

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions :  
of :  
**ROCKWELLS RESTAURANT CORP.** : DETERMINATION  
for Revision of Determinations or for Refund of Sales : DTA NOS. 819724 &  
and Use Taxes under Articles 28 and 29 of the Tax Law : 819752  
for the Periods November 30, 2002 through February 23, :  
2003 and May 31, 1998 through August 31, 2000. :  
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Petitioner, Rockwells Restaurant Corp, 97 Brookby Road, Scarsdale, New York 10583, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods November 30, 2002 through February 23, 2003 and May 31, 1998 through August 31, 2000.

On September 29, 2004, petitioner, Rockwells Restaurant Corp., by its president, Stephen Robins, and the Division of Taxation by Christopher C. O'Brien, Esq. (Jennifer A. Murphy, Esq., of counsel) waived a hearing and agreed to submit this case for determination, with all documents and briefs to be submitted by the parties by February 7, 2005, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Frank W. Barrie, Administrative Law Judge, renders the following determination.

***ISSUES***

I. Whether tax amnesty has been granted to petitioner in regard to certain statutory notices at issue.

II. Whether penalties were properly imposed on statutory notices which were not paid under tax amnesty.

***FINDINGS OF FACT***

1. During the period at issue, petitioner owned and operated restaurants known as Rockwells American Restaurants in three different locations in Westchester County, i.e., Tuckahoe, Pelham and Larchmont. Petitioner's quarterly taxable sales ranged from \$831,000.00 for the period December 1, 2002 to February 28, 2003 to \$1,000,000.00 for the period September 1, 2002 to November 30, 2002. Given its volume of sales, petitioner was required to file, on a part-quarterly or monthly basis, a tax return known as a Part Quarterly ST-809. Consequently, for each of the first two months of a quarter, petitioner was required to file an ST-809, and then a final return for all three months of the quarter known as a Quarterly ST-810. This final return reports sales tax due for the final month and also functions as a reconciliation of the total sales tax due for the quarter.

2. A total of ten sales tax quarters are at issue in this consolidated proceeding, eight by the petition designated DTA No. 819752, and two by the petition designated DTA No. 819724. Of the ten sales tax quarters at issue, only one, June 1, 2000 to August 31, 2000, involved late payment of petitioner's tax liability for its Part-Quarterly ST-809 for June 1, 2000 to June 30, 2000. For the nine other quarters at issue, petitioner filed part-quarterly (ST-809) and quarterly (ST-810) sales and use tax returns without remittance of the tax reported due. Fourteen checks tendered by petitioner with its part-quarterly and quarterly returns in payment of the tax due were dishonored by its bank. An additional eight sales tax returns were filed with no accompanying check or other remittance. The Division of Taxation ("Division") has not contested the amount of sales tax reported due by petitioner on its returns.

3. The Division issued eight notices and demands for payment of tax due with reference to the eight sales tax quarters covered by the petition designated DTA No. 819752 as follows:

Date of notice and demand	Assessment Number	Period	Tax due
2/23/99	L016057838	3/1/98-5/31/98	\$68,958.17
2/23/99	L016057837	6/1/98-8/31/98	48,046.37
8/17/99	L016830589	9/1/98-11/30/98	48,166.54
2/08/00	L017390992	12/1/98-2/28/99	22,781.87
2/08/00	L017393664	6/1/99-8/31/99	74,253.28
5/16/00	L017770407	9/1/99-11/30/99	66,989.09
8/22/00	L018456216	12/1/99-2/28/00	43,349.88
1/30/01	L019032402	6/1/00-8/31/00	-0 <sup>1</sup>

Petitioner has been granted tax amnesty with regard to all eight notices listed above, and full payment of the amount due under amnesty has been made. With the granting of tax amnesty, the Division abated penalty, and interest was reduced to the minimum under the statute.

4. The Division issued two notices and demands with reference to the two sales tax quarters covered by the petition designated DTA No. 819724 as follows:

Date of notice and demand	Assessment Number	Period	Tax due
5/05/03	L022324290	9/1/02-11/30/02	\$67,962.30
8/12/03	L022841070	12/1/02-2/28/03	56,115.65

Petitioner has *not* been granted tax amnesty with regard to these two notices listed above because the amnesty period only extended to sales and use tax liabilities up to February 28, 2001 (L 2002, pt R, § 1[b]). Petitioner filed its corresponding part-quarterly (ST-809) sales tax returns

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<sup>1</sup> For this sales tax quarter, only penalty was imposed for late payment of tax.

for September 1, 2002-September 30, 2002 and October 1, 2002-October 31, 2002 and its quarterly (ST-810) sales tax return for September 1, 2002-November 30, 2002 with checks that were subsequently dishonored by its bank. Therefore, the Division asserted, as of May 5, 2003, the date of the notice and demand, penalty of \$10,196.21 for failure to pay the self-assessed tax on or before the due date as well as interest of \$3,929.92 on the tax due shown above of \$67,962.30. In addition, petitioner filed its corresponding part-quarterly (ST-809) sales tax returns for December 1, 2002- December 31, 2002 and January 1, 2003- January 31, 2003 and its quarterly (ST-810) sales tax return for December 1, 2002- February 28, 2003 with no accompanying check or remittance. Therefore, the Division asserted, as of August 12, 2003, the date of the notice and demand, penalty of \$8,485.96 for failure to pay the self-assessed tax on or before the due date as well as interest of \$3,789.83 on the tax due shown above of \$56,115.65.

5. The parties entered into a stipulation of facts dated September 29, 2004, relevant portions of which have been incorporated into this determination.

#### ***CONCLUSIONS OF LAW***

A. The Division of Taxation is correct that since petitioner has been granted tax amnesty with regard to all eight notices pertaining to its petition designated DTA No. 819752, such petition must be denied as moot (*see, Matter of Walsh*, Tax Appeals Tribunal, November 19, 1992, ***confirmed*** 196 AD2d 367, 609 NYS2d 405 [wherein the Tribunal noted that a taxpayer, who has taken advantage of an amnesty program, is precluded from maintaining a petition with regard to the same taxes]).

B. With regard to penalty imposed on sales tax asserted due with regard to the two notices pertaining to the petition designated DTA No. 819724, such petition must also be denied.

Petitioner has simply failed to demonstrate a cause for its delinquency which would appear to a

person of ordinary prudence and intelligence as a reasonable cause for delay in paying sales and use taxes. In the words of the Tax Appeals Tribunal, in establishing reasonable cause, the taxpayer faces an “onerous task” (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained why the task is onerous as follows:

By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner’s discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]” (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992).

Petitioner’s claim that certain individuals employed by the Division failed to provide it with the option of a deferred payment agreement in an allegedly timely fashion does not establish a reasonable cause for its delay in paying such taxes. The Division persuasively points out that petitioner’s filing of 22 returns without remittance of the tax reported due “suggests more than a simple misunderstanding” but rather “compellingly suggests that the non-payments could not have been inadvertent, otherwise attributable to an oversight or could not be rectified within a shorter period of time.” This is especially so, given the volume of petitioner’s taxable sales, which during one quarter at issue, as noted in Finding of Fact “1”, reached \$1,000,000.00. Furthermore, there is no statutory basis for the abatement of ordinary interest, while the abatement of penalty interest also required petitioner to establish a reasonable cause for its delay in paying the taxes at issue which, as noted above, it has failed to do (*see, Matter of Barrier Oil*, Tax Appeals Tribunal, July 29, 1999).

C. The petitions of Rockwells Restaurant Corp. are denied, and the two notices and demands dated May 5, 2003 and August 12, 2003, respectively, which were not the subject of the granting of tax amnesty to petitioner, are sustained.

DATED: Troy, New York  
May 12, 2005

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE