STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RITTLING DISPENSERS, INC.	:	DECISION DTA No. 807744
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.	:	

Petitioner Rittling Dispensers, Inc., 451 Northwood Drive, Kenmore, New York 14223 filed an exception to the determination of the Administrative Law Judge issued on August 29, 1991 with respect to its 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. Petitioner appeared by Robert Peter Rittling, President. The Division of Taxation appeared by William F. Collins, Esq. (Donald DeWitt, 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 shown reasonable cause and an absence of willful neglect warranting the abatement of penalties and statutory interest imposed pursuant to Tax Law § 1145(a)(1)(i), (ii) and (vi).

FINDINGS OF FACT

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

On August 26, 1988, following an audit, the Division of Taxation (hereinafter the "Division") issued to petitioner, Rittling Dispensers, Inc., two notices of determination and demands for payment of sales and use taxes due (Notice Numbers S880826335C and S880826336C) in respect of the period September 1, 1984 through August 31, 1987. Notice number S880826335C assessed tax due of $47,320.90, plus penalty and interest pursuant to Tax Law § 1145(a)(1)(i) and (ii). Notice number S880826336C assessed penalty of $3,625.04 pursuant to Tax Law § 1145(a)(1)(vi).

Petitioner conceded liability for the tax assessed in the above-referenced notice.

Petitioner is engaged in a dairy business and also operates a vending machine business in the Buffalo area. Petitioner has been in existence for about 50 years.

The assessments herein arose from petitioner's vending machine business. On audit, the Division determined that petitioner had failed to properly account for "on-premises" consumption of certain items sold by petitioner through its vending machines and had failed to collect and to pay sales tax with respect to such sales. This failure resulted in the assessment of tax against petitioner.

Petitioner was unaware that the Tax Law required differing sales tax treatment with respect to certain sales for on-premises consumption versus sales for off-premises consumption. Petitioner's understanding of the Tax Law was based upon the understanding of its president, Mr. Robert Peter Rittling. Mr. Rittling has been in the vending machine business since the early 1960's and, at the time of the audit, Mr. Rittling had been president of Rittling Dispensers, Inc. for about 11 years. Mr. Rittling based his understanding of the Sales Tax Law, as applied to vending machine sales, on a Department of Taxation and Finance publication of guidelines for the vending machine industry dated March 1970. According to Mr. Rittling,[1] said publication made no reference to the sales tax consequences of on-premises consumption. Mr. Rittling's

[1]The referred-to publication was not introduced into the record herein.

understanding of the Sales Tax Law as applied to vending machines was, in his mind, confirmed by the results of a sales tax audit of petitioner conducted by the Division in approximately 1981 or 1982. That audit resulted in no significant assessment of tax, notwithstanding petitioner's failure to account for on-premises and off-premises consumption.

Petitioner cooperated fully with the Division during the course of the audit and acted in good faith at all times.

Subsequent to the audit herein, petitioner has attempted to properly account for on-premises consumption in its collection and remittance of sales tax.

Throughout its history, petitioner has consistently timely filed and remitted sales tax.

OPINION

The Administrative Law Judge determined below that petitioner failed to prove that its failure to properly collect and remit sales tax was due to reasonable cause and not due to willful neglect. The Administrative Law Judge noted that 20 NYCRR 527.8(g), three decisions by the former State Tax Commission and a memorandum by the Technical Services Bureau discussed the Division's audit policy regarding vending machine sales, and were published before the audit period in question. The Administrative Law Judge stated that, under the regulations, petitioner's ignorance of the law, and reliance on a 1970 Department of Taxation and Finance publication of guidelines for the vending machine industry, did not constitute reasonable failure, and that petitioner's level of inquiry was insufficient to rise to the level of an honest and reasonable misunderstanding of the law.

On exception, petitioner argues that it did prove that its failure to collect and remit sales tax was due to reasonable cause and the absence of willful neglect. Petitioner asserts that its reliance on the results of a prior audit was reasonable, both because petitioner never received any information from New York State stating that the sales tax due on vending machine sales was now calculated using on-premise rules and because the prior audit never included these new interpretations.

In response, the Division argues that petitioner has not proved reasonable cause and the absence of willful neglect. The Division cites to 20 NYCRR 536.5(d)(2) which states, in pertinent part, that the most important factor to be considered in determining whether reasonable cause exists is the extent of the taxpayer's efforts to ascertain the proper tax liability. The Division argues that, because petitioner merely relied on a 1970 Tax Department publication without making any effort to determine whether its method of reporting sales tax due was proper, petitioner's level of inquiry was insufficient to rise to the level of an honest and reasonable misunderstanding of the law.

Tax Law § 1145(a)(1)(i) imposes a penalty on a taxpayer who fails to pay any sales tax within the time required and Tax Law § 1145(a)(1)(ii) imposes statutory interest on the amount not paid. Tax Law § 1145(a)(1)(iii) provides for remission of the penalty and reduction of the statutory interest to minimum interest if the failure is due to reasonable cause and not due to willful neglect. Petitioner concedes that it failed to pay the required sales tax and, thus, petitioner is required to pay the penalty and statutory interest unless petitioner can show the failure was due to reasonable cause and not due to willful neglect.

The penalties and interest assessed against petitioner were due to petitioner's failure to collect and remit tax on its sale of food (otherwise exempt under Tax Law § 1115[a][1]) for on-premises consumption. Tax Law § 1105(d)(i)(1) imposes a tax on such sales. The regulation interpreting and applying Tax Law § 1105(d)(i)(1) to vending machine sales is 20 NYCRR 527.8(g); it distinguishes between vending machine sales that are deemed to be for on-premises consumption as opposed to sales for off-premises consumption. The regulation provides that when food or drink is sold through vending machines, and facilities such as tables, chairs, benches, counters, etc. are provided for customers, the machines are considered to be eating establishments selling food or drink for on-premises consumption, and sales made through such machines are taxable. When food or drink is sold through vending machines and no facilities are

provided for customers, such sales are deemed to be for off-premises consumption and are taxed accordingly.

Petitioner asserts that its failure to collect and pay sales tax was reasonable in light of the fact that, after a previous audit in 1981 or 1982, petitioner was assured that all was in good order and no significant assessment of tax resulted, notwithstanding petitioner's failure in 1981 or 1982 to account for on-premises and off-premises sales. Petitioner argues that if 20 NYCRR 527.8(g) (effective September 1, 1976) and a Technical Services Bureau Memorandum (published January 18, 1979) constitute evidence that the Division recognized a distinction between on-premises and off-premises consumption prior to the 1981 or 1982 audit, then the State tax auditor should have informed petitioner back in 1981 or 1982 that its method of calculating its sales tax liability was incorrect. Petitioner contends that it reasonably relied on those prior audit results, and petitioner argues that its timely compliance record contradicts the Administrative Law Judge's conclusion that petitioner's failure was not due to reasonable cause and the absence of willful neglect.

Petitioner's argument that it was reasonable to rely on the results of a prior audit would be more persuasive if there was evidence in the record to establish that the prior audit was similar to the one at issue, that the nature of petitioner's vending machine business was the same at both times, and that the prior auditor observed the physical layout of the vending machine area. In order for petitioner to argue successfully that it reasonably relied on the prior audit, petitioner must show that such reliance was, in fact, reasonable. Petitioner's president did not testify at hearing as to what issues, records, etc. the prior audit involved, and petitioner did not submit any documentary evidence concerning the prior audit (Tr., pp. 16-18). Petitioner's president testified that, according to the audit done in September 1987, "there was a whole new way of interpreting taxes," but because the record does not contain any evidence as to what the prior audit involved, it is impossible to determine whether petitioner "reasonably relied" on those audit results.

Further, contrary to petitioner's assertion, the information before us indicates that the interpretation applied in the instant audit was not new in 1987. As the Administrative Law Judge noted, the Division's position that vending machine sales made on premises containing tables and chairs constituted the sale of restaurant food, taxable pursuant to section 1105(d), was clearly articulated in 1976 in the regulations at 20 NYCRR 527.8(g). Further, there is nothing before us that indicates that the policy stated in the regulations reflected any change in interpretation by the Division. The only change in policy that we see in the record before us is the Division's decision, stated in 1979 in TSB-M-79(1)S, to deem 66 2/3 percent of vending machine sales as being for off-premises consumption. Under the TSB-Memorandum, if the taxpayer could prove a higher rate of nontaxable sales, he would be entitled to it, but the 66 2/3 percent was an automatic presumption. This presumption appears to be a benefit to taxpayers not expressed in the 1976 regulation.

To ascertain its tax liability, petitioner relied on its president's understanding of the sales tax law. The president testified at hearing that his understanding was based on a document published in 1970 and he also stated that he never asked the Department of Taxation and Finance for any advisory opinions (Tr., pp. 23, 25, 28). The record does not contain any evidence that petitioner sought advice from its accountant regarding its sales tax liability until the audit in 1987 (Tr., p. 23). At that time, however, petitioner's accountant discovered a 1987 vending machine industry guideline; it outlined how to determine on-premises and off-premises consumption and how to calculate sales tax liability based on those sales (Tr., pp. 19, 20).

Petitioner's efforts to ascertain the proper tax liability were not extensive. As the Administrative Law Judge points out, there was a wealth of information available, prior to petitioner's audit in September 1987, concerning Tax Law § 1105(d)(i)(1): 20 NYCRR 527.8(g), the Technical Services Bureau Memorandum regarding audit policy which was published on January 18, 1979 (TSB-M-79[1]S) and a number of decisions by the former State Tax Commission which discussed 20 NYCRR 527.8(g) (see, Matter of Togni, State Tax Commn.,

January 16, 1987; Matter of Standard Vending of Oneonta, State Tax Commn., February 11, 1983; Matter of Morris, State Tax Commn., February 4, 1983; Matter of Serve Well Enters., State Tax Commn., November 26, 1982). Petitioner's ignorance of the law does not constitute reasonable cause (20 NYCRR 536.5[c][5]), and petitioner's reliance on a 1970 Tax Department publication also fails to establish reasonable cause. In conclusion, petitioner has failed to prove that its failure to pay the sales tax was due to reasonable cause and the absence of willful neglect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Rittling Dispensers, Inc. is denied;

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

3. The petition of Rittling Dispensers, Inc. is denied; and

4. The Notices of Determination and Demand for Payment of Sales and Use Taxes Due dated August 26, 1988 are sustained.

DATED: Troy, New York
May 7, 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