

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
THOMAS NADLER, :
OFFICER OF OLIVER'S STORES, INC. :
: :
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 September 1, 1984 :
through August 31, 1987 :

DECISION
DTA Nos. 807312
and 807314

In the Matter of the Petition :
of :
JOSEPH WOLFER, :
OFFICER OF OLIVER'S STORES, INC. :
: :
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 September 1, 1984 :
through August 31, 1987 :
:

Petitioners Thomas Nadler, officer of Oliver's Stores, Inc., 782 Hemlock Court, Franklin Lakes, New Jersey 07417 and Joseph Wolfer, officer of Oliver's Stores, Inc., 110 Eisenhower Drive, Cresskill, New Jersey 07626 each filed an exception to the determination of the Administrative Law Judge issued on June 20, 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 September 1, 1984 through August 31, 1987. Petitioners appeared by Leon A. Kweit & Co., P.C. (Leon A. Kweit, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

Neither petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief. Oral argument was not requested.

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

ISSUE

Whether penalties and/or interest assessed against petitioners as persons required to collect and remit sales and use taxes on behalf of Oliver's Stores, Inc. should be reduced or abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On November 4, 1987, the Division of Taxation issued to petitioner Thomas Nadler, as president of Oliver's Stores, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing sales tax due for the period September 1, 1984 through August 31, 1987 in the amount of \$142,884.05, plus penalty and interest. On the same date, the Division of Taxation also issued an identical notice of determination to petitioner Joseph Wolfer, as an officer of Oliver's Stores, Inc.

The foregoing notices assessed petitioners as persons required to collect and remit sales and use taxes on behalf of Oliver's Stores, Inc. for the period in question.

Oliver's Stores, Inc. ("Oliver's") was, during the period in question, engaged in the business of selling clothing at retail. Oliver's outlets included approximately 15 stores located in New York State. Petitioner Thomas Nadler was president of Oliver's, while petitioner Joseph Wolfer was an officer of such corporation (the office held by Mr. Wolfer was not specified in the record).

Oliver's was a privately-held corporation until approximately February 1986, at which time a public offering of the corporation's stock was made. Commencing shortly prior to the public offering and continuing thereafter for the period through the beginning of 1987, Oliver's was engaged in a fast-paced expansion, opening some 28 stores during such period. During this period of time, Oliver's hired a full-time controller to take charge of the financial aspects of the corporation, including tax reporting and the maintenance of books and records. During the same period of time, petitioner Joseph Wolfer was engaged in locating new store outlets and

negotiating leases therefor, while petitioner Thomas Nadler was involved in purchasing merchandise stock for each of the new stores.

On or about March 6, 1987, Oliver's filed for protection under Chapter 11 of the Bankruptcy Code. At some point thereafter, the Chapter 11 proceeding was converted to a Chapter 7 proceeding and Oliver's was liquidated. As a result of the bankruptcy proceedings and liquidation, Oliver's assets were converted to cash and the taxes in question here were paid. Therefore, only the imposition of penalty and interest against petitioners remains at issue in this proceeding.

Petitioners concede that they were persons required to collect and remit sales and use taxes on behalf of Oliver's pursuant to Tax Law §§ 1131(1) and 1133(a). Similarly, petitioners do not contest the dollar amount of the tax assessed and paid pursuant to the bankruptcy proceedings. However, petitioners do contest the imposition of penalty, seeking waiver of the same based upon an allegation that reasonable cause exists. Petitioners also request reduction or abatement of interest.

Neither petitioner appeared in person to provide testimony at hearing.

OPINION

In the determination below, the Administrative Law Judge held that petitioners have not established any basis sufficient to warrant waiver of the penalties or reduction of the interest imposed. Petitioners' arguments, which centered on allegations that they were busy or fully occupied with the demands of a rapidly expanding business and, further, that they believed Oliver's full-time controller complied with all filing and payment obligations, were rejected by the Administrative Law Judge, who found that being "otherwise occupied" does not constitute any basis to excuse petitioners' failure to perform the obligations imposed under the Tax Law or to assure that such obligations were performed. Further, the Administrative Law Judge found that petitioners' belief that all taxes were timely paid remains entirely unproven. The Administrative Law Judge rejected all other arguments advanced by petitioners, finding none of the arguments warranted waiver of the penalties or reduction of the interest imposed.

On exception, petitioners allege that on October 1, 1987 petitioners were removed as officers and had no control over the payment of taxes or the time of payment of taxes and, therefore, petitioners should not be subject to any penalties after the appointment of the Bankruptcy Trustee on September 30, 1987 or, in the alternative, after the payment of all taxes by this Trustee on November 25, 1990.

The Division of Taxation (hereinafter the "Division") agrees with the determination of the Administrative Law Judge, arguing that since petitioners have failed to raise any relevant substantive issues in their exception papers, the Division will rely on the arguments set forth in its post-hearing letter brief dated May 1, 1991. The Division argues that since the penalties and interest at issue herein are for unpaid taxes which were due prior to October 1, 1987, petitioners' contention concerning facts after that date is not relevant to the question at hand and, therefore, petitioners' exception should be denied and the determination of the Administrative Law Judge should be sustained in full.

We find no basis in the record before us for modifying in any respect the determination of the Administrative Law Judge. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of petitioners Thomas Nadler, officer of Oliver's Stores, Inc. and Joseph Wolfer, officer of Oliver's Stores, Inc. are denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Thomas Nadler, officer of Oliver's Stores, Inc. and Joseph Wolfer, officer of Oliver's Stores, Inc. are denied; and

4. The notices of determination and demand for payment of sales and use taxes due dated November 4, 1987 are sustained.

DATED: Troy, New York
April 9, 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