STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RITTLING DISPENSERS, INC.	:	DETERMINATION DTA NO. 807744
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1984 through August 31, 1987.	:	

Petitioner, Rittling Dispensers, Inc., 451 Northwood Drive, Kenmore, New York 14223, 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 September 1, 1984 through August 31, 1987.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on February 6, 1991 at 1:15 P.M. Petitioner appeared by Robert Peter Rittling, President. The Division of Taxation appeared by William F. Collins, Esq. (Peter J. Martinelli, Esq., of counsel).

ISSUE

Whether petitioner has shown reasonable cause and an absence of willful neglect warranting the abatement of penalties and statutory interest imposed pursuant to Tax Law § 1145(a)(1)(i), (ii) and (vi).

FINDINGS OF FACT

On August 26, 1988, following an audit, the Division of Taxation issued to petitioner, Rittling Dispensers, Inc., two notices of determination and demands for payment of sales and use taxes due (Notice Numbers S880826335C and S880826336C) in respect of the period September 1, 1984 through August 31, 1987. Notice number S880826335C assessed tax due of$47,320.90, plus penalty and interest pursuant to Tax Law § 1145(a)(1)(i) and (ii). Notice number S880826336C assessed penalty of $3,625.04 pursuant to Tax Law § 1145(a)(1)(vi).

Petitioner conceded liability for the tax assessed in the above-referenced notice.

Petitioner is engaged in a dairy business and also operates a vending machine business in the Buffalo area. Petitioner has been in existence for about 50 years.

The assessments herein arose from petitioner's vending machine business. On audit, the Division determined that petitioner had failed to properly account for "on-premises" consumption of certain items sold by petitioner through its vending machines and had failed to collect and to pay sales tax with respect to such sales. This failure resulted in the assessment of tax against petitioner.

Petitioner was unaware that the Tax Law required differing sales tax treatment with respect to certain sales for on-premises consumption versus sales for off-premises consumption. Petitioner's understanding of the Tax Law was based upon the understanding of its president, Mr. Robert Peter Rittling. Mr. Rittling has been in the vending machine business since the early 1960's and, at the time of the audit, Mr. Rittling had been president of Rittling Dispensers, Inc. for about 11 years. Mr. Rittling based his understanding of the Sales Tax Law, as applied to vending machine sales, on a Department of Taxation and Finance publication of guidelines for the vending machine industry dated March 1970. According to Mr. Rittling,[1] said publication made no reference to the sales tax consequences of on-premises consumption. Mr. Rittling's understanding of the Sales Tax Law as applied to vending machines was, in his mind, confirmed by the results of a sales tax audit of petitioner conducted by the Division in approximately 1981 or 1982. That audit resulted in no significant assessment of tax, notwithstanding petitioner's failure to account for on-premises and off-premises consumption.

Petitioner cooperated fully with the Division during the course of the audit and acted in good faith at all times.

Subsequent to the audit herein, petitioner has attempted to properly account for on-premises consumption in its collection and remittance of sales tax.

Throughout its history, petitioner has consistently timely filed and remitted sales tax.

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[1]The referred-to publication was not introduced into the record herein.

CONCLUSIONS OF LAW

A. Tax Law § 1145(a)(1)(i) provides that "[a]ny person failing...to pay or pay over any tax...within the time required...shall be subject to a penalty...." Tax Law § 1145(a)(ii) provides for the imposition of so-called "statutory interest" where tax is not paid when due. Tax Law § 1145(a)(1)(iii) provides for the remission of such penalty and reduction of statutory interest to minimum interest where the taxpayer's failure was "due to reasonable cause and not due to willful neglect". Tax Law § 1145(a)(1)(vi) provides for the imposition of an additional penalty where

a taxpayer's omission of tax required to be shown on the return is in excess of 25% of the amount required to be reported on the return. This section also provides for the remission of such additional penalty where such failure was "due to reasonable cause and not due to willful neglect".

B. The regulations offer the following (relevant) guidance regarding the meaning of reasonable cause:

> "(c) The following exemplify grounds for reasonable cause, where clearly established by or on behalf of the taxpayer or other person.
>
> (1) The death or serious illness of the taxpayer, a partner, responsible partner, officer, director, shareholder, employee or other representative of the taxpayer or such individual's unavoidable absence from the usual place of business, which precluded timely compliance, may constitute reasonable cause....
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> (2) The destruction of the taxpayer's or the taxpayer's representative's place of business or business records by a fire or other documented casualty, which precluded timely compliance, may constitute reasonable cause....
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> * * *
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> (3) The inability, for reasons beyond the taxpayer's control, to timely obtain and assemble essential information required for the preparation of a complete return despite the exercise of reasonable efforts, may constitute reasonable cause....
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> * * *
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> (4) A pending petition to the Commissioner of Taxation and Finance for an advisory opinion or a declaratory ruling, a pending conciliation conference

proceeding in the Bureau of Conciliation and Mediation Services of the Division of Taxation, a pending petition to the Division of Tax Appeals or a pending action or proceeding for judicial determination may constitute reasonable cause....

* * *

(5) Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause....

(d)(1) The provisions of subdivision (a), (b) and (c) of this section shall apply to the extent pertinent where any taxpayer substantially understates the amount of taxes required to be shown on the return and such understatement or omission was due to reasonable cause and not due to willful neglect [see Tax Law § 1145(a)(1)(vi)]. Reasonable cause and the absence of willful neglect may be determined to exist only where the taxpayer has acted in good faith.

(2) In determining whether reasonable cause and good faith exist, the most important factor to be considered is the extent of the taxpayer's efforts to ascertain the proper tax liability. In addition to any relevant grounds for reasonable cause as exemplified in subdivision (c) of this section, circumstances that indicate reasonable cause and good faith with respect to the substantial understatement or omission of tax, where clearly established by or on behalf of the taxpayer, may include the following:

(i) an honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge and education of the taxpayer;

(ii) a computational or transcriptional error;

(iii) the reliance by the taxpayer on any written information, professional advice or other facts provided such reliance was reasonable and the taxpayer had no knowledge of circumstances which should have put the taxpayer upon inquiry as to whether such facts were erroneous" (20 NYCRR 536.5).

C. The assessment herein results from petitioner's failure to collect and remit tax on its sales of food (otherwise exempt under Tax Law § 1115[a][1]) for on-premises consumption. Such sales are taxable pursuant to Tax Law § 1105(d)(i)(1). Petitioner was unaware of the provisions of the sales tax regulations which deem vending machine operations carried on in premises where facilities such as tables and chairs are provided for customers to be eating establishments selling food or drink for on-premises consumption (20 NYCRR 527.8[g][1]). Petitioner's case for remission of penalties rests upon the reasonableness of this failure. Petitioner contended that its attempt to ascertain its proper tax liability by reference to the 1970 Department publication was reasonable. Moreover, petitioner contended that its method of

reporting its sales tax liability was not contested by the Division during a previous audit. Additionally, petitioner contended that the Division's interpretation of the law was not discussed in a tax service publication reviewed by Mr. Rittling subsequent to the audit at issue. The record herein is insufficient, however, to establish that such a publication did, in fact, fail to properly interpret the law in this area.

D. The regulation interpreting and applying Tax Law § 1105(d)(i)(1) to the vending machine industry, 20 NYCRR 527.8(g),[2] was promulgated by the former State Tax Commission and became effective September 1, 1976. Additionally, on December 14, 1978, the Commission announced the following audit policy:

> "There is a rebuttable presumption that 66 2/3% of the vending machine sales of non-taxable food are considered for off-premises consumption. This presumption may be rebutted by a vendor who can submit evidence to prove that the sales for off-premises consumption are in excess of 66 2/3%."

This policy was set forth in a Technical Services Bureau Memorandum (TSB-M-79[1]S), "Percent of Vending Machine Sales Subject to Sales Tax" which was published on January 18, 1979. The foregoing regulation and Technical Services Bureau Memorandum were discussed in detail in the

following published decisions of the former State Tax Commission: Matter of James E. Togni d/b/a Tyrolean Automatic Vending (State Tax Commn., January 16, 1987 [published as TSB-H-87(62)S]); Matter of Standard Vending of Oneonta, Inc. (State Tax Commn., February 11, 1983

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[2]This regulation states, in pertinent part, as follows:

> "(g) Sales through vending machines. (1) Vending machine operations carried on in premises where facilities such as tables, chairs, benches, counters, etc. are provided for customers are considered to be eating establishments selling food or drink for on-premises consumption and sales made through such machines are taxable.
>
> (2) When food or drink is sold through vending machines and no facilities are provided for customers, such sales are deemed to be for off-premises consumption and are taxed accordingly" (20 NYCRR 527.8[g]).

[published as TSB-H-83(68)S, April 14, 1983]); Matter of Seymour Morris d/b/a Sunny Vending Co. (State Tax Commn., February 4, 1983 [published as TSB-H-83(56)S, March 14, 1983]); Matter of Serve Well Enterprises, Inc. (State Tax Commn., November 26, 1982 [published as TSB-H-82(161)S, December 30, 1982]).

E. Based upon review of the facts and circumstances herein, it must be concluded that petitioner has failed to show that its failure to properly collect and remit tax was due to reasonable cause and not due to willful neglect. As noted above, section 527.8(g) of the regulations became effective September 1, 1976, long before the audit period herein. Moreover, the Division's audit policy regarding vending machine sales was published by the Technical Services Bureau Memorandum on January 18, 1979. Additionally, three decisions of the former State Tax Commission which discussed this regulation and audit policy in detail were published in advance of the audit period herein. These publications of the former State Tax Commission should have alerted petitioner as to the proper method of determining its sales tax liability. As the regulations clearly state, petitioner's ignorance of these provisions does not constitute reasonable cause (20 NYCRR 536.5[c][5]). Petitioner apparently relied on Department information published in 1970 to ascertain its proper tax liability. It appears, however, that petitioner made no effort between the time it obtained the 1970 publication and the commencement of the audit herein in 1988 to determine whether its method of reporting sales tax was proper. Specifically, petitioner apparently made no contact with either a tax professional or the Division of Taxation over an 18-year period to ascertain whether its method of reporting was correct. It thus cannot be said that petitioner's level of inquiry was sufficient to rise to the level of an honest and reasonable misunderstanding of the law (20 NYCRR 536.5[d][2][i]). Nor can it be said that petitioner's reliance on a 1970 publication, during the period September 1, 1984 through August 31, 1987, was reasonable (20 NYCRR 536.5[d][2][iii]).

F. The petition of Rittling Dispensers, Inc. is denied and the notices of determination and demands for payment of sales and use taxes due, dated August 26, 1988, are sustained.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE