

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petitions | : | |
| of | : | |
| ROCKWELLS RESTAURANT CORPORATION | : | DETERMINATION |
| for Revision of Determinations or for Refund of Sales | : | DTA NOS. 820805, 820806 |
| and Use Taxes under Articles 28 and 29 of the Tax Law | : | AND 820807 |
| for the Periods June 1, 2003 through August 31, 2003, | : | |
| March 1, 2004 through May 31, 2004 and June 1, 2004 | : | |
| through August 31, 2004. | : | |

Petitioner, Rockwells Restaurant Corporation, 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 June 1, 2003 through August 31, 2003, March 1, 2004 through May 31, 2004 and June 1, 2004 through August 31, 2004.

On July 16, 2006 and July 27, 2006, respectively, petitioner, appearing by Stephen Robins, president, and the Division of Taxation, appearing by Daniel Smirlock, Esq. (Jennifer A. Murphy, Esq., and Michael Hall, of counsel), waived a hearing and submitted these matters for determination based on documents and briefs to be submitted by September 30, 2009, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner has established any facts or circumstances warranting the reduction or abatement of penalties and interest imposed herein.

FINDINGS OF FACT

1. Petitioner, Rockwells Restaurant Corporation, owned and operated two restaurants known as Rockwell's American Restaurants. Stephen Robins was petitioner's president, sole officer and shareholder. Petitioner was a part-quarterly filer for sales tax purposes, being required to file two part-quarterly returns (Form ST-809) for the first two months of a quarter and a quarterly sales tax return (Form ST-810) for the entire quarter. The returns were due on the 20th day following the last day of the period for which the return was filed.

2. Petitioner timely filed its part-quarterly sales tax return for the month of June 2003, indicating tax due of \$17,745.88. The return was accompanied by a check drawn on petitioner's account at the Hudson Valley Bank, located in White Plains, New York, in the amount of the tax due. The check was returned unpaid to the Division of Taxation (Division) by Hudson Valley Bank due to insufficient funds in petitioner's account.

3. Petitioner's part-quarterly sales tax return for the month of July 2003 was late filed on November 6, 2003 without remittance of the tax due indicated on the return of \$15,201.06.

4. Petitioner late-filed its quarterly sales tax return for the period June 1, 2003 through August 31, 2003 on November 13, 2003 without remittance of the tax due of \$49,255.01 indicated on the return.

5. On October 29, 2004, the Division of Taxation issued to petitioner a Notice and Demand for Payment of Tax Due (Assessment ID Number L-024682169-1) seeking payment of \$49,255.01 in sales and use taxes due, plus penalty and interest, for the quarterly period ended August 31, 2003.

6. Petitioner timely filed its part-quarterly sales tax return for the month of April 2004, indicating tax due of \$18,341.33. The return was accompanied by a check drawn on petitioner's

account at the Hudson Valley Bank in the amount of the tax due. The check was returned unpaid to the Division by Hudson Valley Bank due to insufficient funds in petitioner's account.

7. On October 18, 2004, the Division of Taxation issued to petitioner a Notice and Demand for Payment of Tax Due (Assessment ID Number L-024657348-5) seeking payment of \$18,491.33 in sales and use taxes due, plus penalty and interest, for the quarterly period ended May 31, 2004. The notice explained that the amount asserted to be due consisted of the returned check amount and the vendor collection credit of \$150.00 claimed on the quarterly sales tax return. The notice stated that the vendor collection credit is only allowed on a timely filed, full paid return.

8. Petitioner failed to file a part-quarterly return for the months of June 2004 and July 2004, as required.

9. Petitioner timely filed its quarterly sales tax return for the period June 1, 2004 through August 31, 2004. Accompanying the return was payment of the tax due for the quarter of \$53,115.90.

10. On November 10, 2004, the Division issued to petitioner a Notice and Demand for Payment of Tax Due (Assessment ID Number L-024744453-6) seeking payment of \$4,037.62 in penalty and interest due, for the quarterly period ended August 31, 2004. The notice explained that the amount asserted to be due was penalty and interest assessed on the late filing and payment of the tax due for the months of June and July 2004.

11. Petitioner's liability in this matter results from its failure to remit sales tax collected on taxable sales.

SUMMARY OF PETITIONER'S POSITION

12. Petitioner asserts that reasonable cause exists for the abatement of penalty and interest imposed herein because of certain actions of the Division. Petitioner contends that the Division's refusal to enter into a deferred payment arrangement "resulted in the taxpayer making misguided judgments [which] ruined the taxpayer's credit and ability to borrow." The actions by the Division "prevented the taxpayer from being able to sell its assets at or near market value," with the result that petitioner was unable to pay its debts on time, including the sales tax due.

CONCLUSIONS OF LAW

A. Petitioner does not contest the tax assessed for the quarterly periods at issue herein, but rather seeks only abatement of penalty and reduction or abatement of interest. The Division asserted penalty herein pursuant to Tax Law § 1145(a)(1). Tax Law § 1145(a)(1)(i) states that any person failing to file a return or pay over any sales or use tax "shall" be subject to a penalty. This penalty may be canceled if the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). Consistent with this statute, the Division's regulations provide that penalty imposed under Tax Law § 1145(a)(1)(i) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1[a][1]).

B. In establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). Referring to the mandatory language of Tax Law § 1145(a)(1)(i), the Tribunal stated that "the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation" (*Matter of MCI Communications Corp.*, Tax Appeals Tribunal, January 16, 1992). In this case, petitioner filed late returns and failed to timely

remit payment of the tax due as shown on the returns. Petitioner has failed to establish any cause for its delinquency in the timely filing of returns and the payment of taxes for the periods at issue that would appear to a person of ordinary prudence and intelligence as reasonable cause for the delay in filing a sales tax return and paying the tax imposed under Articles 28 and 29 of the Tax Law (*see* 20 NYCRR 2392.1[d][5]). Accordingly, penalties and interest imposed herein are properly sustained.

C. Even accepting the factual assertions noted in paragraph 11, such claim does not establish reasonable cause for petitioner's failure to timely file returns and pay sales taxes for the periods at issue. It is noted that petitioner's excuses for its failure to timely remit taxes are, essentially, that economic difficulties prevented timely payment. It is well established, however, that economic difficulties do not excuse a failure to pay taxes (*see Matter of Zeitman*, Tax Appeals Tribunal, January 25, 1996; *Matter of Dworkin Construction Co.*, Tax Appeals Tribunal, August 4, 1988).

D. The petitions of Rockwells Restaurant Corporation are hereby denied and the notices and demands for payment of tax due dated October 18, 2004, October 29, 2004 and November 10, 2004 are sustained.

DATED: Troy, New York
March 18, 2010

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE