STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CLAIRE'S BOUTIQUES, INC.	:	DETERMINATION DTA NO. 809389
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, 1986 through February 28, 1989.	:	

Petitioner, Claire's Boutiques, Inc., 3 S.W. 129th Avenue, Pembroke Pines, Florida 33027, 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, 1986 through February 28, 1989.

On July 3, 1991 and July 22, 1991, respectively, petitioner, appearing by Ronald L. Glazer, tax manager for petitioner, and the Division of Taxation by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel) agreed to waive a hearing and have the matter determined on submission of documents. After due consideration of the record, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.[1]

ISSUE

Whether there is reasonable cause to abate the penalty imposed under Tax Law § 1145(a).

FINDINGS OF FACT

Petitioner, Claire's Boutiques, Inc., operates retail stores which sell handbags, jewelry, accessories, etc.

The Division of Taxation conducted an audit of petitioner for the period March 1, 1986 through February 28, 1989. At the time of the audit, petitioner had 39 retail locations in New

[1]Petitioner submitted a letter brief that was received by the Division of Tax Appeals on August 19, 1991. The Division of Taxation did not submit a brief.

York State. The auditor found petitioner's sales tax records to be adequate but conducted the audit using a two-month test period for the Watertown and Plattsburgh stores. The auditor traced the sales as reported by the stores through petitioner's Florida accounting system which summarized the weekly totals for each store to arrive at monthly sales and sales tax totals for each individual store. These monthly totals were used to complete sales tax returns. The auditor found no discrepancies in her examination of petitioner's records and the sales tax returns and, therefore, determined petitioner's taxable sales to be as reported.

The auditor reviewed petitioner's asset acquisitions subject to use tax. Apparently, petitioner calculated its use tax liability based on an accrual accounting system whereby it netted certain debits and credits to arrive at the amount of tax due. The auditor reviewed all the credits that petitioner claimed against certain asset acquisitions. Of 345 asset transactions, the auditor found a credit due on 123 transactions but found additional tax due on 222 asset transactions. According to petitioner, the credit on certain assets was denied because it was unable to provide records to verify that some of the taxable assets were transfers between asset accounts. Petitioner provided no further information concerning why it believed these transfers were not subject to tax, though presumably the reasoning might have been that such assets were shipped out of New York State to other retail locations and, therefore, were not subject to New York use tax. Based on her review of the assets account, the auditor found an additional taxable amount of $210,158.56 for additional use tax due of $15,969.78.[2]

The Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated January 18, 1990, assessing a tax deficiency of $15,969.78, a penalty of $4,817.53 and interest of $5,297.47.

Petitioner paid the tax deficiency plus interest but protested the penalty. A Conciliation Default Order was issued on November 2, 1990.

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[2]In her field audit report, the auditor noted a prior audit of petitioner which resulted in additional use tax due of $1,396.00 with regard to capital assets for the period September 1977 through August 1980.

By letter dated January 30, 1991, petitioner petitioned the Division of Tax Appeals for abatement of the penalty. Petitioner filed a formal petition, dated March 21, 1991, challenging the penalty. Petitioner argued that it did not willfully intend to underestimate the use tax, that its recordkeeping reflected a relatively new and growing company with an unsophisticated method of capturing taxable assets subject to use tax, and that its tax filing "record with respect to sales and use tax has been very good in terms of timeliness and accuracy."

CONCLUSIONS OF LAW

A. Under Tax Law § 1145(a)(1)(iii) the penalty imposed for failure of a taxpayer to pay sales or use taxes within the time required may be waived if the Commissioner of Taxation and Finance determines that such failure was due to reasonable cause and not due to willful neglect (see, 20 NYCRR

536.5). The taxpayer has the burden of demonstrating that a late-payment penalty was improperly assessed (see, Matter of Ilter Sener d/b/a Jimmy's Gas Station, Tax Appeals Tribunal, May 5, 1988).

B. The implementing regulations set forth examples that would constitute grounds for reasonable cause (20 NYCRR 536.5[c]). In addition to enumerating certain grounds for reasonable cause (none of which apply to the present case), the regulations set forth a catch-all provision as follows:

> "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" (20 NYCRR 536.5[c][5]).

Petitioner argues that the situation set forth as example 5 under this catch-all provision most closely resembles its case; that there was an absence of willful neglect because its intent was to fully comply with the use tax laws; that reasonable efforts were made to calculate properly the use tax liability; and that it otherwise substantially complied with the law.

Example 5 (20 NYCRR 536.5[c][5]) provides as follows:

> "A manufacturer with production facilities throughout New York State has established an accrual accounting system to record purchases subject to use tax. The manufacturer, as the result of his first sales and use tax audit, owes additional use tax because of occasional misclassification of office supplies and equipment and because of local tax errors on transfers of supplies and equipment between different facilities. After a review of a written statement, submitted by the taxpayer, containing all of the facts alleged as a basis for reasonable cause, it was determined that the taxpayer had made reasonable efforts to account for its use tax liabilities, that the understatement of tax was unintentional and that the manufacturer had otherwise substantially complied with the law. The audit findings established that willful neglect did not occur and reasonable cause existed. Therefore, penalty and interest in excess of the statutory minimum will be waived."

Petitioner notes that its company grew from approximately 325 to 630 stores during the audit period and that it rapidly changed its type of management and became more sophisticated in all of its operations including accounting, computer reports and methods of capturing use tax. Petitioner asserts that the "information [it] used to compile taxable assets for use tax was not as accurate as [it] originally believed and [it] could not provide the level of detail requested during the audit" (Petitioner's brief at 2).

Contrary to petitioner's contention, the present situation is not similar to the facts in example 5 of the regulations. In the example, the situation involved a first sales and use tax audit, occasional misclassifications of office supplies and equipment and a determination that the taxpayer made reasonable efforts to account for its use tax liabilities. Here, there was a prior audit wherein a use tax deficiency was also found (see Finding of Fact "3", footnote "2"). More importantly, however, the use tax deficiency in the present case involved 222 asset transactions that petitioner could not establish as nontaxable. While it is possible that petitioner may have correctly considered these assets nontaxable, there is no basis for making that assumption for the purpose of cancelling the deficiency or for the purpose of waiving the penalty. Given the lack of evidence, the only inference that can be made is that petitioner incorrectly failed to pay use tax with respect to all 222 asset transactions. Thus, this case does not involve an occasional misclassification.

Furthermore, there is no evidence, other than petitioner's bare assertions, upon which to conclude that petitioner made reasonable efforts to account for its use tax liabilities. Petitioner reasons that because its business grew rapidly it needed a more sophisticated method to capture

its use tax but that to the best of its knowledge at that time it had accurately reported the amount of use tax due and that such method was adopted subsequent to the audit. This reason, at best, is arguably equivalent to such excuses as reliance on the advice of a tax counsel or ignorance of the law, none of which by itself has been held to constitute reasonable cause (see, 20 NYCRR 536.5[c][5]; Matter of LT & B Realty v. State Tax Commn., 141 AD2d 185, 535 NYS2d 121; Matter of Bachman v. State Tax Commn., 89 AD2d 679, 453 NYS2d 774; Matter of Petrolane Northeast Gas v. State Tax Commn., 79 AD2d 1043, 435 NYS2d 187, lv denied 53 NY2d 601, 438 NYS2d 1027). Even if a taxpayer relied on the advice of a tax expert, the taxpayer must demonstrate that such reliance was reasonable (Matter of Bachman v. State Tax Commn., supra, 453 NYS2d at 776). Petitioner has not demonstrated that its reliance on its accounting system to capture the use tax was reasonable. The fact that petitioner believed that it was preparing its tax returns accurately does not provide the basis for waiving the penalty. Acting in good faith is insufficient to warrant waiving a tax penalty (Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557).

C. The petition of Claire's Boutiques, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated January 18, 1990 is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE