STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
WELCO AD CORPORATION	:	DECISION DTA Nos. 800860
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1979 through February 28, 1986.	:	and 803993

Petitioner Welco Ad Corporation, 2460 Rochester Road, Canandaigua, New York 14424, filed an exception to the determination of the Administrative Law Judge issued on April 14, 1994. Petitioner appeared by Devorsetz, Stinziano, Gilberti, Heintz & Smith, P.C. (Bruce E. Wood, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kathleen D. Church, Esq., of counsel).

Petitioner appended a copy of its hearing brief to its exception. The Division of Taxation filed a letter brief in opposition to the exception. The six-month period to issue this decision began on June 30, 1994, the date by which petitioner could submit a reply brief. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether all of the accrued interest on petitioner's tax assessment may be abated.

II. If the interest may be abated, whether petitioner has established reasonable cause for its failure to pay the tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Welco Ad Corporation, was engaged in the printing and publication business during the periods at issue.

Petitioner published the Honeoye Falls-Lima-Avon Shopping News, the Canandaigua-Victor-Holcomb Shopping News and the Naples Shopping News during the periods in issue.

Two sales tax field audits were conducted of petitioner's records for the periods March 1, 1979 through February 28, 1983 and March 1, 1983 through February 28, 1986. The Division of Taxation ("Division") concluded after each audit that petitioner's purchases of printing services were not exempt from sales and use taxes under Tax Law § 1115(i)(A), and that petitioner owed sales and use taxes on capital acquisitions (furniture and equipment), expense purchases (other than printing costs) for the first and second audit periods and sales tax on a bulk sale purchase and unreported taxable sales for the second audit period. The Division further concluded that petitioner did not qualify for an exemption under Tax Law § 1115(i)(A) and (B)

On September 27, 1983, the Division issued to petitioner two notices of determination and demands for payment of sales and use taxes due as follows:

Period	Tax	Interest	Total Due
3/1/79-8/31/82	$59,355.02	$17,754.77	$77,109.79
9/1/82-2/28/83	12,993.78	897.95	13,891.73

A petition for revision of a determination or for refund of tax paid was received by the former Tax Appeals Bureau on December 22, 1983. In this petition, petitioner asserted its business constituted the publication of "shopping papers" within the meaning of Tax Law § 1115(h).

In a letter dated May 15, 1985 from the Tax Appeals Bureau to petitioner's representative, petitioner was informed that the prehearing conference had not resolved the matter and that a Perfected Petition must be filed in order to proceed with petitioner's protest.

A Perfected Petition was received by the former Tax Appeals Bureau on June 21, 1985. Petitioner asserted that its business constituted the publication of a "shopping paper" within the meaning of Tax Law § 1115(i) and that it was in full compliance thereunder.

Petitioner filed an Amended Perfected Petition which was received by the former Tax Appeals Bureau on January 8, 1986. In this Amended Perfected Petition, petitioner asserted, inter alia, that its business constituted the publication of a "shopping paper" within the meaning of Tax Law § 1115(i); that its publications known as the Honeoye Falls-Lima-Avon Shopping News, the Canandaigua-Victor-Holcomb Shopping News and the Naples Shopping News are "newspapers" or "periodicals" as defined in Tax Law § 1115(a)(5); and that Tax Law § 1115(i) is unconstitutionally vague and ambiguous on its face and in its application unconstitutionally discriminatory since there is no rational basis for classifying and taxing "shopping papers" in a manner different from newspapers and periodicals.

On August 26, 1986, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1983 through February 28, 1986 which assessed tax of $23,643.55, plus interest of $6,108.85, for a total amount due of $29,752.40.

A petition for revision of a determination or for refund of tax paid was received by the former Tax Appeals Bureau on September 12, 1986. In this petition, petitioner asserted, inter alia, that its business constitutes the publication of a "shopping paper" within the meaning of Tax Law § 1115(i); that its publications known as the Honeoye Falls-Lima-Avon Shopping News, the Canandaigua-Victor-Holcomb Shopping News and the Naples Shopping News are "newspapers" or "periodicals" as defined in Tax Law § 1115(a)(5); and that Tax Law § 1115(i) is unconstitutionally vague and ambiguous on its face and in its application unconstitutionally discriminatory in taxing "shopping papers" in a manner different from newspapers and periodicals.

In a letter dated March 11, 1987 from the Tax Appeals Bureau, petitioner was informed that the original petition filed had been accepted as a Perfected Petition.

In March 1988, petitioner and the Division stipulated that the administrative proceedings would be held in abeyance until the outcome of Scotsman Press v. Tax Appeals Tribunal (165 AD2d 630, 569 NYS2d 991 [3d Dept 1991]). Petitioner did not pay either of the assessments.

Based on the Scotsman Press decision, petitioner conceded that it owed the assessed tax. Subsequent to the issuance of the Scotsman Press decision, petitioner has been corresponding with the Division to work out a payment plan for the tax and an abatement of the interest.

OPINION

In her determination, the Administrative Law Judge stated, inter alia, that:

> "Under Tax Law § 1142(2), the Commissioner is empowered 'for cause shown, to remit penalties but not interest computed at the rate of six percent per annum.'
>
> "Tax Law § 1142(9) imposes a minimum underpayment rate of 6% compounded daily" (Determination, conclusions of law "A" and "B").

The Administrative Law Judge found that "petitioner has been assessed the minimum underpayment rate of interest" and, relying on Matter of Martin Lithographers (State Tax Commn., December 2, 1985, TSB-H-87[1]S), concluded that there existed no provision which permitted the waiver of minimum interest for any reason.

On exception, petitioner asserts that the Administrative Law Judge did not address its argument that interest charges should be abated in full considering the facts of this case and on equitable grounds. Alternatively, petitioner argues that it "has been assessed over the years a variable rate of interest ranging from 6 percent to 14 percent" and that it "is at least entitled to the abatement of interest in excess of 6 percent per annum" (Petitioner's exception, p. 1).

In its letter brief in opposition to petitioner's exception, the Division asserts that "there is no proof in the record that interest was charged at a higher rate than the minimum statutory rate (6%)" (Division's letter brief, p. 2). This statement is consistent with the Division's position as asserted in its hearing brief, which stated as follows:

> "(Section 1142 of the Tax Law sets the underpayment rate at 6% per annum.) . . . . Assuming, without conceding, that the petitioner did have reasonable cause, then the statute allows for the abatement of the penalties and a portion of the interest in excess of six percent per annum" (Division's hearing brief, p. 2).

We affirm the result reached by the Administrative Law Judge, i.e., sustaining the assessments, for the following reasons.

Interest is imposed pursuant to Tax Law § 1145(a)(1)(ii) which provides, in pertinent part, that:

> "[i]f any amount of tax is not paid on or before the last date prescribed in this article for payment, interest on such amount at the rate of twelve per cent per annum or at the underpayment rate set by the commissioner of taxation and finance pursuant to section eleven hundred forty-two, whichever is greater, shall be paid for the period from such last date to the date paid, whether or not any extension of time for payment was granted."

Penalty and a portion of interest can be abated in accordance with Tax Law § 1145(a)(1)(iii) which provides, in pertinent part, as follows:

> "[i]f the commissioner of taxation and finance determines that such failure or delay was due to reasonable cause and not due to willful neglect, he shall remit all of such penalty and that portion of such interest that exceeds the interest that would be payable if such interest were computed at the underpayment rate set by the commissioner of taxation and finance pursuant to section eleven hundred forty-two."

The statute in this matter is clear; only penalty and the portion of interest in excess of interest computed at the underpayment rate can be waived or abated. Here, the Division did not assess any penalty against petitioner and it did not compute interest pursuant to Tax Law § 1145(a)(1)(ii) at the rate of 12% per annum. Interest was computed at the underpayment rate and there exists no statutory or regulatory authority to waive or abate interest computed at the underpayment rate. With respect to the assessment of interest at the underpayment rate, it is irrelevant whether or not petitioner's failure or delay in remitting the tax due was due to reasonable cause and not willful neglect since the abatement provision of Tax Law § 1145(a)(1)(iii) permits only the partial reduction of interest from the 12% per annum rate to the underpayment rate.

Petitioner's argument that all interest charges should be abated on equitable and other grounds is unconvincing. Petitioner, in essence, seeks an interest-free loan from the State of New York. As we noted in Matter of Rizzo (Tax Appeals Tribunal, May 13, 1993):

> "interest assessed may be viewed as a quantification of the risk assumed by a taxpayer when appealing an assessment without paying it. The Sales Tax Law sets forth a procedure for the timely remittance of tax and the keeping of proper books and records to substantiate the amounts remitted (Tax Law §§ 1137 and 1135, respectively). Failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due (Tax Law § 1145). In this case, the bulk of the interest has accrued as a result of petitioners' challenge to the assessment. It is not proper to describe interest as substantial prejudice, as it is applied to all taxpayers who fail to remit sales and use tax due in a timely manner. Rather, a more accurate interpretation would be to say that interest represents the cost to the taxpayer for the use of the funds during the period of protest" (Matter of Rizzo, supra).

Turning next to petitioner's argument that it has been assessed interest at varying rates from 6% to 14% and that it is entitled to abatement of all interest charges in excess of 6%, we conclude that no such reduction can be allowed.

It appears that petitioner was misled by both the Division and the Administrative Law Judge to the effect that the underpayment rate of interest was 6% per annum. In its hearing letter brief, the Division states that "[s]ection 1142 of the Tax Law sets the underpayment rate at 6% per annum" (Division's hearing brief, p. 2) and in its letter brief in opposition to petitioner's exception, the Division asserts that "there is no proof in the record that interest was charged at a higher rate than the minimum statutory rate (6%)" (Division's letter brief, p. 2). The Administrative Law Judge in her determination indicates that "Tax Law § 1142(9) imposes a minimum underpayment rate of 6% compounded daily" (Determination, conclusion of law "B") and that "[p]etitioner has been assessed the minimum underpayment rate of interest" (Determination, conclusion of law "E"). These statements do not accurately reflect the statute or regulations.

As noted earlier, Tax Law § 1145(a)(1)(iii) provides for the assessment of interest at the underpayment rate as set by the Commissioner of Taxation and Finance pursuant to Tax Law § 1142. Tax Law § 1142(9) authorizes said Commissioner to:

> "set the overpayment and underpayment rates of interest for purposes of sections eleven hundred thirty-nine and eleven hundred forty-five. Such rates shall be the overpayment and underpayment rates of interest set pursuant to subsection (e) of section one thousand ninety-six of this chapter, but not less than six percent per annum."

For periods prior to September 1, 1989, the rate of interest to be set pursuant to Tax Law § 1142(9) was determined in accordance with Tax Law § 697(j)(2). Examination of the Commissioner's procedural regulations, specifically, 20 NYCRR 2393.2 and 2393.4, reveals that the underpayment interest rates during the period August 13, 1981 through August 31, 1989 varied from as high as 14% to as low as 6%. Accordingly, the Division's computation of interest charges using interest rates ranging from 14% to 6% was proper.

While an initial examination of Tax Law § 1142(2)[1] would suggest that there exists authority to waive interest charges in excess of 6%, we find that said section does not grant such authority. The language used in Tax Law § 1142(2) is general in nature as it relates to the abatement of interest and said language cannot be held to override or supercede the specific language contained in Tax Law § 1145(a)(1)(iii) which authorizes the abatement of interest only to the underpayment rate.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

---

[1]Tax Law § 1142 grants to the Commissioner of Taxation and Finance certain "General powers . . ." and, in particular, Tax Law § 1142(2) authorizes the Commissioner:

> "[t]o extend, for cause shown, the time of filing any return or report for a period not exceeding three months; and for cause shown, to remit penalties but not interest computed at the rate of six percent per annum."

1. The exception of Welco Ad Corporation is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Welco Ad Corporation are denied; and

4. The two notices of determination and demand for payment of sales and use taxes due dated September 27, 1983 and the one Notice of Determination and Demand for Payment of Sales and Use taxes Due dated August 26, 1986 are sustained.

DATED: Troy, New York
November 23, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner