STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of EASTERN ELECTRIC CORP. AND FRANK M. GRIFFEN, AS OFFICER for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1984 through August 31, 1987.	:	DETERMINATION

Petitioners, Eastern Electric Corp. and Frank M. Griffen, as officer, 96-98 Fulton Street, White Plains, New York 10606, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1984 through August 31, 1987 (File No. 807499).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on July 26, 1990 at 11:00 A.M. Petitioner appeared by David A. Yablon, C.P.A. The Division of Taxation appeared by William F. Collins Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUE

Whether petitioner has established that its failure to pay its taxes due on materials consumed in the performance of capital improvement contracts during the audit period was due to reasonable cause and not willful neglect.

FINDINGS OF FACT

On December 13, 1988, the Division of Taxation issued to Eastern Electric Corp. and Frank M. Griffen, president of Eastern Electric Corp.,notices of determination and demands for payment of sales and use taxes due for the period September 1, 1984 through August 31, 1987 ("the audit period") which set forth a total tax due of $75,897.99,[1] penalty in the sum of $21,111.32 and interest of $27,557.98, for a total amount due of $124,567.29. The notice sent to Frank M. Griffen as president of Eastern Electric Corp. set forth identical amounts due (see Footnote "1" below).

On December 13, 1988, two additional notices of determination and demands for payment of sales and use taxes due were issued to Eastern Electric Corp. and Frank M. Griffen as president of Eastern Electric Corp. which assessed a penalty of $5,905.07 pursuant to Tax Law § 1145(a)(1)(vi).

It was conceded that petitioner Frank M. Griffen was a responsible officer of Eastern Electric Corp. and liable for the payment of sales and use taxes due from said corporation.

On November 10, 1988, Frank M. Griffen, as president of Eastern Electric Corp., agreed to the full amount of the tax assessed, $75,898.00 and minimum interest on a form entitled "Statement of Proposed Audit Adjustment".

Although the "consent", or Statement of Proposed Audit Adjustment, stated that Mr. Griffen agreed to penalty and

---

[1]Although the notice issued to Eastern Electric Corp. stated the total tax due as $75,897.96, the actual total tax due was $0.03 more, which is apparent if one adds the tax due as broken down by quarters set forth in the notice.

statutory interest as well, it was conceded by both parties that the agreement embodied only the amount of the tax and minimum interest which figure is also stated on the face of the consent form, i.e., $91,431.63. It is also noted that the two notices of

determination and demands for payment of sales and use taxes due which set forth a total tax due of $75,897.96, stated that petitioners' payment of $91,431.63, was to be applied to that assessment.

Eastern Electric Corp. is a contractor engaged in electrical contracting, including repairs and capital improvements, which reported sales of $9,676,828.00 for the audit period.

During a routine audit of petitioner Eastern Electric Corp., it was determined that it never paid tax on materials purchased.

After the audit was completed, petitioners agreed with the audit findings with regard to additional tax due but disagreed with the imposition of penalties and additional statutory interest. Petitioners were represented prior to and during the audit period by the certified public accounting firm of Bennett, Kielson and Company of New Rochelle, New York.

SUMMARY OF PETITIONERS' POSITION

Petitioners contend that the penalties and additional interest should not be assessed since the tax was not willfully underpaid. Petitioners argue that they relied in good faith

upon the advice of their accountants for certain sales tax information and that the information provided was inaccurate.

CONCLUSIONS OF LAW

A. Tax Law § 1145(a)(1)(i) provides, in pertinent part, 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 or pursuant to this article (determined with regard to any extension of time for filing or paying) shall be subject to a penalty of ten 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...."

Additionally, Tax Law § 1145(a)(1)(vi) states, in part, as follows:

> "Any person required by this article to file a return, who omits from the total amount of state and local sales and compensating use taxes required to be shown on a return an amount which is in excess of twenty-five percent of the amount of such taxes required to be shown on the return shall be subject to a penalty equal to ten percent of the amount of such omission."

Tax Law § 1145(a)(1)(iii), pertaining to the penalty asserted pursuant to section 1145(a)(1)(i), states, in part, as follows:

> "If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it 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 rate set by the tax commission pursuant to section eleven hundred forty-two."

A similar statutory provision for the remission of all or part of the penalty upon determination that the failure or act described in Tax Law § 1145(a)(1)(vi) was due to reasonable cause and not due to willful neglect is found at Tax Law § 1145(a)(3)(iv).

B. The regulations at 20 NYCRR 536.5(c) elaborate on what constitutes reasonable cause. Reasonable cause has been found where the taxpayer has clearly established death, destruction of business, inability to obtain information, or pending proceedings with the Division of Taxation. (See, 20 NYCRR 536.5[c][1], [2], [3], [4].) The section also contains the following catch-all provision:

> "Any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause" (20 NYCRR 536.5[c][5]).

It is determined herein that petitioners have not clearly established a reasonable cause and an absence of willful neglect which would permit the remittance of the section 1145(a)(1)(i) penalty.

Petitioners argue that despite their experience in the industry, they were unaware of proper procedures or taxability of materials purchased and used in capital improvement projects. Whether or not this statement is accurate, ignorance of the law does not constitute reasonable cause (20 NYCRR 536.5[c][5]). Petitioners' argument that they relied upon advice of their accountant in regard to the proper taxable status of the purchases of such materials is not convincing. (See, Matter of Dougherty Towing Co., Tax Appeals Tribunal, April 12, 1990.)

Reliance upon a tax advisor is not necessarily grounds for finding reasonable cause (see, Matter of LT&B Realty Corp. v. State Tax Commn., 141 AD2d 185, 535 NYS2d 121).

In LT&B Realty (supra), which involved the failure of a petitioner to pay real property transfer gains tax on the transfer of shares and cooperative housing corporations, the court refused to adopt a per se rule that consulting with and following the advice of a tax professional constitutes reasonable cause insulating a taxpayer from penalties. The court said that such a rule would be contrary to its prior decisions and common sense. The court continued:

> "To permit consulting with a tax professional to act as immunity to penalties would effectively remove the penalty provisions." (LT&B Realty Corp. v. State Tax Commission, supra, 535 NYS2d 121, 123.)

C. With respect to the section 1145(a)(1)(vi) penalty for substantial understatement or omission of tax, the regulation at 20 NYCRR 536.5(d) lists several additional grounds for finding reasonable cause including:

> "the reliance by the taxpayer on any written information, professional advice or other facts, provided such reliance was reasonable and the taxpayer had no knowledge of circumstances which should have put the taxpayer on inquiry as to whether such facts were erroneous..." (20 NYCRR 536.5[d][2][iii]).

However, the mere assertion that the failure to pay was in good faith and on the advice of a tax professional is insufficient to warrant the setting aside of penalties (see, Matter of Auerbach v. State Tax Commission, 142 AD2d 390, 536 NYS2d 557, 561).

Petitioners have failed to show through credible testimony or documentary evidence that they sought or received advice from their accountant as to whether sales or compensating use taxes were due on their purchases of materials which were subsequently

incorporated into their capital improvement projects. Neither the accountant who purportedly gave the advice nor any officer or employee of petitioner Eastern Electric Corp. testified to such advice. Additionally, no documentation was entered into evidence demonstrating or even intimating such advice was given or requested. Eastern Electric Corp., which purportedly had 9.68 million dollars in sales during the audit period, does not present a credible argument in support of its contention that it was totally ignorant of the sales tax law pertaining to its purchases of materials. To accept such an argument without any substantiation as a basis for remitting penalties would be to accept ignorance of the law as a basis for reasonable cause, and to do so would effectively remove the penalty provisions of the New York State Tax Law (LT&B Realty Corp. v. State Tax Commn., supra).

D. The petition of Eastern Electric Corp. and Frank M. Griffen, as officer, is denied and the four notices of determination and demands for payment of sales and use taxes due dated December 13, 1988 are sustained.

DATED: Troy, New York

3/14/91

_____

ADMINISTRATIVE LAW JUDGE