

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ROYKEN, LTD. : DETERMINATION
for Review of a Denial, Suspension, or :
Revocation of a Certificate of Authority or :
Exempt Status under Articles 28 and 29 of the :
Tax Law. :

Petitioner, Royken, Ltd., 163-19 Jamaica Avenue, Jamaica, New York 11432, filed a petition for review of a denial, suspension, or revocation of a certificate of authority or exempt status under Articles 28 and 29 of the Tax Law (File No. 807884).

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on May 23, 1990 at 10:45 A.M. Petitioner appeared by Harold Shapiro, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner's certificate of authority to collect sales tax should be revoked for petitioner's failure to pay its outstanding sales tax liability.

FINDINGS OF FACT

On March 23, 1989, the Division of Taxation issued a Notice of Proposed Revocation of Sales Tax Certificate of Authority to petitioner, Royken, Ltd. The notice stated, in pertinent part, as follows:

"Your sales tax Certificate of Authority will be [revoked] 90 days from the date of this notice in accordance with the provisions of Section 1134(a)(4)(A) of the Sales and Use Tax Law for the following reason(s):

Failure to pay sales tax returns for the periods ending November 30, 1978, May 31, 1985, August 31, 1985, November 30, 1985, February 28, 1986, May 31, 1986, August 31, 1986, November 30, 1986, February 28, 1987, May 31, 1987, August 31, 1987, November 30, 1987, February 29, 1988, May 31, 1988.

Failure to pay a sales tax audit covering the periods of September 1, 1976-February 28, 1987."

The notice showed a total tax due of \$25,959.92, penalty of \$7,736.31 and interest of \$9,619.52, for a total of \$43,315.75.

Petitioner filed a timely petition protesting the proposed revocation.

Petitioner operates a small, leased millinery department in the C & M Department Store in the Jamaica section of Queens. Petitioner began experiencing financial difficulties in early 1984 or 1985, when its then-landlord, Gorman's Department Store, in Brooklyn, was attempting to negotiate a new lease with the owner of the building. During the negotiations, petitioner's rent was raised from \$2,000.00 per month to \$5,200.00 per month, for two months. The negotiations failed and, at the end of the two months, petitioner had to vacate its space on five days' notice. Petitioner placed its inventory and fixtures in storage while it searched for a new location. After being out of business for about five months, petitioner reopened at its present location in Queens. The new rent was \$3,000.00 per month. In late 1988 or early 1989, petitioner's rent was reduced to \$2,500.00 per month and then to \$2,000.00 per month.

Petitioner failed to remit tax for the periods covered in the notice of proposed revocation (see, Finding of Fact "1") and the additional periods ending August 31, 1988, November 30, 1988 and February 28, 1989. It was only after the notice of proposed revocation was issued that petitioner commenced timely filing and payment.

The Division of Taxation offered petitioner a deferred payment agreement whereby petitioner's outstanding liability could be paid off at about \$5,000.00 per month. Petitioner's president, Roy Tillis, rejected the offer, claiming that petitioner could not afford such payments. Petitioner, however, has been voluntarily paying approximately \$500.00 per month on the outstanding liability for about one year. Petitioner's outstanding sales tax liability as of May 18, 1990 was as follows:

<u>Period</u> <u>Ending</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Paid</u>	<u>Balance</u>	
8/31/85	\$ 1,688.69		\$ 506.46	\$ 1,203.80	\$2,413.46	\$ 985.49

11/30/85	1,786.95	535.89	1,245.58	0.00	3,568.42
2/28/86	1,509.34	452.73	977.40	0.00	2,939.47
5/31/86	1,998.98	599.49	1,196.38	0.00	3,794.85
8/31/86	1,170.76	351.07	644.95	0.00	2,166.78
11/30/86	1,674.34	502.23	845.84	0.00	3,022.41
2/28/87	2,246.39	673.90	1,036.26	0.00	3,956.55
5/31/87	2,728.19	818.42	1,139.76	0.00	4,686.37
8/31/87	1,592.33	477.66	597.98	0.00	2,667.97
11/30/87	1,476.01	442.80	494.46	0.00	2,413.27
2/29/88	2,039.57	611.84	603.89	0.00	3,255.30
2/28/87*	2,262.89	678.85	1,044.59	0.00	3,986.33
5/31/88	2,418.65	725.57	622.75	0.00	3,766.97
11/30/88	1,428.24	371.33	262.89	0.00	2,062.46
8/31/88	1,387.07	402.23	305.18	0.00	2,094.48
2/28/89	<u>1,738.28</u>	<u>399.79</u>	<u>259.96</u>	<u>0.00</u>	<u>2,398.03</u>
	\$29,146.68	\$8,550.26	\$12,481.67	\$2,413.46	\$47,765.15

* This item appears in the Accounts Receivable System with the period designators "287-387".

CONCLUSIONS OF LAW

A. Tax Law § 1134(a)(4)(A) provides, in pertinent part, as follows:

"Where a person who holds a certificate of authority...(iv) willfully fails to collect, truthfully account for or pay over any tax imposed under this article or pursuant to the authority of article twenty-nine of this chapter..., the tax commission may revoke or suspend such certificate of authority and all duplicates thereof."

(See also, 20 NYCRR 539.4)

B. Petitioner has clearly failed to collect, truthfully account for and pay over tax within the meaning of Tax Law § 1134(a)(4)(A). While petitioner's history of non-payment is indefensible, there are some mitigating circumstances which must be considered. First, petitioner's failure to remit sales tax appears to have been due to a period of financial difficulties created by a substantial increase in rent and having to virtually start all over again at a new location. Secondly, for the past year petitioner has been filing returns and paying all current taxes in a timely manner, as well as paying \$500.00 per month against its outstanding liabilities.

Revocation of petitioner's certificate of authority would effectively put petitioner out of business. It is extremely doubtful that the Division of Taxation would ever recoup the past due amount by liquidation of petitioner's business assets, essentially the inventory of a small, leased millinery department. Petitioner's self-imposed deferred payment plan of \$500.00 per month, however, is also unsatisfactory. This sum will barely pay the interest on the outstanding balance

and will never result in the diminution of the balance itself.

After consideration of all of the facts and circumstances herein, the petition is granted on the condition that within 60 days petitioner enter into a deferred payment agreement whereby petitioner pays \$1,500.00 per month and on the further condition that petitioner continues to file returns on a current basis and pay the tax due on a current basis. If petitioner fails to meet said conditions, its certificate of authority is to be revoked.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE