

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
TURNPIKE TOBACCO, :
DIVISION OF VALLEY STREAM DISTRIBUTORS CO., INC. : 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 March 1, 1983 :
through June 26, 1986. :

Petitioner, Turnpike Tobacco, Division of Valley Stream Distributors Co., Inc., 171 East Industry Court, Deer Park, New York 11729, filed an exception to the determination of the Administrative Law Judge issued on December 17, 1987 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 March 1, 1983 through June 26, 1986 (File No. 804090). Petitioner appeared by Holtz Rubenstein & Co. (Alan E. Weiner). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Neither of the parties requested oral argument on this exception and neither of the parties filed a brief.

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

ISSUE

Whether reasonable cause exists for abatement of the penalties asserted under Tax Law section 1145(a)(1)(i),(vi).

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 are summarized below.

As the result of an audit conducted by the Suffolk District Office, the Division of Taxation issued two notices of determination and demand for payment of sales and use taxes due against Turnpike Tobacco, a Division of Valley Stream Distributors Co., Inc. (hereinafter "petitioner"), on August 5, 1986, wherein the following assessments were made:

- "a) For the period March 1, 1983 through June 26, 1986, total tax due of \$123,576.30 plus penalty of \$26,944.24 and interest of \$28,858.20, for a total amount due of \$179,378.74.
- b) For the period June 1, 1985 through February 28, 1986, additional penalty of \$3,235.50 which was explained as follows: 'Effective 9/1/85, a penalty equal to 10% of the additional tax due has been imposed as authorized by Section 1145(a)(1)(vi) of the tax law. This is in addition to Section 1145(a)(1)(i) penalties.'

On January 15, 1986, Louis Zucker, as president of petitioner, executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law. Said consent extended the time within which taxes for the period December 1, 1982 through May 31, 1983 could be determined to anytime on or before June 20, 1986.

On June 4, 1986, David Schneidman, as secretary of petitioner, executed a consent which extended the time within which the aforesaid taxes for the period March 1, 1983 through August 31, 1983 could be determined to anytime on or before August 20, 1986.

Petitioner operated two stationery stores, one in Nassau County and one in Suffolk County.

On August 8, 1986 petitioner submitted a check for \$152,434.50. Said amount was in payment of the tax assessment of \$123,576.30 and interest of \$28,858.20. The sole remaining issue herein is whether the penalties asserted may be abated due to reasonable cause. The total of the penalties asserted is \$30,179.74 (\$26,944.24 plus \$3,235.50).

During the period at issue, Turnpike Tobacco ("Turnpike") was a retail operation of Valley Stream Distributors Co., Inc. ("Valley").

The sales tax, which was assessed and paid, related to two Turnpike stores. One was located in the Nassau Mall, the other in the Sunvet Mall.

Mr. Lou Zucker, a minority shareholder of Valley, operated and controlled the two stores until his retirement in early 1986.

During the period at issue, Valley, in its principal business, had sales of approximately \$100 million per year. Its division, Turnpike, had sales of approximately \$1 million per year.

The accounting firm which represented Valley did not assign an accountant to prepare or review Turnpike's sales tax returns. The firm assigned a paraprofessional to Turnpike who merely worked from sales summary sheets. The paraprofessional did not make, or have the professional background or competence to make, an in-depth review of the manner in which sales were recorded at the Turnpike stores.

The sole principals of Valley, Mr. Stanley Sedlitz and Mr. David Schneidman, reviewed only the summary sheets showing that Turnpike did collect sales taxes. Considering the sales volume of Valley as compared to Turnpike, they felt that it was reasonable to devote their energy and attention to Valley and to rely on Mr. Zucker to properly operate Turnpike.

Mr. Zucker personally visited each of the Turnpike stores approximately once or twice each year, usually at a time when inventory was being taken.

Each of the Turnpike stores employed a manager to oversee the operation of each store. The managers were paid at the rate of \$5.25 per hour during the periods at issue.

Sales were rung up on Turnpike's registers in accordance with a handwritten sheet of paper taped onto the register at each location. These sheets of paper were made up by one of the store managers and were believed to convey an accurate account of how the sales were to be rung up.

OPINION

In the case at bar, the petitioner waived his right for a hearing. As a result, the Administrative Law Judge was limited in his review to the documents submitted to him. In his determination the Administrative Law Judge concluded that reasonable cause did not exist to abate the penalties pursuant to section 1145(a)(1)(i) and (vi) of the Tax Law. The petitioner has taken

exception to this conclusion, but has not excepted to any of the Administrative Law Judge's findings of fact. We affirm the determination of the Administrative Law Judge in its entirety.

According to section 1145(a)(1)(i):

"Any person failing to file a return or to pay or pay over any tax to the tax commission within the time required by or pursuant to this article (determined with regard to any extension of time for filing or paying) shall be subject to a penalty of ten percent of the amount of tax due if such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding thirty percent in the aggregate."

This penalty may be abated, pursuant to section 1145(a)(1)(iii) of the Tax Law, if the taxpayer establishes that the failure or delay was due to reasonable cause.

Section 1145(a)(1)(vi) imposes an additional penalty. Pursuant to this section:

"Any person required by this article to file a return, who omits from the total amount of state and local sales and compensating use taxes required to be shown on a return an amount which is in excess of twenty-five percent of the amount of such taxes required to be shown on the return shall be subject to a penalty equal to ten percent of the amount of such omission. . . . If the tax commission determines that such omission was due to reasonable cause and not due to willful neglect, it shall remit all of such penalty. The penalty provided for in this subparagraph shall not apply to any return of estimated tax required to be filed under section eleven hundred thirty-seven-A."

The petitioner contends that reasonable cause should be found because the corporation relied upon a competent accounting firm, had a spotless history of filing past returns, made an innocent error and remitted the past-due taxes and interest immediately upon discovery of the error.

We agree with the conclusion of the Administrative Law Judge that none of these factors establish reasonable cause on the facts presented here. Instead, the instant facts indicate that the underreporting of sales tax arose because inadequate attention was paid by petitioner to the collection of tax by its cashiers and the reporting of tax by its accounting firm. While petitioner's underreporting may not have been intentional, petitioner has not established that its failure to

adequately supervise the collecting and reporting of tax would appear to a person of ordinary prudence and intelligence as reasonable cause (20 NYCRR 536.5[c][5] and former 20 NYCRR 535.5[b][6]).

The instant facts are distinguished from those in In the Matter of the Petition of Bowen's Arco (TSB-H-85[217]S) relied upon by the petitioner. In Bowen, the State Tax Commission found reasonable cause because the tax was paid promptly upon discovery and also because the taxpayer was of very limited knowledge and needed to rely on his accountant. The taxpayer in Bowen had given its accountant all of the information necessary to calculate the tax. In the present case, the additional tax was paid promptly but there is no evidence that the corporation was unsophisticated in tax matters or otherwise lacked the resources to avoid the errors made. Further, it is not clear that petitioner gave all of the necessary information to its accounting firm.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of the petitioner is denied and the two notices of determination and demand for payment of sales and use tax due issued on August 5, 1986 are sustained with respect to the penalties at issue herein.

Dated: Albany, New York
August 4, 1988

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

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