

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**STEPHEN ROBINS** : DETERMINATION  
for Revision of a Determination or for Refund of Sales : DTA NO. 821213  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period December 1, 2003 through February 29, :  
2004.

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Petitioner, Stephen Robins, 5 Crossway, Scarsdale, New York 10583, 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 December 1, 2003 through February 29, 2004.

On November 11, 2006 and December 5, 2006, respectively, petitioner, appearing *pro se*, and the Division of Taxation appearing by Daniel Smirlock, Esq. (Michael B. Infantino, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by March 23, 2007, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

***ISSUE***

I. Whether petitioner has established a basis for the cancellation of penalties and interest imposed by the Division of Taxation for the period in issue.

II. Whether petitioner should be liable for a penalty pursuant to Tax Law § 2018 for filing a frivolous petition.

***FINDINGS OF FACT***

1. Petitioner was the president, sole officer and shareholder of Rockwells Restaurant Corp. (“Rockwells”), the principal place of business of which was located at 97 Brookby Road, Scarsdale, New York.

2. The Division of Taxation (the “Division”) issued a Notice of Determination to petitioner as a responsible officer of Rockwells for the sales tax quarter ended February 29, 2004, dated June 20, 2005, which asserted tax due in the amount of \$15,654.16, penalty of \$3,287.35 and interest of \$2,350.71. After allowing a credit for payment of \$15,654.16, the balance due was \$5,638.06.

3. The computation section of the Notice of Determination revealed that the Division did not challenge the amount of sales and use taxes collected and reported by the corporation (\$49,073.71) for the quarter ended February 29, 2004. However, petitioner only paid \$33,419.55 with the return, leaving a balance due of \$15,654.16 for the month of December 2003, which constituted the basis of the tax asserted in the Notice of Determination.

4. Rockwells was required to file part-quarterly (monthly) sales and use tax returns during the period in issue. For the month of December 2003, Rockwells reported tax due of \$15,654.17 on its return, but did not file the return until April 5, 2004. The Division issued a Notice and Demand to Rockwells on July 23, 2004, in which it asserted \$15,654.16, after a \$.01 credit. Rockwells submitted a bank check in the sum of \$15,654.16, dated December 29, 2004, which was received by the Division on December 31, 2004.

5. The Notice of Determination issued to petitioner for the quarter ended February 29, 2004, reflected the payment by the corporation of \$15,654.16 and left in issue only penalty and interest in the sum of \$5,638.06.

6. Besides his status as president, sole officer and shareholder, petitioner had several indicia of a responsible officer, including:

a) signing requests for extension to file New York S corporation franchise tax returns during the years in issue as the president of Rockwells, as well as the checks on the corporate account to pay for the deposits on said extensions;

b) signing the corporation's Certificate of Registration, accepted by the Division on January 7, 1993, as president;

c) possessing check signing authority over the corporation's account; and

d) signing the sales and use tax return for the quarter in issue as president of Rockwells.

7. Petitioner has not disputed his responsibility for the taxes due from Rockwells or the propriety of the tax that was asserted for the period in issue. He only challenges the Division's imposition of penalty and additional interest.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

8. Petitioner contends that the Division acted improperly towards him and gave him erroneous advice over a course of years prior to the audit period which negatively affected his ability to operate his business. He argued that warrants filed against him restricted his credit with suppliers and generally raised the cost of doing business. In addition, petitioner contends that a protracted tax amnesty application process that lasted 19 months caused additional interest to accrue and further eroded his ability to save the business.

9. Petitioner claims he was precluded from effectively operating his business, borrowing money or selling the business assets because of the financial difficulties brought on by the Division's actions and contends this constitutes reasonable cause for the abatement of penalties.

10. The Division argues that Rockwells failed to pay the total sales tax due for the quarter in issue, which was collected and reported on its return. The company eventually paid only the tax due on December 31, 2004, but never paid the penalty and interest. The Division contends that petitioner has not explained the failure of the company or himself to pay the tax when due and therefore has not established reasonable cause or the absence of willful neglect to justify abatement of penalty and additional interest.

11. The Division also argues that petitioner should be liable for the penalty provided by Tax Law § 2018 for filing a frivolous petition, given the lack of evidence he produced in support of his petition and for wasting the resources of both the Division of Tax Appeals and the Division of Taxation.

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

A. Tax Law § 1145(a)(1)(i) imposes a penalty upon persons who fail to timely file a return or timely pay the tax imposed by Articles 28 and 29 of the Tax Law. The penalty and additional interest may be waived if “such failure or delay was due to reasonable cause and not due to willful neglect” (Tax Law § 1145[a][1][iii]). In determining whether reasonable cause and good faith exist, the regulations provide several specific grounds and also a catchall which provides for a finding of reasonable cause based upon any ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay, demonstrating an absence of willful neglect (20 NYCRR 2392.1[d][5]). The taxpayer bears the burden of establishing that the actions were based upon reasonable cause and not willful neglect (*see, Matter of Philip Morris*, Tax Appeals Tribunal, April 29, 1993; *Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978, 598 NYS2d 360; 20 NYCRR 3000.15[d][5]).

B. Since the tax due for the quarter in issue has been paid, only penalty and interest remain in issue, and petitioner is seeking an abatement of same. However, petitioner's argument that the Division's prior collection actions against Rockwells and its allegedly abusive behavior with regard to petitioner's request for a deferred payment agreement, which caused the filing of warrants and heralded the general downturn in fortune for petitioner's business, was without merit. These events, which occurred prior to the period in issue, were ultimately all of petitioner's own doing and do not establish reasonable cause for Rockwells' delay in paying the taxes for the period in issue.

It may well be that petitioner's ability to pay the tax due was compromised because of the corporation's ongoing financial difficulties, but diverting sales taxes collected on behalf of the State to address other business needs was improper and does not establish reasonable cause for his failure to pay the tax due in a timely manner. (*See, Matter of F & W Oldsmobile v. Tax Commn.*, 106 AD2d 792, 484 NYS2d 188 [where it was held that a taxpayer's financial condition, hurt by high mortgage rates and a depressed industry, did not constitute reasonable cause for failure to timely pay over sales and use taxes it had collected]; *Matter of Zeitman*, Tax Appeals Tribunal, January 25, 1996; *Matter of Dworkin Construction Co.*, Tax Appeals Tribunal, August 4, 1988. )

C. The Division of Taxation requested in its answer that penalty be imposed herein for the filing of a frivolous petition pursuant to Tax Law § 2018 and 20 NYCRR 3000.21. The statute and regulation provide that a penalty of up to \$500.00 may be imposed for filing and maintaining an action in which the petitioner's position is "frivolous." That term, by definition, includes maintaining a proceeding primarily for delay. Since it was determined that petitioner has not raised a valid or plausible defense to the late payment of taxes in this action, it is concluded that

his prosecution of this matter has been primarily for delay and a penalty of \$500.00 is imposed.

Further reinforcing the foundation for imposition of this penalty is the fact that petitioner and his company, Rockwells, have instituted at least six actions in the Division of Tax Appeals, each seeking the same relief based upon similarly deficient evidence, wasting the resources of both the Division of Taxation and the Division of Tax Appeals.

D. The petition of Stephen Robins is denied, the Notice of Determination, dated June 20, 2005, is sustained and a frivolous petition penalty is imposed in the sum of \$500.00.

DATED: Troy, New York  
August 16, 2007

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE