

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STEPHEN ROBINS	:	DETERMINATION
	:	DTA NO. 821546
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period December 1, 2004 through	:	
November 30, 2005.	:	

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 period December 1, 2004 through November 30, 2005.

On July 30, 2007 and August 13, 2007, respectively, petitioner, appearing pro se, and the Division of Taxation appearing by Daniel Smirlock, Esq. (Michael Hall, of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by October 9, 2009, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Thomas C. Sacca, 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 period 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 at 97 Brookby Road, Scarsdale, New York.

2. Rockwells was required to file part-quarterly (monthly) and quarterly sales and use tax returns during the period in issue. For the month of January 2005, Rockwells failed to file its part-quarterly return (ST-809) as required. Rockwells timely filed its quarterly sales tax return (ST-810) with a check in the amount of \$16,601.98, drawn on petitioner's account with the First County Bank of Greenwich, Connecticut. The check was returned unpaid by the bank to the Division of Taxation (Division). The Division issued a Notice and Demand to Rockwells on July 8, 2005, in which it asserted sales tax due of \$34,352.83, plus penalty and interest.

3. The Division issued a Notice of Determination, dated February 13, 2006, to petitioner as a responsible officer of Rockwells for the sales tax quarter ended February 28, 2005 which asserted tax due in the amount of \$34,352.83, plus penalty and interest.

4. The computation section of the Notice of Determination revealed that the Division did not challenge the amount of sales and use taxes collected and reported by the corporation (\$52,740.06) for the quarter ended February 28, 2005. However, Rockwells only paid \$18,387.23 during the quarter, representing the sales tax due for the month of December 2004, leaving a balance due of \$34,352.83, which constituted the basis of the tax asserted in the Notice of Determination.

5. For the month of April 2005, Rockwells late-filed its part-quarterly return, remitting payment of \$19,832.48 in sales tax due. Rockwell late-filed its quarterly sales tax return for the period ended May 31, 2005 with payment of the sales tax due of \$19,097.03. On the return,

Rockwells claimed the vendor collection credit of \$150.00. The Division issued a Notice and Demand to Rockwells on August 26, 2005, in which it asserted sales tax due of \$150.00, plus penalty and interest. The notice explained that the vendor collection credit was only allowed on a timely filed, full paid return, and penalties were being asserted for the late filed returns and late payment of the tax due.

6. The Division issued a Notice of Determination, dated February 13, 2006, to petitioner as a responsible officer of Rockwells for the sales tax quarter ended May 31, 2005 which asserted tax due in the amount of \$150.00, plus penalty and interest.

7. For the month of June 2005, Rockwells late-filed its part-quarterly return with a check in the amount of \$15,121.06, drawn on its account with the First County Bank. The check was returned unpaid by the bank to the Division. Rockwells late-filed its quarterly sales tax return for the quarter ended August 31, 2005 without remitting the sales tax indicated to be due on the return of \$22,945.04. The Division issued a Notice and Demand to Rockwells on January 17, 2006, in which it asserted sales tax due of \$38,066.27, plus penalty and interest.

8. The Division of Taxation issued a Notice of Determination, dated February 13, 2006, to petitioner as a responsible officer of Rockwells for the sales tax quarter ended August 31, 2005, which asserted tax due in the amount of \$38,066.27, plus penalty and interest.

9. The computation section of the Notice of Determination revealed that the Division did not challenge the amount of sales and use taxes collected and reported by the corporation (\$56,014.94) for the quarter ended August 31, 2005. However, Rockwells only paid \$17,948.67 during the quarter, representing the sales tax due for the month of July 2005, leaving a balance due of \$38,066.27, which constituted the basis of the tax asserted in the Notice of Determination.

10. Rockwells timely filed its quarterly sales tax return for the period September 1, 2005 through November 30, 2005 with a check in the amount of \$18,285.20, drawn on an account with the Bank of New York located in Hartsdale, New York. The check was returned unpaid by the bank to the Division. The Division issued a Notice and Demand to Rockwells on March 23, 2006, in which it asserted sales tax due of \$19,242.66, plus penalty and interest.

11. The Division issued a Notice of Determination, dated April 17, 2006, to petitioner as a responsible officer of Rockwells for the sales tax quarter ended November 30, 2005, which asserted tax due in the amount of \$19,242.66, plus penalty and interest.

12. The computation section of the Notice of Determination revealed that the Division did not challenge the amount of sales and use taxes collected and reported by the corporation (\$56,059.74) for the quarter ended November 30, 2005. However, Rockwells only paid \$36,817.08 during the quarter, representing the sales tax due for the months of September 2005 and October 2005, leaving a balance due of \$19,242.66, which constituted the basis of the tax asserted in the Notice of Determination.

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

- a) signing the sales and use tax returns for the quarters in issue as president of Rockwells,
- b) possessing check signing authority over the corporation's account,
- c) signing the checks on behalf of the corporation in payment of the sales tax due; and
- d) signing the corporation's New York State S corporation franchise tax returns.

14. 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

15. Petitioner contends that the Division failed to provide him with copies of the Bureau of Conciliation and Mediation Services' notices of conference, which resulted in the issuance of conciliation default orders and contends this constitutes reasonable cause for the abatement of penalties.

16. The Division argues that Rockwells failed to timely file sales tax returns and pay the total sales tax due for the quarters in issue, which was collected and reported on its return. The Division contends that petitioner has not explained the failure of the company or himself to 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; 20 NYCRR 3000.15[d][5]).

B. Petitioner is only seeking abatement of the penalties and interest imposed. However, petitioner's argument that reasonable cause exists because the Division failed to provide him with notices of conference resulting in default orders being issued is without merit. These events, which occurred after the periods in issue, do not establish reasonable cause for Rockwells' delay in filing returns and paying the taxes for the periods in issue.

It appears that Rockwells' ability to pay the sales taxes 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 [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 and the four notices of determination, dated February 13, 2006 and April 17, 2006, are sustained.

DATED: Troy, New York
March 25, 2010

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE