

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
CAPITOL COIN COMPANY, INC. : DETERMINATION
AND IRA FRIEDBERG AND ARTHUR FRIEDBERG, :
OFFICERS OF CAPITOL COIN COMPANY, INC. :
for Revision of Determinations or for Refunds :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1981 :
through May 31, 1983. :

Petitioners, Capitol Coin Company, Inc., and Ira Friedberg and Arthur Friedberg, officers of Capitol Coin Company, Inc., 1359 Broadway, New York, New York 10018, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1981 through May 31, 1983 (File Nos. 801701, 801702, 801703, 801873, 801874, 801875).

On June 22, 1987 and September 30, 1987, respectively, the Division of Taxation and petitioners, through their duly authorized representatives, waived a hearing and agreed to submit the case for determination based on the Division of Taxation's jurisdictional documents and petitioners' Statement Requesting Abatement of penalty and reduction of interest dated October 22, 1987. After due consideration of the record, Joseph W. Pinto, Jr., Administrative Law Judge, hereby renders the following determination.

ISSUE

Whether reasonable cause exists for the abatement of penalties and interest in excess of the minimum consistent with the law and regulations.

FINDINGS OF FACT

1. Petitioner Capitol Coin Company, Inc. (hereinafter "Capitol Coin") was in the business of selling and purchasing rare coins during the period June 1, 1981 through May 31, 1983 (the "audit period").
2. After an audit of the business, wherein no books or records were produced by petitioners, the Audit Division issued to Capitol Coin two notices of determination and demands for payment of sales and use taxes due. The first such notice was issued on September 20, 1984 and set forth total tax due of \$12,841.37, penalty of \$3,210.34 and interest of \$5,953.26 for a total amount due of \$22,004.97 for the period June 1, 1981 through August 31, 1981. The second notice, dated December 20, 1984, set forth tax due of \$95,788.61, penalty of \$23,562.55 and interest of \$25,569.42 for a total amount due of \$144,920.58 for the period September 1, 1981 through May 31, 1983. Identical notices were issued to the responsible officers of the company, Arthur Friedberg and Ira Friedberg, also petitioners herein.

3. At a conference held on October 17, 1985 and continued on March 26, 1986, the total amount of tax due was reduced to a sum of \$54,879.62. The additional tax due was reduced as a result of the substantiation of certain out-of-state sales.

4. On June 22, 1987 and September 30, 1987, respectively, the Division of Taxation and petitioners executed a partial withdrawal of petition and discontinuance of case, whereby petitioners agreed to pay and the Division of Taxation agreed to accept \$14,279.00 in full satisfaction of the tax due. The parties agreed to submit the issue of abatement of penalty and reduction of interest to the Division of Tax Appeals for determination based upon this stipulated record.

SUMMARY OF PETITIONERS' POSITION

5. Petitioners contend that they have established reasonable cause for abatement of penalty pursuant to 20 NYCRR 536.5 by alleging illness of their bookkeeper and his poor attendance at work during the audit period. They also cite two moves by the business as reason for the substantial disarray of their records and a flood which occurred in January 1983. Further, petitioners contend that it is the usual course of dealing in the coin industry that most of the purchases take place "over the counter" while most of the sales are transacted by mail on an interstate basis. Therefore, they maintain that almost all of their sales were exempt from sales tax and that they should not be penalized.

CONCLUSIONS OF LAW

A. Tax Law former § 1145(a)(1)(i), in effect during the audit period, stated as follows:

"Any person failing to file a return or to pay or pay over any tax to the tax commission within the time required by this article shall be subject to a penalty of five 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 twenty-five percent in the aggregate; plus interest at the rate of one percent of such tax or one-twelfth of the annual rate of interest set by the tax commission pursuant to section eleven hundred forty-two, whichever is greater, for each month of delay after such return was required to be filed or such tax became due."

Tax Law former § 1145(a)(1)(ii) provided that if the Tax Commission determined that such failure or delay was due to reasonable cause and not due to willful neglect it would remit all of such penalty and that portion of such interest that exceeds the interest that would be payable if it had been computed at the rate set by the Tax Commission.

The regulation promulgated pursuant to this section, 20 NYCRR 536.5, provides that reasonable cause for failure to file a return or pay tax on time must be affirmatively shown by the taxpayer in written form and grounds therefor must be clearly established. Although the regulation acknowledges for abatement of penalty and reduction of interest reasonable causes such as serious illness of an employee, destruction of the taxpayer's place of business, timely prepared returns misplaced by the taxpayer and an inability to assemble essential information

despite reasonable efforts, petitioners herein have not clearly established or affirmatively shown any of these grounds by way of documentation, testimony or other proof.

B. That the petitions of Capitol Coin Company, Inc., and Arthur Friedberg and Ira Friedberg are denied and the notices of determination and demands for payment of sales and use taxes due issued against said petitioners on September 20, 1984 and December 20, 1984, as adjusted in accordance with Finding of Fact "4", are sustained with regard to the penalties and interest.

DATED: Albany, New York
June 30, 1988

/s/
ADMINISTRATIVE LAW JUDGE