STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
CAPITOL COIN COMPANY, INC. AND IRA FRIEDBERG AND ARTHUR FRIEDBERG, OFFICERS OF CAPITOL COIN COMPANY, INC.	:	DECISION
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1981 through May 31, 1983.	:	

Petitioners, Capitol Coin Company, Inc., and Ira Friedberg and Arthur Friedberg, officers of Capitol Coin Company, Inc., 1359 Broadway, New York, New York 10018, filed an exception to the determination of the Administrative Law Judge issued on June 30, 1988 with respect to their petitions for revision of determination or for refunds of sales and use taxes under Articles 38 and 29 of the Tax Law for the period June 1, 1981 through May 31, 1983 (File Nos. 801701, 801702, 801803, 801873, 801874, 801875). Petitioners appeared by Ganz, Hollinger & Towe, P.C. (Mark S. Grossjung, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

The petitioners filed a brief on exception. The Division filed a brief in response to the exception. Oral argument was heard at petitioners' request.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioners have established that reasonable cause exists for the abatement of penalties and interest in excess of the minimum.

FINDINGS OF FACT

We find the facts as stated by the Administrative Law Judge and such facts are repeated below. We also find several additional facts noted as such.

Petitioner Capitol Coin Company, Inc. (hereinafter "Capitol Coin") was in the business of selling and purchasing rare coins during the period June 1, 1981 through May 31, 1983 (the "audit period").

After an audit of the business, wherein no books or records were produced by petitioners, the Division issued to Capitol Coin two notices ofdetermination and demands for payment of sales and use taxes due. The first such notice was issued on September 20, 1984 and set forth total tax due of $12,841.37, penalty of $3,210.34 and interest of $5,953.26 for a total amount due of $22,004.97 for the period June 1, 1981 through August 31, 1981. The second notice, dated December 20, 1984, set forth tax due of $95,788.61, penalty of $23,562.55 and interest of $25,569.42 for a total amount due of $144,920.58 for the period September 1, 1981 through May 31, 1983. Identical notices were issued to the responsible officers of the company, Arthur Friedberg and Ira Friedberg, also petitioners herein.

At a conference held on October 17, 1985 and continued on March 26, 1986, the total amount of tax due was reduced to a sum of $54,879.62. The additional tax due was reduced as a result of the substantiation of certain out-of-state sales.

On June 22, 1987 and September 30, 1987, respectively, the Division of Taxation and petitioners executed a partial withdrawal of petition and discontinuance of case, whereby petitioners agreed to pay and the Division of Taxation agreed to accept $14,279.00 in full satisfaction of the tax due. The parties agreed to submit the issue of abatement of penalty and reduction of interest to the Division of Tax Appeals for determination based upon this stipulated record.

In addition to the facts found by the Administrative Law Judge, we find that petitioners submitted two statements to the Administrative Law Judge in support of their claim. The first is an unsworn signed statement from an attorney who was a member of the firm representing petitioners who does not claim to have any personal knowledge of the events about which she writes. The other is a submission, also signed by a member of the firm representing petitioners,

which affirms under penalty of perjury to the truth of the contents asserted therein. However, in this statement the subscriber does not state that he has any personal knowledge of the specific facts of petitioners' business.

OPINION

The Administrative Law Judge held that petitioners did not clearly establish or affirmatively provide any documentation, testimony or other proof providing reasonable cause as to why interest in excess of the minimum and the penalties should be abated. On appeal, petitioners assert that the determination below was arbitrary and contrary to the evidence, that their failure to timely file a return or pay sales tax was due to reasonable cause and not willful neglect, and that fundamental fairness demands that any penalty be abated on the facts herein. The Division responds by asserting that petitioners have failed to demonstrate reasonable cause and that, having failed to maintain adequate books and records, petitioners must suffer the consequence of having to pay the assessed penalties.

We affirm the determination of the Administrative Law Judge.

A taxpayer's failure to file a tax return or timely pay any tax under Article 28 of the Tax Law subjects the taxpayer to a penalty plus interest in excess of the minimum otherwise charged (Tax Law §1145[a][1][i], §1142[9], 20 NYCRR 536.1[a][1], 20 NYCRR 603.4[a]). However, these surcharges are to be cancelled if "reasonable cause" is affirmatively shown by the taxpayer (Tax Law §1145[a][1][ii], former 20 NYCRR 536.1[b], see also 20 NYCRR 536.5[b]). For this audit period, former 20 NYCRR 536.1(b) specified that death or serious illness of certain individuals, destruction of the business or business records by fire or other casualty, the inability to timely obtain and assemble essential information required for preparing a complete return despite reasonable efforts, and certain pending administrative proceedings were all ways by which reasonable cause could be demonstrated (20 NYCRR 536.5[c]). Additionally, "any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay . . . and which clearly indicates an absence of gross negligence or

willful intent to disobey the taxing statutes" (former 20 NYCRR 536.1[b][6], see also, 20 NYCRR 536.5[c][5]) may also constitute reasonable cause.

Petitioners offered on submission without a hearing (20 NYCRR 3000.8), the unsworn statement of an attorney, Jerrietta Hollinger, who did not claim to have personal knowledge of the events which were the subject of her statement. This statement said that the serious illness of petitioners' bookkeeper, several moves petitioners made to new retail locations during the audit period, a "flood" from burst overhead water pipes, the number of their sales destined for out-of-state locations, and the good faith attempts the petitioners made to locate their records and cooperate with the Division provide overwhelming evidence proving grounds for reasonable cause.

Petitioners also offered the sworn and notarized affidavit of David L. Ganz, a member of the firm representing petitioners. The Ganz affidavit, apart from detailing Mr. Ganz's extensive numismatic credentials, states only that Mr. Ganz's knowledge of the coin industry leads him to believe that all of petitioners' claimed out-of-state sales were out-of-state sales although he does not allege that he has any direct knowledge of petitioners' sales. These documents have become a portion of the overall record (20 NYCRR 3000.13[a][3]) to which our review is restricted[1](20 NYCRR 3000.11[e][1]).

Like the Administrative Law Judge, we conclude that petitioners' submitted statements lack sufficient credibility or relevance and that petitioners have failed to support the finding of any facts necessary to their position.

The Hollinger statement contains no additional documentation supporting the grounds for reasonable cause detailed therein, is signed by an individual who, though an attorney, neither affirms nor swears to the truthfulness of her statements, and provides no discussion as to how Ms.

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[1]Petitioners allude to a lawsuit commenced but settled (Capitol Coin v. House of Ronnie, Supreme Court, New York County, Index #3271/84) as evidence of water damage to their books and records from what they refer to as a "flood" which allegedly occurred while petitioner Capitol Coin Company, Inc. was located on Broadway in New York City. Having failed to submit a copy of the alleged settlement and/or any judicial record concerning this case for its incorporation into the record, we cannot extend our scope of review to either verify its existence or its merit herein.

Hollinger personally acquired the information she recites. We find that these factors seriously impair the document's weight. Petitioners' attempt to posture their documents as credible because they were "uncontroverted" by the Division is without merit because petitioners offered their proof by way of written statements, depriving the Division of any means to cross-examine the witnesses.

In addition, we note on the merits, that the Hollinger statement does not assert that petitioners ever maintained the complete records of sales required by section 1135(a) of the Tax Law and that it was these otherwise complete records that were destroyed in the flood or lost in the moves. Further, we do not find the possible loss of records in a number of physical moves of the business an indication of reasonable cause, since a move is not necessarily an unpredictable, uncontrollable event. Finally, without more, the illness of the bookkeeper does not establish reasonable cause. For example, petitioners did not offer the necessary explanation as to why no assistant or replacement for the ailing bookkeeper was hired during the three years of the audit period.

We next address petitioners' claim that the imposition of penalties herein is improper because the vast majority of the corporation's sales were allegedly to destinations outside of New York so that sales tax would rarely be due on their retail sales (20 NYCRR 525.2[a][3]). This claim lacks merit.

The Ganz affadavit submitted in support of this claim misses the mark. The assertion that petitioners mainly sold their goods to out-of-state destinations addresses the propriety of the tax portion of the assessment, a moot issue following petitioners' settlement with the Division.

As we have found no facts upon which reasonable cause may in any way be established herein, we conclude that petitioners have failed to satisfy their burden of proof (Tax Law §1132[c], 20 NYCRR 3000.10[d][4]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioners Capitol Coin Company, Inc. and Ira Friedberg and Arthur Friedberg, as officers, is denied;

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

3. The petitions of Capitol Coin Company, Inc. and Ira Friedberg and Arthur Friedberg, as officers, are denied; and

4. The notices of determination and demand for payment of sales and use taxes, penalties and interest issued on September 20, 1984 and December 20, 1984, as adjusted in accordance with Finding of Fact "4" of the determination of the Administrative Law Judge, are sustained.

DATED: Troy, New York
June 8, 1989

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

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