

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
EASTERN ELECTRIC CORP. : DECISION
AND FRANK M. GRIFFEN, AS OFFICER : DTA No. 807499
: :
for Revision of Determinations 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 Eastern Electric Corp. and Frank M. Griffen, as officer, 96-98 Fulton Street, White Plains, New York 10606 filed an exception to the determination of the Administrative Law Judge issued on March 14, 1991 with respect to their petition for revision of determinations 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 David A. Yablon, CPA. The Division of Taxation appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation filed a letter in lieu of a brief. Petitioners' request for oral argument was denied.

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

ISSUE

Whether petitioners have established that their failure to pay taxes due on materials consumed in the performance of capital improvement contracts during the audit period was due to reasonable cause and not willful neglect.

FINDINGS OF FACT

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

On December 13, 1988, the Division of Taxation issued to Eastern Electric Corp. and Frank M. Griffen, president of Eastern Electric Corp., notices of determination and demands for payment of sales and use taxes due for the period September 1, 1984 through August 31, 1987 ("the audit period") which set forth a total tax due of \$75,897.99,¹ penalty in the sum of \$21,111.32 and interest of \$27,557.98, for a total amount due of \$124,567.29. The notice sent to Frank M. Griffen as president of Eastern Electric Corp. set forth identical amounts due (see Footnote "1" below).

On December 13, 1988, two additional notices of determination and demands for payment of sales and use taxes due were issued to Eastern Electric Corp. and Frank M. Griffen as president of Eastern Electric Corp. which assessed a penalty of \$5,905.07 pursuant to Tax Law § 1145(a)(1)(vi).

It was conceded that petitioner Frank M. Griffen was a responsible officer of Eastern Electric Corp. and liable for the payment of sales and use taxes due from said corporation.

On November 10, 1988, Frank M. Griffen, as president of Eastern Electric Corp., agreed to the full amount of the tax assessed, \$75,898.00 and minimum interest on a form entitled "Statement of Proposed Audit Adjustment".

Although the "consent", or Statement of Proposed Audit Adjustment, stated that Mr. Griffen agreed to penalty and statutory interest as well, it was conceded by both parties that the agreement embodied only the amount of the tax and minimum interest which figure is also stated on the face of the consent form, i.e., \$91,431.63. It is also noted that the two notices of determination and demands for payment of sales and use taxes due which set forth a total tax

¹Although the notice issued to Eastern Electric Corp. stated the total tax due as \$75,897.96, the actual total tax due was \$.03 more, which is apparent if one adds the tax due as broken down by quarters set forth in the notice.

due of \$75,897.96, stated that petitioners' payment of \$91,431.63, was to be applied to that assessment.

Eastern Electric Corp. is a contractor engaged in electrical contracting, including repairs and capital improvements, which reported sales of \$9,676,828.00 for the audit period.

During a routine audit of petitioner Eastern Electric Corp., it was determined that it never paid tax on materials purchased.

After the audit was completed, petitioners agreed with the audit findings with regard to additional tax due but disagreed with the imposition of penalties and additional statutory interest. Petitioners were represented prior to and during the audit period by the certified public accounting firm of Bennett, Kielson and Company of New Rochelle, New York.

OPINION

In the determination below, the Administrative Law Judge found that petitioners failed to show through credible testimony or documentary evidence that they sought or received advice from their accountant as to whether sales or compensating use taxes were due on their purchases of materials which were subsequently incorporated into their capital improvement projects. The Administrative Law Judge held that ignorance of the law does not constitute reasonable cause and reliance upon a tax advisor is not necessarily grounds for finding reasonable cause to warrant the setting aside of penalties. Since petitioners did not clearly establish reasonable cause and an absence of willful neglect which would permit the abatement of the section 1145(a)(i) penalty, the Administrative Law Judge sustained the notices of determination and demand for payment of sales and use taxes due dated December 13, 1988. The Administrative Law Judge also determined that petitioners' mere assertion that they relied on the advice of their accountant was not sufficient to abate the penalty imposed pursuant to section 1145(a)(1)(vi) for the substantial understatement or omission of tax.

On exception, petitioners disagree with the findings of the Administrative Law Judge. Petitioners stated that they do not agree with the penalties that were assessed by the auditor because they relied on their accounting firm to provide accurate information regarding the sales

tax laws and were advised, specifically and inaccurately, that sales tax was not due on purchases bought for capital improvements. Petitioners, therefore, respectfully request penalties be waived.

The Division of Taxation (hereinafter the "Division") argues that petitioners' assertion that reliance on the advice of their accountant alone provided a basis for waiver of penalties is not supported in law or fact. The Division further argues that petitioners have not proven any facts including reliance on professional advice, offer no explanation regarding the failure of Mr. Griffen himself to appear and testify, and argue that absent such proof there is no basis to abate the penalties.

We find no basis in the record before us for modifying the Administrative Law Judge's determination in any respect. 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 exception of petitioners Eastern Electric Corp. and Frank M. Griffen, as officer is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Eastern Electric Corp. and Frank M. Griffen, as officer is denied; and

4. The notices of determination and demand for payment of sales and use taxes due dated December 13, 1988 are sustained.

DATED: Troy, New York
October 3, 1991

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

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

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