STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
WELCO AD CORPORATION	:	DETERMINATION DTA NOS. 800860
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1979 through February 28, 1986.	:	AND 803993

Petitioner, Welco Ad Corporation, 2460 Rochester Road, Canandaigua, New York 14424, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1979 through February 28, 1986.

On August 17, 1993 and June 15, 1993, respectively, petitioner by its duly authorized representative, Devorsetz, Stinziano, Gilberti & Smith, Esqs. (Bruce E. Wood, Esq., of counsel), and the Division of Taxation by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel) waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by November 29, 1993. The Division of Taxation submitted documents on October 8, 1993. Petitioner submitted a brief on October 14, 1993. The Division of Taxation submitted a responding letter brief on November 12, 1993. Petitioner did not submit a reply brief. After due consideration of the documents and briefs submitted, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether all of the accrued interest on petitioner's tax assessment may be abated.

II. If the interest may be abated, whether petitioner has established reasonable cause for its failure to pay the tax.

FINDINGS OF FACT

Petitioner, Welco Ad Corporation, was engaged in the printing and publication business during the periods at issue.

Petitioner published the Honeoye Falls-Lima-Avon Shopping News, the Canandaigua-Victor-Holcomb Shopping News and the Naples Shopping News during the periods in issue.

Two sales tax field audits were conducted of petitioner's records for the periods March 1, 1979 through February 28, 1983 and March 1, 1983 through February 28, 1986. The Division of Taxation ("Division") concluded after each audit that petitioner's purchases of printing services were not exempt from sales and use taxes under Tax Law § 1115(i)(A), and that petitioner owed sales and use taxes on capital acquisitions (furniture and equipment), expense purchases (other than printing costs) for the first and second audit periods and sales tax on a bulk sale purchase and unreported taxable sales for the second audit period. The Division further concluded that petitioner did not qualify for an exemption under Tax Law § 1115(i)(A) and (B).

On September 27, 1983, the Division issued to petitioner two notices of determination and demands for payment of sales and use taxes due as follows:

Period	Tax	Interest	Total Due
3/1/79-8/31/82	$59,355.02	$17,754.77	$77,109.79
9/1/82-2/28/83	12,993.78	897.95	13,891.73

A petition for revision of a determination or for refund of tax paid was received by the former Tax Appeals Bureau on December 22, 1983. In this petition, petitioner asserted its business constituted the publication of "shopping papers" within the meaning of Tax Law § 1115(h).

In a letter dated May 15, 1985 from the Tax Appeals Bureau to petitioner's representative, petitioner was informed that the prehearing conference had not resolved the matter and that a Perfected Petition must be filed in order to proceed with petitioner's protest.

A Perfected Petition was received by the former Tax Appeals Bureau on June 21, 1985. Petitioner asserted that its business constituted the publication of a "shopping paper" within the meaning of Tax Law § 1115(i) and that it was in full compliance thereunder.

Petitioner filed an Amended Perfected Petition which was received by the former Tax Appeals Bureau on January 8, 1986. In this Amended Perfected Petition, petitioner asserted,

inter alia, that its business constituted the publication of a "shopping paper" within the meaning of Tax Law § 1115(i); that its publications known as the Honeoye Falls-Lima-Avon Shopping News, the Canandaigua-Victor-Holcomb Shopping News and the Naples Shopping News are "newspapers" or "periodicals" as defined in Tax Law § 1115(a)(5); and that Tax Law § 1115(i) is unconstitutionally vague and ambiguous on its face and in its application unconstitutionally discriminatory since there is no rational basis for classifying and taxing "shopping papers" in a manner different from newspapers and periodicals.

On August 26, 1986, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1983 through February 28, 1986 which assessed tax of $23,643.55, plus interest of $6,108.85, for a total amount due of $29,752.40.

A petition for revision of a determination or for refund of tax paid was received by the former Tax Appeals Bureau on September 12, 1986. In this petition, petitioner asserted, inter alia, that its business constitutes the publication of a "shopping paper" within the meaning of Tax Law § 1115(i); that its publications known as the Honeoye Falls-Lima-Avon Shopping News, the Canandaigua-Victor-Holcomb Shopping News and the Naples Shopping News are "newspapers" or "periodicals" as defined in Tax Law § 1115(a)(5); and that Tax Law § 1115(i) is unconstitutionally vague and ambiguous on its face and in its application unconstitutionally discriminatory in taxing "shopping papers" in a manner different from newspapers and periodicals.

In a letter dated March 11, 1987 from the Tax Appeals Bureau, petitioner was informed that the original petition filed had been accepted as a Perfected Petition.

In March 1988, petitioner and the Division stipulated that the administrative proceedings would be held in abeyance until the outcome of Scotsman Press v. Tax Appeals Tribunal (165 AD2d 630, 569 NYS2d 991 [3d Dept 1991]). Petitioner did not pay either of the assessments.

Based on the Scotsman Press decision, petitioner conceded that it owed the assessed tax. Subsequent to the issuance of the Scotsman Press decision, petitioner has been corresponding

with the Division to work out a payment plan for the tax and an abatement of the interest.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner requests an abatement of the interest assessed on the tax based upon:

(a) its good faith reliance upon the law, which was never formally interpreted until the Scotsman Press case;

(b) its exemplary record of filing and paying its taxes;

(c) the existence of reasonable cause for failure to pay the tax while the Scotsman Press case was pending;

(d) the "incomplete interpretation of the nebulous statute at issue" by the Division until a 1992 Technical Services Bulletin was issued clarifying the interpretation of the statute; and

(e) equitable grounds.

Petitioner argues that, pursuant to Tax Law § 1145(a)(1)(iii), if the Commissioner of Taxation determines that the failure to pay a tax is due to reasonable cause and not due to willful neglect, he must remit the portion of the interest that exceeds the interest that would be payable if such interest were computed at the underpayment rate set by the Commissioner.

The Division contends that Tax Law § 1145(a)(1) authorizes the imposition of penalties and interest upon a taxpayer for the taxpayer's failure to file returns or pay the tax due on or before its due date. However, if it is determined that nonpayment is due to reasonable cause and not due to willful neglect, the Commissioner shall remit all penalty and a portion of the interest that exceeds the underpayment rate (see, Tax Law § 1145[a][1][iii]; 20 NYCRR 536.1[c]). The Division argues that assuming petitioner did have reasonable cause for its failure to pay the tax, then the statute allows for the abatement of penalties and that portion of the interest in excess of 6% per annum. The Division further argues that petitioner has been given the benefit of its reasonable reliance upon the law since petitioner was never assessed penalties and has only been assessed minimal interest.

The Division argues that it would be bad policy to abate all of the interest accrued on the

tax which has been due and owing as far back as March 1979, especially since "the Tax Law and the regulations promulgated thereunder specifically provide that interest be calculated from the date the tax was due" (Westbury Smoke Stax, Ltd. v. New York State Tax Commn., 142 AD2d 878, 879, 531 NYS2d 65, 67 [3d Dept 1988], lv denied 73 NY2d 706, 539 NYS2d 299 [1989]).

The Division asserts that petitioner has failed to sustain its burden of proof that interest should be abated and that the notices of determination with accrued interest should be sustained.

CONCLUSIONS OF LAW

A. Under Tax Law § 1142(2), the Commissioner is empowered "for cause shown, to remit penalties but not interest computed at the rate of six per cent per annum."

B. Tax Law § 1142(9) imposes a minimum underpayment rate of 6% compounded daily.

C. Tax Law § 1145(a)(1)(iii) provides:

> "[I]f the commissioner of taxation and finance determines that such failure or delay was due to reasonable cause and not due to willful neglect, he 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 underpayment rate set by the commissioner of taxation and finance pursuant to section eleven hundred forty-two . . . ."

D. 20 NYCRR 536.1(c) provides:

> "[I]f a person required to collect tax can establish that the failure or delay to file or to pay or pay over was due to reasonable cause and not due to willful neglect, . . . all of such penalty and that portion of the interest which exceeds the amount that would be payable if such interest were computed at the rate set by the Commissioner of Taxation and Finance in Part 2393 of this Title pursuant to section 1142 of the Tax Law shall be waived."

E. Petitioner has requested an abatement of all accrued interest due on the two notices of determination. Petitioner argues that reasonable cause exists to abate the interest assessed.

Petitioner contends that one statutory ground constituting reasonable cause includes a pending non-frivolous judicial action involving virtually identical facts and circumstances (20 NYCRR 536.5[c][4]). Petitioner argues that its situation in this case clearly falls under the above-stated exception. It identifies another statutory ground constituting reasonable cause, 20 NYCRR 536(c)(5), which provides as follows:

> "[a]ny other 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 . . . ."

Petitioner asserts that until a decision was rendered in Scotsman Press v. Tax Appeals Tribunal (supra), neither a comprehensive interpretation of the methodology to be used in determining compliance under the statute was available to the industry, nor was the definition as to what constituted an "advertisement" clear. Petitioner further argues that many other newspapers in the industry considered themselves a "shopping paper" and in good faith computed their tax accordingly. Petitioner interpreted the complex and nebulous law in a manner similar to others in the industry. Petitioner maintains that there was no willful neglect on its part and that it acted in the manner of at least a person of ordinary prudence and intelligence.

Petitioner contends that there is another ground for reasonable cause in this case; "an honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge and education of the taxpayer" (20 NYCRR 536.5[d][2][i]). It asserts that it (and many other similar shopping newspapers) honestly and in good faith interpreted the law as allowing the sales and use tax exemption claimed. Petitioner states that only after the Scotsman Press v. Tax Appeals Tribunal (supra) decision was issued "did the complex and nebulous statute under which the increased assessments are based get comprehensively and understandably interpreted." Lastly, petitioner argues that based on equitable grounds which include the lack of clarity in the law, the judicial economy in agreeing to be bound by the Scotsman Press case, and its exemplary record of paying taxes, the interest assessed on the sales and use tax liability should be abated completely. Alternatively, petitioner requests that the interest be completely abated for the period beginning when the assessment of interest began and ending with when the Scotsman Press case was adjudicated.

On the issue of the reasonableness of petitioner's failure to pay the tax, the Division argues that there should be no abatement of the minimal interest to petitioner. The Division maintains that although the parties stipulated that administrative proceedings in this matter would be held in abeyance pending the outcome of Scotsman Press v. Tax Appeals Tribunal

(supra), this was not a reasonable ground for petitioner not to pay the tax. This stipulation was entered into at the request of petitioner in March 1988 after the issuance of both assessments. The Division notes that petitioner had the use of the tax money for a considerable length of time before the stipulation based on the Scotsman Press case was considered (nine years since the first taxes were due [tax period March 1, 1979 commencement point for assessment number one] and almost five years since the first assessment). Furthermore, the Division maintains that petitioner could have stopped the accrual of interest at any time by paying the amount due pending the outcome of its petition. Petitioner chose not to do so.

Petitioner has been assessed the minimum underpayment rate of interest in this case. "There is no provision for waiver of the minimum interest for any reason" (see, Matter of Martin Lithographers, State Tax Commn., December 2, 1985 [TSB-H-87(1)S]). In Matter of Framapac Delicatessen, Tax Appeals Tribunal, July 15, 1993), the Tribunal stated:

> "[W]ith respect to any interest that may have accrued, we have already held that interest represents the cost to the taxpayer for the use of the funds during the period of protest and does not constitute substantial prejudice (Matter of Rizzo, Tax Appeals Tribunal, May 13, 1993)."

Furthermore, the Commissioner has no discretion to remit the first 6% of interest imposed (see, Spancrete Northeast v. Wetzler, 180 AD2d 981, 580 NYS2d 586 [3d Dept 1992], lv denied 79 NY2d 758, 584 NYS2d 446).

In the instant case, petitioner chose not to pay the tax and has had the use of the funds throughout this period.

F. The petitions of Welco Ad Corporation are denied; the two notices of determination dated September 27, 1983 and the notice of determination dated August 26, 1986 are sustained.

DATED: Troy, New York
April 14, 1994

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE