

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MANUEL J. ORTIZ	:	SMALL CLAIMS
	:	DETERMINATION
	:	DTA NO. 821309
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 March 1, 1975 through August 31, 1982.	:	

Petitioner, Manuel J. Ortiz, 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 March 1, 1975 through August 31, 1982.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 12, 2007 at 9:15 A.M. Petitioner appeared by Olivia D. Rosario, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Richard B. Slovacek).

Since neither party elected to reserve time to file a post hearing brief, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

ISSUE

Whether petitioner, the purchaser in a bulk sales transaction who concedes that he is liable for payment of the sales taxes owed by the seller, should also be held liable for accrued interest charges.

FINDINGS OF FACT

1. On May 22, 1986, the Division of Taxation (Division) received a Notification of Sale, Transfer or Assignment in Bulk (Notification) which indicated that petitioner was purchasing or had purchased from Margaro Latalladi a supermarket known as Stop #1. The Notification reported a total sales price of \$152,000.00, with \$2,000.00 paid or payable in cash and the remaining \$150,000.00 balance secured by a promissory note. The date of sale as shown on the Notification did not reflect a specific date, listing only “May, 1986” as the scheduled date of sale.

2. On May 30, 1986, the Division sent a Notice of Claim to Purchaser advising petitioner not to transfer any funds to the seller until (i) the seller’s sales tax liability had been determined; (ii) payment had been received fully satisfying the seller’s liability; and (iii) the Division authorized the purchaser or escrow agent to release the funds to the seller. A letter was also sent to the escrow agent named in the Notification informing him not to release any funds until all three of the above conditions had been met.

3. The Division, after audit, determined that the seller owed \$11,289.79 of additional sales tax for the period March 1, 1975 to August 31, 1982, and on June 24, 1986, it issued a notice to the seller seeking payment of the amount determined to be due. On August 21, 1986, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner asserting that he owed \$11,289.79 of sales tax due, plus penalty and interest. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due advised petitioner that “[t]he following taxes are determined to be due from Margaro Latalladi d/b/a Stop #1 and represents your liability, as purchaser, in accordance with Section 1141(c) of the Sales Tax Law.”

4. On or about October 6, 1986, the former Tax Appeals Bureau received from petitioner a protest of the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 21, 1986. A conciliation conference was scheduled to be held on Tuesday, December 15, 1987 by the Division's Bureau of Conciliation and Mediation Services (BCMS). Neither petitioner nor his representative appeared at the scheduled conciliation conference and, on January 8, 1988, BCMS issued a Conciliation Default Order sustaining the Notice of Determination and Demand for Payment of Sales and Use Taxes Due and dismissing petitioner's protest.

5. Petitioner sold the supermarket on an undisclosed date in 1989, and soon after the sale he returned to the Dominican Republic. Petitioner moved back to New York some 13 years later in 2002. In 2004, petitioner received a Payment Document from the Division wherein it sought payment of the sales tax assessed in the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 21, 1986. The Payment Document reflected a revised tax due of \$10,779.28 and accrued interest of \$81,716.20. Petitioner completed the Disagreement with Findings Section of the Payment Document and the protest was then referred back to BCMS.

6. A conciliation conference was held by BCMS on April 6, 2006, and on July 14, 2006, it issued a Conciliation Order reflecting a tax due of \$10,779.28, and no penalty. Interest, beginning on August 27, 1986, was to be computed at the lower underpayment rates. Payments, totaling \$3,294.61, were applied to the tax and interest due and, as of June 23, 2006, tax and interest due totaled \$39,954.94.

SUMMARY OF PETITIONER'S POSITION

7. Petitioner concedes that he is a bulk sale purchaser who failed to give proper notice of the bulk sale to the Division and that he is liable for payment of the sales tax determined to be due from the seller. Petitioner asserts that his actions were not willful or neglectful and that during his 13-year stay in the Dominican Republic he received no notice from the Division that the liability was unsatisfied and that interest was continuing to accrue. Petitioner believes that given the unique facts of this case it is fair and equitable to abate all interest charges.

CONCLUSIONS OF LAW

A. Tax Law § 1145(a)(1)(i) provides that if any amount of sales tax is not paid on or before the date due, interest, computed at either the higher statutory rate or the lower underpayment rate, is due on said amount from the date payment is due to the date the tax is paid. Where, as here, the tax due has been assessed against the purchaser in a bulk sale transaction, interest owed by the purchaser on the taxes due from the seller is computed from the date the purchaser receives the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, in this case August 27, 1986 (*Matter of Velez v. Division of Taxation of the Dept. of Taxation & Fin.*, 152 AD2d 87, 547 NYS2d 444 [1989]). In the instant matter, the Division has already canceled penalties, reduced the interest rate to the lower underpayment rate and agreed to calculate interest starting from August 27, 1986. Accordingly, the sole issue to address herein is whether, given the facts of this case, all interest charges should be abated.

B. Petitioner's request to have all interest charges waived or abated must be denied. By requesting that all interest charges be abated, petitioner, in essence, seeks an interest-free loan from the State of New York. As noted by the Tribunal in *Matter of Rizzo* (Tax Appeals Tribunal, May 13, 1993):

Failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due. . . . It is not proper to describe interest as substantial prejudice, as it is applied to all taxpayers who fail to remit . . . tax due in a timely manner. Rather, a more accurate interpretation would be to say that interest represents the cost to the taxpayer for the use of the funds. . . .

If interest charges were routinely waived or abated, there would be little or no incentive for a taxpayer to remit the proper tax due since he or she would have the use of the State's funds interest-free. In fact, such a practice or policy would promote and encourage taxpayers not to remit the proper tax due and reward them for such actions.

Finally, petitioner, at the time he left New York in 1989, was aware of the fact that he owed taxes and interest to the Division and he apparently chose to ignore this obligation. In fact, petitioner had protested the assessment with BCMS in 1986 and such protest was dismissed on January 8, 1988 by reason of default. Petitioner's actions do not support that the principles of fairness and equity weigh in his favor.

C. The petition of Manuel J. Ortiz is denied and the Division's Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 21, 1986 is, as modified by the Conciliation Order dated July 14, 2006, sustained.

DATED: Troy, New York
December 6, 2007

/s/ James Hoefer
PRESIDING OFFICER