

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

**ANNA PLAVCAN,
AS OFFICER OF LIMA FLORISTS, INC.**

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 September 1, 1982 through
August 31, 1985.

In the Matter of the Petition

of

**STEPHAN PLAVCAN,
AS OFFICER OF LIMA FLORISTS, INC.**

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 September 1, 1982 through
August 31, 1985.

In the Matter of the Petition

of

LIMA FLORISTS, INC.

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 September 1, 1982 through
August 31, 1985.

DECISION
DTA NO. 803109,
803110, & 803111

Petitioners, Anna Plavcan, Stephan Plavcan and Lima Florists, Inc., 2019 Lake Avenue, Lima, New York 14485, filed exceptions to the determination of the Administrative Law Judge issued on February 11, 1988 with respect to their petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1982 through August 31, 1985 (File Nos. 803109, 803110, 803111). Petitioners appeared by Kenneth D. Licht, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioners did not file a brief on exception. The Division filed a letter brief in opposition to the exception.

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

ISSUE

Whether reasonable cause was present such that the penalties and interest in excess of the statutory minimum, which were imposed against the corporation and its two officers, should be waived.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. These facts may be summarized as follows.

On December 19, 1985 the Division of Taxation, on the basis of a field audit, issued two notices of determination and demand for payment of sales and use taxes due to petitioner Lima Florists, Inc. ("Lima Florists") which in the aggregate assessed a deficiency of sales and use taxes for the period September 1, 1982 through August 31, 1985 in the amount of \$30,084.53

plus penalty of \$5,726.43 and interest of \$6,037.40 for a total amount due of \$41,848.36. On the same day, the Division issued notices assessing the same amount of tax, penalty and interest against Stephan Plavcan and Anna J. Plavcan as officers of Lima Florists.

In the course of the field audit, the Division found that Lima Florists did not have any journal showing gross sales, taxable sales or exempt sales during the audit period. The Division also found that while Lima Florists had sales invoices and exemption certificates, the exemption certificates could not be traced to the sales invoices. Furthermore, the sales invoices could not be traced to the sales tax returns.

The amount of sales and use taxes found due on audit was based on additional gross sales found on the corporation's Federal income tax returns compared to the sales reported on its sales tax returns for a portion of the audit period, and on a comparison of bank deposits with the gross sales reported on Lima Florists' sales and use tax returns for the remainder of the period. Gross sales reported were increased by the amount of these discrepancies to determine total audited gross sales. Since Lima Florists could not substantiate nontaxable sales, all sales were presumed taxable. The additional taxable sales were determined by subtracting the reported taxable sales from the audited gross sales for the audit period. The amount of additional taxable sales of \$429,779.00 resulted in the additional tax due of \$30,084.53.

On the basis of documentation submitted at a prehearing conference, the amount of tax asserted due was reduced to \$10,978.41 plus penalty and interest. After the conference, each petitioner agreed to the amount of tax. Consequently, only penalty and interest in excess of the statutory minimum remain in issue.

Lima Florists had eleven greenhouses and a flower shop. Depending upon the season, it had from 3 to 10 employees. Mr. Plavcan was the president of Lima Florists and was primarily responsible for the care of the firm's greenhouses. Mrs. Plavcan was primarily responsible for the flower shop.

Lima Florists' sales and use tax returns were prepared by an accountant. The total sales were determined from deposits shown on the bank statements plus checks received from customers which were not deposited in the business bank account.

OPINION

Pursuant to Tax Law section 1145(a)(1)(i), the Administrative Law Judge sustained the imposition of penalty for failure to file a return or to pay or to pay over any tax under Article 28 in a timely manner. On exception, petitioners contend that the evidence presented establishes that petitioners' failure to comply with the Tax Law was due to reasonable cause and not due to willful neglect.

We affirm the determination of the Administrative Law Judge.

During the period in issue, Tax Law section 1145(a)(1)(ii) provided:

'If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it 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 rate set by the tax commission pursuant to section eleven hundred forty-two. The tax commission shall promulgate rules and regulations as to what constitutes reasonable cause.'¹

During the same period, 20 NYCRR former 536.1(b) provided:

¹ See, present Tax Law § 1145(a)(1)(iii) (added, L 1985).

“Reasonable cause. In determining whether reasonable cause exists for waiving interest or penalties, the taxpayer's previous compliance record may be taken into account. Reasonable cause must be affirmatively shown by the taxpayer in a written statement. Grounds for reasonable cause, where clearly established, may include the following:

(1) death or serious illness of the taxpayer, a responsible officer or employee of the taxpayer, or his unavoidable absence from his usual place of business;

(2) destruction of the taxpayer's place of business or business records by fire or other casualty;

(3) timely prepared returns misplaced by the taxpayer or a responsible employee of the taxpayer and discovered after the due date;

(4) inability to obtain and assemble essential information required for the preparation of a complete return despite reasonable efforts;

(5) pending petition to the Tax Commission or formal hearing proceedings involving a question or issue involving the computation of tax for the year, quarter, month or other period of delinquency; or

(6) 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.”²

The facts before us do not constitute reasonable cause such that the penalties and interest in excess of the statutory minimum should be waived. The facts reveal that petitioners did not take the time to organize a method for keeping records that would accurately reflect the tax due because of other concerns. Petitioners, with knowledge of the obligation to keep records in a manner such that taxable and nontaxable sales could be properly distinguished, clearly failed to do so. Additionally, 20 NYCRR former 536.1(b)(4) does not apply to petitioners. Petitioners' efforts to prepare and complete a return were not reasonable such that abatement of the penalty

² See, present 20 NYCRR 536.5(c) (filed September 3, 1985)

and interest at issue should be waived. Cancellation of the penalty contemplates a situation that is beyond the control of the petitioner due to no fault of his own (see, F & W Oldsmobile, Inc. v. State Tax Commn., 106 AD2d 792; In Re Matter of Old Country Toyota Corp., State Tax Commn., TSB-H-86[157]S). Here petitioners' casual disregard of the Tax Law was the controlling factor.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of the petitioners, Anna Plavcan, as Officer of Lima Florists, Inc., Stephan Plavcan, as Officer of Lima Florists, Inc. and Lima Florists, Inc., are denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petitions of Anna Plavcan, as Officer of Lima Florists, Inc., Stephan Plavcan, as Officer of Lima Florists, Inc. and Lima Florists, Inc. are denied and the notices of determination, as modified by finding of fact "4" of the Administrative Law Judge's determination are sustained.

Dated: Albany, New York
December 15, 1988

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner