

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
NELSTADT READY MIX CONCRETE CORP.	:	SMALL CLAIMS
AND JAMES CAPOSSELA	:	DETERMINATION
	:	DTA NOS. 820382
	:	AND 820383
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2003 through August 31, 2003.	:	

Petitioners, Nelstadt Ready Mix Concrete Corp., 40 Huntington Place, New Rochelle, New York 10801, and James Capossela, 119 Nelson Road, Scarsdale, New York 10583, each 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 June 1, 2003 through August 31, 2003.

A consolidated small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York on April 19, 2006 at 1:15 P.M. Both petitioners appeared by Stewart Buxbaum, CPA, and Michael Buxbaum, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Joseph DeFazio and Nancy Ressler).

Since the parties herein did not reserve time to submit post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

ISSUE

Whether petitioners have established that reasonable cause exists to abate penalty and reduce interest charges from statutory rates to minimum rates.

FINDINGS OF FACT

1. Petitioner Nelstadt Ready Mix Concrete Corp. (“Nelstadt”) is, as its name suggests, engaged in the sale and delivery of ready mix concrete in Westchester County and surrounding areas, including New York City. Nelstadt’s sales are significant, as evidenced by the fact that its reported taxable sales for the three-month period at issue in this proceeding totaled \$2,031,630.00.

2. Nelstadt is required to file its New York State and local sales and use tax returns on a monthly basis. The following table reflects Nelstadt’s reported sales and use tax liability for the periods at issue:

Period	Due Date	Amount Due	Check Submitted
June 2003	07/21/2003	\$49,816.50	\$24,908.25
July 2003	08/20/2003	\$42,421.34	\$21,210.67
August 2003	09/22/2003	\$58,387.50	\$58,387.50

The checks submitted by Nelstadt as shown in the above table were not honored by the bank when presented for payment due to insufficient funds.

3. Petitioner James Capossela is vice-president of Nelstadt, and he signed the two part-quarterly sales tax returns filed by Nelstadt for the months of June and July 2003, as well as the quarterly return ending August 31, 2003. Mr. Capossela also signed the checks which were submitted with the three returns in dispute. In this proceeding, petitioner James Capossela concedes that he is personally liable for any taxes, penalty and interest determined to be due from Nelstadt for the quarter ending August 31, 2003.

4. On March 8, 2004, the Division of Taxation (“Division”) issued a Notice and Demand For Payment of Tax Due (“Notice”) to Nelstadt asserting that \$150,644.14 of tax was due for the

quarter ending August 31, 2003. The notice also asserted that interest of \$11,823.49 and penalty of \$24,017.14 were due based on Nelstadt's failure to remit payment of the tax due for the three months in question. As of the date of this small claims hearing, no payments have been made against the notice.

5. On April 5, 2004, the Division issued a Notice of Determination to petitioner James Capossela asserting that he was personally liable for the taxes, interest and penalty due from Nelstadt for the quarter ending August 31, 2003. The Notice of Determination asserted that \$150,644.14 of tax was due, together with interest of \$13,577.41 and penalty of \$25,523.58, for a total balance due of \$189,745.13.

6. The Division, from the present time and dating back to 1995, has issued numerous assessments to Nelstadt for sales and use taxes, withholding taxes, fuel and highway use taxes and corporate franchise taxes.

SUMMARY OF THE PARTIES' POSITIONS

7. In this proceeding, petitioners do not contest the Division's assertion that \$150,644.14 of tax is due for the quarter ending August 31, 2003. Petitioners do, however, believe that there is reasonable cause to abate penalty and reduce interest charges from statutory rates to minimum rates. While petitioners concede that Nelstadt has, on occasion, had difficulty in meeting its sales tax obligations, it is argued that such difficulties were caused by the fact that Nelstadt is required to pay sales tax on its billings. Petitioners maintain that it is common in the construction industry for payments to be received many months after the billings go out, thereby creating a situation where funds were not always available to pay over the sales tax which had been billed, but not yet collected.

Petitioners also assert that an undisclosed clerical error in Nelstadt's accounting system was another contributing factor in Nelstadt's delinquency and that this fact lends further support that reasonable cause exists to waive penalty and reduce interest to minimum rates.

8. The Division asserts that petitioners' failure to make any payments for the period in question in the almost three years that have elapsed from the time the tax was due undermines the argument that the failure to pay was due to a short-term cash flow problem. The Division also argues that Nelstadt's longstanding and continued record of filing returns with no payment or only part payment of the tax shown due and the issuance of checks which were dishonored for insufficient funds does not support that reasonable cause exists for the waiver of penalty and the reduction of interest charges.

CONCLUSIONS OF LAW

A. Tax Law § 1145(a)(1)(i) and (ii) provide for the imposition of penalty and interest at statutory rates in situations where a vendor/taxpayer fails to file a sales tax return or pay the tax due on or before the date set forth in the statute. The penalty can be waived and statutory interest reduced to minimum rates pursuant to Tax Law § 1145(a)(1)(iii) when it is shown that the failure to timely file the return or timely pay the tax due "was due to reasonable cause and not due to willful neglect. . . ." In determining whether reasonable cause and good faith exist, the regulations provide several specific grounds and also a catchall which provides for a finding of reasonable cause based upon any ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay, demonstrating an absence of willful neglect (20 NYCRR 2392.1[d][5]). The taxpayer bears the burden of establishing that the actions were based upon reasonable cause and not willful neglect (*see, Matter of Philip Morris,*

Inc., Tax Appeals Tribunal, April 29, 1993; *Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978, 598 NYS2d 360).

B. In establishing reasonable cause for penalty abatement (or interest reduction), the taxpayer faces an onerous task (*Matter of Philip Morris, Inc., supra*). The Tribunal explained that “[b]y first requiring the imposition of penalties (rather than merely allowing them at the Commissioner’s discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]” (*Matter of MCI Telecommunications Corp., supra*).

C. In the instant matter, petitioners have failed to demonstrate a cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for Nelstadt’s failure to timely remit sales and use taxes which were admittedly due. Also, it has been held that reasonable cause for failing to timely pay over sales and use taxes does not include financial inability or the need to use the taxes collected for other more pressing obligations (*see, Matter of F & W Oldsmobile v. Tax Commn.*, 106 AD2d 792, 484 NYS2d 188).

D. The petitions of Nelstadt Ready Mix Concrete Corp. and James Capossela are denied and the Notice and Demand For Payment of Tax Due, issued to Nelstadt Ready Mix Concrete Corp. on March 8, 2004, and the Notice of Determination, issued to James Capossela on April 5, 2004, are both sustained, together with such additional interest and penalty as may be lawfully due and owing.

DATED: Troy, New York
June 29, 2006

/s/ James Hoefler
PRESIDING OFFICER