

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**NAUGHTON ENERGY CORPORATION** : DETERMINATION  
for Revision of a Determination or for Refund of Tax : DTA NO. 823470  
on Gasoline and Similar Motor Fuel and Tax on :  
Petroleum Businesses under Articles 12-A and 13-A :  
of the Tax Law for the Period December 1, 2003 :  
through June 30, 2004. :

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Petitioner, Naughton Energy Corporation, filed a petition for revision of a determination or for refund of tax on gasoline and similar motor fuel and tax on petroleum businesses under Articles 12-A and 13-A of the Tax Law for the period December 1, 2003 through June 30, 2004.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at One Centre Street, New York, New York, on March 30, 2011, at 10:00 A.M., with all briefs to be submitted by June 2, 2011, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Joseph Naughton, Marketing Manager. The Division of Taxation appeared by Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel).

***ISSUE***

Whether petitioner has established any basis warranting reduction or elimination of the penalties imposed.

***FINDINGS OF FACT***

1. During the period at issue, petitioner, Naughton Energy Corporation, was a registered fuel distributor required to file petroleum business tax returns, form PT-100, on a monthly basis,

and to pay the tax on gasoline and similar motor fuels and the tax on petroleum businesses imposed by Tax Law §§ 284 and 301.

2. Petitioner timely filed petroleum business tax returns for the period December 1, 2003 through June 30, 2004 indicating zero tax due. Petitioner failed to file a petroleum business tax return for the month of July 2004. In August 2004, the employee responsible for the filing and payment of the tax returns was dismissed due to her failure to timely file tax returns, and the new bookkeeper discovered that the tax returns for the period at issue had been filed incorrectly. On November 29, 2004, an auditor of the Division of Taxation (Division) contacted petitioner concerning its failure to file a return for the month of July 2004, and the new bookkeeper stated that the December 2003 through June 2004 zero tax returns were incorrect, and that she was in the process of filing amended returns to reflect the proper amount of tax due. In December 2004, petitioner late filed and late paid the petroleum business tax return for the month of July 2004.

3. On May 3, 2005, due to the failure of petitioner to file the corrected returns, the auditor spoke by telephone and wrote a letter to petitioner's bookkeeper again requesting that the corrected returns and tax payments for the period at issue be made.

4. On June 8, 2005, the Division sent a Demand for NYS Petroleum Tax Returns and/or Payment of Taxes Due Pursuant to Articles 12-A, 13-A, 28 and 29 that stated that the corrected returns had still not been filed and that petitioner's registration under Articles 12-A and 13-A might be canceled if the corrected returns and payments were not received within 10 days of the date of the letter.

5. Petitioner filed the corrected returns on June 17, 2005. No payment was received with the returns, although petitioner did request a payment plan for the total amount of taxes shown due.

6. Upon receipt of the amended returns, the Division issued to petitioner, on July 25, 2005, two notices of determination assessing tax, penalty and interest due for tax on gasoline and similar motor fuel and tax on petroleum businesses. Petitioner did not timely protest the notices of determination.

7. On November 14, 2005, the Division issued to petitioner two notices and demands for payment of tax due for the unpaid motor fuel taxes and unpaid taxes on petroleum businesses for the period at issue. Petitioner was eventually granted an installment payment agreement and fully paid the amount of taxes, penalty and interest due in February 2008.

8. On August 6, 2008, petitioner filed a refund claim in the amount of \$119,162.94 for penalties paid for the period at issue. On December 29, 2008, the Division issued a letter to petitioner denying the refund claim in full.

9. As of the year 1990 and continuing through the date of the hearing, the Division had issued to petitioner over 85 notices of determination and notices and demands for taxes on petroleum businesses, sales and use taxes and corporation franchise taxes. Most of the notices were for the late filing or late payment of the relevant taxes. The Division's records indicate that all of the notices are marked closed, either having been paid in full or the penalty abated.

#### ***CONCLUSIONS OF LAW***

A. Tax Law § 289-b(1), which is part of the article 12-A, provides, in relevant part, as follows:

[a] distributor or other person who or which fails to file a return or to pay any tax within the time required by or pursuant to this article (determined with regard to any extension of time for filing or paying) shall be subject to a penalty of ten per centum of the amount of tax determined to be due as provided in this article plus one per centum of such amount for each month or fraction thereof during which such failure continues after the expiration of the first month after such return was

required to be filed or such tax became due, not exceeding thirty per centum in the aggregate.

Tax Law § 315(a) provides, in relevant part, as follows:

The provisions of . . . article twelve-A of this chapter, including those provisions of such article twelve-A relating to penalty and interest, shall apply to the administration of and procedure with respect to the tax imposed under this article in the same manner and with the same force and effect as if the language of . . . article twelve-A had been incorporated in full into this article and expressly referred to the tax under this article . . . .

B. Petitioner has not provided evidence that would support reduction or abatement of the penalties imposed, and they are therefore sustained. In establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained that “[b]y first requiring the imposition of penalties (rather than merely allowing them at the Commissioner’s discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]” (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978, 598 NYS2d 360 [1993]). Here, petitioner failed to timely file petroleum business tax returns and pay the tax due for the period December 1, 2003 through June 30, 2004. Petitioner was aware as early as August 2004 that the zero tax due returns filed for the period at issue were incorrect, but did not file corrected tax returns until June 2005 and did so without remittance of the tax due. In an effort to have the required returns filed and the tax paid, the Division contacted petitioner by telephone on November 29, 2004, telephoned petitioner again and wrote a letter memorializing the conversation on May 3, 2005, and finally issued a demand letter on June 8, 2005 threatening to cancel petitioner’s registrations, before petitioner finally complied by filing the returns for the period at issue. In addition, petitioner has a long history of late filing and late paying not only

petroleum business tax returns, but sales and use tax returns and corporation franchise tax returns as well. Although petitioner states that it appears that the various notices were issued for “sporadic minor violations,” petitioner also states that the notices appear to have been primarily issued due to its own late filings and late payment of the various taxes admittedly due. The Tax Appeals Tribunal has noted on many occasions that in considering abatement of penalty the most important factor to be taken into account is the taxpayer’s efforts to comply with its obligations under the Tax Law (*e.g. Northern States Contracting Co.*, Tax Appeals Tribunal, February 6, 1992). Filing the tax returns at issue eleven months after due and only after being threatened with the cancellation of its registrations under Articles 12-A and 13-A of the Tax Law and consistently failing to timely file and pay tax liabilities does not reflect sufficient efforts to comply with obligations under the Tax Law. Under these circumstances, penalties were properly imposed.

C. The petition of Naughton Energy Corporation is denied, and the Division’s denial of petitioner’s refund claim dated December 29, 2008 is sustained.

DATED: Troy, New York  
August 11, 2011

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE