

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JERRY LITT, LTD. AND JERRY LITT, AS OFFICER	:	DETERMINATION DTA NO. 807443
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1984 through February 28, 1987.	:	

Petitioners, Jerry Litt, Ltd. and Jerry Litt, as officer, 501 Central Avenue, Cedarhurst, New York 11516, filed a 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 June 1, 1984 through February 28, 1987.

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 6, 1992 at 1:15 P.M. with all briefs due by May 20, 1992. The Division of Taxation submitted a brief on May 19, 1992. Petitioner did not submit a brief. Petitioner Jerry Litt appeared pro se and for Jerry Litt, Ltd. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

ISSUE

Whether petitioners are liable for the delinquency penalty imposed by Tax Law § 1145(a)(1)(i) and the excessive omission penalty of Tax Law § 1145(a)(1)(vi) or whether there was reasonable cause and an absence of willful neglect so that said penalties can be remitted under Tax Law § 1145(a)(1)(iii) and (vi).

FINDINGS OF FACT

Petitioner Jerry Litt, Ltd. (hereinafter "the company") operates a business which sells home improvement materials (mainly windows and insulation) to homeowners and contractors. It made no over-the-counter sales. It had three employees who delivered and installed the products it sold.

The company's suppliers sold it building materials. The principal supplier sent blank resale certificates to the company and it filled them out and sent them back. It did not pay sales tax on these purchases.

The company's customers presented capital improvement certificates and did not pay sales tax. (This was proper; the nonpayment of tax is not contested.)

(a) The company relied on Mr. Ira Levy, their certified public accountant of 39 years, for professional advice regarding the preparation and payment of New York State sales tax.

(b) Mr. Litt claims that Mr. Levy, after the audit period involved herein, had stated to him that he was "not qualified" to make certain judgments concerning the sales tax liability of the business.

(c) Mr. Levy did not appear or testify at the hearing.

(a) A consent was executed dated August 20, 1987 extending the period of limitation on assessment to June 20, 1988.

(b) A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued on June 1, 1988 to petitioner Jerry Litt, Ltd. for sales and use taxes due for the period June 1, 1984 through February 28, 1987 for tax due of \$18,497.26, penalty under Tax Law § 1145(a)(1) of \$5,103.95 and interest of \$6,512.12, for a total amount due of \$30,113.33. This was an estimated amount.

(c) A second notice of determination was issued on July 11, 1988 for a penalty under Tax Law § 1145(a)(1)(vi) of 10% of tax omitted for the period June 1, 1985 through February 28, 1987 of \$1,210.46.

(d) Identical notices of determination were issued against petitioner Jerry Litt, as an

officer of Jerry Litt, Ltd.

(e) A conciliation conference was held on February 16, 1989 and an order dated June 9, 1989 denied the request for relief.

(f) Petitioners have entered into a deferred payment agreement concerning the tax due, but this agreement excludes any agreement on the penalty.

(g) Petitioner Jerry Litt has not disputed that he is a responsible officer of the company.

CONCLUSIONS OF LAW

A. I cannot remit the penalties. Petitioners have not shown reasonable cause and an absence of willful neglect as required by Tax Law § 1145(a) (see also 20 NYCRR 536.5). Even where a petitioner claims he relied on a tax expert, the Tax Appeals Tribunal has been very chary about remitting penalties and has held that there is no excuse for not following the Division of Taxation's "articulated policy" (Matter of 1230 Park Associates, Tax Appeals Tribunal, July 27, 1989, confirmed 170 AD2d 842, 566 NYS2d 957). The articulated policy applicable in this case is clearly stated in the statute itself and also in Department rulings. The requirement which petitioners failed to observe -- the payment of sales tax on purchases by a contractor -- has been the law since 1969 (L 1969, ch 473). The Department of Taxation has issued information to the public concerning this. For instance, in a memorandum of May 27, 1982 concerning capital improvement certificates it was stated:

"A contractor remains liable for the sales tax on his purchases of building materials or other tangible personal property for incorporation into real property as a capital improvement, even though he has accepted a properly completed certificate."
(TSB-M-82[17]S.)

In this case, petitioners failed to pay a tax on purchases relying apparently on casual information from suppliers who accepted resale certificates. Petitioners' claim to have relied on their accountant cannot be given very great weight since the accountant himself did not testify or otherwise acknowledge any failure on his own part. (See Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557.) In any event, petitioners must have known that many of their supplies were both purchased and sold free of sales tax. Petitioners cannot so easily disclaim

responsibility for ignoring rules which had been in effect for over 15 years.

B. The petition of Jerry Litt, Ltd. and Jerry Litt, as officer, is denied and the notice of determination of tax due, including all penalties, is due and owing.

DATED: Troy, New York
August 6, 1992

/s/ Nigel G. Wright
ADMINISTRATIVE LAW JUDGE