

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STEPHEN ROBINS	:	DETERMINATION
	:	DTA NO. 820986
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods June 1, 2003 through August 31, 2003,	:	
March 1, 2004 through May 31, 2004 and June 1, 2004	:	
through August 31, 2004.	:	

Petitioner, Stephen Robins, 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 periods June 1, 2003 through August 31, 2003, March 1, 2004 through May 31, 2004 and June 1, 2004 through August 31, 2004.

On October 6, 2006 and October 20, 2006, respectively, petitioner, appearing pro se, and the Division of Taxation appearing by Daniel Smirlock, Esq. (Jennifer A. Murphy, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by August 4, 2009, which date 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.

ISSUE

Whether petitioner has established a basis for the cancellation of penalties and interest imposed by the Division of Taxation for the periods in issue.

FINDINGS OF FACT

1. Petitioner was the president, sole officer and shareholder of Rockwells Restaurant Corp. (Rockwells), the principal place of business of which was located in Scarsdale, New York.

2. During the periods in issue, Rockwells was required to file New York State and local sales and use tax returns on a part-quarterly basis, where the filing consists of two monthly returns for the first two months of a quarter (Part Quarterly Form ST-809) and a quarterly return for all three months of the quarter (Quarterly ST-810), which acts as a reconciliation of the total sales for the quarter.

3. Rockwells failed to file its monthly returns, ST-809, for June and July 2004; however, it did timely file form ST-810 for the June 1, 2004 through August 30, 2004 quarter with full payment. The failure to file the monthly returns resulted in penalty and interest beginning to accrue from the due dates of those returns, July 20, 2004 and August 20, 2004, respectively. As a result, the Division of Taxation (Division) issued a Notice of Determination (No. L-025597811), dated June 20, 2005, to petitioner as a responsible officer of Rockwells for penalty and interest of \$642.19 and 3,447.84, respectively, for the, failure to file returns and pay the self-assessed tax on or before the due dates.

4. Rockwells timely filed its form ST-809 for the month of March 2004, and its quarterly return for March 1, 2004 through May 31, 2004, with the stated liabilities paid. However, the company filed its ST-809 for the month of April 2004 with a check that was dishonored by the corporation's bank. The Division then issued a Notice of Determination (L-025597813), dated June 20, 2005, to petitioner as a responsible officer of Rockwells, assessing tax, penalty and interest in the total amount of \$25,580.05 for the late filing and nonremittance of the liability, including penalties and interest, due for the quarter ending May 31, 2004.

5. Rockwells timely filed its form ST-809 for the month of June 2003; however, its check was dishonored by its bank. The corporation filed its form ST-809 for July 2003 with no accompanying remittance and similarly filed its quarterly sales tax return for the period June 1, 2003 through August 31, 2003 without any accompanying check. As a result the Division issued to petitioner as a responsible officer of Rockwells a Notice of Determination (L-025597812), dated June 20, 2005, for a total amount of \$78,919.83, for the late filing and the nonremittance of the tax, penalties and interest due from Rockwells for the quarter ended August 31, 2003.

6. Besides his status as president, sole officer and shareholder, petitioner had several indicia of a responsible officer, including:

a) a designation in the New York Department of State documents that he held the position of chairman or chief executive officer;

b) signing corporation franchise tax returns as president of Rockwells;

c) signing a request for an extension to file a New York S corporation franchise tax return during one of the years in issue as the president of Rockwells, as well as the check on the corporate account to pay for the deposit on said extension;

d) possessing check signing authority over the corporation's account; and

e) signing sales and use tax returns during the quarters in issue as president of Rockwells.

7. Petitioner has not disputed his responsibility for the taxes due from Rockwells or the propriety of the tax that was asserted for the period in issue. He only challenges the Division's imposition of penalty and additional interest.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioner contends that the Division acted improperly towards him, gave him erroneous advice over a course of years prior to the audit period, issued improper notices to him and

engaged in other abuses of power, all of which negatively affected his ability to operate his business, borrow funds or sell any of the business assets at or near market value. He argues that because the Division forced him to withdraw prior petitions and because of its failure to respond to Rockwells' amnesty application in a timely and consistent manner, interest continued to accrue and should be abated. In addition, he maintains that the delays caused by the Division resulted in liens against the corporation and petitioner's personal property, and perpetuated his inability to effectively operate his business and pay his debts and further eroded his ability to save the business.

9. The Division argues that Rockwells' poor tax filing record and its poor business practices are well established in the Division's records. Rockwells often filed late, failed to pay the total sales tax due, and inappropriately blames the Division for its own financial problems and bad decisions. The Division contends that petitioner has not explained the failure of the company or himself to timely file returns and pay the tax when due and therefore has not established reasonable cause or the absence of willful neglect to justify abatement of penalty and additional interest.

CONCLUSIONS OF LAW

A. Tax Law § 1145(a)(1)(i) imposes a penalty upon persons who fail to timely file a return or timely pay the tax imposed by Articles 28 and 29 of the Tax Law. The penalty and additional interest may be waived if "such failure or delay was due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). In determining whether reasonable cause and good faith exist, the regulations provide several specific grounds and also a catchall provision 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*, Tax Appeals Tribunal, April 29, 1993; *Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978, 598 NYS2d 360 [1993]; 20 NYCRR 3000.15[d][5]).

B. The only issue in this case is petitioner's request for abatement of the penalties and interest on the notices in issue. Petitioner's argument that the Division's prior collection actions against Rockwells and its allegedly abusive behavior with regard to petitioner's request for a deferred payment agreement, which caused the filing of warrants and led the way for the general downturn in fortune for petitioner's business, is without merit. Petitioner has failed to establish the factual assertions against the Division upon which his claim of reasonable cause rests. The probative value of such assertions depends largely upon the credibility of the individual making the claims. Petitioner sought to establish these factual assertions only by his affidavit, as president of Rockwells. However, absent an opportunity to assess the credibility of Mr. Robins, the affidavit is insufficient to establish many of the facts asserted therein. In addition, these events, most of which occurred prior to the periods in issue, were ultimately all of petitioner's own doing and do not establish reasonable cause for Rockwells' delay in paying the taxes for the periods in issue.

It may well be that petitioner's ability to pay the tax due was compromised because of the corporation's ongoing financial difficulties, but diverting sales taxes collected on behalf of the state to address other business needs was improper and does not establish reasonable cause for the failure to pay the tax due in a timely manner (*see Matter of F & W Oldsmobile v. Tax Commn.*, 106 AD2d 792, 484 NYS2d 188 [1984] [a taxpayer's financial condition, hurt by high

mortgage rates and a depressed industry, did not constitute reasonable cause for failure to timely pay over sales and use taxes it had collected]; *Matter of Zeitman*, Tax Appeals Tribunal, January 25, 1996; *Matter of Dworkin Construction Co.*, Tax Appeals Tribunal, August 4, 1988).

C. The petition of Stephen Robins is denied, the three notices of determination, dated June 20, 2005, are hereby sustained.

DATED: Troy, New York
January 28, 2010

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE