STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
IVAN KOVAC, OFFICER OF ALL AMERICAN PETROLEUM CORPORATION	:	DETERMINATION DTA NOS.816888 AND 816889
for Redetermination of a Deficiency or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law and Petroleum Business Tax under Article 13-A of the Tax Law for the Years 1991, 1992, 1993 and 1994.	:	

Petitioner, Ivan Kovac, officer of All American Petroleum Corporation, 2 Briarcliff Lane, Glen Cove, New York 11542-3103, filed a petition for redetermination of a deficiency or for refund of motor fuel tax under Article 12-A of the Tax Law and petroleum business tax under Article 13-A of the Tax Law for the years 1991, 1992, 1993 and 1994.

On January 17 and January 21, 2000, petitioner, appearing by Carl S. Levine & Associates, P.C. (Carl S. Levine, Esq., of counsel), and the Division of Taxation appearing by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), respectively, waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by July 7, 2000, which date commenced the six-month period for issuance of this determination. Upon review of the evidence and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

I. Whether petitioner is entitled to credits for petroleum business taxes and prepaid motor fuel taxes where the underlying debt attributable to the sale of the products is alleged to be an uncollectible bad debt.

II. Whether, assuming petitioner is not entitled to the credits, he has nonetheless established reasonable cause for taking such credits for prepaid petroleum business taxes and motor fuel taxes, such that penalties should be abated.

III. Whether petitioner established reasonable cause for the abatement of penalties imposed on assessments that resulted from inadvertent mathematical or clerical errors.

FINDINGS OF FACT

DTA# 816888

1. The Division of Taxation ("Division") issued to petitioner, Ivan Kovac, the following six notices of determination dated August 1, 1994:

Tax Period Ended and Assessment ID	Tax Assessed	Interest	Penalty	Payments/ Credits	Balance Due
11-30-93, L-009289730-9			$ 51.12		$ 51.12
1-31-94, L-009289731-8			29.56		29.56
12-31-93, L-009289729-9			264.23		264.23
2-28-93, L-009289728-1			51,907.12		51,907.12
9-30-91, L-009289737-2			30,129.73		30,129.73
10-31-91, L-009289738-1			33,187.00		33,187.00

Each of the notices of determination are addressed to "Kovac-Ivan, 2 Briarcliff Ln, Glen Cove, NY 11542-3103." The notices indicate the assessments relate to petitioner's position as an officer or responsible person of All American Petroleum Corporation.

2. The Division of Taxation ("Division"), by the affidavit of John E. Matthews, provided the following facts about the notices in issue:

Notice Nos. L-009289730 and L-009289731, covering November 1993 and January 1994, respectively, originally assessed tax of $25.00 each. Copies of the returns for the tax periods covered by such assessments were submitted into evidence and showed that All American Petroleum Corporation ("All American" or "the corporation") did not report any tax due on these returns, although line 11 of each return requires that a minimum of $25.00 be reported. The return bears the handwritten notation, "taxes paid to supplier," on line 13. The Division issued an assessment for $25.00 in tax, plus penalty and interest against the corporation, which was assessed as a penalty against petitioner, its principal owner and officer, for the total amount due from the corporation in the amounts of $51.12 and $29.56, respectively.

Notice No. L-009289729, covering the month of December 1993, assessed tax due in the amount of $209.51. This assessment was the result of the Division's correction of mathematical errors on the return for such month which resulted in total tax due of $335.78, while the corporation reported and paid $126.27, as shown on the return. The Division issued an assessment for the balance of $209.51 plus penalty and interest against the corporation, and a penalty against petitioner for the total amount due of $264.23.

Notice No. L-009289728 concerns tax due for the month of February 1993. On the return for that month, the corporation reported tax due of $42,364.96, but remitted only $4,236.49 as payment with the filing of the return. The Division issued a notice to the corporation for the

balance remaining due, $38,128.29 in tax, plus penalty and interest, and in the form of a penalty against petitioner for the total amount due of $51,907.12.

Notice No. L-009289737 covers the month of September1991. On the return for that month, the corporation reported tax due of $38,299.09, but remitted a $21,000.00 payment with that return. The Division issued notices to both the corporation and petitioner for the balance remaining due, $17,299.00 in tax, penalty and interest against the corporation and a penalty assessment against the officer for the entire amount due from the corporation of $30,129.73.

Notice No. L-009289738 pertains to October 1991. On the corporate return for that month, the corporation reported tax due of $36,906.61, but remitted only $20,000.00 as payment,[1] leaving tax reported as due, but unpaid, in the amount of $16,906.61. The Division issued a notice to the corporation for $19,680.00 in tax, plus penalty and interest. The Division concedes this amount is an error and should have been $16,944.92, and cancels any tax in excess of that amount. In arriving at the adjusted tax figure of $16,944.92, the Division corrected a mathematical error on the return. [2]

3. The six officer assessments are based upon returns filed by the corporation, for which tax was self assessed when the returns were filed. The Division maintains that in each case, the return was filed without payment or with only part of the payment due. The corporate assessments were issued in the form of separately stated tax, interest and penalty. The officer

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[1] Although the Division's answer refers to an $18,000.00 payment, the Division corrected this to reflect an additional $2,000.00 payment.

[2] Part IV of Form PT 102.1 (Diesel Motor Fuel Schedule of Receipts and Sales) indicates that the corporation sold 279,294 gallons of fuel to exempt governmental agencies, which is shown on Line 9, Part A of Form PT-102. The figure transferred to line 27, Part B of Form PT-102 was reported in error as 279,594 gallons, resulting in a tax error of $38.31 (300 gallons x $.1277 per gallon). Adding $38.31 to the $16,906.61 reported as due but unpaid, gives the revised assessment figure of $16,944.92.

assessments, though issued for the same total amount due, were issued in the form of a penalty equal in amount to the tax, penalty and interest due from the corporation.

4. A conciliation conference was conducted relative to the notices listed above on July 30, 1998. A Conciliation Order dated October 2, 1998 was issued by the Bureau of Conciliation and Mediation Services, sustaining the notices. A timely petition was filed by petitioner with the Division of Tax Appeals in protest of the Order on December 28, 1998.

DTA# 816889

5. The Division issued to petitioner the following six notices of determination dated August 1, 1994:

Tax Period Ended and Assessment ID	Tax Assessed	Interest	Penalty	Payments/ Credits	Balance Due
2-28-94, L-009289727-2			$ 29.17		$ 29.17
10-31-93, L-009289732-7			30.77		30.77
5-31-92, L-009289733-6			292.42		292.42
8-31-92, L-009289734-5			54,942.58		54,942.58
7-31-92, L-009289735-4			50,269.67		50,269.67
4-30-93, L-009289736-3			49,501.11	44,141.43	5,359.68

Each of the notices of determination are addressed to "Kovac-Ivan, 2 Briarcliff Ln, Glen Cove, NY 11542-3103." The notices indicate the assessments relate to petitioner's position as an officer or responsible person of All American Petroleum Corporation.

6. The Division, by the affidavit of John E. Matthews, provided the following facts about the notices in issue:

Notice Nos. L-009289727 and L-009289732, covering February 1994 and October 1993, respectively, each originally assessed tax of $25.00. Copies of the returns for the tax periods

covered by such assessments were submitted into evidence, and show that All American Petroleum Corporation did not report any tax due on the returns, although line 11 of each return requires that a minimum of $25.00 be reported. The October return bears the handwritten notation, "taxes paid to supplier," on line 13. The Division issued an assessment for $25.00 in tax, plus penalty and interest against the corporation, which was assessed as a penalty against petitioner for the total amount due from the corporation in the amounts of $29.17 and $30.77, respectively.

Notice No. L-009289733, covering the month of May 1992, assessed tax due in the amount of $199.89. This assessment was the result of the Division's correction of mathematical errors on the return.[3] The Division issued an assessment for the balance of $199.89 plus penalty and interest against the corporation, and a penalty against petitioner for the total amount due of $292.42.

Notice No. L-009289734 concerns tax due for the month of August 1992. On the return for that month, the corporation reported tax due of $38,139.18, but remitted no payment with the filing of the return. The Division recalculated the tax as $38,138.99 and issued a notice to the corporation for $38,139.18 in tax, plus penalty and interest, and in the form of a penalty against petitioner for the total amount due of $54,942.58.

Notice No. L-009289735 covers the month of July 1992. On the return for that month, the corporation reported tax due of $34,707.90, but remitted no payment with that return. The Division issued a notice to the corporation for $34,707.90 in tax, penalty and interest, and a

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[3] Line 19 of Form PT-102 should be 122,135 gallons, which would have resulted in an additional $200.00 in tax. Additional corrections were made to Form PT-100, line 4, column A and line 5, column B from their respective source pages of Form PT-102 in the amount of $.11, resulting from the mathematical tax calculations. The net assessment correction is $199.89.

penalty assessment against the officer for the entire amount due from the corporation of $50,269.67.

Notice No. L-009289736 pertains to April 1993. On the corporate return for that month, the corporation reported tax due of $44,141.43, but remitted no payment with that return. The Division issued a notice to the corporation for $44,141.43 in tax, plus penalty and interest and a penalty in the total of $49,501.11 to petitioner. A credit in the amount of $44,141.43 has been applied to this amount, resulting in the assessment of $5,359.68.

7. The six officer assessments are based upon returns filed by the corporation named in the notices, for which tax was self assessed when the returns were filed. The Division maintains that in each case, the return was filed without payment or with only part of the payment due. The corporate assessments were issued in the form of separately stated tax, interest and penalty. The officer assessments, though issued for the same total amount due, were issued in the form of a penalty equal in amount to the tax, penalty and interest due from the corporation.

8. A conciliation conference was conducted relative to the notices listed above on July 30, 1998. A Conciliation Order dated October 2, 1998 was issued by the Bureau of Conciliation and Mediation Services, sustaining the notices. A timely petition was filed by petitioner with the Division of Tax Appeals in protest of the Order on December 28, 1998.

9. Petitioner seeks to cancel the 12 assessments[4] issued to him as a responsible person of All American.

10. In the late 1980s and early 1990s, All American experienced difficulty in collecting payment from numerous customers for its sales of petroleum products. A substantial portion of

[4] Although Petitioner's affidavit references canceling eleven assessments, this affidavit, read in conjunction with Mr. Levine's affidavit covers all twelve assessments.

its accounts receivable related to its sales to its largest customer, Fighting Oil. Eventually Fighting Oil and its principals filed for bankruptcy, which prompted All American to file an adversary proceeding against Fighting Oil and its principals (Edward and Lynn Verdecanna) to bar discharge of its claims against them. Lynn Verdecanna's obligations were discharged, but Edward Verdecanna's were not discharged. However, All American's efforts to obtain payment from Mr. Verdecanna have been unsuccessful. After consulting with All American's CPA, petitioner determined that the accounts receivable of Fighting Oil and several other accounts were uncollectible. In 1989, 1990, 1991, 1992, and 1993 All American wrote off as bad debts the total receivables (product cost plus applicable taxes) from those fuel customers who failed to pay All American for product they received, plus taxes. The bad debts were recorded as such on All American's Federal corporation income tax returns (Forms 1120) in the amounts of $16,456.00, $158,876.00, $307,953.00, $100,000.00 and $377,166.93, respectively, for tax years 1989 through 1993. All American then sued its nonpaying customers and obtained judgments against some of them, from which it has not collected any money.

SUMMARY OF THE PARTIES' POSITIONS

11. Petitioner argues that it is entitled to take credits for petroleum business taxes and prepaid motor fuel taxes where the underlying debt attributable to the sale of such products was later determined to be uncollectible. Petitioner requests that the Tax Appeals Tribunal decision in ***Matter of New York Fuel Terminal*** (Tax Appeals Tribunal, October 26, 1995) be relied upon to support its position, and the Tribunal's subsequent decision in ***Matter of New York Fuel Terminal*** (Tax Appeals Tribunal, February 12, 1998) be disregarded as not supportive. Petitioner contends that it has demonstrated reasonable cause for the position taken with regard to the bad debt credits and thus established reasonable cause for penalties to be abated.

Petitioner requests abatement of penalties for failure to pay tax where inadvertent mathematical or clerical errors were made, resulting in assessments.

12. The Division maintains petitioner improperly took credits for such bad debts since there is no provision in the Tax Law which permits a bad debt credit for motor fuel tax, and likewise no provision in the Tax Law for a bad debt credit for petroleum business taxes prior to September 1, 1994, which is subsequent to the periods in issue. Furthermore, the Division argues that petitioner has failed to show that the amounts in controversy are bona fide bad debts, and penalties should be upheld even if the law allows credits.

CONCLUSIONS OF LAW

A. Petitioner maintains that ***Matter of New York Fuel Terminal Corp.*** (Tax Appeals Tribunal, October 26, 1995) which held that a distributor is allowed to take a credit for prepaid sales taxes where the underlying debt attributable to the sale of the fuel was deemed uncollectible supports its position. In that case, the Tribunal determined that the sales tax on motor fuel and diesel motor fuel that was required to be prepaid pursuant to Tax Law § 1102 could be the subject of a credit for bad debts under Tax Law § 1132(e), which permits a vendor a credit against sales tax due on a subsequent tax return for sales tax paid on items that have been returned or when the customer has not paid for the item and the charge has been ascertained to be uncollectible. The underlying reasoning of the Tribunal was that the legislative intent expressed in Tax Law § 1102(b) indicated that the provisions of Article 28 (i.e., section 1132[e], permitting a credit for bad debts) apply to the prepaid sales tax on motor fuel under section 1102(a), unless the provision is inconsistent or not relevant to the prepaid tax. The Tribunal found that a credit for bad debts is not inconsistent or irrelevant to the prepaid tax. Petitioner seeks to make the same argument that was made in a later case concerning the same taxpayer ***(Matter of New York***

Fuel Terminal, Tax Appeals Tribunal, February 12, 1998), that, similar to prepaid sales tax on motor fuel, prepaid motor fuel tax is also the subject of a credit for a bad debt. Petitioner in this matter believes the Tribunal incorrectly analyzed the interplay between the prepaid sales tax and prepaid motor fuel tax. In ***Matter of New York Fuel Terminal*** (Tax Appeals Tribunal, October 26, 1995), the Tribunal relied upon a taxing scheme under Article 28 that simply does not exist under Article 12-A, that would permit a credit for a bad debt with respect to prepaid motor fuel tax by a distributor. As such, this conclusion was affirmed by the Tribunal in ***Matter of New York Fuel Terminal*** (February 12, 1998) and is relied upon to reach the conclusion herein that petitioner was not permitted the credits sought.

B. Petitioner also argues that the credits are allowable because there is nothing in the Tax Law prohibiting a distributor from taking a credit for prepaid motor fuel taxes when the underlying transactions are found to be uncollectible and the Tax Law requires reporting, assessment, collection, determination and refund of taxes under Articles 12-A, 13-A and 28 on a joint basis (referencing Tax Law § 289[f]). Article 12-A does not contain a provision to allow a distributor a credit for prepaid motor fuel tax where the distributor is not paid by the customer for the motor fuel. Section 289-f, added to the Tax Law in 1985 to assist with the joint administration of the motor fuel and sales and use taxes, was part of a bill which was aimed at deterring tax evasion with respect to motor fuel and the importation and sale of motor fuel in New York. The act was designed to eliminate daisy chain schemes which ultimately resulted in the avoidance of taxes (Executive Dept Mem, 1985 McKinney's Session Laws of NY, at 2955, 2959). Tax Law § 289-f, under Article 12-A, does not provide that the provisions of Article 28 apply to those of Article 12-A.

C. Concerning credits claimed for Article 13-A taxes, prior to September 1, 1994, the Tax Law did not contain a provision for bad debt credits with respect to Article 13-A petroleum business taxes (Tax Law § 301-l). In 1994, the Legislature enacted Tax Law § 301-l to provide a refund of petroleum business taxes which become due on or after September 1, 1994, where the debt underlying the tax became worthless and uncollectible. Since the latest period in issue is the tax period ended February 28, 1994, this provision does not apply to the credits claimed in this matter.

Accordingly, the Division properly denied the credits sought by petitioner for Article 12-A and 13-A bad debts.

D. Tax Law § 289-b(c) provides the statutory authority for the promulgation of rules and regulations which determine what constitutes reasonable cause where a distributor has failed to file a return or pay taxes pursuant to both Articles 12-A and 13-A (Tax Law § 289-b[c]; § 315). The regulations in effect for the periods in issue provide examples of grounds for reasonable cause, none of which have been asserted or apply in this case (20 NYCRR former 416.3[c][5]; contrasted with 20 NYCRR former 536.5, which derives its authority from the sales tax law). Furthermore, the regulation is clear that the absence of willful neglect alone is not sufficient grounds for not imposing penalties or for canceling penalties (20 NYCRR former 416.3[a]). Petitioner argues that this case involves one of first impression and there was no statutory provision which prohibited petitioner from asserting such credits. However, and more importantly, there was no statutory provision upon which petitioner could have reasonably relied for authority to claim the credits with respect to prepaid motor fuel and petroleum business taxes in this matter. Additionally, the fact that petitioner relied on the advice of All American's

experienced accountant is no basis for reasonable cause (***see, Matter of Auerbach v. State Tax Commission***, 142 AD2d 390, 536 NYS2d 557,561). The penalties must stand.

E. Concerning the abatement of penalties on assessments representing mathematical or clerical errors, reasonable cause pursuant to 20 NYCRR former 416.3 has not been asserted or established. Petitioner merely stated that such errors were inadvertent and not willful. Such a bare assertion does not establish the grounds for reasonable cause pursuant to 20 NYCRR former 416.3(c) (contrasted again with 20 NYCRR former 536.5, which derives its authority from the sales tax law, and is inapplicable to this case). Further, the absence of willful neglect alone is not sufficient grounds for not imposing penalties or for canceling penalties (20 NYCRR 416.3[a][2]). Accordingly, penalties for such notices are upheld.

F. The petitions of Ivan Kovac are denied and the 12 notices of determination dated August 1, 1994 are sustained.

DATED: Troy, New York
December 28, 2000

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE