

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CLAIRE'S BOUTIQUES, INC.	:	DECISION
	:	DTA No. 809389
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, 1986	:	
through February 28, 1989	:	

Petitioner Claire's Boutiques, Inc. 3 S.W. 129th Avenue, Pembroke Pines, Florida 33027 filed an exception to the determination of the Administrative Law issued on December 19, 1991 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 June 1, 1986 through February 28, 1989. Petitioner appeared by Ronald L. Glazer, tax manager for petitioner. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioner submitted a letter brief in support of its exception. The Division of Taxation submitted a letter in lieu of a brief in response to petitioner's exception.

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

ISSUE

Whether there is reasonable cause to abate the penalty imposed under Tax Law § 1145(a).

FINDINGS OF FACT

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

Petitioner, Claire's Boutiques, Inc., operates retail stores which sell handbags, jewelry, accessories, etc.

The Division of Taxation conducted an audit of petitioner for the period March 1, 1986 through February 28, 1989. At the time of the audit, petitioner had 39 retail locations in New York State. The auditor found petitioner's sales tax records to be adequate but conducted the audit using a two-month test period for the Watertown and Plattsburgh stores. The auditor traced the sales as reported by the stores through petitioner's Florida accounting system which summarized the weekly totals for each store to arrive at monthly sales and sales tax totals for each individual store. These monthly totals were used to complete sales tax returns. The auditor found no discrepancies in her examination of petitioner's records and the sales tax returns and, therefore, determined petitioner's taxable sales to be as reported.

The auditor reviewed petitioner's asset acquisitions subject to use tax. Apparently, petitioner calculated its use tax liability based on an accrual accounting system whereby it netted certain debits and credits to arrive at the amount of tax due. The auditor reviewed all the credits that petitioner claimed against certain asset acquisitions. Of 345 asset transactions, the auditor found a credit due on 123 transactions but found additional tax due on 222 asset transactions. According to petitioner, the credit on certain assets was denied because it was unable to provide records to verify that some of the taxable assets were transfers between asset accounts. Petitioner provided no further information concerning why it believed these transfers were not subject to tax, though presumably the reasoning might have been that such assets were shipped out of New York State to other retail locations and, therefore, were not subject to New

York use tax. Based on her review of the assets account, the auditor found an additional taxable amount of \$210,158.56 for additional use tax due of \$15,969.78.¹

The Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated January 18, 1990, assessing a tax deficiency of \$15,969.78, a penalty of \$4,817.53 and interest of \$5,297.47.

Petitioner paid the tax deficiency plus interest but protested the penalty. A Conciliation Default Order was issued on November 2, 1990.

By letter dated January 30, 1991, petitioner petitioned the Division of Tax Appeals for abatement of the penalty. Petitioner filed a formal petition, dated March 21, 1991, challenging the penalty. Petitioner argued that it did not willfully intend to underestimate the use tax, that its recordkeeping reflected a relatively new and growing company with an unsophisticated method of capturing taxable assets subject to use tax, and that its tax filing "record with respect to sales and use tax has been very good in terms of timeliness and accuracy."

OPINION

In the determination below, the Administrative Law Judge held that, contrary to petitioner's contention, the present situation is not similar to the facts in Example 5 of the regulations (20 NYCRR 536.5[c][5]). The Administrative Law Judge pointed out that, in the example, the situation involved a first sales and use tax audit, occasional misclassifications of office supplies and equipment and a determination that the taxpayer made reasonable efforts to account for its use tax liabilities. In the matter before us, there was a prior audit wherein a use tax deficiency was found due, but, more importantly, the use tax deficiency in the present case involved 222 asset transactions that petitioner could not establish as nontaxable. Thus, the Administrative Law Judge concluded that this case does not involve an occasional misclassification. The Administrative Law Judge further held that there is no evidence, other than petitioner's bare assertions, upon which to conclude that petitioner made reasonable efforts

¹In her field audit report, the auditor noted a prior audit of petitioner which resulted in additional use tax due of \$1,396.00 with regard to capital assets for the period September 1977 through August 1980.

to account for its use tax liabilities, and the fact that petitioner believed that it was preparing its tax returns accurately does not provide the basis for waiving the penalty.

Petitioner takes exception with the findings of fact relating to the number of audit transactions and the penalty amount and asserts that reasonable efforts to account for use tax liabilities were made as indicated by the fact that petitioner had what was thought to be a good system for capturing taxable assets. Petitioner alleges that it has properly paid additional use tax and interest due and firmly believes that the penalty is not warranted due to the above circumstances.

The Division argues that although petitioner alleges that more than 345 transactions were examined under the audit, no evidence was presented to the Administrative Law Judge on this point and that the 345 transactions represent the asset purchases that had use tax consequences. The Division also argues that "[t]he only similarity between the facts in this audit and Example 5 is the audit found a use tax liability with conceded substantial compliance with the law otherwise" (Division's letter in lieu of a brief on exception, p. 2). The Division agrees that petitioner has shown that it met one condition of Example 5, but argues that petitioner has failed to meet the major condition of showing that its failure to pay the use tax was reasonable. Thus, the Division requests that the assessments against Claire's Boutiques, Inc. and the determination of the Administrative Law Judge be sustained.

We find no basis in the record before us for modifying the determination of the Administrative Law Judge in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Claire's Boutiques, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Claire's Boutiques, Inc. is denied; and

4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated January 18, 1990 is sustained.

DATED: Troy, New York
August 27, 1992

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

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

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