

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANDALUZA INTERNATIONAL, LTD.	:	SMALL CLAIMS
	:	DETERMINATION
	:	DTA NO. 820638
for Review of a Denial, Suspension, Cancellation or	:	
Revocation of a License, Permit or Registration under	:	
Article 20 of the Tax Law.	:	

Petitioner, Andaluza International, Ltd., c/o Rafael Berges, P.O. Box 620704, Little Neck, New York 11362, filed a petition for review of a denial, suspension, cancellation or revocation of a license, permit or registration under Article 20 of the Tax Law.

A small claims hearing was held before Arthur S. Bray, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 23, 2007 at 1:15 P.M. Petitioner appeared by its president, Rafael Berges. The Division of Taxation appeared by Daniel Smirlock, Esq. (Heinz Ruppert). All briefs and documents were to be submitted by April 2, 2007, which date began the three-month period for the issuance of this determination.

ISSUE

Whether petitioner's failure to file tobacco tax returns in a timely manner warrants cancellation of its licence as a wholesale dealer of tobacco products.

FINDINGS OF FACT

1. On September 16, 1997, the Division of Taxation (“Division”) issued to petitioner, Andaluza International, Ltd. (“Andaluza”), a certificate denominated Appointment of Distributor of Tobacco Products. Andaluza’s president was Mr. Rafael Berges.

2. Each month, from October 1998 through January 2000, petitioner filed a form MT-203, Distributor of Tobacco Products Tax Return. No activity was reported on any of the returns.

3. From July 2002 through August 2003, petitioner did not file any tobacco products tax returns. After the Division requested filings, petitioner filed the overdue returns for the months of July 2002 through May 2003 on August 29, 2003.

4. On August 10, 2004, the commodities unit of the Division advised petitioner that tobacco products tax returns had not been filed for the period June 2003 through June 2004. Andaluza did not respond to the letter.

5. In a letter dated October 29, 2004, petitioner’s license as a distributor as a wholesale dealer of tobacco products was cancelled. The letter set forth two grounds for cancelling the license: petitioner had not filed a tobacco products tax return since May 2003¹ and petitioner did not file a sales and use tax return for the annual period ending February 29, 2004.

6. The Division’s records show that at the time of the conciliation conference, June 17, 2005, petitioner had not filed an annual sales and use tax return for the period ending February 29, 2004. This return has subsequently been filed. However, the tax reported to be due remained unpaid as of the date of the hearing. In addition, petitioner has not filed its corporation franchise tax returns for the years 2002 and 2003.

¹ The tobacco product tax returns for June 2003 through August 2004 were filed February 28, 2005.

7. The second line of the tobacco products tax return asks for the number of pounds of tobacco products, other than cigars, purchased or acquired. Mr. Berges made a practice of including tobacco leaf on this line, and, as a result, paid taxes on this item. At the conciliation conference, Mr. Berges was informed by the Division's advocate that he should not have included tobacco leaf on this line.²

8. On many of the returns filed by petitioner, Andaluza claimed a deduction on the basis that the tobacco products tax had been paid or assumed by another distributor. In a letter dated February 7, 2005, petitioner was asked to provide documentation substantiating the deduction. Eventually, the Division learned that petitioner's reporting was based on the assumption that when Andaluza transferred product to another tobacco dealer, the recipient of the product was responsible for the taxes payable thereon.³

9. At the hearing, Mr. Berges explained that from June 2003 through June 2004 he was suffering from certain difficulties. First, he was involved in a marital separation. Mr. Berges's wife used to prepare the tobacco products tax returns, and he was not familiar with the filing methodology. Second, Mr. Berges suffered from anxiety and depression. According to Mr. Berges, his condition caused him to not care about anything. Lastly, Mr. Berges notes that, during this period, he was outside of New York State approximately 70 percent of the time.

10. At the hearing, petitioner offered amended returns for the months of May 2000 through October 2004. An examination of the original and amended tobacco tax returns from May 2003 through October 2004 shows that petitioner was engaged in an active business through November 2003. From December 2003 through June 2004, the tobacco tax returns

² Petitioner's president maintained that he was misinformed on this topic by the Department of Taxation and Finance's "hotline."

³ At the hearing, petitioner's president asserted that he was also misinformed on this point by an individual who answered questions on the Department of Taxation and Finance's "hotline."

reported that no business was conducted during each month. Also, no business was conducted in August 2004. However, business was conducted in July, September and October 2004.

SUMMARY OF THE PARTIES' POSITIONS

11. The Division notes that the license of a wholesale dealer of tobacco products states that a violation of Article 20 or 20-A of the Tax Law is cause for the suspension or cancellation of the license. The Division also notes that the tobacco products tax returns direct taxpayers to file returns and that the related instructions explain that the failure to file returns may result in cancellation of the tobacco distributor license. The Division asserts that petitioner is a taxpayer which has consistently filed late or failed to file tobacco product tax returns. Further, petitioner has a history of being delinquent in the filing of returns other than tobacco products tax returns. It is noted that petitioner did file a delinquent sales tax return but did not pay the tax due. In addition, petitioner did not file timely corporation franchise tax returns for certain years. The Division posits that Mr. Berges's emotional problems did not prevent him from importing tobacco leaves and selling tobacco. It is also contended that many people with personal problems still manage to obey the tax laws.

12. Petitioner acknowledges that it did not file the tobacco tax returns on time. At the hearing, petitioner argued that the amended tobacco tax returns show that it did not file the returns on time, that it erroneously claimed certain credits and that it mistakenly paid tax on tobacco leaf.

13. According to petitioner, its filing record with respect to the other taxes is irrelevant. Mr. Berges submits that the failure to file shows that he was not in a proper state of mind and he did not have the services of the person who was in charge of filing the returns. Mr. Berges believes that his state of mind should be considered when determining whether his license should

be revoked. He further contends that the whole situation should be considered and that there were not only mistakes on his part but also mistakes made by New York State.

CONCLUSIONS OF LAW

A. Tax Law § 480 governs the licenses of wholesale dealers of tobacco products. Subdivision 1(j) of section 480 provides that the Commissioner of Taxation and Finance may revoke a wholesaler's license after an opportunity for a hearing has been afforded. Subdivision 3(a) further provides that the license of any wholesaler dealer may be cancelled or suspended upon:

(ii) Its failure to comply with any of the provisions of this article or article twenty-A of this chapter or any rule or regulation adopted pursuant to this article or article twenty-A of this chapter by the department or the commissioner. . . .

A similar provision appears in the Regulations of the Commissioner at 20 NYCRR 72.3[b][1][I].

B. Tax returns and the payment of tobacco products tax by distributors are regulated by Tax Law § 473-a. This section requires, in pertinent part, that every distributor file with the Commissioner, on or before the twentieth day of each month, a return showing the quantity and wholesale price of all tobacco products imported or caused to be imported into New York or manufactured in New York during the proceeding month.

C. In this case, the Division cancelled petitioner's license as a tobacco products distributor and wholesaler. The record in this matter shows that for extended periods of time, that is, from July 2002 through August 2003 and again, from June 2003 through October 2004, petitioner failed to file timely tobacco products tax returns until prompted by the Division. The Division chose to focus upon the second period as a premise for cancelling petitioner's license. The undisputed delay in filing the required tobacco products tax returns constituted a failure to comply with the explicit language of Tax Law § 473-a. It follows that there was a failure to

comply with the provisions of Article 20 of the Tax Law and it was within the discretion of the Division to cancel petitioner's license as a tobacco products distributor (Tax Law § 480[3][a][ii]; 20 NYCRR 72.3[b][1][i]). In view of the explicit language of Tax Law § 480(3)(a)(ii) and 20 NYCRR 72.3(b)(1)(i), petitioner's failure to timely file a sales tax return or corporation franchise tax returns have not been considered in reaching this conclusion.

D. The arguments raised by petitioner lack merit. It is recognized that Mr. Berges's separation from his wife may have caused a disruption in the business operations. Mr. Berges's emotional state may also have made compliance with the Tax Law more difficult. However, under the circumstances, neither excuse justifies petitioner's abysmal filing record for such an extended period of time. Petitioner's pattern of not filing returns began almost a year before the period relied upon by the Division to justify the cancellation of the license. The inference to be drawn is that neither Mr. Berges's mental state nor his marital difficulties had any bearing upon the pattern of not filing the required tax returns. Additionally, the tobacco products tax returns show that neither Mr. Berges's mental state nor his marital difficulties prevented him from having the wherewithal to actively conduct his business through at least November 2003. Clearly, if petitioner's president could conduct business, he could have taken steps to file the tobacco products tax returns. Lastly, petitioner has not presented any reason for concluding that the purported advice from the taxpayer "hotline" had any bearing upon the failure to file tax returns in a timely manner.

E. Since the Division did not reserve time to submit additional documents after the hearing, the documents offered with the Division's brief have not been included as a part of the record (*see, Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

F. The petition of Andaluza International Ltd. is denied and the cancellation of petitioner's License of Wholesale Dealer of Tobacco Products is sustained.

DATED: Troy, New York
June 28, 2007

/s/ Arthur S. Bray
PRESIDING OFFICER