

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOIANN M. KINLEY	:	DETERMINATION
		DTA NO. 820809
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, 2001 through May 31, 2003.	:	

Petitioner, Joiann M. Kinley, 4371 New Road, Williamson, New York 14589, 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, 2001 through May 31, 2003.

On June 23, 2006 and June 28, 2006, respectively, petitioner, and the Division of Taxation, by Daniel Smirlock, Esq. (James Della Porta, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs to be submitted by November 21, 2006, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly imposed sales tax against petitioner on certain sales of motor vehicles and transactions involving warranties on motor vehicles.

II. Whether petitioner has established facts or circumstances warranting the abatement of penalties for reasonable cause.

FINDINGS OF FACT

1. Petitioner, Joiann M. Kinley, was doing business as Mitch Motors, a used car dealership in New York State, during the period June 1, 2001 through May 31, 2003.

Petitioner was a sole proprietor and owner of the business. Petitioner's tax returns were prepared by income tax preparation and accounting services.

2. On or about April 15, 2004, the Division of Taxation ("Division") commenced a sales tax field audit of petitioner's books and records by mailing to petitioner an audit appointment letter requesting all books and records of the business pertaining to its sales and use tax liability for the period June 1, 2001 through February 28, 2004.

3. A detailed audit was conducted of petitioner's sales. Petitioner's sales records were deemed to be adequate for the audit period and thus were used to conduct the audit. The records allowed the auditor to trace any transaction back to the original source or forward to a final total. The audit disclosed the following:

a. some sales transactions were not reported on petitioner's sales and use tax returns, although listed on petitioner's books and records, resulting in additional sales tax in the amount of \$12,060.97;

b. petitioner failed to file sales and use tax returns or remit payment for sales tax collected for the quarters ending February 28, 2003, May 31, 2003, August 31, 2003 and November 30, 2003,¹ resulting in additional sales tax in the amount of \$6,024.91; and

¹ Ultimately, no sales tax was found due on audit for the quarters ending August 31, 2003 and November 30, 2003.

c. petitioner failed to collect sales tax on extended vehicle warranties sold to customers, resulting in additional sales tax in the amount of \$2,739.14.²

4. Petitioner executed a Consent Extending the Period of Limitations for Assessment of Sales and Use Taxes Under Articles 28 and 29 of Tax Law, such that a determination of taxes for the period June 1, 2001 through November 30, 2001 could be made at any time on or before December 20, 2004.

5. As a result of the audit, the Division issued a Notice of Determination dated December 1, 2004, to Joian M. Kinley, Mitch Motors, 4371 New Road, Williamson, NY 14589-9235, asserting additional sales and use taxes due for the period June 1, 2001 through May 31, 2003 in the amount of \$20,825.02, plus penalty of \$7,336.99 and interest of \$7,576.60, for a total of \$35,738.61.

6. Petitioner admits that when she sold additional warranties on vehicles, she added the cost of vehicle warranties to the sales price of the vehicle after the sales tax on the vehicle purchase had been computed, failing to also calculate sales tax on the portion of the sale representing the warranty.

7. Petitioner, formerly operating as Mitch Motors, has not been in business since June 6, 2003. According to correspondence with the Division in September 2005, petitioner has been unable to enter into gainful employment from June 2003 through the date of the correspondence.

8. The New York State Department of Health, Wayne County Department of Social Services, issued a Disability Review Team Certificate dated August 5, 2004 as to petitioner's medical condition. This determination bore an effective date of June 1, 2003, and was

² None of the tax computed on warranties was accrued during the quarters for which no tax return was filed or where no remittance was made. Thus, there is no overlap of tax computed, and the total sales tax liability in issue is \$20,825.02.

considered to have an expiration date of May 31, 2005. Petitioner's condition included depression, anxiety, irritable bowel syndrome, peptic ulcers and right shoulder tendonopathy and labral tearing. Further explanation of petitioner's condition was provided, in part, as follows:

The Social Security Act provides that for cases submitted with an application date of 5/1/96 or later an individual is not considered disabled if the disability would be based on drug/or alcohol dependence. Since the only diagnosis in this case is substance abuse, the individual is not disabled. Client is determined disabled based on a Mental Residual Functional Capacity Assessment, which indicates that this client has marked limitations in several work related areas that prevent her from performing any kind of substantial gainful activity. This client's impairments do not meet or equal any listing. The client is a 39 year old woman with a GED and a past work history as a used car salesperson. The client has been having symptoms of depression and anxiety since a motor vehicle accident 4 years ago. The client is noted as having been seeing a psychotherapist since 3/13/04. The client is noted as having a depressed mood, poor attention and concentration, such that she requires assistance with paying bills Client is noted as unable to concentrate and stay on task.

9. Petitioner provided no evidence that the tax assessed herein has otherwise been paid, or that any of the transactions in question were exempt from sales tax.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner submits that she is financially unable to meet her obligations, is considered totally disabled by the Department of Social Services, has not been gainfully employed since Mitch Motors ceased business in June 2003 and is receiving public assistance and financial support from her church, family and friends.

11. The Division maintains that petitioner has not paid her sales tax responsibilities for the periods in issue and bears the burden of proving she does not owe such liability. Further, the Division argues that reasonable cause for nonpayment of taxes or abatement of penalties does not include financial inability or petitioner's decision to use taxes collected for other more pressing obligations.

CONCLUSIONS OF LAW

A. Tax Law § 1101(b)(8)(i) defines “vendor” for purposes of the sales tax law, in part, as follows:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article. . . .

Petitioner is clearly a vendor for purposes of the sales tax law under the above definition.

B. Tax Law § 1131(1) and § 1132(a) provide that vendors of tangible personal property are responsible for collecting sales tax on the items they sell, and pursuant to Tax Law § 1105(a), retail sales of motor vehicles in New York State are subject to sales tax except as otherwise provided in Article 28 of the Tax Law. Consequently, petitioner was obligated to collect tax upon her sales of the used cars in question unless she could establish that such sales were not subject to tax (Tax Law § 1132[c]). Additionally, Tax Law § 1105(c)(3) and Regulation 20 NYCRR 527.5(c) provide that the sales of extended warranties are also subject to sales tax. Since sales tax is considered a transaction tax, petitioner, as a vendor, became liable for such sales tax when the sales occurred. The Tax Appeals Tribunal in ***Matter of BAP Appliance Corp.*** (June 29, 1989) noted as follows:

The sales tax is a transaction tax; liability for the tax occurs when the transaction takes place. Generally, the taxed transaction consists of the transfer of title or possession of property or the rendition of services in exchange for consideration, and the vendor collects the tax from the customer when the transaction occurs. The time or method of payment is immaterial since the tax becomes due at the time of the transfer of property or rendition of services (*see generally*, 20 NYCRR 525.2).

No exemption from such sales tax has been either alleged or proven in this case.

C. Petitioner has introduced no evidence concerning the unreported sales, does not deny failing to submit payment with her sales tax returns as alleged, and admits that she did not properly compute sales tax on extended warranties sold to customers. As a result, there is no basis to modify the results of the conclusions reached on audit or the Division's assessment of tax.

D. Tax Law § 1145(a)(1)(i) states that any person failing to file or pay over any sales or use tax to the Commissioner of Taxation and Finance ("the Commissioner") "shall" be subject to a penalty. This penalty may be canceled if the Commissioner determines that the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). Consistent with this statute, the Commissioner's regulations provide that penalty imposed under Tax Law § 1145(a)(1)(i) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1[a][1]). "By 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 [*Matter of F&W Oldsmobile v. Tax Commn. Of the State of New York*, 106 AD2d 792, 484 NYS2d 188]" (*Matter of MCI Telecommunications, Corp.*, Tax Appeals Tribunal, January 16, 1992). The taxpayer faces the "onerous task" of establishing reasonable cause as well as the absence of willful neglect (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993).

E. Petitioner maintains she has medical infirmities which affected her business and the filing and payment of her sales tax liabilities. In fact, an assessment of petitioner was performed by the New York State Health Department on August 20, 2004, effective June 1, 2003 (*see*, Finding of Fact "8"). The Division's regulations provide that the "serious illness of a taxpayer

or the taxpayer's unavoidable absence from its usual place of business, which precluded timely compliance, may constitute reasonable cause," provided, however, in the case of a failure to pay, the "amount is paid within a justifiable period of time" after the illness (*see*, 20 NYCRR 2392.1[d][1][i]). The regulations further require that, in the case of a failure to file the return, in order for the illness to constitute reasonable cause, the return must be filed within a "justifiable period of time" after the illness, defined as a "period which is substantiated by the taxpayer" as reasonable based on the facts and circumstances of the case (*see*, 20 NYCRR 2392.1[d][1][i][b]). Here, the sales tax due for the quarters ending February 28, 2003 and May 31, 2003 has never been paid, and although returns were prepared, copies of which were included with the Division's evidence, the Division's records do not show them as having ever been filed with the Division. Since petitioner cannot show that the amounts have been paid or the returns filed within a justifiable period of time after the illness, the medical infirmities may not constitute reasonable cause. Although one may argue that petitioner's illnesses were ongoing, and did not cease so as to allow her to recommence filing and payment, any returns that were filed or prepared for petitioner during the audit period for the liabilities at issue were done with the assistance of income tax or accounting services. Petitioner knew her own limitations and sought the assistance she needed to prepare tax returns required by law. Had the tax been paid and the returns filed, though late, petitioner's medical issues may have formed the basis for reasonable cause and, therefore, for abatement of penalties. However, the returns in issue were not filed and the tax due was simply not paid, and remain unfiled and unpaid, respectively, to date. Petitioner's medical infirmities, therefore, do not constitute a cause for the subject delinquency "which would appear to a person of ordinary prudence and intelligence" as reasonable cause for

delay and which clearly indicated an absence of willful neglect (*see*, 20 NYCRR 2392.1[d][5]).

Accordingly, the Division's imposition of penalties in this matter was proper.

F. The petition of Joiann M. Kinley is denied, and the Notice of Determination dated December 1, 2004, is hereby sustained.

DATED: Troy, New York
May 10, 2007

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE