate additional tax due of $30,738.00. The entire amount was attributed to the period ended September 30, 1989.[1]

The bulk of the additional gallonage found on audit is based on the Division's determination that NYFT failed to report or pay tax on motor fuel it imported or caused to be

---

[1]We modified finding of fact "13" of the Administrative Law Judge's determination to correct a misstatement. The Administrative Law Judge stated that petitioner "overstated" its inventory losses for the period June 1, 1990 through August 31, 1990. In fact, petitioner understated such losses. It is clear from her determination that the Administrative Law Judge understood that the inventory losses for this period were actually "understated" since petitioner received a credit of 45,225 gallons. Accordingly, this correction does not impact on the outcome.

imported into New York for sale to Meridian Resources and Development Ltd. ("Meridian"). The Division was conducting an audit of petitioner's petroleum business tax liability under Article 13-A of the Tax Law at the same time that it was conducting the motor fuel tax audit under discussion. The Article 13-A auditor, Laurence Albert, found that NYFT reported sales to Meridian on its 1989 petroleum business tax return and then took a deduction for those sales. The auditor asked for copies of the NYFT invoices that would substantiate the sales to Meridian. He was provided with four NYFT invoices documenting the sales. All four invoices state that New York State motor fuel tax and sales tax is included in the total invoice amount, indicating that payment of the taxes imposed by Article 12-A and Article 28 of the Tax Law was the responsibility of NYFT. However, the auditor concluded that NYFT did not report or pay tax on the motor fuel it imported into New York and reported selling to Meridian on its petroleum business tax returns. The four NYFT sales invoices show sales to Meridian as follows:

Invoice Date	Total gallons
April 24, 1989	308,700
April 27, 1989	420,000
September 22, 1989	296,810
September 25, 1989	124,905

To show the source of the motor fuel sold to Meridian, NYFT provided the Division with invoices showing sales and delivery of motor fuel to NYFT by two suppliers. They provide the following information:

Ship Date:	4/25/89	4/28/89
Seller:	CITGO Petroleum	BP Oil
Delivery By:	Barge/Leona L	Barge/Bonnie B.
Gallons:	297,113	402,399
Shipment Point:	Linden, N.J.	Linden, N.J.
Delivery Point:	Newton Creek, N.Y.	Tremley Pt., N.J.

Ship Date:	9/20/89	9/22/89
Seller:	Citgo Petroleum	Citgo Petroleum
Delivery By:	Barge/East Coast	Barge/East Coast
Gallons:	296,810	124,905
Shipment Point:	Linden, N.J.	Linden, N.J.
Delivery Point:	NYFT N.J. Terminal	NYFT N.J. Terminal

The invoice dated April 28, 1989 has a handwritten notation on it that states: Sales; Meridian; 5/1. The writer of that entry is not known. In addition to the invoices, the Division was provided with what appear to be broker's invoices related to the April 25, 1989 and April 28, 1989 Meridian sales. Each of these documents is directed to the "Attention" of various people. The name Zev Furst, identified with Meridian Resources, appears in a list of such persons.

NYFT provided the Division with a workpaper entitled "NEW YORK FUEL TERMINAL CORP. / SALES TAX MOTOR FUEL TAX PREPAYMENTS / SEPTEMBER 1990" which is a reconciliation of opening inventory and closing inventory for the month. The worksheet shows an opening inventory of 722,403 gallons of motor fuel. Taxable receipts, or imports, total 6,324,835 gallons. Listed with other receipts are purchases of 402,339 gallons of motor fuel in April 1989 and 421,715 gallons in September 1989. These purchases directly relate to the April 1989 purchase invoices which purportedly show the purchases of motor fuel by NYFT for sale to Meridian. In short, the taxable imports that allegedly were sold to Meridian in April and September 1989 appeared on NYFT's September 1990 inventory reconciliation. NYFT's workpaper also shows tax paid receipts of 165,352 gallons and an inventory loss of 28,361 gallons of motor fuel, yielding a total of 7,184,229 gallons to be accounted for. Distributions of 6,492,583 gallons were subtracted from that total resulting in a closing inventory of 691,646 gallons. Without the inclusion of the April 1989 and September 1989 imports, the number of

gallons sold in September 1990 would have been greater than the total inventory at the beginning of September 1990, plus receipts during the month.

Mr. Albert testified about the motor fuel tax and prepaid sales tax audits which are the subjects of this proceeding. On direct examination, the Division's attorney asked a question of the auditor that suggests that the attorney believed that Meridian's name should have appeared on the motor fuel tax return. Referring to Meridian, the attorney stated: "So this name -- their name should have appeared on the 12-A return for these sales then, right?" (tr., p. 51). The auditor responded to the question by stating: "Well, these gallons should have been included on the taxable gallons on the 12-A return, that's correct." (Tr., p. 51.)

In general, sales to a customer are stated on a motor fuel tax return only if the tax has not been imposed prior to the sale (i.e., upon import). The NYFT sales invoices to Meridian indicate that NYFT paid the required taxes before selling to Meridian. If that were true, NYFT would not be required to list its sales to Meridian on its motor fuel tax returns. Petitioners produced evidence intended to show that the gallonage sold to Meridian was included in its statement of receipts, or imports, and that NYFT paid the tax on the first import of the motor fuel into New York.

An affidavit was submitted on behalf of petitioners by Abbey Blatt. Mr. Blatt is a certified public accountant who has had numerous petroleum companies as clients and is familiar with the petroleum industry as a whole. He assisted NYFT in setting up its books and records and has represented NYFT since 1981 and its affiliates since 1964. Mr. Blatt stated in his affidavit that distributors, like NYFT, experience timing differences in the recording and reporting of the gallonage they purchase and sell. Mr. Blatt's point was that the dates on the NYFT sales invoices

typically do not correspond to the actual dates on which motor fuel is shipped into New York or delivered to NYFT customers. According to Mr. Blatt, it would not be unusual for a sales transaction with an invoice dated in April to be completed in May. Consequently, the invoice date might not coincide with the date NYFT recorded a purchase or sale in its books and records and on its tax returns. Mr. Blatt also stated that if NYFT arranged for the transportation and delivery of motor fuel to a customer there would be a difference between the gallons NYFT purchased from its supplier and the gallons stated on NYFT's sales invoices to its customer. The difference, according to Mr. Blatt, is usually the result of the expansion or contraction of the motor fuel.

A copy of NYFT's May 1989 form MT-104 was attached to Mr. Blatt's affidavit. The return was intended to show that the motor fuel sold to Meridian was reported on NYFT's May 1989 schedule of receipts and that NYFT paid the tax imposed on the import of that motor fuel. An entry on schedule 1 of the form MT-104 shows gallonage received on May 1, 1989. The seller is shown as BP Oil Company, the method of delivery as the Bonnie B. barge, and the number of gallons as 125,453. The point of shipment is shown as Tremley, Pt. and the point of delivery is shown as Oyster Bay. Mr. Blatt did not definitively state that this shipment was the source of the fuel sold to Meridian. The schedule lists a second purchase on May 1, 1989 from Citgo Petroleum in the amount 293,666 gallons. The method of delivery is identified as the Bonnie B. barge, the shipment point as Linden and the delivery point as Oyster Bay.

DTA Nos. 814153, 814157 and 814163

The Division issued a Notice of Determination to NYFT, dated September 21, 1992, assessing motor fuel tax under Article 12-A of the Tax Law for the periods ended September 30,

1990 and October 31, 1990 and the period January 1, 1991 through February 28, 1991 in the amount of $10,980.00, plus interest of $1,920.41 and penalty of $3,217.70 for a total amount due of $16,118.11 (L-006394868-2). On or about January 19, 1993, the Division issued notices of determination to Joseph A. Macchia and Lawrence Macchia (L-006933111-6 and L-006933112-5, respectively) assessing penalties against each in the amount of $16,497.97 for the period September 1, 1990 through February 28, 1991. The notices assert that each of them is liable "as an Officer/Responsible Person for a penalty in the amount equal to the tax, penalty and interest not paid by [NYFT]" pursuant to Tax Law § 289-b(2).

The tax assessed was based upon the Division's determination that NYFT overstated inventory losses on its motor fuel tax returns for the months of September, November and December 1990 and January and February 1991. The auditor based his conclusions on a comparison of inventory losses and gains stated on NYFT's forms MT-104 with gains and losses appearing in NYFT's own records. Inventory losses and gains result primarily from temperature related expansions or contractions of gasoline while in storage. In some months, NYFT's records showed a gain in product while in other months they showed a loss of product. The auditor accepted the gains and losses recorded in NYFT's workpapers as accurate and adjusted the amounts reported on the tax returns accordingly. This resulted in an overall gain of 36,014.08 gallons.

In his affidavit, Mr. Blatt asserts that it is impossible to state the number of gallons lost or gained due to changes in temperature with absolute certainty. He points out that the audit adjustment is extremely small when compared with the number of gallons of motor fuel handled by NYFT every month, approximately six million gallons.

DTA Nos. 814152, 814156, 814160 and 814162

The Division issued a Notice of Determination, dated December 28, 1992, to NYFT, assessing sales tax due in the amount of $690,598.62, plus penalty of $207,179.04 and interest of $243,503.75 for a total due of $1,141,281.41 (L-006902009-4). The notice covers the periods ended April 30, 1989, May 31 1989, September 30, 1989, December 31, 1989 and the period October 31, 1990 through February 28, 1991. The Division also issued a Notice and Demand, dated April 8, 1993, to NYFT. This notice is based upon the Notice of Determination which is in issue here. The Division acknowledges that the Notice and Demand was issued in error, and it withdrew the notice at hearing.

The Division issued notices of determination of sales tax due, dated January 19, 1993, to petitioners Joseph A. Macchia and Lawrence Macchia (L-006933110-7 and L-006933109-7, respectively), assessing each of them a penalty in the amount of $765,172.43 for the period ended December 1, 1989 and the period October 1, 1990 through February 28, 1991. The basis for these notices is the Division's determination that as officers under a duty to act for NYFT in complying with the Tax Law Joseph A. and Lawrence Macchia are each liable for a penalty in an amount equal to the tax, penalty and interest not paid by NYFT.

The notices of determination were issued as a result of an audit of NYFT's forms FT-945 for the period January 1, 1989 through March 31, 1991. This audit was conducted in conjunction with the motor fuel tax audits previously discussed (DTA Nos. 814155, 814153, 814157 and 814163), and several of the adjustments made to NYFT's reports of prepaid sales tax correspond to adjustments made to NYFT's motor fuel tax returns.

The Division determined that the forms FT-945 filed by NYFT failed to report motor fuel imported into New York and purportedly sold to Meridian. Unreported gallonage was determined to be 728,700 gallons of motor fuel in April 1989 and 421,715 gallons of motor fuel in September 1989. The basis for these conclusions is detailed above. NYFT was assessed sales tax of $47,365.50 on additional gallons imported in April 1989 and sales tax of $27,411.48 on additional gallons imported in September 1989. The notices of determination issued to Joseph A. and Lawrence Macchia do not assess penalties for these months.

The Division also found that NYFT failed to pay sales tax on 403,000 gallons of motor fuel imported into New York in December 1989. This conclusion was based upon a discrepancy between the motor fuel tax return filed for December 1989 and the prepaid sales tax return filed for the same month. On its December 1989 form MT-104, NYFT reported 6,183,422 gallons of motor fuel subject to motor fuel tax. On its December 1989 form FT-945, NYFT reported 5,780,422 gallons of motor fuel subject to sales tax. In both cases, the gallonage reported represented motor fuel imported into New York by NYFT, and the totals should have agreed. A workpaper provided to the Division by NYFT as supporting documentation shows total receipts of 6,183,422 gallons for the month of December 1989. The difference between imports reported on NYFT's motor fuel tax returns and prepaid sales tax reports was deemed to be unreported gallonage subject to sales tax, and NYFT was assessed sales tax of $26,195.00 on these additional gallons plus penalty and interest. Petitioners Joseph A. and Lawrence Macchia were assessed penalties for this period equal to the amount of the tax, penalty and interest owed by NYFT.

As was the case with the associated motor fuel tax audit, inventory losses shown on NYFT's reports of prepaid sales tax were not substantiated by workpapers provided to the auditor. The auditor accepted the accuracy of NYFT's records which showed lower figures for losses than those claimed on NYFT's forms FT-945. This resulted in additional tax due of $10,996.00 for the assessment period. Tax of $4,968.00 was assessed for the month of October 1990, tax of $2,607.00 was assessed for the month of January 1991 and tax of $3,421.00 was assessed for the month of February 1991. Petitioners Joseph A. and Lawrence Macchia were assessed penalties for these periods in an amount equal to the tax, penalty and interest owed by NYFT.

The final adjustment made to NYFT's reports of prepaid sales tax was the disallowance of certain bad debt credits. NYFT took credits for bad debt write-offs of prepaid sales tax related to sales to TunYung Oil Corporation ("TunYung"), A. Tarricone, Inc. ("Tarricone"), Riverside Oil Co., Inc. ("Riverside") and Malon Enterprises, Ltd. ("Malon").

The Division disallowed a credit in the amount of $134,128.68 for the month of May 1989, a credit of $329,159.95 for the month of November 1990 and a credit of $115,342.01 for the month of December 1990. The Notice of Determination challenged in this proceeding assesses sales tax against NYFT in amounts corresponding to the disallowed credits. The notices of determination issued to petitioners Joseph A. and Lawrence Macchia assess penalties for the months of November and December 1990 in amounts equal to the tax, penalty and interest owed by NYFT at the time the notices were issued, but they do not assess penalties for the month of May 1989.

We modify finding of fact "33" of the Administrative Law Judge's determination to read as follows:

> The Division now concedes that it assessed tax twice for the months of November 1990 and December 1990. The disallowed bad debt credits were assessed against NYFT by notice number S910424951C, and the tax due for those periods was finally determined by the prior NYFT Decision. Joseph A. and Lawrence Macchia were assessed penalties for November 1990 and December 1990 as discussed above. Consequently, the notices of determination protested by NYFT in this proceeding[2] (L-006902009-4) and the proceedings brought by petitioners Joseph A. and Lawrence Macchia (L-006933110-7 and L-006933109-7)[3] must be adjusted by canceling the tax, interest and penalty assessed for the months of November 1990 and December 1990. These notices otherwise remain in dispute, including the assessment against NYFT arising from the disallowed bad debt credit of $134,128.68 claimed for May 1989.[4]

On audit, the Division was provided with invoices showing sales to Tarricone, Riverside and Malon; a schedule of uncollectible debts prepared by Abbey Blatt; and a copy of NYFT's December 1989 Report of Sales Tax Prepayment on Motor Fuel, where NYFT claimed a credit of $134,128.68 for bad debts.

The auditor reviewed these documents and found no discrepancies within them. He did not request additional documentation to verify that the sales occurred or that the invoice amounts were unpaid and uncollectible. Rather, the Division disallowed all credits for bad debts on the

---

[2]DTA Nos. 814152 and 814156

[3]DTA Nos. 814160 and 814162. The Administrative Law Judge erroneously referred to Notice Nos. L-005694275-6 and L-005694279-2.

[4]We modified finding of fact "33" of the Administrative Law Judge's determination to correct references to notice numbers requiring adjustments.

ground that no provision of the Tax Law provides for a credit or refund as a result of bad debt write-offs by a distributor.

After the issuance of the NYFT Decision, the Division no longer argued that a bad debt credit could not be taken against prepaid sales taxes. It argued, instead, that the burden is on petitioners to show entitlement to the credit. In the Division's answer and at hearing, the Division's representative took the position that petitioners had the burden of proving that the sales to Riverside, Tarricone and Malon actually occurred and that the underlying debts were real and valid.

Mr. Blatt states in his affidavit that as part of his duties he routinely reviewed NYFT's outstanding accounts receivable in March through May of each year. As part of his review, Mr. Blatt analyzed whether NYFT had uncollectible receivables that should be written off as bad debts.

Mr. Blatt received a letter, signed by Lawrence Macchia, listing certain receivables that should be considered bad debts for the year closing December 31, 1987. The total amount of all uncollectible debts listed by Mr. Macchia is $2,641,880.22. Mr. Macchia stated that the listed funds could not be collected "after substantial efforts" at collection. Included in his listing are amounts receivable as follows:

Riverside:	$116,166.77
Malon:	675,211.44
Tarricone:	636,369.15

Mr. Blatt states that the dollar amounts appearing in Mr. Macchia's letter represent both charges for the motor fuel and sales taxes imposed on the charges but never collected. Mr. Blatt states that he "independently investigated all of the customers listed on Mr. Macchia's letter"

(affidavit, ¶ 15). Regarding most of those customers, he determined that NYFT did not charge, and was not required to charge, sales tax, but he concluded that Riverside, Malon and Tarricone were properly charged sales tax. Mr. Blatt reviewed invoices issued to those companies in the 1986 calendar year and determined that the uncollected sales tax from these three vendors amounted to $134,128.68. The invoice amounts for these vendors, less sales tax, totaled $1,291,681.45. Mr. Blatt documented his findings on a schedule which was provided to the auditors on audit, along with copies of the sales invoices which were the source of Mr. Blatt's schedule. The invoice amounts agree with Mr. Blatt's schedule.

Mr. Blatt states that he was aware that Riverside had gone out of business when he prepared his schedule, and he determined that the last payment NYFT received from Riverside was in September 1986. He states that Malon ceased business operations before the end of 1987 and made its last payment to NYFT in November 1986. Tarricone filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code on December 12, 1986.

With regard to other vendors listed in Mr. Macchia's letter, Mr. Blatt determined in early 1988 that they had not made payments to NYFT in over 12 months. Based on the facts recounted above and his discussions with NYFT's management, Mr. Blatt concluded that all of the accounts listed in Mr. Macchia's letter were uncollectible or worthless for Federal income tax purposes.

NYFT filed its 1987 United States Corporation Income Tax Return (Form 1120) claiming a bad debt deduction of $2,530,351.00 on line 15. Mr. Blatt avers that the Internal Revenue Service never contested NYFT's treatment of these accounts as uncollectible or worthless. Mr. Blatt prepared NYFT's Financial Statement for December 31, 1987 charging off bad debts of $2,317,463.00.

Mr. Blatt notes that at the time he prepared NYFT's sales tax returns there were no published decisions or promulgated regulations regarding uncollected prepaid sales taxes. In consultation with NYFT's tax counsel, Mr. Blatt determined that it was reasonable for NYFT to claim a bad debt credit for prepaid sales taxes relating to its sales to Riverside, Malon and Tarricone.

We modify finding of fact "44" of the Administrative Law Judge's determination to read as follows:

> On June 30, 1993, indictments were filed against Joseph A. Macchia and Lawrence Macchia, among others, in the United States District Court, Eastern District of New York. Joseph A. and Lawrence Macchia pled guilty to three counts of the indictment charging them with conspiring with others, to defraud the government in the collection of Federal gasoline excise taxes and of evading $85,000,000.00 in Federal gasoline taxes. The facts relating to the conspiracy are set forth in the indictment in some detail. The Macchias and NYFT sold large quantities of gasoline to unlicensed companies without paying Federal excise taxes due and owing to the United States. NYFT sold the gasoline to the unlicensed companies in a variety of ways.
>
> Most of the "bootlegged"[5] gasoline sold by NYFT to the unlicensed companies was sold by "book transfer"[6] at the M&Q Terminal in Brooklyn, a gasoline storage facility owned and operated by the Macchias. The remainder of the gasoline was sold by barge in New York and New Jersey and by book transfer in New Jersey. These sales to unlicensed companies were disguised as sales to licensed companies in order to evade the Federal excise

[5]"Bootlegging" is a term used in the gasoline industry to describe activity designed to evade motor fuel excise taxes. "Bootleg gasoline" is gasoline on which the excise tax has been evaded.

[6]The term "book transfer" refers to the passing of title to gasoline from one company to another within a terminal. This transfer of ownership occurs on paper, but the gasoline itself does not move.

> tax. The period covered by the conspiracy began around the end of 1982 and continued through the middle of 1988.[7]

We make the following additional finding of fact:

> Marat Balagula, a co-conspirator with the Macchias, controlled many of the unlicensed companies which purchased bootleg gasoline from NYFT as part of this scheme. Malon was one of Balagula's unlicensed companies. We take official notice of the decision of the Court in ***United States v. Joseph Macchia, Sr., Marat Balagula, et al*** (104 F3d 350 [2nd Cir]) solely for the purpose of noting that Marat Balagula was charged in the same indictment as the Macchias and pled guilty to all counts.

We modify finding of fact "45" of the Administrative Law Judge's determination to read as follows:

> The indictment reflects that a variety of falsified documents and records were created and a number of unlicensed companies were used in a "daisy chain" scheme to evade the taxes due. In a "daisy chain" scheme, gasoline taxes are evaded by the creation of one or more "burn companies." The "burn company" issues phony invoices reflecting that the applicable excise taxes have been paid. By the time the government discovers the nonpayment of tax, the "burn company" has been dissolved and is unavailable to pay the tax. The indictment shows that the Macchias used this "daisy chain" scheme to cause the Internal Revenue Service to believe that the "burn companies," and not NYFT, owed the excise taxes on the gasoline which NYFT had sold to the unlicensed companies.
>
> To be successful, this scheme required an extensive phony paper trail. False invoices were created to show that NYFT sold hundreds of millions of gallons of gasoline to approximately 18 licensed companies, including A. Tarricone, Inc., Riverside Oil Co. and TunYung Oil Corp. False invoices were also created to show that these 18 companies had, in turn, resold the gasoline to a third company, when, in fact, these 18 companies did not purchase the gasoline from NYFT in the first place.

---

[7]We modified finding of fact "44" of the Administrative Law Judge's determination to more completely reflect the record.

The unlicensed companies which had actually purchased the gasoline from NYFT often received a false invoice showing that all taxes had been paid when, in fact, the Macchias knew no taxes had been paid. As noted earlier, the unlicensed companies were controlled by Marat Balagula, et al. One of those companies is Malon Enterprises, Ltd.

In furtherance of the conspiracy, false cash receipts were created and used to disguise that NYFT received a large quantity of cash from the actual unlicensed purchasers of the gasoline. Much of that cash was reported in NYFT's books as having been received from the 18 licensed companies that had purportedly purchased the gasoline. In reality, few, if any, of these cash payments were from the licensed companies.

Also in furtherance of this scheme, false book transfers made it appear that gasoline sold by NYFT was transferred through accounts of several other licensed and unlicensed companies before being received by the actual purchasers when, in fact, the only transfers that occurred were from NYFT to the actual unlicensed purchasers.

The false and fraudulent invoices were reflected in the sales journals and ledgers of NYFT, which caused those books and records to be false and fraudulent as well.

The indictment notes that while the Macchias shared many responsibilities and functions in the companies they owned, including NYFT, each developed particular roles. Joseph A. Macchia was "the final decision maker." His son, Lawrence Macchia, was responsible for overseeing recordkeeping and the creation of phony book transfers.

The indictment lists some of these phony book transfers, including transfers to Tarricone (referred to in the indictment and in Mr. Blatt's affidavit as "A.T.I.") and Malon. No information contained in the indictment allows one to directly tie a sales invoice upon which petitioners base their bad debt claim to an illegal act.[8]

---

[8]We modified finding of fact "45" of the Administrative Law Judge's determination to more completely reflect the record.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

DTA Nos. 814159 and 814161

At the hearing in this matter, petitioners Joseph A. and Lawrence Macchia conceded that they were persons under a duty to act for NYFT in complying with the requirements of Articles 12-A and 28 of the Tax Law.

The Administrative Law Judge noted that on the face of the notices issued to the individual officers penalties were assessed under the authority of Tax Law § 1145(e). That provision provides, in pertinent part:

> Any officer . . . of a corporation . . . who as such officer . . . is under a duty to act for such corporation . . . in complying with any requirement of [article 28] . . . which fails to pay the tax required to be prepaid by section eleven hundred two or eleven hundred three of [article 28], shall, in addition to other penalties provided by law, be liable for a penalty equal to the total amount of the tax not paid, plus penalty and interest . . . . If the commissioner determines that such failure was due to reasonable cause and not due to willful neglect, the commissioner shall remit all or part of such penalty imposed under this subdivision.

The Administrative Law Judge concluded that the notices of determination issued to the Macchias were related to the NYFT sales tax assessment which was the subject of the earlier NYFT Decision.

Petitioners also noted that the amounts assessed against them as officers are different from the amounts assessed against NYFT and that the tax period stated on the notices issued to them (period ended February 28, 1991) does not correspond with the tax period of the NYFT assessment (November 1990 and December 1990). Based on those differences, they claim that the officer assessments cannot be related to the NYFT assessment.

The Administrative Law Judge rejected this argument, noting that the Division introduced computer records which established that assessment numbers L-005694275-6 and L-005694279-2, issued to Joseph A. Macchia and Lawrence Macchia, respectively, were based upon the sales tax assessment issued to NYFT (L-005231292). Petitioners did not offer evidence challenging the Division's proof. Further, the Administrative Law Judge stated, Joseph A. and Lawrence Macchia knew that the notices issued were based on the NYFT assessment. Their petitions allege as much. Further, the Administrative Law Judge stated, the Division's answers were sufficient to clarify any confusion that petitioners might have had. The Division conceded that the notices erroneously state the periods covered by the officer assessments. The Administrative Law Judge concluded this mistake was insufficient to prove that the officer assessments were not based upon the NYFT assessment. Moreover, the Administrative Law Judge concluded, petitioners have not shown that they were prejudiced by the Division's mistake in referring to a tax period covered by the assessments ***(citing, Matter of Pepsico, Inc. v. Bouchard***, 102 AD2d 1000, 477 NYS2d 892; ***Matter of Tops, Inc.***, Tax Appeals Tribunal, November 22, 1989). The Administrative Law Judge stated that the difference in the amounts assessed against the officers and NYFT is explained by interest and penalties accruing during the time between the issuance of the officer and NYFT assessments. The penalties now asserted are in the amount of $66,312.39, plus the penalty and interest not paid by NYFT. The Administrative Law Judge directed that the notices of determination issued to petitioners Joseph A. Macchia and Lawrence Macchia (L-005694275-6 and

L-005694279-2, respectively), be conformed to $66,312.39, plus penalty and interest remaining due.[9]

Next, petitioners argued that there is no basis in law for not canceling the officer assessments. Petitioners were assessed penalties pursuant to Tax Law § 1145(e). Petitioners admitted they were officers under a duty to act for NYFT in complying with the requirements of Article 28. NYFT failed to pay the tax required to be prepaid by Tax Law § 1102. In the NYFT Decision, we determined the amount of the unpaid tax to be $66,312.39, plus penalty and interest. The Administrative Law Judge concluded that pursuant to Tax Law § 1145(e) petitioners were properly assessed penalties in an amount equal to the total amount of the tax not paid, plus penalty and interest. Contrary to petitioners' argument, the Administrative Law Judge concluded that there is no basis in law for canceling these officer assessments.[10]

The Administrative Law Judge also concluded that petitioners have not shown reasonable cause for NYFT's failure to comply with the provisions of Article 28. In the NYFT Decision we found that NYFT claimed a credit of $442,536.69 against its November and December 1990 returns, but only established the existence of a bad debt in the amount of $376,224.30. Because NYFT did not explain why it claimed credits in excess of the amount of the bad debt it proved, we sustained the penalty. The Administrative Law Judge found that these petitioners have also failed to explain the discrepancy and concluded that petitioners failed to establish reasonable cause for the abatement of penalties.[11]

---

[9]Determination, conclusion of law "A."

[10]Determination, conclusion of law "B."

[11]Determination, conclusion of law "C."

At the outset, the Administrative Law Judge pointed out that every distributor of motor fuel must pay an aggregate excise tax of eight cents per gallon on each gallon of motor fuel which it imports or causes to be imported into New York (Tax Law §§ 284, 284-a, 284-c). On or before the 20th day of each month, each distributor must file a monthly report of tax on motor fuels stating, among other things, the number of gallons of motor fuel the distributor imported or caused to be imported into New York for use, distribution, storage or sale in New York (Tax Law § 287[1]; 20 NYCRR 413.1[a]).[12]

The Division audited NYFT and determined that NYFT failed to pay motor fuel tax on the importation of 728,700 gallons of motor fuel imported in April 1989 and an additional 421,715 gallons imported in September 1989. This finding came about as a result of an investigation into sales of motor fuel to Meridian.[13]

NYFT offered no evidence that directly related to the tax assessed for the month of September 1989. Therefore, the Administrative Law Judge sustained that portion of the assessment relating to September 1989, i.e., $30,738.00.[14]

The Administrative Law Judge rejected petitioner's argument that the Division's determination of unreported gallonage for April 1989 was based on the fact that Meridian's name did not appear on NYFT's April 1989 return. The Division determined that the motor fuel sold to Meridian was not reported as a taxable receipt on NYFT's April 1989 form MT-104, the

---

[12]Determination, conclusion of law "D."

[13]Determination, conclusion of law "E."

[14]Determination, conclusion of law "F."

Administrative Law Judge concluded, because the Division could not trace the gallonage sold to Meridian to motor fuel imported into New York by NYFT. In coming to this conclusion, the Administrative Law Judge pointed out, the Division reviewed NYFT sales invoices documenting the Meridian sales and four third-party invoices showing NYFT's purchase and importation of motor fuel, purportedly for sale to Meridian. The Division also reviewed petitioner's inventory reconciliation for September 1990 prepared by NYFT where the 1989 receipts are recorded. Based on its analysis of these documents, the Administrative Law Judge pointed out, the Division determined that the gallonage sold to Meridian was not reflected on NYFT's schedule of taxable receipts on its forms MT-104. The Administrative Law Judge concluded that both the audit method and the audit result were reasonable based upon the information available to the auditor at the time of the audit.

Petitioner claimed that the gallonage invoiced to Meridian on April 28, 1989 appears as an import on NYFT's May 1989 motor fuel tax return. Petitioner relied on Mr. Blatt's affidavit and NYFT's May 1989 form MT-104 as proof this claim. According to Mr. Blatt, it is typical in the petroleum industry for the actual date of delivery of a product to differ from the delivery date initially contracted for. In its brief, the Administrative Law Judge noted, petitioner identified a single import as the source of the motor fuel sold to Meridian. According to NYFT, the import is shown on its May 1989 form MT-104 as a purchase from BP Oil of 125,453 gallons of motor fuel transferred by the barge Bonnie B. on May 1, 1989. Upon review of all of the evidence, the Administrative Law Judge concluded that this import could not be traced to the Meridian sales.

NYFT provided four invoices to the auditor as backup for the Meridian sales. One of these invoices shows the purchase of 402,399 gallons from BP Oil on April 28, 1989 and the means of

transport as the Bonnie B. barge. A handwritten notation on the invoice suggests that this gallonage was purchased for sale to Meridian and delivered on May 1, 1989. The gallonage appears in NYFT's books and records for September 1990. The Administrative Law Judge concluded that it was reasonable to conclude that this gallonage was imported into New York by NYFT for sale to Meridian, although the amount of the Meridian sale was 420,000 gallons. The Administrative Law Judge noted that there was no evidence that this purchase and import was reported by NYFT in April or May 1989.

Further, the Administrative Law Judge stated, petitioner did not explain how the May 1, 1989 purchase of 125,453 gallons could be traced to the Meridian sales. The number of gallons imported does not approximate the number of gallons sold. In contrast to the 402,399-gallon import of April 28, 1989, there are no invoices or similar documents, the Administrative Law Judge said, which would enable one to tie this entry on the tax return to a Meridian sale. Even Mr. Blatt, the Administrative Law Judge noted, did not state that this was the gallonage sold to Meridian. Petitioner did not explain why the import of 402,339 gallons of motor fuel, sold to Meridian in April 1989, appears on NYFT's worksheets in September 1990. In sum, the Administrative Law Judge concluded, petitioner has not shown that the motor fuel sold to Meridian in April was ever reported as NYFT receipts and has not addressed the September Meridian sales. Consequently, the Administrative Law Judge concluded, NYFT provided no basis for altering the Division's assessment.[15]

[15]Determination, conclusion of law "G."

For the period September 1, 1990 through February 28, 1991, the Division assessed NYFT motor fuel taxes of $10,980.00, plus penalty and interest, and it assessed penalties against Joseph A. and Lawrence Macchia in an amount equal to tax, penalty and interest owed by NYFT. The assessments were based on the Division's determination that NYFT had overstated inventory losses on its motor fuel tax returns for this period. The auditor compared NYFT's tax return for each month with workpapers and schedules maintained by NYFT. In each case, the auditor accepted the accuracy of NYFT's own records and adjusted the amount reported on NYFT's tax returns accordingly.

Petitioners argued that the Division should not have accepted NYFT's figures. Instead, petitioners argued, the Division should have performed its own independent analysis and obtained third-party verification to determine the extent of any losses which may have occurred. Petitioners argued that absent such an investigation the Division had no legal authority to adjust the inventory losses claimed by NYFT on its tax returns. They base this argument on Tax Law § 285-a(2).

The Administrative Law Judge pointed out that Tax Law § 285-a(2) creates a presumption of taxability for motor fuel imported, manufactured or sold, received or possessed in New York with some exceptions. As pertinent here, the statute states:

> a distributor of motor fuel who imports, manufactures or sells and stores in the state or who purchases and stores motor fuel in the state on which he has paid the taxes imposed by this article shall be allowed an adjustment . . . on account of the gallons the distributor establishes were lost due to shrinkage, evaporation and handling; provided, however, such allowance shall not exceed two percent of the fuel stored (Tax Law § 285-a[2], emphasis added).

The Administrative Law Judge concluded that Tax Law § 285-a(2) establishes an absolute limit of two percent on the amount a distributor may claim due to shrinkage, evaporation and handling and it places the burden on the distributor to establish the actual number of gallons lost. The Administrative Law Judge concluded it was reasonable for the Division to rely on NYFT's own records to determine the credits to which NYFT is entitled and petitioners failed to explain why their records differ from their tax returns. Consequently, the Administrative Law Judge stated, petitioners have not shown any error in the Division's audit method or results. Moreover, the Administrative Law Judge concluded, since petitioners have not explained why there is a discrepancy between NYFT's books and records and its motor fuel tax returns, they have not established reasonable cause for cancellation of penalty.[16]

DTA Nos. 814152, 814160 and 814162

The final series of assessments in issue for the three petitioners concern notices of determination assessing sales tax due. Two of the audit adjustments made to NYFT's reports of prepaid sales tax are related to adjustments made to NYFT's motor fuel tax returns. The Division found that NYFT failed to report and pay sales tax on the importation of 728,700 gallons of motor fuel in April 1989 and on the importation and sale of 421,715 gallons of motor fuel in September 1989. Petitioners' arguments regarding the motor fuel tax assessment, the Administrative Law Judge stated, applied as well to the sales tax assessment (*see*, Determination, conclusion of law "G") and the final result is the same. Because petitioners did not show that NYFT reported these gallons on its prepaid sales tax reports, the Administrative Law Judge sustained the assessment.

---

[16]Determination, conclusion of law “H.”

The Division also found a discrepancy of 403,000 gallons when it compared NYFT's sales tax and motor fuel tax returns for the month of December 1989. Moreover, a workpaper prepared by NYFT supported the higher import figure shown on the motor fuel tax return.[17] The amount of the discrepancy was determined to be additional unreported gallons. Petitioners, the Administrative Law Judge noted, did not address this aspect of the sales tax assessment and, therefore, they provided no basis for any adjustment.[18]

Petitioners disagreed with the Division's disallowance of bad debt credits in the amount of $134,128.68 for the month of May 1989. Tax Law § 1132(e) states that the Commissioner of Taxation and Finance may, by regulation, provide for a credit for sales tax paid to the State where the charge upon which the tax was imposed has been ascertained to be uncollectible. In the NYFT Decision, we found that this provision applies to the sales tax required to be prepaid on motor fuel by Tax Law § 1102(a). The Division argued here that even if the credit is authorized by law, petitioners have not established either (1) that the sales underlying the bad debt actually occurred or (2) that the bad debt credit was actually charged off for Federal income tax purposes.[19]

Petitioners countered that this was a new factual issue raised by the Division for the first time in its brief. The Administrative Law Judge rejected petitioners' argument, pointing out that the factual issues relating to NYFT's bad debt credits were first raised by the Division in its answers. At hearing, the Division conceded that the credit provided for in Tax Law § 1132(e)

---

[17]See findings of fact above.

[18]Determination, conclusion of law "I."

[19]Determination, conclusion of law "J."

applies to the prepaid sales tax on motor fuel. However, the Division's attorney then stated "our position . . . is that . . . the taxpayer still needs to prove the facts and the line of that debt" (Tr., p. 36). The Administrative Law Judge left the record in this matter open to give petitioners an opportunity to submit affidavits and documentary evidence. The additional evidence on the bad debt issue was received and the record was closed. Based on the complete record, the Administrative Law Judge rejected petitioners' claim that the Division raised new factual issues in its brief.

The Administrative Law Judge noted that even if the auditor did not question the existence of the debts at the time of the audit, petitioners still carried the burden of proof at hearing to show that NYFT met each and every requirement for taking the bad debt credit. A tax credit is "a particularized species of exemption from taxation" ***(citing, Matter of Grace v. New York State Tax Commn.,*** 37 NY2d 193, 371 NYS2d 715, 719, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027) and the burden is on the taxpayer seeking the exemption to show a clear-cut entitlement to it ***(Matter of Golub Serv. Sta. v. Tax Appeals Tribunal***, 181 AD2d 216, 585 NYS2d 864, 865).[20]

Tax Law § 1132(e) provides for a credit for sales tax paid by a registered vendor where the underlying charge has been ascertained to be uncollectible. The term "uncollectible" as used in the statute has been defined by regulation to mean "worthless, as used for Federal income tax purposes" (20 NYCRR 534.7[a][1]). In order to qualify for the bad debt credit, the Administrative Law Judge stated, an account must have been found to be uncollectible and actually charged off for Federal income tax purposes (20 NYCRR 534.7[d][1]).

---

[20]Determination, conclusion of law "K."

The Administrative Law Judge noted further that a bad debt deduction is allowed only for a bona fide bad debt, i.e., "a debt which arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money" (Treas Reg § 1.166-1[c]). To establish NYFT's entitlement to the bad debt credit, the Administrative Law Judge stated, petitioners must prove that the Tarricone, Riverside and Malon sales invoices were authentic and that NYFT had valid claims for payment of the amounts shown on the invoices.

Petitioners' evidence on this issue consisted of sales invoices showing sales to Tarricone, Riverside and Malon and the affidavit of Abbey Blatt. The probative value of this evidence, the Administrative Law Judge concluded, is called into question by the Macchias' pleas of guilty to conspiring to evade Federal excise taxes and to evading Federal excise taxes. By those pleas, the Macchias admitted to creating false and fraudulent invoices showing sales to Tarricone and Riverside when, in fact, the sales never occurred. The Macchias also admitted that gasoline purportedly sold to licensed companies was sold to Malon, an unlicensed company controlled by a co-conspirator. In furtherance of their conspiracy to evade Federal excise taxes, the Administrative Law Judge stated, the Macchias created fraudulent invoices showing sales to Malon and others which stated that all Federal taxes were included in the invoice amount when they knew that was not true.

The Administrative Law Judge noted that the disputed sales invoices documenting sales to Tarricone, Riverside and Malon bear dates that fall within the period covered by the indictment and guilty pleas, the second half of 1986. The Administrative Law Judge concluded that the guilty pleas to specific charges related to the creation of false invoices are sufficient to raise doubts concerning the authenticity of the sales invoices.

Petitioners, the Administrative Law Judge pointed out, knew that the authenticity of the sales invoices was in issue. A copy of the indictment was received in evidence over the objection of their attorney and the indictment was specifically offered in relation to the bad debt credit. Petitioners were given an opportunity to prove that the bad debt credit was based upon bona fide bad debts. No one testified on behalf of petitioners at the hearing, but the record was left open at petitioners' request to allow petitioners to submit evidence after its close. However, the Administrative Law Judge stated, no evidence was submitted which establishes the authenticity of the sales invoices.

Mr. Blatt's affidavit states, without elaboration, that he "independently investigated" the customers listed in Mr. Macchia's letter, but, the Administrative Law Judge noted, he provided no details about his investigation. According to Mr. Blatt's affidavit, he relied on NYFT's books and records in determining whether the debts were collectible. Mr. Blatt does not say whether he knew at the time that NYFT's books and records contained fraudulent entries. He does not swear to the authenticity of the invoices and books and records that are relied on in this proceeding as evidence of the existence of bona fide bad debts. If Mr. Blatt looked beyond the books and records of NYFT to satisfy himself of the authenticity of the invoices, he does not say so. The Administrative Law Judge acknowledged that the mere fact that Joseph A. and Lawrence Macchia admitted that false invoices were created in furtherance of their tax evasion scheme is not, in itself, proof that these invoices are false. But, the Administrative Law Judge stated, a heavy burden was placed on petitioners to show that the disputed invoices are valid.

The Administrative Law Judge concluded that petitioners have not carried their burden by showing that the credits taken were based on bona fide transactions, i.e., bona fide bad debts.[21]

The Division next argued that under Federal law NYFT was required to ascertain that the debts were uncollectible, charge them off on the corporate books and take the Federal deduction within the same taxable year. The Division maintains that NYFT is not entitled to the bad debt credit because all three steps were not taken during the same year. Since the Administrative Law Judge found that NYFT failed to prove the existence of a bona fide bad debt, she concluded the second ground for denying the credit was moot.[22]

The Division conceded that credits disallowed for the months of November and December 1990 were assessed previously (assessment number S910424951C) and that the tax due for those periods was fixed by a final determination of the Tax Appeals Tribunal in the NYFT Decision. In addition, penalties were assessed against petitioners Joseph A. and Lawrence Macchia based upon that earlier notice. Accordingly, the Administrative Law Judge directed that three of the notices of determination which are the subject of this proceeding (L-006902009-4, L-006933009-7 and L-006933110-7) shall be modified by canceling tax assessed for the month of November 1990 in the amount of $329,159.95 and for the month of December 1990 in the amount of $115,342.01.[23]

---

[21]Determination, conclusion of law "L."

[22]Determination, conclusion of law "M."

[23]Determination, conclusion of law "N."

The Administrative Law Judge also cancelled the Notice and Demand dated April 8, 1993 (L-006902009-4) in accordance with the Division's concession that it was issued improperly.[24]

ARGUMENTS ON EXCEPTION

The Macchias disagree with that portion of the Administrative Law Judge's determination that concludes that the officer assessments issued to them (L-005694275-6 and L-005694279-2) are related to the corporate assessment (L-005231292) issued to NYFT (Determination, conclusion of law "A"). Petitioners also urge that the Administrative Law Judge erred in concluding that they were not prejudiced by the Division's error in misstating the period covered by the two notices.

The Macchias also disagree with conclusion of law "B" of the Administrative Law Judge's determination to the extent that it concludes that there is no basis in law for canceling the officer assessments issued against them.

The Macchias claim that the Administrative Law Judge erred in concluding that they have failed to demonstrate reasonable cause for NYFT's failure to comply with the provisions of Article 28, i.e., NYFT and the Macchias did not explain why they claimed credits in excess of the amount of the bad debt they proved (Determination, conclusion of law "C"). The Macchias argue they should not be penalized because NYFT took too much of a credit for bad debts. In addition, the Macchias claim they showed good cause for taking the bad debt credits.

---

[24]Determination, conclusion of law "O." This should not be confused with the Notice of Determination bearing the same number.

The Macchias also disagree with the Administrative Law Judge's sustaining of the tax ($30,738.00) assessed for September 1989 on the basis that petitioners offered no proof in support of their challenge to that month's assessment (Determination, conclusion of law "F").

Petitioners also urge that the Administrative Law Judge erred in conclusion of law "G" to the extent she concluded that NYFT failed to report and remit motor fuel taxes on the motor fuel sold to Meridian in April 1989 and May 1989. Petitioners feel that the affidavit of Abbey Blatt, the sales invoices and the MT-104's in evidence show that the gallons imported by NYFT agree with the gallons NYFT sold to Meridian.

Petitioners argue that the auditors should not have accepted NYFT's figures for its inventory losses, but should have performed an independent investigation of the tank/inventory losses. Further, petitioners claim, they have showed that the audit methodology employed relating to the tank losses was arbitrary and erroneous. Further, petitioners disagree with the Administrative Law Judge's conclusion that Tax Law § 285-a(2) requires that they prove the number of gallons they claimed were lost. Petitioners also disagree with the conclusion that they have failed to establish reasonable cause for the abatement of penalties (Determination, conclusion of law "H").

Petitioners also take exception to conclusion of law "I." Petitioners argue that the Administrative Law Judge neglected to address the issue of whether penalties should be abated for petitioners' failure to report 403,000 gallons of motor fuel. According to petitioners, this was just a transcription error. Thus, petitioners urge that penalties relating to this portion of the assessment be abated.

Next, petitioners take exception to the conclusion of the Administrative Law Judge that the Division did not raise new factual issues for the first time in its brief (Determination, conclusion of law "K"). Specifically, petitioners argue, the bona fides of the sales to Tarricone, Riverside and Malon and the collectibility of such debts were never raised by the auditor.

Petitioners also disagree with the conclusion that they failed to prove that NYFT's sales to the above three customers were authentic and that NYFT had valid claims for payment (Determination, conclusion of law "L"). Petitioners urge that the Macchias' pleas of guilty in a Federal tax evasion scheme should not unfavorably reflect on the evidence presented here. By placing a heavy burden on petitioners to show that their invoices are valid, the Administrative Law Judge, says petitioners, is impermissibly placing a burden of disproving fraud on petitioners.

Finally, petitioners disagree with the Administrative Law Judge's mooting of the issues of whether, under Federal law, NYFT was required to: (i) ascertain that the claimed debts were uncollectible; (ii) charge them off its books; and (iii) take the Federal deduction within the same year. This issue should have been addressed, petitioners argue, and the Administrative Law Judge should have found that NYFT was not required to do all of these things in the same year (Determination, conclusion of law "M").

OPINION

If petitioners wished to avail themselves of a credit under Tax Law § 1132(e) for sales tax paid where the underlying charge has been uncollectible, then they had the burden of establishing entitlement to the credit.

Petitioners did not have to "disprove fraud." Rather, they had to establish that the claimed bad debts were legitimate. The record in this case shows that the Macchias, as owners and

officers of NYFT, pled guilty to Federal tax evasion, which included the creation of fraudulent invoices and book transfers. The indictment shows that some fraudulent invoices were created by petitioners to show sales to companies which included Tarricone and Riverside. Malon was owned by Marat Balagula, a co-conspirator in the Macchias' tax evasion scheme.

Lawrence Macchia, who the indictment shows was in charge of creating bogus records as part of the Macchias' tax evasion scheme, wrote a letter to Abbey Blatt stating that certain listed debts for the year ending December 31, 1987 are to be considered "bad debts." Included in this listing are amounts receivable from Riverside, Malon and Tarricone. As proof of these bad debts, we have only the affidavit of Abbey Blatt. According to Mr. Blatt, he reviewed petitioners' invoices issued to Riverside, Malon and Tarricone and determined that the uncollected sales tax from these three vendors amounted to $134,128.68. Mr. Blatt does not explain how he verified that these particular invoices were legitimate. From this record, the Administrative Law Judge could not conclude that the invoices at issue here were fraudulent. However, petitioners' conviction of crimes, which included the creation of fraudulent invoices and business records involving Riverside, Tarricone and Malon, necessarily impacted upon the weight to be given petitioners' evidence, i.e., NYFT's invoices and Mr. Blatt's affidavit which, in turn, was based on NYFT's business records. Under these circumstances, it was reasonable for the Administrative Law Judge to require petitioners to come forward with strong evidence to establish that the subject invoices represented actual transactions. It was also reasonable, under these facts, for the Administrative Law Judge to conclude that petitioners failed to meet their burden of proof in that regard.

We also agree with the Administrative Law Judge that by petitioners having failed to prove the existence of bona fide bad debts, the additional grounds for disallowing petitioners' bad debt credits were moot.

After considering petitioners' other arguments and reviewing the entire record in this matter, we conclude that petitioners have not directed us to any reasons or authority which would justify our modifying the Administrative Law Judge's determination in any respect. The Administrative Law Judge fully and completely addressed all of the issues necessary to the disposition. Therefore, we affirm that determination for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of New York Fuel Terminal Corporation, Joseph A. Macchia and Lawrence Macchia is denied;

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

3. The petitions of New York Fuel Terminal Corporation are granted to the extent indicated in conclusions of law "N" and "O" of the determination of the Administrative Law Judge and, in all other respects, the petitions are denied; and

4. The petitions of Joseph A. Macchia and Lawrence Macchia are granted to the extent indicated in conclusions of law "A" and "N" of the determination of the Administrative Law Judge and, in all other respects, the petitions are denied.

DATED: Troy, New York
August 27, 1998

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner