STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DOUGHERTY TOWING CO.	:	DECISION
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, 1981 through February 28, 1985.	:	

Petitioner, Dougherty Towing Co., 131-53 Sanford Avenue, Flushing, New York 11355, filed an exception to the determination of the Administrative Law Judge issued on November 16, 1989 with respect to its 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, 1981 through February 28, 1985 (File Nos. 802074 and 802279). Petitioner appeared by Isaac Sternheim & Co. (Isaac Sternheim, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Michael Infantino, Esq., of counsel).

Petitioner did not file a brief on exception. The Division submitted a letter in lieu of a brief. Oral argument was not requested.

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

ISSUE

Whether petitioner has stated reasonable cause to justify the remittance of Tax Law § 1145(a)(1)(i) penalty and excess interest.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below except that we modify finding of fact "1" as indicated below.

Finding of fact "1" of the Administrative Law Judge's determination is modified to read as follows:

> Petitioner, Dougherty Towing Co., is in the business of towing and repairing automobiles. It employs nine men in its body shop. Petitioner's records were in good order. Its books were kept by a bookkeeper although its returns were prepared by a certified public accountant. It reported sales tax of $163,954.00 for the audit period. There is no allegation on the Division of Taxation's part that petitioner had any intent to defraud the State.[1]

A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued on March 19, 1985 to petitioner for sales and use taxes due for the period December 1, 1981 through February 28, 1982 in the amount of $12,778.10, plus interest of $5,507.75 and penalty under Tax Law § 1145(a)(1)(i) of $3,194.53 for a total amount due of $21,480.38.

Another notice was issued on June 14, 1985 for the period March 1, 1982 through February 28, 1985 in the amount of $204,404.83, plus interest of $42,414.55 and penalty under Tax Law § 1145(a)(1)(i) of $39,066.04, for a total amount due of $285,885.42.

These determinations were based upon the denial of petitioner's claims that certain of its sales were exempt from tax.

The penalty was recommended by the auditor because of the large deficiency and because of a failure to present requested information. The information requested appears from the auditor's file to have consisted of tax exemption certificates and invoices.

It has been stipulated that the determinations are due and owing in the reduced amount of $170,259.14, plus statutory interest and a penalty to be determined in this proceeding. The reduction in tax due was made because of the allowance as exempt of certain sales made to automobile rental companies and automobile dealers, even though no resale or exemption certificates were produced, and because of the invalidity of the determination for the quarter ending February 28, 1985 because of the Division's failure to request records for that quarter.

---

[1]We modified the Administrative Law Judge's finding of fact "1" to add the word "tax" to the fifth sentence in the paragraph. We made this change so that the fact reflected the audit report (Exhibit G) rather than the unsworn statements of the Division's attorney (Tr. p. 31).

The penalty here in dispute was computed under Tax Law § 1145(a) as it existed prior to amendment in 1985 at 5% for the first month of delay and 1% a month thereafter with a maximum of 25%.

The interest in issue was computed at a rate set by the Tax Commission under Tax Law § 1142. This was at the rate of 14% per annum for the quarter ending February 28, 1982 and 13.5% per annum for the next four quarters. The rate was computed under Tax Law § 1145 at 12% for all remaining quarters (during which the rate set by the Tax Commission was 9.1% for four quarters and then 10% for the final four quarters) (see 20 NYCRR 536.1[a]; 603.2[a]).

OPINION

In the determination below the Administrative Law Judge held that petitioner failed to show reasonable cause for failure to pay the proper sales tax so as to justify the remission under Tax Law § 1145(a)(1)(i) of penalty and excess interest. The Administrative Law Judge stated that it was impossible to believe that petitioner was ignorant of the legal duty to obtain and retain exemption certificates. Further, the Administrative Law Judge opined that petitioner should have asked its accountant or the accountant should have advised petitioner as to the requirements for exemptions.

On exception, petitioner argues that the penalty should not be imposed because it was unaware that its procedures were incorrect and it made every attempt to keep a proper set of books and prepare and file all tax returns. To support this, the petitioner points to the fact that it hired an accountant who prepared its returns and advised it that insurance repairs were exempt.

The Division contends that the facts as found by the Administrative Law Judge do not substantiate petitioner's allegation of reasonable reliance upon its accountant, and even so, such reliance is not "reasonable cause" under the law to support a remission of the penalty.

We affirm the decision of the Administrative Law Judge.

Former Tax Law § 1145(a)(1)(i) provided that a penalty could be imposed on any person failing to file a return or to pay over any tax within the time required.

Former Tax Law § 1145(a)(1)(iii) provided that penalties could be abated if the failure to pay was "due to reasonable cause and not due to willful neglect". The regulations (former 20 NYCRR 536.5[b]) list possible reasonable causes such as death, destruction of the business, inability to obtain information, and pending proceedings with the Division of Taxation. Former 20 NYCRR 536(b)(6) states:

> "Any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance will be taken into account. Ignorance of the law, however, will not be considered reasonable cause." (Emphasis added.)

We find that petitioner has not established reasonable cause for the remittance of the § 1145(a)(1)(i) penalties assessed.

Petitioner argues that despite its business experience it was unaware of the proper procedures as to exemption certificates. Whether or not this statement is accurate, as seen above, ignorance of the law does not constitute reasonable cause. Petitioner's argument that it relied upon the advice of its accountant in regard to the proper taxable status of insurance repairs is also not convincing.

Reliance upon a tax advisor is not necessarily grounds for a finding of reasonable cause (see, Matter of LT & B Realty v. State Tax Commn., 141 AD2d 185, 535 NYS2d 121; Matter of BAP Appliance Corp., Tax Appeals Tribunal, June 22, 1989; Matter of Turnpike Tobacco, Division of Valley Stream Distributors Co., Tax Appeals Tribunal, August 4, 1988). In LT & B Realty, the court expressly rejected a per se rule that reliance upon the advice of a tax professional constitutes a reasonable cause stating:

> "to permit consulting with a tax professional to act as immunity to penalties would effectively remove the penalty provisions" (Matter of LT & B Realty v. State Tax Commn., supra, 535 NYS2d 121, 123).

Even if we were to accept petitioner's assertions that its failure to pay was in good faith and at the advice of a tax professional, such has been held insufficient to warrant the setting aside of penalties (see, Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557, 561).

In any event, the petitioner has failed to show that it sought or received advice from its accountant as to whether the sales in issue were taxable or nontaxable or what documents were necessary to verify the exempt sales. The record shows that the accountant simply prepared the petitioner's returns and audited its books based upon the bottom line taxable sales figures that were provided him by the petitioner's bookkeeper.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Dougherty Towing Co. is denied;

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

3. The petition of Dougherty Towing Co. is denied; and

4. The notices of determination and demand for payment of sales and use taxes due issued March 19, 1985 and June 14, 1985 as reduced by the stipulation of the parties are sustained.

DATED: Troy, New York
April 12, 1990

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner