STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **THOUSAND ISLAND CLUB, 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, 1985 through November 30, 1985.	:	DECISION DTA NO. 804091

Petitioner, Thousand Island Club, Inc. , 551 East Genesee Street, Fayetteville, New York 13066 ("Club") filed an exception to the determination of the Administrative Law Judge issued on May 5, 1988 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 September 1, 1985 through November 30, 1985 (File No. 804091). The petitioner appeared by its treasurer, Robert D. Hall, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Neither party submitted a brief on exception. The Division submitted a letter in lieu of a formal brief. Neither party requested oral argument.

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

ISSUE

Whether the penalties and interest in excess of the minimum, which were imposed against petitioner, should be waived.

FINDINGS OF FACT

Except as noted, we find the facts as stated in the determination of the Administrative Law Judge and such facts are incorporated herein by reference. To summarize these facts, on January 17, 1986, petitioner, Thousand Island Club., Inc., filed a New York State and Local Sales and Use Tax Return for the period September 1, 1985 through November 30, 1985. The return reported sales and use taxes due of $15,315.79, plus a late filing charge of $153.15, for an amount due of $15,468.94. In conjunction with its return, petitioner remitted a check payable to "New York State Sales Tax" for the amount shown due on its return.

On May 5, 1986, the Division of Taxation issued a Notice and Demand for Payment of Sales and Use Taxes Due for the period ending November 30, 1985. The notice calculated the amount due as follows:

Tax	Penalty	Interest	Amount Paid and/or Credited	Due
$15,315.79	$1,781.29	$279.57	$15,472.38	$1,904.27

The penalty was imposed for the late payment of sales and use taxes. We find in addition to the facts found by the Administrative Law Judge that the Division determined that these returns and payments should have been made monthly during this period but were not (Division's Exhibit B).

During the period in issue, petitioner operated a lodging facility on Wellesley Island which is located across from Alexandria Bay, New York. Petitioner also operated a golf course and small restaurant at the same location. It entertained guests from approximately May 15th to October 15th and was closed the remainder of the year.

During the years 1984 and 1985, the sales and use tax returns were signed either by Mr. Robert Hall, as the corporation's treasurer; Mr. Paul Davis, as the general manager; or Ms. Elaine Michel, as the bookkeeper. However, the bookkeeper was responsible for preparing the returns under the supervision of the treasurer.

During the period in issue, petitioner's treasurer was a certified public accountant who worked in Syracuse, New York. Petitioner's treasurer did not receive any compensation for his work as treasurer and only became involved with petitioner's books and records on a quarterly basis in order to prepare withholding tax reports and quarterly financial statements.

In October 1985 petitioner's manager unexpectedly decided to leave the business on short notice. Consequently, some of the accounting work was left to be completed by the part-time bookkeeper. At or about this time, petitioner's treasurer attempted to contact the bookkeeper by telephone to determine if she had taken any action with respect to the sales tax return for the period ending November 30, 1985. However, he was unable to contact her and was advised by another individual that she had gone out of town on a trip.

When petitioner's treasurer went to the business premises to perform year-end accounting procedures and prepare the financial statements, he realized that the sales tax return for the period ending November 30, 1985 had not been filed. At this time, he prepared and remitted the return and an accompanying check. He also prepared and submitted a Tax Amnesty Application.

When petitioner began its activity, it was in the practice of filing sales and use tax returns on a quarterly basis. For the year 1985, we also find from an assessment dated May 17, 1985, for the quarterly period December 1, 1984 through February 28, 1985, (Division's Exhibit J),

that the Division determined that petitioner should file on a monthly basis. We also find that this determination occurred at some time prior to the period at issue herein (Division's Exhibit H, "monthly return late").

Initially, petitioner disagreed with the position and attempted to resolve the matter with the Division. In the interim, petitioner continued to file on a quarterly basis. However, since monthly returns were either not filed or filed late, petitioner received assessments pertaining to the periods ending May 31, 1985 and August 31, 1985. Eventually, petitioner determined that it should file on a monthly basis and commenced doing so, even though it has at all times disagreed with the Division on this point.

We also find in addition to the facts found by the Administrative Law Judge that for the quarter ending August 31, 1985, petitioner's taxable receipts totaled $318,059 (Division's Exhibit I).

OPINION

The Administrative Law Judge held that: (1) petitioner did not establish that its failure to comply with the Tax Law was due to reasonable cause and not willful neglect, (2) petitioner did not show an "inability to obtain and assemble essential information" within the meaning of former 20 NYCRR 536.5(b)(4) (see, 20 NYCRR 536.5[c][3]), (3) petitioner was required to file monthly for the months it was not in operation, and (4) petitioner's Tax Amnesty Application did not apply to any penalties arising on or after January 1, 1985.

On exception, petitioner contends that: (1) the Administrative Law Judge misinterpreted the meaning of "reasonable cause," (2) it is entitled to a full abatement of the penalty under "Regulation E22.275," (3) the Division cannot demand a showing of reasonable cause by

petitioner before agreeing to cancel its penalties when the amount of penalties the Division assesses is "unreasonable," (4) the phrase "in any quarter of the preceding four quarters" (20 NYCRR 533.3[b]) does not apply when a business ceases all operation during any of these quarters, (5) it was overassessed on its penalty charge of $1,781.29 and interest charge of $279.57, and (6) equity should intervene to cancel its penalties since having to pay them will expedite the permanent closing of its business.

We affirm the determination of the Administrative Law Judge.

During the period in issue, Tax Law section 1145(a)(1)(iii) 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."

During the same period, 20 NYCRR former 536.5(b) provided:

> "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:
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> (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 taxpayeror 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."[1]

We first address petitioner's exception that the Administrative Law Judge misinterpreted the meaning of "reasonable cause as that phrase is used within the Tax Law section 1145(a)(1)(iii). Petitioner would have us include "good faith effort to comply with the Tax Law" as "reasonable cause." However, the cause of petitioner's late filing was the inadequate supervision provided by its treasurer over the bookkeeper who was responsible for preparing the returns. Petitioner's treasurer failed to adequately communicate with the bookkeeper, only to find after the returns were due that they had not yet been filed. Petitioner has not established that its failure to adequately supervise the preparation of these returns would appear to a person of ordinary prudence and intelligence as reasonable cause (former 20 NYCRR 536.5[b][6], see 20 NYCRR 536.5[c][5], see also, Matter of Turnpike Tobacco Division of Valley Stream Distributors Co., Inc., Tax Appeals Tribunal, August 4, 1988.)

Petitioner's next exception is that regulation "E22.275" entitles it to a full abatement of the penalty. First, no regulation "E22.275" exists. The only regulation which pertained to abatement of penalties during the period at issue was former 20 NYCRR 536.5(b) as already

[1] See, present 20 NYCRR 536.5(c) (filed September 30, 1987)

provided above (see, 20 NYCRR 536.5[c]). Of the enumerated grounds included within former 20 NYCRR 536.5(b), the record cannot support even a bare assertion pertaining to death or serious illness of the taxpayer, destruction of the taxpayer's place of business or a pending petition to the Tax Commission.[2]

Continuing with other possible grounds for a finding of reasonable cause, we note that when petitioner's treasurer went to the business premises to perform year-end accounting procedures he did not discover after the returns were due they had been prepared and misplaced, but only that the returns had not been prepared. Thus, former 20 NYCRR 536.5(b)(3) is inapplicable. Neither does the distance between the place of business for petitioner's treasurer and the Club or the failed attempt to contact the bookkeeper constitute an "inability to obtain and assemble essential information" (former 20 NYCRR 536.5[b][4], see, 20 NYCRR 536.5[c][3]).

Petitioner is then left with "any other cause for delinquency" (former 20 NYCRR 536.5[b][6], see, 20 NYCRR 536.5[c][5]) as its last basis to avoid the penalty. Into this category fall the manager's unexpected decision to leave the Club on short notice and the opinion of petitioners treasurer that petitioner did not have to file monthly returns for the period at issue.

First, the record is absent of any indication as to how the departure of petitioner's manager in October of 1985 was related to the late filing of any sales tax return. Second, to qualify for quarterly filing, petitioner had a burden to show that for each of the four quarters prior to

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[2] Effective September 1, 1987, the Tax Commission was replaced by the Tax Appeals Tribunal (20 NYCRR 3000.0 - 3000.16 as repealing former 20 NYCRR 601.0 - 601.13)

September 1, 1985, its taxable receipts for each period totaled less than $300,000 (Tax Law § 1136[a]). Not only did petitioner fail to meet this burden, but the record clearly indicates that for the quarter preceding the period in dispute, petitioner's taxable receipts totalled $318,059 to make it a monthly filer thereafter, at least until the period beginning September 1, 1986. Additionally, petitioner's contention that it was erroneously placed on a monthly filing schedule prior to the period just discussed, a factor which apparently contributed to its not filing monthly during the period at issue, was in ignorance of the law and does not therefore constitute "reasonable cause" (former 20 NYCRR 536.5[b][6], see, 20 NYCRR 536.5[c][5]).

We turn next to petitioner's argument that the Division should cancel petitioner's penalties and interest charges, because these charges, as applied to its case, are unreasonably severe. Initially we note that the rate of interest and penalty is set by statute (Tax Law § 1145[a][1]). Section 1145(a)(1)(iii) authorizes the Division to determine whether the taxpayer's failure to properly file a return or pay over any tax due was due to reasonable cause and not due to willful neglect and directs it to draft rules and regulations specifying what constitutes reasonable cause. Having already examined the applicable regulation, petitioner's position is unsupported by any law or regulation which would require the cancellation of its penalty and reduction of the interest charges.

We next turn to the computation of petitioner's penalty and interest charges. Tax Law section 1145(a)(1)(i) authorizes 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."

In insisting that it only had to file quarterly so that its first, and only payment due, for the period in issue was December 20, 1985, petitioner claims that it was over assessed penalties. Here, petitioner's penalty was calculated based upon the sum of the applicable penalty charge for each of three dates, i.e., October 20, November 20, and December 20, 1985, on which the tax was due until payment was made on January 23, 1986.

In regard to the interest due of $279.57, Tax Law section 1145(a)(1)(ii) authorizes an interest rate of 12 percent per annum to be compounded daily (20 NYCRR 536.1[e]). Here, petitioner's interest was calculated based upon the sum of interest from the three dates mentioned above until the time of petitioner's payment on January 23, 1986. Thus, we find no error in the penalty or interest charges.

Finally, petitioner prays for equity in our granting it relief from the Division's assessment. Specifically, petitioner claims that this assessment will only expedite the loss, forever, of summer jobs for students and other northern New York residents and, on that basis, should be cancelled. Again, abatement of penalties and interest in excess of the minimum is based upon reasonable cause (Tax Law § 1145[a] [ii]) which petitioner has failed to demonstrate. Thus, no abatement is appropriate here.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of the petitioner, Thousand Island Club, Inc., is denied;

2. The determination of the Aftinistrative Lav Judge is affirmed; and

3. The petition of Thousand Island Club, Inc. is denied and the notice of determination and demand issued on May 5. 1986 is sustained.

Dated: Albany, Now York
December 22, 1988

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner