

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
JULIUS ENDREI, OFFICER OF	:	DETERMINATION
J & E ENTERPRISES, INC.	:	
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 June 1, 1982	:	
through August 31, 1984.	:	

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Petitioner, Julius Endrei, 1 Main Street, Haines Falls, New York 12436, 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 June 1, 1982 through August 31, 1984 (File No. 804711).

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on May 8, 1990 at 10:00 A.M., with additional information to be submitted by May 25, 1990. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Arnold Glass, Esq., of counsel).

ISSUES

- I. Whether the Division of Taxation properly applied payments in the amount of \$3,357.26 made by petitioner, Julius Endrei, to his sales tax liability.
- II. Whether the Division of Taxation properly determined that no sales tax payments were remitted for the period June 1, 1982 through August 31, 1984, and that therefore the notice of determination dated April 27, 1987 must be upheld.

FINDINGS OF FACT

Petitioner, Julius Endrei, operated a gift shop and wholesale costume manufacturing business during the period in question. He originally started the business by importing gifts, souvenirs, and clothing connected to various European cultures. The business primarily

provided products that served the festivals known as Octoberfest.

According to an excerpt from the field audit report, the business being operated by petitioner was originally called Alpine Imports and it operated under I.D. #NY-8227070. In 1982, the business was incorporated under the name of J & E Enterprises, Inc. In 1984, the name again was changed to Julius Endrei d/b/a Alpine House Imports then operating under I.D. #14-1657303. According to petitioner he operated his business since 1978 at which time he asserts he was incorporated as J & E Enterprises, Inc. However, petitioner did not submit any documents substantiating his existence as a corporation. The name of the business for which petitioner is being held responsible as an officer is J & E Enterprises, Inc. most currently operating under I.D. #14-1616903. The testimony of the auditor in this case reveals that the Division of Taxation was aware of various identification numbers and several names pertaining to the same business operation. It appears as though where duplicate payments were made because of a confusion with respect to the name of the business or the I.D. number under which payment was made, the Division of Taxation claims to have eliminated any duplication and has given petitioner credit for such payments. Petitioner however seems to remain confused as to whether such duplication still exists.

Ms. Diane Carlson, from the Albany District Office, was assigned to perform an audit of petitioner's operations. At the time of the audit, she prepared a schedule of sales tax returns filed by petitioner for the various business operations covering the period August 1, 1978 through May 31, 1986. It was determined during the audit, that sales tax returns covering quarters ended August 31, 1978 through May 31, 1982 were not filed until October 14, 1983, at which time \$1,000.00 was paid toward those returns. The compliance agent responsible for collection of those funds allocated the monies paid to the earliest tax periods due and allocated such monies to taxes owed first. There was one exception with respect to the allocation of funds and that is for the period ended August 31, 1981, in which tax was due in the amount of \$807.00. The Division of Taxation did not allocate any of the \$1,000.00 toward that quarter, but rather allocated small amounts to three subsequent quarters.

It appears from the testimony that because of the late-filed returns pertaining to the quarters ended August 31, 1978 through May 31, 1982, the Division filed warrants against the business operations run by petitioner, Julius Endrei. Further, it appears that Mr. Endrei was notified that he must pay the penalties and interest pertaining to those earlier tax quarters in the amount of \$2,357.26 in order to prevent the seizure of his business. During the course of the hearing, Mr. Endrei submitted for review a copy of a cancelled check dated September 7, 1984 payable to the State Tax Commission in the amount of \$2,357.26 identifying the payor as Alpine House, Int. also bearing the name and address of Julius Endrei. The check also indicated that the payment was for sales tax, penalty and interest.<sup>1</sup>

During the course of the hearing, Mr. Endrei testified that for the period June 1, 1982 through August 31, 1984, the period in question, he filed returns without payment on the advice of his accountant who indicated to him that he should file even if he was unable to pay. Mr. Endrei now believes that the \$1,000.00 payment toward the earlier quarters and the payment of penalty and interest against the warrant in the amount of \$2,357.26 should be applied to the periods at issue in this case.

Mr. Endrei relied heavily on the advice of his accountant, Mr. Varga.<sup>2</sup> Mr. Endrei also asserts that the Division of Taxation imposed levies on various bank accounts from which funds were withdrawn to pay taxes.

Post-hearing, the Administrative Law Judge allowed additional evidence to be submitted by Mr. Endrei to show payments or withdrawal of funds from various accounts to satisfy tax obligations for which liability is being asserted. Mr. Endrei was unable to locate any additional

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<sup>1</sup>Although this documentation was not admitted into evidence, the post hearing record remained open for two weeks for the Administrative Law Judge to receive copies of checks or other source payments. Therefore review of this information contained in the record is appropriate.

<sup>2</sup>Throughout the transcript, Mr. Varga is erroneously referred to as Mr. Vonga.

checks or any additional liens or levies against accounts from which he claims funds were taken by the Division of Taxation. One such payment taken from the First American Bank of New York in the amount of \$552.99 was later explained by the Division of Taxation as an amount applied to withholding tax for a period during 1984. Also post-hearing, the Administrative Law Judge requested the Division of Taxation to review with the Tax Compliance Division, all payments received from petitioner, his corporation or through

accounts upon which levies were placed. A schedule of payments was provided to the Administrative Law Judge, none of which were applied to the returns for the period June 1, 1982 through August 31, 1984. These returns were remitted without payment as indicated by the records of the Division of Taxation and the testimony of the petitioner, and to this date appear unpaid.

In correspondence submitted to the Administrative Law Judge after the hearing, Julius Endrei claimed that having carefully examined the signature on the various tax returns filed by him and presented as evidence during the hearing, he was able to determine that the signature appearing on the return was a forgery of his name. According to petitioner, he never had copies of these returns in his possession, and he surmises that his accountant, Mr. Varga, may have fallen behind in filing or provided Mr. Endrei with poor advice, and realizing he should have been filing, he attempted to catch up filing by doing so all at one time, never supplying copies to petitioner. Contrary to this information was the testimony of Mr. Endrei during the hearing at which, not less than six different times, he identified his signature on the documents that he now claims are forged.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner asserts that payments made by him in satisfaction of his sales tax liability for his business operations by way of check or bank levy, have not in their entirety, been applied to sales tax that the Division of Taxation claims is due and owing. At the very least petitioner believes that some of the payments made were inappropriately applied to earlier sales taxes due

and owing. He relied on the professional advice of his accountant and believes that he attempted to comply with the Tax Law in good faith.

The Division of Taxation contends that the returns for the periods in question were not timely filed and were filed without payment. As a result, the notice of determination should be sustained in full with the applicable interest and penalty.

#### CONCLUSIONS OF LAW

A. Petitioner created a difficult situation for himself by filing under various names and obtaining several identification numbers for his business operations, whether or not that was done at the advice of others. Petitioner carries the burden of proving that payments made were applied in duplicate by virtue of maintaining the same operation under different names or numbers, since he has clearly stated that the returns for the period in issue were filed without payment.

B. It is a well-settled principle that in the absence of any direction from the debtor, a creditor may allocate payments among debts owing in any manner the creditor wishes (see, First National Bank in Palm Beach v. United States, 591 F2d 1143 [5th Cir 1979]; Matter of Farkas, Tax Appeals Tribunal, October 14, 1988). Apparently petitioner's business operations were ongoing for some period of time with nonfiled sales tax returns and nonpayment of tax. At the time the earlier returns were filed in October 1983, it appears as though petitioner was fully aware that the \$1,000.00 tax payment was to be applied to earlier periods and that penalties and interest would ensue. The Division of Taxation clearly and most appropriately applied those payments to the earliest tax due in order to eliminate a compounding of the penalty as the years continued to pass without payment. With the exception of one quarter, which was skipped, the \$1,000.00 was applied to the earliest liability due, and this was appropriate under the circumstances.

C. Tax Law § 1145(a)(1)(i) and former § 1145(a)(1)(ii) provided that a penalty could be imposed on any person failing to file a return or pay over any tax within the time required but that the penalty could be abated if the failure to pay was due to reasonable cause and not willful

neglect. The applicable regulation 20 NYCRR former 536.1(b)(6), states, that reasonable cause may include:

"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."

Petitioner asserts that he was unaware of the requirements to file sales tax returns in the earlier periods and relied heavily on the advice of his accountant to file returns once he was aware of his obligation to do so. It has been established that reliance upon a tax advisor is not necessarily grounds for finding of reasonable cause (see, Matter of LT & B Realty v. State Tax Commn., 141 AD2d 185, 535 NYS2d 121; Matter of BAP Appliance Corp., Tax Appeals Tribunal, June 29, 1989). In LT & B Realty, the court rejected a per se rule that reliance upon the advice of a tax professional constitutes reasonable cause stating:

"to permit consulting with a tax professional to act as immunity to penalties would effectively remove the penalty provisions" (Matter of LT & B Realty v. State Tax Commission, supra, 535 NYS2d 121, 123).

D. It appears as though petitioner relied in good faith on his accountant to file appropriate documents with the taxing authorities and pay the necessary obligations. Nothing in the record indicates a willful intent to disobey the taxing statutes. However, a good faith effort and reliance on faulty professional advice is insufficient to require penalties to be set aside (see, Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557; Matter of Dougherty Towing Co., Tax Appeals Tribunal, April 12, 1990).

E. The petition of Julius Endrei is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated April 27, 1987, is hereby sustained.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE