

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
A & V CROWN, 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, 1979 :
through May 31, 1982. :

Petitioner, A & V Crown, Inc., 853 West Sunrise Highway, Bellmore, New York 11710, filed an exception to the determination of the Administrative Law Judge issued on October 26, 1989, 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, 1979 through May 31, 1982 (File No. 805251). Petitioner appeared by Allen Kramer, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation submitted a responding brief 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.

ISSUE

Whether petitioner established that it had reasonable cause for its failure to report and pay over sales taxes when due.

FINDINGS OF FACTS

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

On April 20, 1983, the Division of Taxation ("Division") issued to petitioner, A & V Crown, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1979 through May 31, 1982, assessing tax due of \$30,921.76, plus

penalty of \$7,094.87 and interest of \$9,103.71, for a total amount due of \$47,120.34. Al Votta, president of A & V Crown, had previously signed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1979 through February 28, 1980 to June 20, 1983.

At the administrative hearing, petitioner conceded the tax due as assessed by the Division. Petitioner and the Division consented to have the sole remaining issue, whether penalty should be abated, determined on submission of documents without hearing.

At the commencement of the audit, Mr. Votta was contacted by the auditor, and he referred the auditor to petitioner's accountant, Steven Schissler. Petitioner's sales tax returns for the audit period were prepared by Mr. Schissler who also represented petitioner throughout the field audit which resulted in the issuance of the notice under consideration here.

The auditor's notes show that Mr. Schissler often failed to return her phone calls and that he canceled numerous appointments with the auditor. On June 7, 1982, August 24, 1982 and September 1, 1982, the auditor spoke directly to Mr. Votta who each time assured her that he would have Mr. Schissler contact her. A Statement of Proposed Audit Adjustment was issued to petitioner in December 1982. By letter dated December 31, 1982, Mr. Schissler registered petitioner's disagreement with the audit findings. The auditor then attempted to schedule an informal conference with Mr. Schissler to discuss the audit findings, but she was unable to do so because of his lack of cooperativeness.

On January 10, 1983, while the field audit was being conducted, a warrant was entered against petitioner for sales tax, penalty and interest due in the amount of \$44,993.78. The taxable periods covered by the warrant correspond to periods within the audit period, but the warrant was in no way related to the field audit which was then being conducted. As a result of the issuance of the warrant, petitioner entered into a payment plan with the Division. Approximately, four months after this warrant was issued, the notice in question here was issued to petitioner.

A timely petition was filed protesting the statutory notice, and a conciliation conference was conducted by the former Tax Appeals Bureau. As no settlement was reached, petitioner was directed to file a perfected petition. The perfected petition was not filed in the period allowed for filing; therefore, on May 1, 1985, the former State Tax Commission issued a default order against petitioner. A copy of the default order was sent to petitioner.

In May 1987, Mr. Schissler was incarcerated. The nature of his crime is not in the record. He died in prison in August 1987.

On September 18, 1987, a warrant was docketed against petitioner for various unpaid tax assessments, including the one at issue here. At this time, petitioner obtained a second accountant, Mr. Gary Zucker.

At Mr. Zucker's request, the default order issued against petitioner was vacated, and the instant proceeding ensued. Mr. Zucker tried but was unable to procure petitioner's financial records from Mr. Schissler's estate. As a result, petitioner was unable to present any evidence to challenge the tax assessment at issue.

OPINION

The Administrative Law Judge determined that petitioner offered no evidence to show that it made a reasonable effort to ascertain and pay its sales tax and that its reliance on an accountant was not sufficient to establish reasonable cause. She stated that even if petitioner believed that it was paying the assessed tax under the payment agreement it had entered into earlier, that belief does not constitute reasonable cause for petitioner's initial failure to report sales tax when due. Thus, the Administrative Law Judge concluded that petitioner has not established that it had reasonable cause for its failure to report and pay sales taxes when due.

On exception, petitioner claims that its accountant, Mr. Schissler, led it to believe that the sales tax assessments in question were being "taken care of" and that absent any advice to the contrary from Mr. Schissler, it reasonably assumed that the monies then paid were for payment of the deficiency resulting from the audit. Petitioner states that it relied on Mr. Schissler to handle all tax matters on its behalf. Petitioner argues that its reliance on Mr. Schissler, who

inadequately prepared its tax return which resulted in an underpayment of taxes, constituted reasonable cause. Petitioner asserts that there was no willful neglect on its part for its failure to report the sales tax when due and, therefore, the penalty should not be imposed. We affirm the determination of the Administrative Law Judge.

Tax Law § 1145(a)(1) imposes a 10% penalty and interest on taxpayers who fail to timely file a sales tax return or pay the sales tax when due. The statute requires the Division of Taxation to abate the penalty and interest if it determines that such delay or failure was due to reasonable cause. The grounds for reasonable cause are defined in the Division's regulations to include "[a]ny . . . cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect . . ." (20 NYCRR 536.5[c][5]). The burden of showing that there was reasonable cause and that the penalty was wrongly assessed is on the taxpayer.

In determining whether reasonable cause exists when a taxpayer relied upon the advice of a tax professional, it must be shown that the taxpayer relied in good faith on such advice and that it was reasonable for the taxpayer to rely on the advice (see, Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557, 561; LT & B Realty v. State Tax Commn., 141 AD2d 185, 535 NYS2d 121, 123). To establish that his reliance was reasonable, the taxpayer has the burden of demonstrating that he acted with ordinary business care and prudence in attempting to ascertain his tax liability (see, United States v. Boyle, 469 US 241, 85-1 USTC ¶ 13,602 at 88,255).

Petitioner presented no evidence as to what kinds of financial records were kept for the corporation or what records or documents were given to Mr. Schissler. Petitioner provided no information with respect to the manner in which its tax returns were prepared or any other evidence to show that petitioner made a reasonable effort to ascertain and pay its sales tax liability. Hence, we conclude that petitioner's assumption that the assessed tax was already being paid and its reliance on the advice of its accountant, without more, do not constitute reasonable cause for its failure to pay the sales tax when due.

Petitioner contends that it did not pay the assessed tax because its accountant, Mr. Schissler, informed it that the matter would be taken care of and it relied on his judgment and advice. In order to demonstrate that petitioner's reliance was reasonable, it must be shown that the advice came from competent tax counsel (see, Plante v. Commr., T.C. Memo 1985-117, 49 TCM 963, 966). The record here, however, contains no evidence that the advice was furnished by a competent tax expert. On the contrary, the facts relating to Mr. Schissler's manner of dealing with petitioner seriously call into questions the accountant's experience, expertise and competence as a tax professional. In any event, we agree with the Administrative Law Judge that petitioner's excuse for not paying the tax when assessed does not establish reasonable cause for petitioner's initial failure to pay the taxes when due.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exception of the petitioner, A & V Crown, Inc., is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of A & V Crown, Inc. is denied; and
4. The notice of deficiency dated April 20, 1983 is sustained.

DATED: Troy, New York
May 24, 1990

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner