

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
415 DEVOE BEER CORPORATION : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 826192
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period March 1, 2009 through February 28, 2013. :

Petitioner, 415 Devoe Beer Corporation, 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 March 1, 2009 through February 28, 2013.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, on May 13, 2015 at 10:30 A.M., in New York, New York, with all briefs to be submitted by October 15, 2015, which date began the six-month period for issuance of this determination. Petitioner appeared by Isaac Sternheim & Co. (Isaac Sternheim, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel).

ISSUE

Whether the Division of Taxation's imposition of penalty on petitioner for failing to file information returns for the period March 1, 2009 through February 28, 2013 was proper.

FINDINGS OF FACT

1. Petitioner, 415 Devoe Beer Corporation, an alcoholic beverage wholesaler licensed by the New York State Liquor Authority (SLA), is located at 415 Devoe Avenue, Bronx, New York.

Primarily, petitioner sells beer, water, soda, juice, tea (Snapple, Mystic or Arizona) and ice to stores in the Bronx and Harlem.

2. John Schauder is petitioner's president and has operated the company since 1998.

3. On April 7, 2009, amendments to Tax Law §§ 1136(i) and 1145(i) were enacted, requiring every alcoholic beverage wholesaler licensed by the SLA that sells alcoholic beverages without collecting sales or use tax to file annual transaction information returns with the Division of Taxation (Division). The first information returns required by Tax Law § 1136(i) were due on or before September 20, 2009 and covered the period March 1, 2009 through August 31, 2009. The next information returns were due on or before March 20, 2010 and covered the period September 1, 2009 through February 28, 2010. All subsequent annual transaction information returns are required to be filed on or before March 20th of each year, and cover the period from March 1st of the previous year through February 28th or 29th of the current year.

4. The annual transaction information returns must be filed electronically through the Division's web site. That web site contains instructions describing how to file the "Annual Beer, Wine, & Liquor Wholesalers Transaction Information" return by downloading an Excel spreadsheet template from a provided link, entering the necessary data, and then uploading the completed file to the Division's online tax system.

5. The record includes a downloaded blank Excel spreadsheet template that requires provision of the following information for the period covered by the return with respect to each vendor located in New York State to whom the alcoholic beverage wholesaler made a sale without collecting sales or use tax: the vendor's legal name; the vendor's DBA name; the vendor's SLA license address; the vendor's SLA license city; the vendor's SLA license state; the vendor's SLA license zip code; the vendor's telephone number; the vendor's mailing address; the

vendor's mailing address city; the vendor's mailing address state; the vendor's mailing address zip code; the vendor's SLA license number; the vendor's Federal Tax Identification number (EIN); the vendor's New York State Sales Tax Identification number (Sales Tax Certificate of Authority number); the year and month of reported sales; and total monthly net sales amount; i.e., net of deposits and returns.

6. Alcoholic beverage wholesalers are required to give to each vendor included on the annual transaction information returns a statement showing the same information reported for that vendor on the transaction information returns. The statement given to each vendor may be in summary form, but it must include the identifying information pertinent to the vendor along with the total monthly sales amounts for sales of alcoholic beverages, exclusive of total amounts for deposits and returns for that vendor during the period covered by the return. The Division uses the annual information returns to determine the accuracy of the purchases and the income tax and sales tax returns filed by both the filers of the annual information return, i.e., the alcoholic beverage wholesalers, and the vendors.

7. The Division receives a file from the SLA that lists licensees and the types of licenses issued to them by the SLA. David Viall, a tax auditor in the Division's Sales Tax Audit Investigation Financial Unit (Audit Investigation Financial Unit), reviews the file to determine which SLA licensees should be filing annual transaction information returns. He then checks the Division's records to determine whether those businesses filed information returns, and compiles a list of those who have not filed. The list is given to one of the tax information aides in the Audit Investigation Financial Unit who contacts each business about its filings.

8. On September 10, 2009, petitioner filed a 90-day extension to file the annual transaction information return for the initial filing period of March 1, 2009 through August 31,

2009. The Division granted the extension and the extended due date for the initial filing period was December 21, 2009. Petitioner again filed a 90-day extension of time to file the annual transaction information return for the period September 1, 2009 through February 28, 2010, which extension was granted and the due date for filing that information return was extended to June 21, 2010. However, petitioner failed to file either of the information returns for which the Division had granted 90-day extensions.

9. On October 20, 2011, Kyle Gibson, a tax information aide in the Audit Investigation Financial Unit, spoke with Mr. Schauder by telephone. During that telephone call, Mr. Gibson notified Mr. Schauder that the Division had not received petitioner's annual transaction information returns for the periods March 1, 2009 through August 31, 2009; September 1, 2009 through February 28, 2010; and March 1, 2010 through February 28, 2011. Mr. Schauder indicated to Mr. Gibson that petitioner was part of a pending class action law suit regarding the amendments to the information return law. Because all previous suits were denied and he was not aware of any pending case, Mr. Gibson advised Mr. Schauder to contact his attorney and then follow up with Mr. Gibson. In his follow-up telephone call to Mr. Gibson on October 20, 2011, Mr. Schauder acknowledged that he had to file the information returns; however, he asked for an extension of time to file them. Mr. Gibson informed him that no extension was available, and the three returns needed to be filed as soon as possible because assessments for all three information returns were forthcoming.

10. On March 22, 2013, Jennifer Akin, a tax information aide in the Audit Investigation Financial Unit, attempted to contact Mr. Schauder by telephone two times, failed to do so, and left two messages for him regarding the unfiled information returns. However, Mr. Schauder never returned the telephone calls or tried to contact the Division. Ms. Akin again contacted him

by telephone on May 3, 2013 and left a message to call her back regarding unfiled annual transaction information returns for the periods March 1, 2010 through February 28, 2011; and March 1, 2011 through February 29, 2012. The Division never received a response from any of petitioner's employees regarding the annual transaction information returns.

11. Petitioner did not file information returns for the tax periods ending August 31, 2009; February 28, 2010; February 28, 2011; February 29, 2012; and February 28, 2013. As a result of petitioner's failure to file information returns for the five noted periods, the Division determined that the penalty should be assessed for each period pursuant to Tax Law §§ 1136(i) and 1145(i).

12. Subsequently, on July 18, 2013, the Division issued a Notice of Determination (Notice No. L-039690779-1) to petitioner assessing penalty in the total amount of \$50,000.00 for the tax periods ending August 31, 2009; February 28, 2010; February 28, 2011; February 29, 2012; and February 28, 2013, i.e., \$10,000.00 for each period. The computation section of the notice contained, in pertinent part, the following explanation:

“We’re imposing a penalty on you because you haven’t filed an information return as required by section 1136(i) of the Tax Law. Because you haven’t provided us with your books and records, as we requested, it’s necessary for us to estimate the amount of your penalty. Since we can’t determine that you owe a lesser amount, we’ve imposed the maximum penalty allowed by law.”

The Division imposed the maximum penalty for each of the five tax periods because it did not know the number of records of alcoholic beverage sales to vendors that petitioner was required to report on each of the information returns.

13. Petitioner filed a petition dated March 24, 2014, contesting the Notice of Determination issued herein. The petition asserts that penalties should not have been assessed.

14. At the hearing, Mr. Schauder admitted that petitioner is an alcoholic beverage wholesaler required to file annual transaction information returns. He further admitted that petitioner has not filed all of its information returns.

15. Mr. Schauder testified that, in an effort to comply with the information return filing requirement, on or about August 19, 2010, petitioner purchased a computer system consisting, of among other things, a custom beer tender software package from Ariesoft. According to Mr. Schauder, this software package continues to be modified for the type of business petitioner conducts, i.e., cash and carry, and delivery. Mr. Schauder indicated that he began uploading information regarding petitioner's customers onto a file on petitioner's computer sometime in either 2012 or 2013. Mr. Schauder further indicated that in an effort to show that petitioner was gathering the necessary information to be reported on the information returns, sometime in 2013, he gave his representative, Isaac Sternheim, a disc containing information about petitioner's customers, and requested Mr. Sternheim to present it to the Division for possible acceptance. Petitioner did not submit any evidence showing that the Division accepted the disc in lieu of petitioner electronically filing the transaction information returns.

16. One of the audit documents submitted by the Division at the hearing is a "Schedule of Returns Filed" by petitioner for the period March 1, 2010 through February 28, 2015. Review of this schedule indicates that petitioner reported total gross sales in the amount of \$36,423,579.00 and taxable sales in the amount of \$35,485.00 for the period March 1, 2010 through February 28, 2013. Further review of this schedule indicates that petitioner's alcohol purchases totaled \$29,443,417.00 for the same period.

17. On March 18, 2015, Mr. Schauder electronically submitted petitioner's Annual Transaction Information Return for the period March 1, 2013 through February 28, 2014, on

which petitioner reported third-party sales of alcoholic beverages in the total amount of \$3,790,606.00. Review of the Schedule of Returns Filed indicates that petitioner reported gross sales in the amount of \$12,640,762.00 and taxable sales in the amount of \$12,642.00 on its annual sales tax return filed for the period March 1, 2013 through February 28, 2014. Further review of this schedule indicates that petitioner's alcoholic beverage purchases totaled \$9,307,060.00 for the same period.

18. On March 20, 2015, Mr. Schauder electronically filed petitioner's Annual Transaction Information Return for the period March 1, 2014 through February 28, 2015, on which petitioner reported third-party sales of alcoholic beverages in the total amount of \$2,431,509.00. Review of the Schedule of Returns Filed indicates that petitioner reported gross sales in the amount of \$11,939,758.00 and taxable sales in the amount of \$13,018.00 on its annual sales tax return filed for the period March 1, 2014 through February 28, 2015.

19. According to Mr. Schauder, on an average day, petitioner sells between 20 and 40 cases of product, i.e., beer, water, soda, juices, teas and ice, to each store (customer). He explained that beer sales and associated deposit information must be extracted from each customer's sales invoice and uploaded into a file on the Ariesoft software system. That information, among other items, must be included on petitioner's annual transaction information return. Mr. Schauder described the task of submitting 60 to 70 invoices a day into petitioner's computer system as "physically and mentally" overwhelming. He further described it as a tremendous amount of work, given petitioner's slim profit margins on various kinds of beer. Mr. Schauder admitted that petitioner has boxes of sales invoices, dated between March 1, 2013 and February 28, 2014, that include beer sales never uploaded into the file on petitioner's computer system and, therefore, were not included in the annual information return filed for such period.

He also stated that the financial strain placed upon petitioner in trying to electronically file complete annual transaction information returns may force the company out of business.

SUMMARY OF PETITIONER'S POSITION

20. Petitioner does not dispute that the Division followed procedures in assessing the penalties against it for failing to file the transaction information returns for the five periods at issue. However, petitioner argues that the Division does not have the right to put undue financial and physical burdens on the taxpayer in order to use the information supplied by the taxpayer for the Division's own policing operations. Petitioner further argues that Tax Law §§ 1136(i) and 1145(i) are unfair and unconstitutional.

CONCLUSIONS OF LAW

A. Tax Law § 1136(i) provides, in relevant part, as follows:

“(1) The following persons must file, in addition to any other return required by this chapter, annual information returns with the commissioner providing the information specified below about their transactions with vendors, hotel operators, and recipients of amusement charges:

* * *

(C) Every wholesaler, as defined by section three of the alcoholic beverage control law, if it has made a sale of an alcoholic beverage, as defined by section four hundred twenty of this chapter, without collecting sales or use tax during the period covered by the return, except (i) a sale to a person that has furnished an exempt organization certificate to the wholesaler for that sale; or (ii) a sale to another wholesaler whose license under the alcoholic beverage control law does not allow it to make retail sales of the alcoholic beverage. For each vendor, operator, or recipient to whom the wholesaler has made a sale without collecting sales or compensating use tax, the return must include the total value of those sales made during the period covered by the return (excepting the sales described in clauses (i) and (ii) of this subparagraph) and the vendor's, operator's or recipient's state liquor authority license number, along with the information required by paragraph two of this subdivision

(2) The returns required by paragraph one of this subdivision must also include, for each vendor, operator, or recipient about whom information is

required to be reported under such paragraph, the name and address, and the certificate of authority or federal identification number, and any other information required by the commissioner. The commissioner may, in the commissioner's discretion, require the reporting of less than all the information otherwise required to be reported by this paragraph and paragraph one of this subdivision.

(3) The returns required by paragraph one of this subdivision must be filed annually on or before March twentieth and must cover the four sales tax quarterly periods immediately preceding such date. Notwithstanding section three hundred five of the state technology law or any other law to the contrary, the returns must be filed electronically in the manner prescribed by the commissioner.

(4) Any person required to file a return under paragraph one of this subdivision must, on or before March twentieth, give to each vendor, operator, or recipient about whom information is required to be reported in the return the information pertaining to that person. The commissioner may prescribe a form to be used to provide the information required to be given by this paragraph.

(5) Nothing in this subdivision is to be construed to limit the persons from whom the commissioner can secure information or the information the commissioner can require from those persons pursuant to the commissioner's authority under section eleven hundred forty-three of this part or any other provision of law."

B. Tax Law § 1145(i) provides, in relevant part, as follows:

“(1) Every person required to file an information return by subdivision (i) of section eleven hundred thirty-six of this part who (A) fails to provide any of the information required by paragraph one or two of subdivision (i) of section eleven hundred thirty-six of this part for a vendor, operator, or recipient, or who fails to include any such information that is true and correct (whether or not such a report is filed) for a vendor, operator, or recipient, or (B) fails to provide the information required by paragraph four of subdivision (i) of section eleven hundred thirty-six of this part to a vendor, operator, or recipient specified in paragraph four of subdivision (i) of section eleven hundred thirty-six of this part, will, in addition to any other penalty provided in this article or otherwise imposed by law, be subject to a penalty of five hundred dollars for ten or fewer failures, and up to fifty dollars for each additional failure.

(2) Every person failing to file an information return required by subdivision (i) of section eleven hundred thirty-six of this part within the time required by subdivision (i) of section eleven hundred thirty-six of this part will, in addition to any other penalty provided for in this article or otherwise imposed by law, be subject to a penalty in an amount not to exceed two thousand dollars for

each such failure, provided that the minimum penalty under this paragraph is five hundred dollars.

(3) In no event will the penalty imposed by paragraph one, or the aggregate of the penalties imposed under paragraphs one and two of this subdivision, exceed ten thousand dollars for any annual filing period as described by paragraph three of subdivision (i) of section eleven hundred thirty-six of this part.

(4) If the commissioner determines that any of the failures that are subject to penalty under this subdivision was entirely due to reasonable cause and not due to willful neglect, the commissioner must remit the penalty imposed under this subdivision. These penalties will be determined, assessed, collected, paid, disposed of and enforced in the same manner as taxes imposed by this article and all the provisions of this article relating thereto will be deemed also to refer to these penalties.”

C. In the instant matter, the Division assessed penalties in the total amount of \$50,000.00 for the tax periods ending August 31, 2009; February 28, 2010; February 28, 2011; February 29, 2012; and February 28, 2013 because petitioner failed to file information returns for such periods, which returns were required to be filed by Tax Law § 1136(i). Petitioner, an alcoholic beverage wholesaler licensed by the SLA that sells alcoholic beverages without collecting sales and use tax, does not dispute that it failed to file five information returns for the period at issue. However, petitioner contends that Tax Law §§ 1136(i) and 1145(i) are unconstitutional because undue financial and physical burdens are placed upon the taxpayers, alcoholic beverage wholesalers such as itself, required to file information returns. Petitioner vaguely challenges the constitutionality of Tax Law §§ 1136(i) and 1145(i) on their face.

D. It is well settled that the Division of Tax Appeals lacks jurisdiction to consider claims alleging that a statute is unconstitutional on its face (*see Matter of A&A Service Sta., Inc.*, Tax Appeals Tribunal, October 15, 2009; *Matter of R.A.F. General Partnership*, Tax Appeals Tribunal, November 9, 1995) and at the administrative level, statutes are presumed to be

constitutional (*see Matter of Lunding v. Tax Appeals Trib.*, 218 AD2d 268 [1996], *revd* 89 NY2d 283, 287 [1996], *cert granted* 520 US 1227 [1997], *revd* 522 US 287 [1998]).¹

The Division of Tax Appeals may, however, determine whether tax statutes are constitutional as applied, (*Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003, citing *Matter of David Hazan, Inc.*, Tax Appeals Tribunal, April 21, 1988, *confirmed* 152 AD2d 765 [1989], *affd* 75 NY2d 989 [1990]). The taxpayer bears the burden of proving that a statute, as applied, is unconstitutional (*Matter of Brussel*, Tax Appeals Tribunal, June 25, 1992).

In the present matter, petitioner has offered no evidence that it was treated any differently than other taxpayers, similarly situated, in the application of Tax Law §§ 1136(i) and 1145(i), and therefore it has failed to meet its burden of proof. As such, the Division's imposition of penalty on petitioner for failing to file information returns for the period March 1, 2009 through February 28, 2013 was proper.

E. The petition of 415 Devoe Beer Corporation is denied and the Notice of Determination, dated July 18, 2013, is sustained.

DATED: Albany, New York
April 7, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

¹ It is noted that the constitutionality of Tax Law §§ 1136(i) and 1145(i) has already been decided in *Empire State Beer Distrib. Assn., Inc. ex rel. Alcoholic Beverage Wholesalers v. Patterson*, No. 09 CIV. 10339 DAB, (SD NY, Mar. 1, 2010), 2010 WL 749828. In *Empire*, the Court ruled that Tax Law §§ 1136(i) and 1145(i) did not violate the plaintiffs Substantive Due Process, Equal Protection¹, and Fourteenth Amendment rights. The Court also ruled that the statutes do not violate the Dormant Commerce Clause doctrine.