

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ARTHUR ROTONDI : DETERMINATION
for Revision of Determinations or for Refund of Sales and : DTA NO. 822142
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period December 1, 2000 through November 30, 2005. :
:

Petitioner, Arthur Rotondi, 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, 2000 through November 30, 2005.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 2, 2009 at 12:05 P.M., with all briefs to be submitted by May 17, 2011, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Mark F. Volk, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUES

I. Whether some taxable sales reported by The Motorcycle Excellence Group, Inc., on its sales and use tax returns filed for the period December 2000 through May 31, 2001, were also included in taxable sales, either reported on filed sales and use tax returns or included after audit, of a predecessor corporation, Rotondi Industries Corporation, for the same period.

II. Whether reasonable cause exists to abate the penalties.

FINDINGS OF FACT

1. At all relevant times, The Motorcycle Excellence Group, Inc. (Motorcycle Excellence Group), owned and operated a BMW motorcycle dealership located in Valley Stream, New York. Motorcycle Excellence Group sold and repaired motorcycles, and sold clothing, boots and other accessories such as helmets.

2. At the hearing, petitioner, Authur Rotondi, admitted that he was the responsible person for Motorcycle Excellence Group for the period December 1, 2000 through November 30, 2005.

3. On or about November 18, 2005, Motorcycle Excellence Group filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court, Eastern District of New York.

4. On July 19, 2006, Motorcycle Excellence Group's bankruptcy attorney, Tracy L. Klestadt, Esq., filed the corporation's quarterly sales and use tax returns (Form ST-100's) for the period December 1, 2000 through November 30, 2005,¹ reporting gross and taxable sales and sales tax due for each quarter, without remittance. A bankruptcy accountant, hired by Motorcycle Excellence Group, prepared and signed all of the returns filed for the period December 1, 2000 through November 30, 2005.

5. On each of these sales and use tax returns, consisting of 20 sales tax quarters, Motorcycle Excellence Group reported total gross sales and total taxable sales in the same amount of \$4,216,709.00 as follows:

Sales tax quarter ending	Sales reported
February 28, 2001	\$ 70,540.00
May 31, 2001	326,098.00

¹ In her cover letter, dated July 19, 2006, Ms. Klestadt indicated sales and use tax returns were being filed for "the quarterly periods beginning December 1, 2000 through November 17, 2005."

August 31, 2001	324,361.00
November 30, 2001	137,938.00
February 28, 2002	188,723.00
May 31, 2002	353,966.00
August 31, 2002	273,086.00
November 30, 2002	141,774.00
February 28, 2003	282,621.00
May 31, 2003	190,498.00
August 31, 2003	237,367.00
November 30, 2003	102,167.00
February 29, 2004	108,836.00
May 31, 2004	248,974.00
August 31, 2004	183,761.00
November 30, 2004	99,825.00
February 28, 2005	79,939.00
May 31, 2005	330,649.00
August 31, 2005	361,345.00
November 30, 2005	174,241.00
Total	\$4,216,709.00

6. On September 18, 2006, the Division of Taxation (Division) issued 20 notices of determination to petitioner advising him that he was being assessed as an officer or responsible person of Motorcycle Excellence Group. The notices assessed as follows:

Assessment ID Number	Period Ended	Tax	Interest	Penalty	Payments /Credits	Total
L-027688304	02/28/2001	\$5,995.90	\$6,434.54	\$1,798.59	\$0.00	\$14,229.03
L-027688299	05/31/2001	27,718.33	28,034.30	8,315.43	0.00	64,068.06

L-027688294	08/31/2001	27,570.69	26,233.01	8,271.06	0.00	62,074.76
L-027688309	11/30/2001	11,724.73	10,481.58	3,517.27	0.00	25,723.58
L-027688303	02/28/2002	16,041.46	13,454.95	4,812.34	0.00	34,308.75
L-027688298	05/31/2002	30,087.11	23,587.88	9,026.11	0.00	62,701.10
L-027688313	08/31/2002	23,212.31	16,964.56	6,963.63	0.00	47,140.50
L-027688308	11/30/2002	12,050.79	8,192.56	3,615.07	0.00	23,858.42
L-027688302	02/28/2003	24,022.79	15,155.18	7,206.67	0.00	46,384.64
L-027688297	05/31/2003	16,192.34	9,315.14	4,857.33	0.00	30,365.11
L-027688312	08/31/2003	20,769.61	10,789.94	6,230.76	0.00	37,790.31
L-027688307	11/30/2003	8,939.61	4,178.32	2,681.76	0.00	15,799.69
L-027688301	02/29/2004	9,523.15	3,976.99	2,856.91	0.00	16,357.05
L-027688296	05/31/2004	21,785.23	8,038.64	6,535.52	0.00	36,359.39
L-027688311	08/31/2004	16,079.09	5,178.18	4,823.70	0.00	26,080.97
L-027688306	11/30/2004	8,734.69	2,416.93	2,620.26	0.00	13,771.88
L-027688300	02/28/2005	6,994.66	1,629.19	1,888.44	0.00	10,512.29
L-027688295	05/31/2005	28,931.79	5,515.42	6,943.51	0.00	41,390.72
L-027688310	08/31/2005	31,166.00	4,654.99	6,544.86	0.00	42,365.85
L-027688305	11/30/2005	15,028.29	1,652.26	2,705.06	0.00	19,385.61

The computation section of each of these notices of determination indicates that the Division computed the tax due based upon the sales reported by Motorcycle Excellence Group on each of the quarterly sales and use tax returns that it filed late for the period December 1, 2000 through November 30, 2005.

7. At some point, Motorcycle Excellence Group's bankruptcy petition was dismissed with prejudice.

8. On or about October 23, 2007, the Division's Tax Compliance Unit seized Motorcycle Excellence Group's assets. An auction subsequently took place on November 14, 2007 at Motorcycle Excellence Group's Valley Stream, New York, business location. Auction net proceeds in the amount of \$148,272.06 were applied against three assessments issued to Motorcycle Excellence Group for the periods December 1, 2000 through February 28, 2001, March 1, 2001 through May 31, 2001 and June 1, 2001 through August 31, 2001.

9. At the hearing, the Division conceded that two notices of determination (L-027688304 and L-027688299) issued to petitioner that covered the first two periods at issue, i.e., December 1, 2000 through May 31, 2001, were fully paid as of the date of the hearing. With respect to Notice of Determination (L-027688294) issued to petitioner that covered the third period at issue, i.e., June 1, 2001 through August 31, 2001, the Division conceded that the tax and interest due were fully paid, but a penalty of \$4,677.14 remained due. The Division's documents indicate that as of the date of the hearing, no payments were made or credited against the notices of determination issued to petitioner for the remaining 17 periods at issue, i.e., September 1, 2001 through November 30, 2005.

10. At the hearing, petitioner stated that he was an officer of a predecessor corporation Rotondi Industries, Inc. (Rotondi Industries). As noted above, petitioner also admitted that he was the responsible person of Motorcycle Excellence Group. Petitioner maintained that at any point in time, there was only one corporation and only one set of transactions at the Valley Stream, New York, location. The two companies did not operate simultaneously.

11. At the hearing, petitioner claimed that Rotondi Industries had filed sales and use tax returns and possibly paid sales tax on some of the same transactions reported by Motorcycle Excellence Group on its sales and use tax returns. According to petitioner, the Division's Nassau

District Office conducted a sales and use tax field audit of Rotondi Industries that covered taxable periods ending May 31, 2001. That audit was concluded by agreement with consent. He further indicated that the Division's Nassau District Office conducted a second sales and use tax field audit of Rotondi Industries that covered the period June 1, 2001 through November 30, 2003, and that as a result of that audit, a Notice of Determination was issued. Petitioner further claimed that when Motorcycle Excellence Group filed for Chapter 11 bankruptcy protection on November 18, 2005, the bankruptcy accountant filed Motorcycle Excellence Group's sales and use tax returns for the period December 1, 2000 through November 30, 2005, thereby double reporting some of the transactions.

12. Petitioner also asserted that the bankruptcy accounting firm simply used the revenue in the account when it prepared Motorcycle Excellence Group's sales and use tax returns for the period December 1, 2000 through November 30, 2005.

13. Petitioner did not submit any documents into the record at the hearing.

14. Shortly before the hearing concluded, the Division's representative indicated that the Division had no interest in taxing the same transactions twice. He further indicated that, if documentation was provided that indicated the same sales of motorcycles were picked up either on the sales and use tax returns filed by Rotondi Industries or on audits of that corporation, and were also reported on Motorcycle Excellence Group's sales and use tax returns, the Division would voluntarily reduce the amount of tax in issue, by adjusting the returns in issue, i.e., Motorcycle Excellence Group's sales and use tax returns filed for the period December 1, 2000 through November 30, 2005. Mr. Infantino also agreed to ascertain whether the audit files for Rotondi Industries had any forms MV-50, i.e., the form filed with the New York State Department of Motor Vehicles (NYS DMV) by a dealer upon its retail sale of a motorcycle, that

would identify, among other things, the seller of a particular motorcycle. At that time, petitioner agreed to locate the forms MV-50 filed by Motorcycle Excellence Group with respect to its sales of motorcycles during the period December 1, 2000 through May 31, 2001.

15. The parties jointly requested that the record remain open for 90 days so that documentation could be obtained regarding certain sales of motorcycles during the period December 1, 2000 through May 31, 2001.

16. In a letter, dated December 16, 2009, to Administrative Law Judge Winifred M. Maloney and copied to petitioner, Mr. Infantino reported on his post-hearing discovery regarding the audits of Rotondi Industries. He wrote that neither of the audits of Rotondi Industries was based upon filed MV-50s. Rather, the first audit was based upon the sales and use tax returns filed by Rotondi Industries and bank deposits, and the second audit was based upon an extension of the first audit. Mr. Infantino, in his letter, also indicated that the MV-50s would not take into account taxable repair services and other sales of tangible personal property, e.g., motorcycle accessories. Mr. Infantino, in his letter, also advised that, based upon the reasonable belief that only one corporation did business at a time at the same location, the Division cancelled the Notice of Determination issued to Rotondi Industries, which asserted tax in the amount of \$193,938.01, plus penalty and interest, for the period June 1, 2001 through November 30, 2003 (i.e, the second audit of Rotondi Industries), and also completely cancelled a "bulk sale" Notice of Determination (L-029070046) issued to Motorcycle Excellence Group. He further advised that the Division cancelled four delinquency notices of determination (nos. L-021727596 [quarter ending May 31, 2002], L-021940918 [quarter ending August 31, 2002], L-022289119 [quarter ending November 30, 2002], and L-022897397 [quarter ending February 28, 2003]) issued to Rotondi Industries against which some payments had been made, requiring payments totaling

\$61,559.60 to be reapplied to other open liabilities of Rotondi Industries and to the corresponding assessments issued against Mr. Rotondi as the responsible person of Rotondi Industries, and that it also cancelled four delinquency notices of determination (nos. L-023720204 [quarter ending November 30, 2003], L-024342292 [quarter ending February 28, 2004], L-024721020 [quarter ending May 31, 2004], and L-025054926 [quarter ending August 31, 2004]) issued to Rotondi Industries, for which no payments were made. The Division also cancelled any corresponding assessments issued against Mr. Rotondi as the responsible person of Rotondi Industries. In the conclusion of his letter, Mr. Infantino claimed that based upon the foregoing, no further adjustment could be made regarding Motorcycle Excellence Group's sales and use tax returns at issue in this proceeding.

17. Although petitioner was granted six extensions of time in which to file post-hearing documentation, he did not submit any documentation prior to the close of the record on January 19, 2011.

CONCLUSIONS OF LAW

A. As noted above, 20 notices of determination were issued to petitioner as the person liable for sales and use taxes due from Motorcycle Excellence Group for the period December 1, 2000 through November 30, 2005. Petitioner at the hearing admitted that he was the responsible person of Motorcycle Excellence Group for the period December 1, 2000 through November 30, 2005. It is well established that a presumption of correctness attaches to a Notice of Determination upon its issuance and petitioner bears the burden of overcoming this presumption (*see Matter of Hammerman*, Tax Appeals Tribunal, August 17, 1995). Although petitioner asserts that the tax assessed for the period December 1, 2000 through May 31, 2001 should be adjusted because Motorcycle Excellence Group and its predecessor corporation, Rotondi

Industries, included the same transactions in taxable sales reported on their respective sales and use tax returns filed for the period December 1, 2000 through May 31, 2005, he did not submit any of Motorcycle Excellence Group's books and records, any of Rotondi Industries' books and records, or any other probative evidence to support that assertion. Petitioner has failed to establish by clear and convincing evidence that the amount of tax assessed is erroneous (*Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536 [1986], *lv dismissed* 69 NY2d 822, 513 NYS2d 1027 [1987]).

B. Tax Law § 1145(a)(1)(i) authorizes the imposition of a penalty for the failure to file a return or to pay or pay over the sales and use tax due within the time required. Such penalty may be abated pursuant to Tax Law § 1145(a)(1)(iii) when the taxpayer establishes that such omission was due to reasonable cause and not due to willful neglect. Reasonable cause includes any cause for delinquency which would appear to a person of ordinary prudence and intelligence as reasonable cause for the delay in filing a sales tax return and paying the tax imposed under Articles 28 and 29 of the Tax Law (*see* 20 NYCRR 2392.1[d][5]). Petitioner has not presented any evidence or argument warranting waiver of the penalties asserted.

C. The petition of Arthur Rotondi is denied and the notices of determination, dated September 18, 2006, are sustained.

DATED: Troy, New York
November 3, 2011

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE