

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
INSULPANE INDUSTRIES, INC. :
for Revision of Determinations or for Refunds :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1983 :
through August 31, 1986. :

In the Matter of the Petition :
of :
CHARLES SQUILLANTE :
OFFICER OF INSULPANE INDUSTRIES, INC. :
for Revision of Determinations or for Refunds :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1983 :
through August 31, 1986. :

DETERMINATION

In the Matter of the Petition :
of :
EMILE CASALE :
OFFICER OF INSULPANE INDUSTRIES, INC. :
for Revision of Determinations or for Refunds :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1983 :
through August 31, 1986. :

In the Matter of the Petition :
of :
EDWARD SMITH :
OFFICER OF INSULPANE INDUSTRIES, INC. :
for Revision of Determinations or for Refunds :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1983 :
through August 31, 1986. :

In the Matter of the Petition :
of :
ROBERT WAXTEL :
OFFICER OF INSULPANE INDUSTRIES, INC. :
for Revision of Determinations or for Refunds :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1983 :
through August 31, 1986. :

Petitioner Insulpane Industries, Inc., 335 Temple Hill, New Windsor, New York 12550, filed a petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1983 through August 31, 1986 (File No. 805871).

Petitioner Charles Squillante, 4 Bruyns Turnpike, Wallkill, New York 12589, filed a petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1983 through August 31, 1986 (File No. 805871).

Petitioner Emile Casale, 203 Melville Drive, New Windsor, New York 12550, filed a petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1983 through August 31, 1986 (File No. 805871).

Petitioner Edward Smith, P.O. Box 255, Bruyns Turnpike, Wallkill, New York 12589, filed a petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1983 through August 31, 1986 (File No. 805871).

Petitioner Robert Waxtel, 13 Cimorlli Drive, New Windsor, New York 12550, filed a petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1983 through August 31, 1986 (File No. 805871).

A consolidated small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on December 14, 1988 at 1:15 P.M. Petitioners appeared by Isaac Sternheim and Co. (Isaac Sternheim, C.P.A.) The Division of Taxation appeared by William F. Collins, Esq. (Carol Harman).

ISSUE

Whether reasonable cause existed for petitioner Insulpane Industries, Inc.'s failure to pay the proper sales and use tax due, thereby warranting cancellation of penalty charges and interest charges in excess of minimum interest.

FINDINGS OF FACT

1. Petitioner Insulpane Industries, Inc. (hereinafter "Insulpane") was, during the period at issue herein, engaged in the manufacture of replacement windows, store front doors and other related products. As the result of a field audit of Insulpane's books and records, the Division of Taxation, on June 15, 1987, issued to Insulpane two notices of determination and demands for payment of sales and use taxes due. One notice was for the period June 1, 1983 through August 31, 1986 and assessed additional tax due of \$759,741.18, plus penalty of \$184,810.57 and interest of \$197,849.39, for a total amount due of \$1,142,401.14. The second notice was for the period June 1, 1985 through August 31, 1986 and assessed additional penalties of \$41,679.15 pursuant to the Omnibus Tax Equity and Enforcement Act of 1985 (Tax Law § 1145[a][1][vi]).

2. Separate notices of determination and demands for payment of sales and use taxes due were issued to Charles Squillante, Emile Casale, Edward Smith and Robert Waxtel, as officers of Insulpane, holding them personally liable for payment of the taxes, penalties and interest due from said corporation. The notices issued to Messrs. Squillante, Casale, Smith and Waxtel assessed amounts identical to the amounts determined to be due from Insulpane. At the small claims hearing held on December 14, 1988, it was conceded that Messrs. Squillante, Casale, Smith and Waxtel were personally liable for any taxes, penalties or interest due from Insulpane and therefore this issue will not be addressed hereinafter.

3. As the result of a conciliation conference, the additional tax assessed against Insulpane was reduced from \$759,741.18 to \$233,461.00. Insulpane's representative executed a consent wherein he agreed to the revised tax due of \$233,461.00 and disagreed only with the imposition of penalties, including omnibus penalties, and statutory interest.

4. The revised additional tax due of \$233,461.00 is comprised of the following three items:

(i) Expense purchases - Tax due in this category totaled \$20,872.00 and was computed based upon the projection of the results of a three-month test of selected expense accounts such as shop supplies, vehicle expense, advertising, dues and subscriptions and repairs to building. Although figures were not available for the entire audit period, the record does reflect that for the fiscal year ended May 31, 1986 expenses for the selected accounts examined totaled approximately \$500,000.00 and that no tax had been paid on some \$144,608.00 of said purchases.

(ii) Assets and Additions - Tax due in this category totaled \$56,507.00 and is made up of two component parts. The first part consists of tax due on Insulpane's purchases of assets as disclosed in its general ledger, while the second part consists of tax due on Insulpane's sale or disposition of assets as reflected in its Federal tax returns. In both instances Insulpane was requested to provide documentation to show that it paid tax on its purchase of assets, that it collected and remitted tax on its sale of assets or that the transactions were exempt from tax. No documentation was ever presented.

(iii) Disallowed Nontaxable Sales - Tax due in this category totaled \$156,082.00 and was computed based upon the projection of the results of a one-month test of sales. The test month utilized was December of 1985 and sales for said month totaled some \$967,000.00. For periods prior to June 1, 1985, 4.392% (\$42,475.00/\$967,000.00) of sales were disallowed as nontaxable sales and for periods beginning June 1, 1985 and after, 14.87% (\$143,862.00/\$967,000.00) of nontaxable sales were disallowed. A higher percentage of disallowance was computed for

periods beginning June 1, 1985 and after due to a change in Tax Law § 1132(c) which provides that exemption certificates must be received by the vendor within 90 days of the date of the sale. In arriving at the 14.87% figure the Division of Taxation disallowed all claimed exempt sales after May 31, 1985 where the exemption certificate was received by the vendor more than 90 days from the date of the sale.

5. During the period at issue herein, Insulpane filed its sales and use tax returns on an annual basis. No figures were reported on said returns in the columns for gross sales or taxable sales and each of the returns reported that no sales or use tax was due.

6. In March of 1986, Insulpane established an account on its books and records to record the accrual of sales tax. Prior to this date, Insulpane's books and records contained no sales tax accrual account.

7. During the period at issue, Insulpane experienced rapid growth and, in one two-year period its sales tripled from three million to nine million. Insulpane argues that its rapid growth, coupled with an understaffing of office personnel, contributed to the understatement of its sales and use tax liability. As further proof that its failure to remit the proper tax was due to reasonable cause and not willful neglect, petitioner points out that the audit herein was the first time that its books and records were examined and that sales and purchases as shown on the books were accepted as correct. Finally, Insulpane asserts that it relied on a certified public accountant with respect to tax matters, including sales taxes.

CONCLUSIONS OF LAW

A. In order for the penalties and interest imposed pursuant to Tax Law § 1145 to be abated, the burden is upon petitioner Insulpane to show that its failure to comply with the law was due to reasonable cause and was not due to willful neglect. During the period at issue, regulation 20 NYCRR former 536.5(b) listed several situations which exemplified grounds for reasonable cause.

B. In the instant matter, I cannot find that Insulpane's failure to remit the proper tax was due to reasonable cause and not willful neglect. In reaching this conclusion I note that Insulpane filed sales and use tax returns on an annual basis reporting that no sales or use tax was due. After the audit was completed, the tax due per quarter averaged \$17,958.54 (\$233,461.00 divided by 13). Furthermore, with respect to expense purchases, it must be noted that for the fiscal year ended May 31, 1986, an unduly large percentage, 28.92% (\$144,608.00 divided by \$500,000.00), of purchases was made without payment of the proper tax. With respect to the tax due on the purchase and sale of assets it is disturbing that Insulpane could provide no documentation whatsoever with respect to these transactions. Finally, and perhaps most damaging to Insulpane, is the fact that during almost the entire period at issue it maintained no account on its books and records for the accrual of sales tax, even though retail sales were being made. The only conclusion to be drawn from this fact is that Insulpane was making no attempt to collect and remit the proper sales tax due.

C. The petitions of Insulpane Industries, Inc., Charles Squillante, Emile Casale, Edward Smith and Robert Waxtel are denied and the notices of determination and demands for payment of sales and use taxes due issued June 15, 1987 are, as reduced pursuant to the conciliation conference, sustained, together with penalties and interest.

DATED: Albany, New York
March 16, 1989

/s/ James Hoefler _____
PRESIDING OFFICER