

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DOUGHERTY TOWING CO. : DETERMINATION
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, 1981 :
through February 28, 1985. :

Petitioner, Dougherty Towing Co., 131-53 Sanford Avenue, Flushing, New York 11355, filed a 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 December 1, 1981 through February 28, 1985 (File Nos. 802074 and 802279).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 15, 1989 at 9:15 A.M. Petitioner appeared by Isaac Sternheim, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Michael Infantino, Esq., of counsel).

ISSUE

Whether a delay in paying sales tax is excusable so as to justify the remission under Tax Law § 1145(a)(1)(i) of penalty and excess interest.

FINDINGS OF FACT

(a) Petitioner, Dougherty Towing Co., is in the business of towing and repairing automobiles. It employs nine men in its body shop.

(b) Petitioner's records were in good order. Its books were kept by a bookkeeper although its returns were prepared by a certified public accountant. It reported sales of \$163,954.00 for the audit period. There is no allegation on the Division of Taxation's part that petitioner had any intent to defraud the State.

(a) A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued on March 19, 1985 to petitioner for sales and use taxes due for the period December 1, 1981 through February 28, 1982 in the amount of \$12,778.10, plus interest of \$5,507.75 and penalty under Tax Law § 1145(a)(1)(i) of \$3,194.53 for a total amount due of \$21,480.38.

(b) Another notice was issued on June 14, 1985 for the period March 1, 1982 through February 28, 1985 in the amount of \$204,404.83, plus interest of \$42,414.55 and penalty under Tax Law § 1145(a)(1)(i) of \$39,066.04, for a total amount due of \$285,885.42.

(c) These determinations were based upon the denial of petitioner's claims that certain of its sales were exempt from tax.

(d) The penalty was recommended by the auditor because of the large deficiency and because of a failure to present requested information. The information requested appears from the auditor's file to have consisted of tax exemption certificates and invoices.

(e) It has been stipulated that the determinations are due and owing in the reduced amount of \$170,259.14, plus statutory interest and a penalty to be determined in this proceeding. The reduction in tax due was made because of the allowance as exempt of certain sales made to automobile rental companies and automobile dealers, even though no resale or exemption certificates were produced, and because of the invalidity of the determination for the quarter ending February 28, 1985 because of the Division's failure to request records for that quarter.

The penalty here in dispute was computed under Tax Law § 1145(a) as it existed prior to amendment in 1985 at 5% for the first month of delay and 1% a month thereafter with a maximum of 25%.

The interest in issue was computed at a rate set by the Tax Commission under Tax Law § 1142. This was at the rate of 14% per annum for the quarter ending February 28, 1982 and 13.5% per annum for the next four quarters. The rate was computed under Tax Law § 1145 at 12% for all remaining quarters (during which the rate set by the Tax Commission was 9.1% for four quarters and then 10% for the final four quarters) (see 20 NYCRR 536.1[a]; 603.2[a]).

CONCLUSIONS OF LAW

A. The penalty and a portion of the interest (the interest in excess of that computed under Tax Law § 1142) may be remitted if the failure to pay was, in the language of Tax Law § 1145(a)(1)(iii), "due to reasonable cause and not due to willful neglect". That language has been further defined in regulation 20 NYCRR former 536.5(b) and covers generally death, destruction of the business, inability to obtain information, pending proceedings with the Division of Taxation and "other causes". The "other causes" are stated (20 NYCRR former 536.5[b][6]) to be:

"Any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance will be taken into account. Ignorance of the law, however, will not be considered reasonable cause."

The taxes still due in this case amount to over 100% of the taxes paid for the audit period and are due to claims for exempt sales in what must be a great many transactions where no tax was paid and no tax exemption certificates were used. It is impossible to believe under the circumstances that petitioner's officers and its bookkeeper were ignorant of the legal duty to obtain and retain exemption certificates. At any rate, the returns were made out by a certified public accountant who presumably could have been asked (and who should in any event have advised) about requirements for exemptions. Petitioner has not shown reasonable cause for its failure to pay the proper tax.

B. The petition of Dougherty Towing Co. is denied and the notices of determination and demands for payment of sales and use taxes due issued March 19, 1985 and June 14, 1985, as reduced by the agreement in Finding of Fact "2(e)", are sustained.

DATED: Troy, New York
November 16, 1989

/s/ Nigel G. Wright
ADMINISTRATIVE LAW JUDGE