STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions :

of :

BAP APPLIANCE CORP. : DECISION
AND RUTH EPSTEIN, AS OFFICER
:

for Revision of Determinations or for Refunds
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1981
through November 30, 1984. :

Petitioners, BAP Appliance Corp. and Ruth Epstein, as officer, 972 South End, Woodmere, New York 11598 filed an exception to the determination of the Administrative Law Judge issued on October 20, 1988 with respect to their petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1981 through November 30, 1984 (File Nos. 802404 and 802405). Petitioners appeared by Mario A. Procaccino, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael Glannon, Esq., of counsel).

Only the Division filed a brief on exception. Oral argument was not requested.

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

ISSUE

Whether petitioners have shown reasonable cause and are thus entitled to remission of penalties and statutory interest imposed for failure to pay over the proper amount of sales and use taxes due.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are repeated below except that we modify findings of fact "5(a) and (b)" as noted below.

Petitioner BAP Appliance Corp. ("the corporation") was formed on June 1, 1968, and for approximately 20 years operated a furniture and household appliance store. During the period at issue, the store was located at 1735 Pitkin Avenue, Brooklyn, New York. The corporation terminated the business on February 29, 1988.

Petitioner Ruth Epstein was president and sole shareholder of the corporation. She was not involved in the business on a day-to-day basis, however, and visited the store only infrequently. The corporation's Federalincome tax returns show that Mrs. Epstein received salary income of $2,500.00 in the fiscal year ending March 31, 1982, $6,475.00 in the fiscal year ending March 31, 1983 and $7,800.00 in the fiscal year ending March 31, 1984.

The business was managed by Ruth Epstein's husband, Bert Epstein, who was assisted by the Epsteins' son-in-law, Richard Smoke. The business usually had three other employees during the audit period.

A Federal/State computer tape match showed that for the fiscal year ending March 31, 1983 the corporation reported gross sales of $289,437.00 on its Federal income tax return, but reported only $62,962.00 in taxable sales on its sales tax returns. (The sales tax returns did not show any gross sales figures.) This discrepancy indicated a percentage of error of 359.70 percent.

A field audit of the corporation's books and records was conducted with the following results. Findings of fact "5(a) and (b)" are modified to read as follows:

> (a) The corporation's business records were found to be in fair condition. Petitioners timely filed sales tax returns for the audit period and remitted sales tax with those returns. The audit report indicates that petitioners had no prior audit history and that all books and records requested were provided.
>
> (b) Gross sales reported on the corporation's Federal income tax returns and shown on its books for the audit period were $909,702.00 while taxable sales per sales tax returns were $196,560.00, a difference of $713,142.00 in additional taxable sales. The difference was due to layaway sales, which the corporation contended upon audit were nontaxable. In a layaway sale the purchaser made a deposit or a series of deposits but did not

> take possession of the merchandise. The merchandise was not transferred to the customer until the total purchase price was paid.[1]

(c) Sales tax was found to have been paid on all fixed assets. Expense items were found to be negligible and there were no areas of noncompliance.

(d) Tax due of $58,854.21 was calculated on the $713,142.00 in additional taxable sales. Imposition of penalty and statutory interest was recommended by the auditor.

The corporation executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1981 through November 30, 1984 to December 19, 1985.

On April 11, 1985, the Division of Taxation issued identical notices of determination and demands for payment of sales and use taxes due to the corporation and to petitioner Ruth Epstein, as officer, for the period December 1, 1981 through November 30, 1984. The amounts assessed were as follows: tax due $58,854.18, penalty $11,778.48 and interest $13,187.03, for a total of $83,819.69.

The Division claimed upon audit that all layaway sales were taxable. It later conceded that uncompleted layaway sales were not taxable, but claimed that petitioners owed tax on all layaway sales which could not be substantiated as unfulfilled.

The business was located in an economically-depressed area and much of its sales volume was due to layaway sales.

---

[1]The original findings of fact were as follows:

"(a) The corporation's business records were found to be in fair condition.

"(b) Gross sales reported on the corporation's Federal income tax returns and shown on its books for the audit period were $909,702.00 while taxable sales per sales tax returns were $196,560.00, a difference of $713,142.00 in additional taxable sales. The difference was due to layaway sales, which the corporation contended upon audit were nontaxable."

Petitioners and the Division ultimately stipulated to petitioners' liability in the reduced amount of $51,725.00 in tax. The only issue remaining is whether petitioners are liable for penalty and statutory interest above the minimum.

The entries in the corporation's books were made by Bert Epstein. He would make daily entries of monies received and at the end of each week would post entries of delivered merchandise into the sales tax book. Each entry consisted of an order number, a gross amount, a taxable amount and the tax.

It was Mr. Epstein's understanding, based on the advice of the accountants retained by the corporation, that layaway sales were not subject to sales tax.

An accountant from the accounting firm retained by the corporation would come to the store once a month. The accountant would go over all books and reconcile the checkbook with the bank statement. At the end of each quarter, the accountant would prepare a sales tax return based on the sales tax book kept by Mr. Epstein.

OPINION

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

Former Tax Law section 1145(a)(1)(ii) provided that penalties could be abated if the failure to pay tax was due to reasonable cause.

The Administrative Law Judge determined that it was irrelevant whether the corporation incorrectly interpreted its accountant's advice as to layaway sales or whether it was incorrectly advised. The Administrative Law Judge sustained the imposition of the penalty on the grounds that it was not reasonable for the corporation's management to assume that layaway sales were never taxable, particularly where layaways constituted such a substantial portion of its business.

Petitioners, in their exception, assert that reasonable cause exists for not imposing the penalty (1) because the Division itself ". . . was not clear as to the taxable posture of (layaway)

sales, indicative that at best this was a gray area" and (2) the petitioners heeded the advice of their accountant concerning the taxability of the sales which petitioners assert "turned out to be correct."

The Division asserts that the penalty is based on the failure of the petitioners to maintain proper records from which the Division could determine the taxable status of the layaway sales in question.

We reverse the determination of the Administrative Law Judge.

Whether penalty should be imposed in this case is related to the underreporting of sales tax by the petitioners and whether such underreporting was due to reasonable cause and not willful neglect. The position argued by the Division, i.e., inadequate books and records, is necessarily related to the issue, but in and of itself is not the basis for imposition of the penalty under the statute and regulations.

A brief review of the statutory and regulatory provisions concerning the nature of the sales tax and record keeping requirements imposed on persons required to collect the tax will help frame the specific issues with which we deal on this exception.

The sales tax is a transaction tax; liability for the tax occurs when the transaction takes place. Generally, the taxed transaction consists of the transfer of title or possession of property or the rendition of services in exchange for consideration, and the vendor collects the tax from the customer when the transaction occurs. The time or method of payment is immaterial since the tax becomes due at the time of the transfer of property or rendition of services (see generally, 20 NYCRR 525.2).

The Tax Law provides that for the purpose of proper administration of the sales tax and to prevent evasion of the sales tax it shall be presumed that all receipts from every retail sale of tangible personal property shall be subject to tax (Tax Law § 1132[c]). The law imposes on persons required to collect the tax certain record keeping requirements which include a true copy of the sales slip, invoice, receipt, contract statement or other memorandum of sale. Where no

written document is given the customer, the seller is required to keep a daily record of all cash and credit sales in a day book or similar book. The records must provide sufficient detail to independently determine the taxable status of each sale. The amount of tax due and collected may be substantiated by analysis of the particular record or supporting records (Tax Law § 1135, 20 NYCRR 533.2).

The deficiency asserted by the Division was due solely to layaway sales.[2]

Neither the Tax Law nor the regulations of the Division contain a definition of layaway sale nor do they contain specific provisions dealing with layaway sales. We believe this is relevant to the analysis of the reasonableness of petitioners' reliance on the advice of their accountant and the record keeping responsibilities of the petitioners under the Tax Law and the Division's regulations.

We deal first with petitioners' reliance on the advice of their accountant that layaway sales were not taxable. We agree with the Administrative Law Judge that reliance on the advice of a tax advisor is not necessarily grounds for a finding of reasonable cause (see, Auerbach v. State Tax Commn., App. Div., 3d Dept, December 29, 1988, Kane, J., 536 NYS2d 557). However, the Division conceded that the deficiency was due solely to layaway sales. While we are not privy to the precise manner in which petitioners' accountant phrased his advice, it would appear that the advice was not incorrect. Further, petitioners' reliance upon this advice does not appear unreasonable given the change in the Division's position concerning the taxable status of layaway sales during the audit, i.e., from

[2]The audit report submitted by the Division as Exhibit H states in part: "The basis of the deficiency is the difference for audit period between gross sales reported on F.I.T.s and books of $909,702.00 and taxable sales per ST-100's of $196,560.00 or $713,140.00. This difference are (sic) layaway sales, which taxpayer believes are nontaxable."

a position that all layaway sales were taxable to a position that only those layaway sales which could not be substantiated as unfulfilled were taxable.[3]

We deal next with the Division's assertion on exception concerning the inadequacy of petitioners' books and records.

The standard imposed by the Division in this case was to require the petitioner to prove that a sale did not occur thus rendering the money received in the layaway transactions not receipts and not subject to sales tax. The record before us does not indicate the criteria set forth by the Division with respect to such substantiation nor the deficiency in petitioners' records. Nor does the Division deal with this issue on exception. On the contrary, it is conceded by all parties that a substantial volume of the petitioners' business involved layaway sales.

The Administrative Law Judge determined that Mr. Epstein made daily entries of monies received at the end of each week and would post entries of delivered merchandise into the sales tax book. Each entry consisted of an order number, a gross amount, a taxable amount and the tax. Further, it was found that the petitioners' records were in fair condition and that petitioners timely filed sales tax returns for the audit period and remitted sales tax with those returns. The audit report indicates that petitioner had no prior audit history and that all books and records requested were provided. Under these circumstances, we find no basis for the Division's assertion on exception that petitioners failed to keep adequate books and records.

The regulations of the Division applicable to the period at issue state, in part, that reasonable cause for the abatement of penalty may include:

---

[3]In fact, a sale as defined under the Tax Law does not occur in a layaway situation until the purchase price for the merchandise is fully paid to the vendor and the merchandise is transferred to the purchaser. In the interim, the vendor collects money on account which money is not to be a receipt within section 1105(d)(i) of the Tax Law (see, e.g., Post Road Caterers, Inc., State Tax Commission, November 17, 1980, where the former State Tax Commission determined that "customer's deposits" for a future event that was either postponed or cancelled did not constitute a receipt within the meaning and intent of section 1105[d][i] of the Tax Law and therefore the petitioner in that case was not liable for tax on such deposits. Also, Advisory Opinion TSB-A-86[13]S which, citing Post Road, concluded that amounts representing customer deposits for merchandise ordered need not have been reported on petitioner's sales tax return because they did not constitute "receipts" pursuant to the Tax Law and regulations).

> ". . . 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."

Under the circumstances herein, in particular the Division's uncertainty with respect to the proper taxable status of layaway sales and the absence of specific treatment of such sales in the Division's regulations, we conclude that penalty should not be imposed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Bap Appliance Corp. and Ruth Epstein, as Officer is granted;

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

3. The petitions of Bap Appliance Corp. and Ruth Epstein, as Officer are granted to the extent that penalties and interest above the minimum are cancelled, but are otherwise denied; and

4. The Division of Taxation is directed to modify the notices of determination accordingly, but the notices, as reduced by the parties' stipulation (finding of fact "10" of the Administrative Law Judge's determination) are otherwise sustained.

DATED: Troy, New York
June 29, 1989

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

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