

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MARVIN SIEGEL,	:	DECISION
OFFICER OF A. A. KOLD AIR, INC.	:	DTA No. 811002
	:	
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, 1985 through August 31, 1988.	:	

Petitioner Marvin Siegel, officer of A. A.Kold Air, Inc., c/o Barry R. Feerst, 139 East 23rd Street, New York, New York 10010, filed an exception to the determination of the Administrative Law Judge issued on November 10, 1994. Petitioner appeared by Barry R. Feerst, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Any reply brief would have been due on January 26, 1995, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal.
Commissioners Dugan and DeWitt concur.

ISSUE

Whether reasonable cause exists for the abatement of penalties under Tax Law § 1145(a)(1)(i) or (vi) and additional interest under Tax Law § 1145(a)(1)(ii).

FINDINGS OF FACT

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

Petitioner, Marvin Siegel, was the president of A. A. Kold Air, Inc. ("Kold Air") at all times relevant herein, i.e., between December 1, 1985 through August 31, 1988 (the "audit period").

Kold Air was an air conditioning contractor selling, installing and servicing air conditioning equipment to residential and commercial customers.

The Division of Taxation ("Division") performed a field audit of the corporation for the audit period. Petitioner agreed to a representative test period audit after he was informed that the books and records of the business were adequate and that a test period audit method would be utilized to determine any sales and use tax liability. The audit method election agreement signed by petitioner and the Division indicated that the method was to be used in the audit of sales and recurring expense purchases.¹

The test yielded additional taxable sales of \$1,411,891.03, and additional taxable recurring purchases of \$15,288.68. A detailed audit for the entire period indicated purchases of additional taxable assets of \$4,078.43. These three categories yielded additional tax due of \$118,078.85. The audit of petitioner's tax accrual account indicated numerous reporting errors and resulted in additional tax owed in the sum of \$40,935.51. Total additional tax due was found to be \$159,014.36. The Division assessed penalty pursuant to Tax Law § 1145(a)(1)(i) and "omnibus" penalty pursuant to Tax Law § 1145(a)(1)(vi) for omission of tax greater than 25% of the audited tax due for all quarters in the audit period.

The Division issued to petitioner two notices of determination and demands for payment of sales and use taxes due dated December 12, 1989. The first notice set forth additional tax due of \$159,014.36, plus penalty and interest, for the audit period December 1, 1985 through August 31, 1988. The second notice set forth total penalty due of \$15,901.44 for the same

¹There was a handwritten notation on the audit method election agreement that indicated "12/86 & 7/87," presumably the months tested. However, the form did not preclude a protest of the audit results on the basis of the test period selected. In fact, the Division used the months of December 1986 and July 1987.

period.

A conference was held before a conferee of the Bureau of Conciliation and Mediation Services on May 9, 1991. Petitioner presented additional information that became available after the issuance of the assessments. The information concerned the sales tax accrual account, the materials used in capital improvements and disallowed exempt sales.

After reviewing the information, the Division's advocate, also the auditor in this matter, reduced the additional tax due to \$32,413.80.

The conferee determined this to be the revised amount of tax due, together with penalties pursuant to Tax Law § 1145(a)(1)(i) and (vi) and issued an order consistent therewith, dated May 29, 1992.

Petitioner paid the revised tax due in full and there is no issue remaining regarding the tax. However, petitioner disagreed with the imposition of penalty and petitioned for abatement of same to the Division of Tax Appeals.

During the period in issue, Kold Air experienced cash flow problems and was unable to pay the tax due in certain quarters. Although petitioner overpaid in subsequent quarters to reduce the unpaid balance, he was never able to eliminate the liability.

An analysis of the additional tax due after conference, prepared by the Division and included in the audit workpapers in evidence, indicated that petitioner had an outstanding balance of additional taxes due for 6 of the 11 quarters in the audit period. The revised tax and penalties due were set forth in chart form in the answer as follows:

<u>Period</u>	<u>Tax on Return</u>	<u>Assessed Tax</u>	<u>Overstatement Penalty</u>	<u>§1145(a)(1)(i) Penalty</u>
2/28/86	\$ 6,466.60	\$ 4,475.53	\$ 447.55	\$ 1,342.66
5/31/86	20,690.00	7,274.87	727.49	2,182.46
8/31/86	24,974.70	7,129.51	712.95	2,138.85
11/30/86	7,336.28	(2,328.79)	0.00	0.00
2/28/87	7,517.38	(302.35)	0.00	0.00
5/31/87	18,350.36	(872.58)	0.00	0.00
8/31/87	32,929.73	9,096.31	909.63	2,728.89

11/30/87	8,310.46	(3,981.12)	0.00	0.00
2/29/88	8,830.77	(2,109.20)	0.00	0.00
5/31/88	16,521.24	3,251.25	325.13	975.38
8/31/88	<u>23,210.88</u>	<u>10,780.37</u>	<u>1,078.04</u>	<u>3,234.11</u>
Total	\$175,138.40	\$32,413.80	\$4,200.78	\$12,602.35

OPINION

In the determination below, the Administrative Law Judge pointed out that petitioner conceded that he did not have the funds available to pay the taxes when due, as well as being unable to make up the difference over future quarters.

The Administrative Law Judge then determined that petitioner failed to establish reasonable cause for the abatement of penalty or interest pursuant to Tax Law § 1145(a)(1)(i), (ii) or (vi) for the six quarters remaining in issue. Relying in part on Matter of F & W Oldsmobile v. Tax Commn. (106 AD2d 792, 484 NYS2d 188), the Administrative Law Judge stated that "reasonable cause for failing to timely pay over sales and use taxes does not include financial inability or the need to use the taxes collected for other, more pressing obligations" (Determination, conclusion of law "A").

The Administrative Law Judge, in rejecting petitioner's allegations that the Division had prejudged this case as well as petitioner's argument relating to his history of providing employment in an economically depressed area, held "[t]here is no specific statutory or regulatory basis for remitting the penalties imposed" (Determination, conclusion of law "B") based on these allegations.

On exception, petitioner argues that the Administrative Law Judge was wrong in finding that he did not meet his burden of demonstrating reasonable cause for not paying the tax when due or omitting in excess of 25% of the amount of tax required to be shown on the return for the quarters in question.

Petitioner argues that as the Administrative Law Judge noted he was financially unable to pay the tax liability for each quarter during the audit period; however, he attempted to compensate for this by overpaying the taxes due in subsequent periods, therefore acting in good faith by trying to pay the amounts owed as soon as it was feasible to do so.

Petitioner also argues: 1) he made a concerted effort to ascertain the proper tax liability; 2) he reasonably relied on information the auditors gave him to determine his tax liability; 3) he did not willfully neglect payment, rather, he was misinformed as to the extent of his liability; and 4) since he acted with reasonable cause and good faith, the penalty is unwarranted and should be dismissed.

The Division, in reply, agrees with the determination of the Administrative Law Judge in denying petitioner's claim that financial hardship is reasonable cause and constitutes a lack of willful neglect and points out that "while there is some evidence in the record of financial difficulty on the part of the corporation, there is no showing that Mr. Siegel lacked the resources to pay the tax due" (Division's letter brief, p. 1).

The Division rejects petitioner's claim relating to waiting for the auditor's determination before making payment of tax due, arguing that penalties are imposed to insure that the tax is timely reported and paid, not to get cooperation during an audit, as it is the petitioner's responsibility to report and pay the proper tax on time. The Division asserts that the failure to do so cannot be cured by subsequent cooperation during the audit.

We affirm the determination of the Administrative Law Judge.

In addition, because we find that the Administrative Law Judge completely and adequately addressed the issues before him, we see no reason to analyze these issues further; nor do we see any reason to hold otherwise and, therefore, affirm the Administrative Law Judge based on his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Marvin Siegel, Officer of A. A. Kold Air, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Marvin Siegel, Officer of A. A. Kold Air, Inc. is denied; and

4. The notices of determination and demand for payment of sales and use taxes due dated December 12, 1989, as modified by the Conciliation Order dated May 29, 1992, are sustained.

DATED: Troy, New York
July 13, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner