STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ED LIBONATI PRODUCTIONS, INC.	:	DECISION DTA No. 807577
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 February 28, 1989.	:	

Petitioner Ed Libonati Productions, Inc., 353 West 46th Street, New York, New York 10036 filed an exception to the determination of the Administrative Law Judge issued on July 11, 1991 with respect to its petition 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 February 28, 1989. Petitioner appeared by Mendlowitz and Weitsen, CPA's (Edward Mendlowitz, CPA, and Peter Weitsen, CPA). The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a brief in opposition to the exception. Petitioner's request for oral argument was denied.

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

ISSUE

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

FINDINGS OF FACT

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

On August 18, 1989, the Division of Taxation issued to petitioner, Ed Libonati Productions, Inc., two notices of determination and demands for payment of sales and use taxes

due for the aggregate period March 1, 1983 through February 28, 1989. The first of these notices assessed tax due in the amount of $28,014.79 for the period March 1, 1983 through August 31, 1986, plus penalty and interest, while the second notice assessed tax due in the amount of $10,866.48 for the period September 1, 1986 through February 28, 1989, plus penalty and interest. On the same August 18, 1989date, the Division of Taxation also issued to petitioner two additional notices of determination and demands for payment of sales and use taxes due, each assessing omnibus penalty only. The first of such notices assessed omnibus penalty in the amount of $2,086.30 for the period June 1, 1985 through November 30, 1988, while the second notice assessed omnibus penalty in the amount of $28.30 for the period December 1, 1988 through February 28, 1989.[1]

The notices described above were issued as the result of a field audit of petitioner's business operation, which audit commenced on or about January 10, 1986. During the audit period, petitioner was engaged in the business of preparing television commercials for various advertisers.

The audit itself resulted in the imposition of additional tax in three different areas, to wit, sales, fixed asset acquisitions and purchases, as follows:

(a) With respect to taxable sales, the auditor determined that incorrect sales tax jurisdictional rates were applied by petitioner to certain items shipped by petitioner. An error rate of .0026 was calculated, resulting ultimately in additional tax due of $2,128.94;

(b) Petitioner acquired fixed assets in the amount of $16,708.66 in connection with which payment of tax in the amount of $1,378.50 was not substantiated; and

(c) With respect to production expenses, taxable purchases were made by petitioner without payment of tax. Application of an error rate of .11862 on production expenses subject to tax at a tax rate of 4% resulted in expenses of $825,632.00, with unpaid tax due thereon in the amount of $33,025.28. In addition, an error rate of .00409 was applied to those production costs

[1]Validated consents with respect to the period of limitations on assessment had been executed by petitioner such that assessment for the period March 1, 1983 through August 31, 1986 could be made at any time on or before December 20, 1989.

assessable at the tax rate of 8.25% resulting in expenses of $28,467.67, with unpaid tax due thereon in the amount of $2,348.58.

The audit results described above were derived via use of test period auditing methodologies to which petitioner agreed. Petitioner specifically conceded that no argument was raised as to the audit method employed or the resulting amount of tax determined to be due. Rather, petitioner contests only the imposition of penalty.

At hearing, petitioner's representative provided schedules further specifying and analyzing the breakdown of items comprising the margins of error found by the auditor. Petitioner's representative noted that approximately 65% of the production cost items whereon no sales tax was paid represented recurring items principally involving the rental of equipment, props and studio time. Petitioner's representative added the dollar amount of items in the auditor's test period assessed at 4% ($112,517.98; a relative error rate of .11862), plus the items assessed at 8.25% ($3,878.16; a relative error rate of .00409), to arrive at $116,396.14 of total non-tax paid production costs assessed during the test period. Petitioner would subtract from such amount $75,686.98, representing rental amounts for equipment, props and studio time (65% of the total non-tax paid production costs) leaving $40,709.16 of production costs out of compliance (i.e., on which tax was not charged or paid), or an error rate of 4.29% (as opposed to the nearly 12% total error rate determined upon audit). Petitioner goes on to note that the $40,709.16 balance consists principally of the cost of production assistants hired on a per diem basis (hairdressers, stylists, make-up persons and scene set-up persons), as well as items such as breakfasts purchased for per diem assistants, prop purchases and flower rentals. Petitioner's representative does not contest the taxability of such items, but rather alleges that because of the nature of the items petitioner was confused as to whether tax was due on all such items. In sum, petitioner's representative argues that the main areas of noncompliance resulted from vendors who did not charge sales tax to petitioner (principally on rented items), arguing further that the onus for tax compliance should be first on the vendor as opposed to the user.

Petitioner's representative alleged, and the auditor agreed, that petitioner maintained "reasonably good records". Petitioner's representative maintained that petitioner made efforts to comply with the law and accurately pay all sales tax due, noting that the error rates determined upon audit and the amount of tax assessed ($38,881.30) are comparatively low in light of the $11,051,863.00 total gross sales volume for the audit period. While admitting that no tax was self-assessed by petitioner on any of the items in question, it was also noted that where tax was charged to petitioner by the various vendors, petitioner paid such tax. Finally, petitioner points out that some 91 different vendors were included in the test period, thus allegedly indicating a great deal of confusion as to the proper tax treatment of the items in question.

Petitioner's total gross sales volume for the audit period was $11,051,863.00. As the result of audit, additional taxable sales in the amount of $899,543.14 were determined (the amount "out of compliance"). Petitioner reported and paid tax for the audit period in the amount of $17,380.00. Tax assessed as the result of the subject audit was $38,881.30.

OPINION

In the determination below, the Administrative Law Judge held that the penalties imposed upon petitioner were proper. Specifically, he found that petitioner failed to show that its failure to pay the entire amount of taxes owed was due to reasonable cause and not willful neglect.

On exception, petitioner contends that because the treatment of prop rentals under the Tax Law -- the cause of its underpayment -- has been commonly misunderstood throughout the production industry, petitioner's misunderstanding of this section constitutes reasonable cause for failure to pay the tax in full. In addition, petitioner argues that because the error rates established as a result of the Division of Taxation's (hereinafter the "Division") audit were very small, these amounts should be treated as de minimis and, thus, should result in the abatement of penalties.

In response, the Division contends that there has been a total failure of competent proof on petitioner's part to show that its failure to pay its taxes in full was due to reasonable cause and not willful neglect. In addition, the Division argues that, even if this absence of proof is disregarded, the arguments advanced by petitioner are unpersuasive. Finally, it asserts that petitioner's

conduct, as alleged in its notice of exception, leads to a conclusion that petitioner willfully neglected its sales tax obligations.

On exception, petitioner simply reiterates the same arguments as made at the hearing below. We find that the Administrative Law Judge dealt correctly and adequately with the issues below and, therefore, we sustain the determination based on the opinion rendered by the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ed Libonati Productions, Inc. is denied;

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

3. The petition of Ed Libonati Productions, Inc. is denied; and

4. The notices of determination issued to Ed Libonati Productions, Inc. dated March 18, 1989 are sustained.

DATED: Troy, New York
April 23, 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