

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GREENWICH AUCTION ROOM, LTD. : DETERMINATION
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, 1982 :
through February 28, 1985.

Petitioner, Greenwich Auction Room, Ltd., 156 East 13th Street, New York, New York 10003, filed a 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, 1982 through February 28, 1985 (File No. 805870).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on February 27, 1990 at 9:45 A.M., with additional evidence submitted on August 17, 1990. Petitioner appeared by Samuel Ward, Public Accountant. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether the failure of petitioner to pay sales tax on sales claimed to be sales for resale was due to reasonable cause and not due to willful neglect so that penalty and excess interest (the interest in excess of that imposed by Tax Law § 1142) may be remitted under Tax Law § 1145(a)(1).

FINDINGS OF FACT

Petitioner, Greenwich Auction Room, Ltd., operated an auction room on East 13th Street in Manhattan. Its sole stockholder and officer was Mr. Jesse Bienen or Jesse Bienenfeld. It employed a bookkeeper. Its sales tax returns were prepared by S. M. Ward Company.

(a) A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was

issued to petitioner on November 20, 1986 for tax due of \$21,078.62, penalty under Tax Law § 1145(a) of \$5,261.69 and interest of \$10,461.63, for a total amount due of \$36,801.94.

(b) The determination was based upon the disallowance of petitioner's claim that certain sales were sales for resale.

(c) The determination under review was reduced to \$14,119.74 by a conciliation conferee when petitioner produced some resale certificates. Petitioner agreed to this. Penalty and interest, however, were not agreed to.

Petitioner claims that its principal officer, Mr. Bienenfeld, was an alcoholic from before 1982 until after 1985. Petitioner was given an opportunity to submit medical proof, but has failed to do so. Petitioner presented, after the hearing, Mr. Bienenfeld's own unsigned, unsworn written statement that he has been an alcoholic since 1980 and has participated in Alcoholics Anonymous since 1989. Petitioner also presented a note signed by a "Bob S." to corroborate Mr. Bienenfeld's participation in Alcoholics Anonymous.

CONCLUSIONS OF LAW

A. Petitioner has not shown that the failure to pay sales tax on those sales for which it did not have resale certificates was "due to reasonable cause and not due to willful neglect." Only if that is proven can the penalty and a portion of the interest (the interest imposed in excess of that stated in Tax Law § 1142) be remitted (Tax Law § 1145[a][1]). Grounds for reasonable cause include "serious illness of the responsible officer or employee" (20 NYCRR former 536.1[b][1] effective December 27, 1982, and 20 NYCRR 536.5[b][1] effective September 3, 1985). In this case, the evidence produced is insufficient to show that Mr. Bienenfeld was in fact an alcoholic and was under treatment. More importantly, even if alcoholism is an illness within the meaning of the regulation it does not appear that it was a "serious illness", at least in this case it does not seem to have totally incapacitated Mr. Bienenfeld. Most significantly, it is clear that either Mr. Bienenfeld or his bookkeeper received payment for and recorded sales, and no explanation was provided as to why resale certificates were not obtained.

B. The petition of Greenwich Auction Room, Ltd. is denied, and the Notice of

Determination and Demand for Payment of Sales and Use Taxes Due issued November 20, 1986 is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE