

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JULIUS ENDREI, OFFICER OF : DECISION
J & E ENTERPRISES, 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 June 1, 1982 through August 31, 1984. :

Petitioner Julius Endrei, Officer of J & E Enterprises, Inc., 1 Main Street, P. O. Box 49, Haines Falls, New York 12436 filed an exception to the determination of the Administrative Law Judge issued on October 4, 1990 with respect to his 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 June 1, 1982 through August 31, 1984 (File No. 804711). Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Arnold Glass, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief in response to the exception. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether the Division of Taxation properly determined that no sales tax payments were remitted for the period June 1, 1982 through August 31, 1984.

II. Whether penalty imposed pursuant to Tax Law § 1145(a)(1)(ii) should be abated for petitioner's failure to pay sales tax due.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner Julius Endrei operated a gift shop and wholesale costume manufacturing business during the period in question. He originally started the business by importing gifts, souvenirs, and clothing connected to various European cultures. The business primarily provided products that served the festivals known as Oktoberfest.

According to an excerpt from the field audit report, the business being operated by petitioner was originally called Alpine Imports and it operated under I.D. #NY-8227070. In 1982, the business was incorporated under the name of J & E Enterprises, Inc. In 1984, the name again was changed to Julius Endrei d/b/a Alpine House Imports then operating under I.D. #14-1657303. According to petitioner he operated his business since 1978 at which time he asserts he was incorporated as J & E Enterprises, Inc. However, petitioner did not submit any documents substantiating his existence as a corporation. The name of the business for which petitioner is being held responsible as an officer is J & E Enterprises, Inc. most currently operating under I.D. #14-1616903. The testimony of the auditor in this case reveals that the Division of Taxation was aware of various identification numbers and several names pertaining to the same business operation. It appears as though where duplicate payments were made because of a confusion with respect to the name of the business or the I.D. number under which payment was made, the Division of Taxation claims to have eliminated any duplication and has given petitioner credit for such payments. Petitioner however seems to remain confused as to whether such duplication still exists.

Ms. Diane Carlson, from the Albany District Office, was assigned to perform an audit of petitioner's operations. At the time of the audit, she prepared a schedule of sales tax returns filed by petitioner for the various business operations covering the period August 1, 1978 through May 31, 1986. It was determined during the audit, that sales tax returns covering quarters ended August 31, 1978 through May 31, 1982 were not filed until October 14, 1983, at which time \$1,000.00 was paid toward those returns. The compliance agent responsible for collection of those funds allocated the monies paid to the earliest tax periods due and allocated

such monies to taxes owed first. There was one exception with respect to the allocation of funds and that is for the period ended August 31, 1981, in which tax was due in the amount of \$807.00. The Division of Taxation did not allocate any of the \$1,000.00 toward that quarter, but rather allocated small amounts to three subsequent quarters.

It appears from the testimony that because of the late-filed returns pertaining to the quarters ended August 31, 1978 through May 31, 1982, the Division filed warrants against the business operations run by petitioner, Julius Endrei. Further, it appears that Mr. Endrei was notified that he must pay the penalties and interest pertaining to those earlier tax quarters in the amount of \$2,357.26 in order to prevent the seizure of his business. During the course of the hearing, Mr. Endrei submitted for review a copy of a cancelled check dated September 7, 1984 payable to the State Tax Commission in the amount of \$2,357.26 identifying the payor as Alpine House, Int. also bearing the name and address of Julius Endrei. The check also indicated that the payment was for sales tax, penalty and interest.¹

During the course of the hearing, Mr. Endrei testified that for the period June 1, 1982 through August 31, 1984, the period in question, he filed returns without payment on the advice of his accountant who indicated to him that he should file even if he was unable to pay. Mr. Endrei now believes that the \$1,000.00 payment toward the earlier quarters and the payment of penalty and interest against the warrant in the amount of \$2,357.26 should be applied to the periods at issue in this case.

Mr. Endrei relied heavily on the advice of his accountant, Mr. Varga.² Mr. Endrei also asserts that the Division of Taxation imposed levies on various bank accounts from which funds were withdrawn to pay taxes.

Post-hearing, the Administrative Law Judge allowed additional evidence to be submitted by Mr. Endrei to show payments or withdrawal of funds from various accounts to satisfy tax

¹Although this documentation was not admitted into evidence, the post hearing record remained open for two weeks for the Administrative Law Judge to receive copies of checks or other source payments. Therefore, review of this information contained in the record is appropriate.

²Throughout the transcript, Mr. Varga is erroneously referred to as Mr. Vonga.

obligations for which liability is being asserted. Mr. Endrei was unable to locate any additional checks or any additional liens or levies against accounts from which he claims funds were taken by the Division of Taxation. One such payment taken from the First American Bank of New York in the amount of \$552.99 was later explained by the Division of Taxation as an amount applied to withholding tax for a period during 1984. Also post-hearing, the Administrative Law Judge requested the Division of Taxation to review with the Tax Compliance Division, all payments received from petitioner, his corporation or through accounts upon which levies were placed. A schedule of payments was provided to the Administrative Law Judge, none of which were applied to the returns for the period June 1, 1982 through August 31, 1984. These returns were remitted without payment as indicated by the records of the Division of Taxation and the testimony of the petitioner, and to this date appear unpaid.

In correspondence submitted to the Administrative Law Judge after the hearing, Julius Endrei claimed that having carefully examined the signature on the various tax returns filed by him and presented as evidence during the hearing, he was able to determine that the signature appearing on the return was a forgery of his name. According to petitioner, he never had copies of these returns in his possession, and he surmises that his accountant, Mr. Varga, may have fallen behind in filing or provided Mr. Endrei with poor advice, and realizing he should have been filing, he attempted to catch up filing by doing so all at one time, never supplying copies to petitioner. Contrary to this information was the testimony of Mr. Endrei during the hearing at which, not less than six different times, he identified his signature on the documents that he now claims are forged.

OPINION

In her determination below, the Administrative Law Judge concluded that the Division of Taxation (hereinafter the "Division") appropriately applied \$3,357.26 in payments by petitioner to the earliest tax due from petitioner in order to eliminate a compounding of the penalty for unpaid sales taxes owing since August 31, 1978. Secondly, the Administrative Law Judge determined that for the periods dated June 1, 1982 through August 31, 1984, petitioner did not

remit any sales tax. Therefore, the Administrative Law Judge sustained the Notice of Determination issued against petitioner. Lastly, the Administrative Law Judge held that petitioner did not establish reasonable cause for its failure to pay sales tax. Thus, the Administrative Law Judge did not abate the penalty assessed pursuant to Tax Law § 1145(a)(1)(ii).

On exception, petitioner argues that the sales tax returns in issue were not signed by him, but rather, that his signature was forged. Moreover, he reasserts his contention that he reasonably failed to pay sales tax due to his reliance on his accountant's advice and guidance. Accordingly, petitioner requests full relief from all liability.

In response, the Division states that petitioner has not proven payment of taxes reported on the sales tax returns, which were filed without remittance, and that petitioner has not shown good cause for abatement of penalty. Moreover, the Division states that "[p]etitioner's notice of exception makes several evidentiary statements, without documentary support, which were not in the record before the Administrative Law Judge" (Division's letter in lieu of brief). Therefore, the Division requests that we affirm the determination of the Administrative Law Judge since petitioner shows no error of law or fact upon which an exception should be granted.

We uphold the determination of the Administrative Law Judge for the reasons set forth below.

Primarily, petitioner asserts that the sales tax returns at issue were not signed by him. He alleges that his signature which appears on these returns was forged by his accountant who was falling behind in filing the sales tax returns for petitioner. Petitioner alleges that his accountant forged petitioner's signature on all the returns so that the accountant could quickly file the late returns.

Petitioner's contention is in direct contradiction to his testimony at the hearing below. On several occasions, petitioner was shown sales tax returns and asked if, indeed, such returns contained his signature. At all times, petitioner responded that he, in fact, signed all such

returns (Tr., pp. 49, 66-68, 73). Clearly, his assertion on exception, that such signatures are forgeries, is disingenuous.

Next, petitioner reasserts on exception that he relied on the advice and guidance of his accountant and that he did not willfully neglect to pay tax.

We believe that the Administrative Law Judge dealt adequately with this issue in her determination. Therefore, we conclude that petitioner's mere contention that he relied upon his accountant does not establish reasonable cause and not willful neglect for failure to pay sales tax (see, Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557; Matter of L T & B Realty Corp. v. State Tax Commn., 141 AD2d 185, 535 NYS2d 121). Thus, we sustain the penalty imposed pursuant to Tax Law § 1145(a)(1)(ii).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Julius Endrei, Officer of J & E Enterprises, Inc., is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Julius Endrei, Officer of J & E Enterprises, Inc., is denied; and
4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated April 27, 1987, is sustained.

DATED: Troy, New York
June 6, 1991

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner

