

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
BAP APPLIANCE CORP. :
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 December 1, 1984 :
through February 28, 1985. :

DECISION
DTA Nos. 805681
& 805683

In the Matter of the Petition :
of :
RUTH EPSTEIN, :
AS OFFICER OF BAP APPLIANCE CORP. :
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 December 1, 1984 :
through February 28, 1985. :

Petitioners BAP Appliance Corp. and Ruth Epstein, as officer of BAP Appliance Corp., 972 Southend, Woodmere, New York 11598 filed an exception to the determination of the Administrative Law Judge issued on October 24, 1991 with respect to their petitions 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 December 1, 1984 through February 28, 1985. Petitioners appeared by Morris D. Weintraub, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief.

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

ISSUES

- I. Whether the execution of a consent to the fixing of tax due pursuant to Tax Law § 1138(c) bars petitioners from challenging the accuracy of the sales tax audit.
- II. Whether penalties and interest in excess of the minimum, which were imposed against petitioners, should be waived.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "15" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

In late October 1987, the Division of Taxation ("Division") mailed a letter to petitioner BAP Appliance Corp. ("BAP") which scheduled a field examination of BAP's sales tax returns on November 20, 1987 at BAP's offices. The letter requested that BAP make available all books and records pertaining to its sales tax liability for the period under audit including journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all sales tax records.

The audit period set forth in the appointment letter was December 1, 1984 through August 31, 1987. However, only the first quarterly period of the period under audit is at issue herein.

BAP was a retail store which sold furniture and appliances. Petitioner Ruth Epstein was BAP's president.

On October 23, 1987, an auditor visited BAP and met the store manager, Bert Epstein, Mrs. Epstein's husband. The auditor learned that a Mr. Wiznia was BAP's accountant.

Subsequently, the auditor spoke with Mr. Wiznia and asked him for BAP's journals, general ledger, purchase and sales records and Federal income tax returns. In response, Mr. Wiznia presented a cash receipts journal, purchase records and Federal corporate income

tax returns. At the outset of the audit, the auditor made a list of the sales tax returns which BAP had filed and verified that BAP paid tax on the amounts which had been reported. In examining the returns, the auditor found that when BAP's accountant prepared the returns, he did not report BAP's gross sales. BAP's returns only reported taxable sales and the tax due.

The auditor made a list of BAP's purchases for the period December 1, 1984 through November 30, 1987 and ascertained that BAP had purchases in the amount of \$706,746.00.¹ During the same period of time, BAP's cash receipts records showed cash receipts of \$948,137.00. The auditor found that the difference between the cash receipts and purchases corresponded to the amounts which BAP had reported as its taxable sales on its sales tax returns during the period in issue. However, the gross sales per BAP's cash receipts records corresponded with the gross sales reported on BAP's Federal income tax returns. The auditor then asked BAP's accountant to explain the discrepancy between the cash receipts per BAP's records and gross sales reported on the Federal income tax returns and the taxable sales reported on BAP's sales tax returns. Mr. Wiznia responded that the difference was attributable to layaway sales. Thereafter, the Division asked Mr. Wiznia to substantiate the layaway sales through the production of sales contracts, sales invoices or a sales book. Since BAP was unable to furnish any of the requested documentation or other evidence of layaway sales, the Division regarded all of BAP's cash receipts as taxable sales.

On the basis of the foregoing audit, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner BAP Appliance Corp., dated March 20, 1988, which assessed sales and use taxes for the period December 1, 1984 through February 28, 1985 in the amount of \$5,317.87, plus penalty of \$1,329.47 and interest of \$1,914.43, for a total amount due of \$8,561.77. The Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated March 20, 1988, to

¹For the months of April 1987 through November 1987, the auditor utilized BAP's Federal income tax returns in the absence of other information.

petitioner Ruth Epstein, as an officer of BAP Appliance Corp., which assessed the same amount of tax, penalty and interest which had been assessed against the corporation.

On April 18, 1988, a conference was held which was attended by Bert Epstein, Morris Weintraub, Esq., who was BAP's representative, the sales tax section head, two sales tax team leaders and the auditor who had conducted a prior audit of BAP. At this meeting, petitioners submitted sales invoices and schedules which showed layaway sales. The sales invoices indicated that customers made a small downpayment and thereafter several additional payments were made. Petitioners explained that the merchandise was not delivered until the customers had completed payments. Petitioners also submitted documents which showed out-of-state sales and that some sales were made for resale.

The invoices produced at the conference were not in any kind of order and the dates thereon had gaps in time. They did not remotely account for the difference in total receipts and the reported taxable sales.

At the conference, the section head explained the Division's position that uncompleted layaway sales were not subject to tax. However, the section head felt that petitioners did not have any way of verifying which of the sales in issue were layaway sales. Nevertheless, the documents produced at the conference reinforced the section head's opinion that BAP had some uncompleted layaway sales. Therefore, in order to close the case, the Division and petitioners' representative agreed that 9½ percent of BAP's sales would be treated as nontaxable layaway sales and nontaxable out-of-state sales. This figure was not determinable from the records provided, but was used as a vehicle to resolve the case. As a result of this concession, the original assessment of tax for the audit period December 1, 1984 through August 31, 1987 was reduced from \$53,050.36 to \$42,280.14.

In contrast to the foregoing, it was Mr. Epstein's understanding that the Division was holding all of the receipts taxable because it considered layaway sales taxable regardless of whether the sale was complete. Mr. Epstein was afraid of potential penalties and additional interest. Petitioners were also fearful that they had broken the law.

Mr. Epstein had an opportunity to discuss the Division's position with Mr. Wiznia. At this time, it was also Mr. Wiznia's understanding that the Division was holding uncompleted layaway sales taxable. During their conversations, Mr. Wiznia concluded that Mr. Epstein was suffering from mental anguish because BAP had been held up a few times. On one occasion, Mr. Epstein had been hit on the head and on another occasion a gun was pointed at him. As a result, Mr. Epstein just wanted to be rid of the business.

The Division's Field Audit Report contains a list of those present at the conference and then presents the following narrative of the events at the conference:

"Prior audit as well as current audit was discussed. Vendor submitted sales invoices and schedules showing "Lay Away Sales" (sales where deposit was made but merchandise not shipped due to open balances).

"Sales Invoices indicated a small down payment was made and several additional payment [sic] were made. Taxpayer stated that delivery of merchandise was not shipped until final payment of invoice was made.

"Taxpayer submitted sales invoices showing open balances, out of state sales with delivery receipts, and resale sales with resale certificates.

"Based on review of these documents, L. Grimaldi, STA III allowed vendor 9½% credit for non-taxable and lay-away sales.

"The original assessment of \$53,050.36 was revised to \$42,280.14 which taxpayer agreed, signed consent and submitted \$40,000 part payment of tax due.

"However taxpayer intends to made application for remission of penalties.

"Omnibus document was tendered to taxpayer, but refused.

"Subsequent to conference it is still recommended that penalty, interest and Omnibus [sic] penalty be added to assessment."

On May 12, 1988, the Brooklyn District Office of the Department of Taxation and Finance received a Statement of Proposed Audit Adjustment signed by Ruth Epstein. The first full paragraph of the statement provided as follows:

"The statement of Proposed Audit Adjustment is based on the information indicated by the box checked above. If you agree that a sales and/or use tax as detailed below is due and payable to the State Tax Commission, please sign one copy of this statement and return it to this office within 30 days. Appropriate penalty and/or interest will continue to accrue until full payment is made."

In the center of the statement, the following handwritten notation was made:

"12/1/84-11/30/87 42,280.14

Plus Penalty & Interest

Taxpayer intends to make Application for Remission of penalties."

The following paragraph appears directly above Ruth Epstein's signature on the statement, which was dated May 10, 1988:

"The Tax Law provides that a taxpayer is entitled to have tax due finally and irrevocably fixed by filing a signed consent with the State Tax Commission. Such consent, subject to review and approval, waives the ninety (90) day period for fixing tax due but does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth by law. The agreement to and signing of this statement constitutes such a consent. YOU MAY CONSIDER AN APPROVAL OF THIS MATTER FINAL IF YOU ARE NOT NOTIFIED TO THE CONTRARY WITHIN 60 DAYS FROM THE DATE THE SIGNED CONSENT IS RECEIVED BY THE DEPARTMENT."

We modify finding of fact "15" of the Administrative Law Judge's determination to read as follows:

Mr. Epstein testified that he filed an application for amnesty in connection with a prior audit and remitted \$25,000.00 therewith.²

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The original finding of fact "15" of the Administrative Law Judge's determination read as follows:

"BAP filed an application for amnesty and, in conjunction therewith, remitted \$25,000.00."

We have modified this finding of fact to correctly reflect the record. BAP did not file an amnesty application in connection with the audit period at issue in this case and, thus, there is no issue as to whether petitioners' participation in the amnesty program is a bar to petitioners' challenge to the imposition of penalties in this case.

The relevant testimony of Mr. Epstein is contained in pages 91-101 of the transcript. In brief, Mr. Epstein, on direct examination, testified that in 1981 BAP was the subject of an audit by the Division and that, in connection with that audit, the issue of liability for layaway sales and penalties arose. Mr. Epstein further testified that BAP filed an amnesty application and paid \$25,000.00. Mr. Epstein continued his direct testimony, eventually moving to the audit at issue in this case.

At page 101 of the transcript, the following exchange takes place between the Administrative Law Judge (referred to in the transcript as THE COURT); Mr. Weintraub, petitioners' representative; and the witness, Mr. Epstein which makes it clear that the amnesty payment was not for the audit at issue in this case:

"THE COURT: Mr. Weintraub, could I just clarify one thing. The testimony that was just given, did that all concern the first audit?

"MR. WEINTRAUB: Up until now.

"THE WITNESS: Yes, except I hope I didn't get the names twisted?

On the basis of the adjustments made at the conference, the Division issued a revised Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated May 10, 1988, to BAP Appliance Corp., c/o Ruth Epstein. The notice assessed sales and use taxes for the period December 1, 1984 through February 28, 1985 in the amount of \$2,410.98, plus penalty of \$602.75 and interest of \$1,102.93 for a total amount due of \$4,116.66. The notice contained the following explanation:

"Tax of \$2,410.98 paid in full on May 10, 1988,
Penalty Disagreed.
Tax agreed pursuant to consent executed on May 10, 1988.
Penalty disagreed.

'THE TAX ASSESSED HEREIN HAS BEEN ESTIMATED OR DETERMINED TO BE DUE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH THE APPEAL PROCESS BY FILING A PETITION WITHIN 90 DAYS.'

The Division also issued a revised Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated May 10, 1988, to petitioner Ruth Epstein, as an officer of BAP Appliance Corp., which assessed the same amount of revised tax, penalty and interest as had been assessed against BAP.

BAP was located in an economically-depressed area. It was BAP's practice to allow customers to purchase merchandise by making a series of partial payments. When the item was fully paid for, it would be delivered.

During the period in issue, petitioners' accountant went to BAP's office once a month. On these visits, he made entries in BAP's records, reconciled bank statements and prepared payroll, sales tax and income tax returns. While performing these duties, BAP's accountant told petitioners that uncompleted layaway sales were not subject to sales tax. Mr. Epstein relied on this advice.

"THE COURT: But the other items, that all concerned the first audit?

"THE WITNESS: Yes."

BAP kept a book of completed sales which had entries for the date of the sale, the name of the customer, the gross sales and the sales tax liability. The sales tax liability was reported on the basis of the entries in this book. BAP's records also included a cash receipts book, a cash disbursements book and a sales tax book.

It was BAP's practice to maintain a set of cards for recording layaway sales. When an individual went to the store to make a payment, the amount paid was entered on the card and a duplicate held by the customer. Mr. Epstein and the customer then initialed the card and its duplicate. Although there is some testimony to the contrary, the weight of the evidence is that these cards were never made available to the auditor during the audit or to the auditor's supervisors at the post-audit conference.

At the time of a layaway sale, BAP furnished the purchaser with a sales slip which contained a description of the article, the term "layaway" and a notation of the monies paid towards the balance due.

During the period in issue, Mr. Epstein kept BAP's records including sales slips, invoices, receipts and memorandums of sale. These are the same records that were kept during the period December 1981 through December 1984. BAP did not change its recordkeeping methodology from December 1, 1981 through the period in issue.

The Division never advised petitioners that BAP's records on completed sales were insufficient.

OPINION

The Administrative Law Judge determined that while the audit period was December 1, 1984 through August 31, 1987, only the penalty for the period December 1, 1984 through February 28, 1985 was at issue in this case. The basis for this determination was the Administrative Law Judge's conclusion that petitioners were bound by the May 10, 1988 consent to taxes signed by petitioners which applied to the period December 1, 1984 through

November 30, 1987.³ The Administrative Law Judge rejected petitioners' claim that they signed the consent under duress, pointing out that petitioners had the opportunity to discuss the matter with their representative who was present at the audit conference.

The Administrative Law Judge noted that the consent preserved petitioners' right to challenge the imposition of penalty.

The Administrative Law Judge determined that since petitioners did not make available records from which their tax liability could be determined, they did not show that their failure to pay tax was due to reasonable cause and not willful neglect. The Administrative Law Judge rejected petitioners' assertion that Matter of BAP Appliance Corp. & Ruth Epstein, as Officer (Tax Appeals Tribunal, June 22, 1989) governed with respect to the results to be reached in this case primarily because that case dealt with a different audit period (i.e., December 1, 1981 through November 30, 1984) from that involved here.

On exception, petitioners assert that BAP Appliance is identical with the instant case and that the decision therein governs with respect to this case and that penalty should be waived.

The Division relies on the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

We deal initially with the Administrative Law Judge's determination concerning the consent signed by petitioners. Tax Law § 1138(c) provides that:

"[a] person liable for collection or payment of tax . . . shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period [for the filing of a petition challenging such tax] by filing with the [division] a signed statement in writing . . . consenting thereto."

Petitioners signed such a statement, dated May 10, 1988, which was received by the Division on May 12, 1988.

³The liability asserted for the period December 1, 1984 through November 30, 1987 was \$42,280.14 plus penalty and interest to which the Division applied the \$40,000.00 remitted by petitioners. Subsequent to the consent, the Division issued a revised notice of determination in the amount of \$2,410.98 plus penalty of \$602.75 and interest of \$1,102.93 with an explanation that tax of \$2,410.98 was paid on May 10, 1988 and that penalty is disagreed.

We affirm the determination of the Administrative Law Judge that this consent to tax signed by petitioners pursuant to section 1138(c) of the Tax Law is binding. The salient fact is that petitioners were represented by counsel at the conference with the Division and had the opportunity to discuss the matter with both their lawyer and their accountant prior to signing the consent. Under these circumstances, we cannot agree with petitioners that they were misled and "browbeaten" into signing the consent. Thus, petitioners' tax liability was irrevocably fixed and, in fact, was paid by petitioners.

We deal next with petitioners' assertion that Matter of BAP Appliance Corp. & Ruth Epstein, as Officer (*supra*) governs this case. We affirm the determination of the Administrative Law Judge.

In BAP Appliance, the audit covered the periods December 1, 1981 through November 30, 1984, the period immediately proceeding the period covered in the audit here. The focal point of the prior audit was, as here, petitioners' treatment of layaway sales. The Division initially claimed upon audit that all layaway sales were taxable. It later conceded that uncompleted layaway sales were not taxable, but asserted that petitioners owed tax on all layaway sales which could not be substantiated as unfulfilled. Petitioners and the Division ultimately stipulated to petitioners' liability in the reduced amount of \$51,725.00 due solely to layaway sales. Thus, the only issue before the Tribunal was whether petitioners were liable for penalty.

The Division asserted that the penalty should be imposed because of the failure of petitioners to maintain proper records from which the Division could determine the taxable status of the layaway sales in question.

We determined that:

"[w]hether penalty should be imposed . . . is related to the underreporting of sales tax by petitioners and whether such underreporting was due to reasonable cause and not willful neglect. The position argued by the Division, i.e., inadequate books and records is necessarily related to the issue, but in and of itself is not the basis for the imposition of the penalty under the statute and regulations" (Matter of BAP Appliance Corp. & Ruth Epstein, as Officer, supra, emphasis added).

We concluded that, under the circumstances in that case, in particular the Division's uncertainty with respect to the proper taxable status of layaway sales and the absence of specific treatment of such sales in the Division's regulations, penalty should not be imposed.

In reaching this conclusion, we also found that petitioners reasonably relied on the advice of their accountant that layaway sales were not taxable, which advice was not incorrect in light of the change of position by the Division during the audit.

The situation is different in this case. Here, the audit was started in 1987, more than two years after the conclusion of the prior audit. Whatever uncertainty existed concerning the Division's position on layaway sales was cleared up during the prior audit and petitioners consented to the tax on undocumented sales in the prior audit. Thus, for the audit period in this case, petitioners were clearly aware that layaway sales had to be documented. The failure to document such sales properly cannot be excused on the basis of uncertainty as to the Division's position or because of reliance on the advice of counsel. In our view, the failure to report tax properly was not due to reasonable cause but was due to willful neglect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of BAP Appliance Corp. and Ruth Epstein, as Officer of BAP Appliance Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of BAP Appliance Corp. and Ruth Epstein, as Officer of BAP Appliance Corp. is denied; and

4. The penalties and interest in excess of the minimum imposed against petitioners are sustained.

DATED: Troy, New York
May 28, 1992

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

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

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