STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
G & R MACHINERY & EQUIPMENT CO., INC.	:	DECISION
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1983 through November 30, 1985.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on December 1, 1988 with respect to the petition of G & R Machinery & Equipment Co., Inc., 155 Chandler Street, Buffalo, New York 14207 for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1983 through November 30, 1985 (File No. 804590). Petitioner appeared by Raichle, Banning, Weiss & Stephens (Arnold Weiss, Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

Both parties filed letter briefs on exception. Request for oral argument was denied by the Tribunal.

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

ISSUE

Whether petitioner has shown reasonable cause and an absence of willful neglect in failing to file returns and pay tax, thus warranting the abatement of penalty imposed pursuant to Tax Law § 1145(a)(1)(i).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below except that we modify finding of fact "6" as indicated below. We also find an additional fact which is stated separately.

On March 13, 1987, following an audit, the Division issued to petitioner, G & R Machinery & Equipment Co., Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed $9,467.00 in tax due, plus penalty of $2,312.30 and interest of $3,006.99 for the period March 1, 1983 through November 30, 1985.

Petitioner did not protest the tax assessed in the notice of determination, but did file a petition seeking abatement of penalty assessed in the notice.

Petitioner has been in existence since 1948 and is engaged in the business of buying and selling various kinds of machinery and equipment. Its customers are primarily other businesses.

The deficiency herein consisted of three components. First, the Division determined $7,595.00 in tax due resulting from unsubstantiated exempt sales. Second, the Division determined $1,612.00 in tax due from certain flea market sales. Finally, the Division found $260.00 in tax due on certain recurring purchases made by petitioner.

With respect to the unsubstantiated exempt sales component of the audit, petitioner consented to the use of a test period analysis. The test period selected was January 1, 1985 through November 30, 1985. Additional taxable sales found within the test period were $33,380.00 and gross sales during the test period were $1,163,954.00. The resulting error rate of 2.87 percent was then applied to petitioner's gross sales throughout the audit period. This computation resulted in an assertion of $7,595.00 in additional tax due.

Finding of fact "6" of the Administrative Law Judge's determination is modified to read as follows:

Additional taxable sales of $33,380.00 for the test period consisted of 14 separate sales made by petitioner which were denied tax exempt status by the Division due to a lack of substantiation. One of these transactions was the sale of a forklift by petitioner for $16,500.00. The purchaser in that transaction by letter to petitioner dated April 8, 1985, on or about the day of the sale, stated: "DDF Transportation Tax Certificate Number 8295277-9-NY, allows DDF Transportation to pay sales tax direct to New York State. On the Purchase of Clark Yard Lift SN Y165A, year 1973, DDF will pay the sales tax on the purchase price of $16,500.00." (Petitioner's exhibit 1.) During the conduct of the audit petitioner attempted to resolve the situation by continuing to inquire as to the exempt/non-exempt status of the purchase. By letter dated March 25, 1987 petitioner demanded payment from the purchaser of the sales tax due on the sale (petitioner's exhibit 3). Finally, by letter dated April 2, 1987 the purchaser, in response to petitioner's efforts, informed petitioner as follows:

"You have alluded to our misuse of a tax exemption form. When we purchased the tow motor we supplied our tax identification number to your company, which you interpreted as qualifying us to non tax status. Further, you supplied to Mr. Mark Howard forms to be filled out at a later date, which would have been in substitute for tax exemption, and upon checking with our accountant and legal department, determined we did not qualify for non tax status on the purchase of the tow motor.

"We then forwarded you a check in the amount of $1320.00 for the taxable amount.

"We do not feel responsible for the penalty you incurred because of your failure to collect sales taxes, and do not accept your billing for an additional $4,543.00." (Petitioner's exhibit 2.)[1]

With respect to the flea market component of the audit, the Division determined that petitioner had made sales at a local flea market starting in January 1985. These sales were

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[1] Finding of fact "6" of the Administrative Law Judge's determination read as follows:

"Additional taxable sales of $33,380.00 for the test period consisted of 14 separate sales made by petitioner which were denied tax exempt status by the Audit Division due to a lack of substantiation. One of these transactions was the sale of a forklift by petitioner for $16,500.00. The purchaser in that transaction supplied petitioner with a tax identification number which petitioner interpreted as qualifying the purchase in question as tax exempt. The purchaser also advised petitioner that it would pay sales tax on the forklift directly to the State. Petitioner subsequently attempted to resolve the situation by continuing to inquire as to the exempt/non-exempt status of the purchase. Finally, petitioner demanded payment from the purchaser of the sales tax due on the sale."

The original finding of the Administrative Law Judge has been modified to more accurately reflect the record (1) by adding "by letter to petitioner dated April 8, 1985, on or about the day of the sale" to the third sentence to clarify that the letter was received on or about the time of the sale and not later on during the audit, (2) to quote that letter directly so as to indicate the representation of the purchaser to petitioner at the time of the sale, and (3) to quote the letter of April 2, 1987 to indicate the purchaser's position concerning its liability for the tax.

determined not to have been reported on either petitioner's books or on its sales tax returns. The Division then estimated petitioner's gross flea market sales for 1985 by estimating the cost of operating the flea market booth and adding a profit of $100.00 per week. This resulted in additional tax due of $1,612.00 from petitioner's flea market sales.

Petitioner's former president, Mr. Donald Rosen, maintained a booth at a local flea market in 1985 where he displayed a certificate of authority to collect sales tax. The certificate bore petitioner's name.

With the exception of the flea market sales, petitioner maintained adequate books and records.

We find as an additional fact the following.

The determination of the Administrative Law Judge was issued on December 1, 1988. The Division of Taxation timely filed an exception to that determination. In response to the Division's exception, petitioner's representative requested from the Secretary to the Tribunal additional time to file a brief in response to the exception. Such extension, to August 15, 1989, was granted. On July 10, 1989, petitioner submitted an exception to the determination of the Administrative Law Judge. Petitioner was informed that such exception was untimely, since it was filed more than 30 days after the issuance of the determination of the Administrative Law Judge and that neither the enabling legislation nor regulations of the Tribunal allow for the filing of cross exceptions. On April 5, 1990 the Secretary to the Tax Appeals Tribunal wrote to petitioner's representative to confirm petitioner's agreement to withdraw the late exception. The letter stated that the exception would be considered withdrawn if petitioner did not contact the Tribunal before April 20, 1990. Since petitioner did not contact the Tribunal, the exception has been withdrawn.

OPINION

The Administrative Law Judge determined that petitioner made an extensive effort to ascertain the exempt/non-exempt status of the forklift sale and, relying on 20 NYCRR 536.5(d)(2), concluded that such effort indicates that its failure to report and pay over tax on such sale was due to reasonable cause and not willful neglect. Further, the Administrative Law

Judge determined that the de minimis amount, 1.4 percent, of the remaining disallowed exempt sales during the test period, coupled with petitioner's maintenance of adequate books and records, showed that its failure to report and pay over the tax assessed with respect to the disallowed exempt sales was due to reasonable cause and not due to willful neglect. The Administrative Law Judge determined that petitioner did not prove reasonable cause with respect to its failure to report and pay over the tax assessed on its flea market sales and its recurring purchases.

On exception, the Division asserts that with respect to the forklift there was no exemption certificate collected by petitioner and that its subsequent efforts to ascertain the taxable status of the transaction are not proper criteria to determine reasonable cause. Further, the Division asserts there is no de minimis rule upon which to base a finding of reasonable cause.

We affirm the determination of the Administrative Law Judge.

Tax Law § 1145(a)(1)(i) (as amended by L 1985, ch 65, § 86) provides for the imposition of penalty upon persons who fail to timely file a return or timely pay any tax under Articles 28 and 29. Tax Law § 1145(a)(1)(iii) (as renum by L 1985, ch 65, § 86) provides for the remission of all or part of such penalty if the failure to pay was due to reasonable cause and not due to willful neglect.

We find that the Division's own regulations are in agreement with our conclusion that petitioner has shown that its failure to report and pay over the tax assessed was not due to willful neglect and was based on reasonable cause. These regulations provide several grounds which exemplify reasonable cause including "Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect." (20 NYCRR 536.5[c][5].)

Examples 5 and 6 which follow the above cited language, indicate relief in situations where the taxpayer owes additional tax because of "occasional" errors and are particularly instructive here.

Example 5 deals with an "occasional" misclassification of supplies revealed on the taxpayer's first sales and use tax audit and provides in relevant part that: "After a review of a written statement submitted by the taxpayer, containing all of the facts alleged as a basis for reasonable cause, it was determined that the taxpayer had made reasonable efforts to account for its use tax liabilities, that the understatement of tax was unintentional and that the manufacturer had otherwise substantially complied with the law." (20 NYCRR 536.5[c][5], emphasis added.)

Example 6 deals with an "occasional" miscalculation of tax in a restaurant audit and provides in part as follows:

> "An overcollection test was performed on the guest checks which disclosed occasional miscalculation of tax by vendor's staff which resulted in an understatement of the tax due and paid. The taxpayer submitted a written statement containing all of the facts alleged as a basis for reasonable cause. The understatement of the tax due was not considered substantial taking into account the size of the operation, volume of sales and an otherwise sound accounting system. The audit findings established that willful neglect did not occur and that reasonable cause existed. Therefore, the penalty and interest in excess of the statutory minimum will be waived." (20 NYCRR 536.5[c][5], emphasis added.)

In this case, this was petitioner's first sales tax audit. It is undisputed that petitioner had adequate books and records for a complete audit. Petitioner agreed to a test period audit covering January 1, 1985 through November 30, 1985. Additional taxable sales within this period were $33,380.00 based on 150 sales for which petitioner did not have proper documentation. Gross sales for the same period were $1,163,954.00. The error rate was 2.87 percent.

During the audit, petitioner provided documentation for 136 of the 150 transactions in question. The forklift sale accounted for nearly one-half of the dollar amount of the 14 remaining sales at issue. Petitioner produced a letter from the purchaser, DDR, dated April 8, 1985 (on or about the day of the sale) indicating a tax certificate number and that the purchaser would pay sales tax on the purchase directly to New York State. Petitioner produced the letter of March 25, 1987 wherein he demanded payment of the tax from the purchaser. Petitioner produced the letter dated April 2, 1987 from the purchaser wherein purchaser included a check for payment of the tax, an action inconsistent with the assertion in purchaser's April 8, 1985

letter that it would pay tax directly to the State of New York. Under these circumstances we conclude that petitioner made reasonable efforts to account for its tax liabilities, that the understatement of tax was not intentional and that petitioner substantially complied with the law.

The remaining 13 transactions accounted for 1.4 percent of petitioner's gross sales during the period. Such understatement of the tax due cannot be considered substantial taking into account the volume of sales for the period and complete books and records maintained by the petitioner.

Although we have the discretionary power to review the issues raised by petitioner in his untimely and subsequently withdrawn exception (see, Matter of Klein's Bailey Foods, Inc., Tax Appeals Tribunal, August 4, 1988; Tax Law § 2006.7; 20 NYCRR 3000.11[e]), we see no reason to exercise this discretion in this case. Therefore, we will not address the issues discussed by petitioner.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

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

3. The petition of G & R Machinery & Equipment Co., Inc. is granted to the extent indicated in conclusions of law "B" and "D" of the Administrative Law Judge's determination but is otherwise denied; and

4. The Division of Taxation shall recompute the Notice of Determination dated March 13, 1987 in accordance with paragraph "3" above, but such Notice is otherwise sustained.

DATED: Troy, New York
May 24, 1990

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

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

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