

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ATLANTIC SHEET METAL WORKS, INC.

DECISION

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, 1978
through November 30, 1981.

Petitioner, Atlantic Sheet Metal Works, Inc., c/o Abe Rosenblatt, 25 Jericho Turnpike, Mineola, New York 11501, 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, 1978 through November 30, 1981 (File No. 39958).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 4, 1986 at 9:15 A.M. Petitioner did not appear. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether penalty and that portion of interest exceeding the minimum rate prescribed by law should be cancelled.

FINDINGS OF FACT

1. On July 20, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Atlantic Sheet Metal Works, Inc. covering the period June 1, 1978 through November 30, 1981 for taxes due of \$38,414.04 plus penalty of \$8,221.27 and interest of \$9,514.51, for a total of \$56,149.82.

2. Petitioner timely filed a petition for revision of the above determination.

3. Petitioner executed a Withdrawal of Petition and Discontinuance of Case, dated April 19, 1986, whereby it agreed to a revised tax due of \$21,933.91. The withdrawal indicated **no** penalty due and interest was to be computed at the minimum rate. The auditor had recommended that penalty be cancelled and interest be reduced to minimum interest. Subsequently petitioner was advised that because the amount of the penalty to be abated was in excess of \$5,000.00, it had to be approved by the Tax Commission. Petitioner was further advised of the procedure to follow for making such application to the Tax Commission. After several attempts **to** obtain the application failed, petitioner was advised that the matter would be scheduled for a hearing to address the issue of penalty. A hearing was scheduled **on** December 4, 1986. Neither the petitioner nor its representative appeared at the hearing.

CONCLUSIONS OF LAW

A. That section 1145(a)(1)(i) of the Tax Law provides for the imposition of penalty and interest for failure to file a return or pay over any tax when due. Former subparagraph (ii) of said section provides for the remission of penalty and that portion of interest that exceeds the minimum rate if the Tax Commission determines that the failure or delay was due to reasonable cause and not due to willful neglect.

B. That 20 NYCRR 536.1(b) (former 20 NYCRR 536.5[b]) provides:

"Reasonable Cause. In determining whether reasonable cause exists, either as a basis for remitting assessed interest or penalties or as grounds for remitting interest or penalties upon the late filing of a return or payment, the taxpayer's previous compliance record may be taken into account. Reasonable cause for failure to file a return **on** time must be affirmatively shown by the taxpayer in a

written statement. Grounds for reasonable cause, where clearly established, may include the following:

- (1) death or serious illness of the taxpayer, a responsible officer or employee of the taxpayer, or his unavoidable absence from his usual place of business;
- (2) destruction of the taxpayer's place of business or business records by fire or other casualty;
- (3) timely prepared returns misplaced by the taxpayer or a responsible employee of the taxpayer and discovered after the due date;
- (4) inability to obtain and assemble essential information required for the preparation of a complete return despite reasonable efforts;
- (5) pending petition to Tax Commission or formal hearing proceedings involving a question or issue affecting the computation of tax for the year, quarter, month or other period of delinquency; or
- (6) any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance will be taken into account. Ignorance of the law, however, will not be considered reasonable cause."

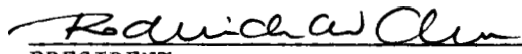
C. That petitioner failed to establish that reasonable cause existed for the underpayment of sales and use taxes for the period at issue. Accordingly the imposition of penalty and interest is sustained.

D. That the petition of Atlantic Sheet Metal Works, Inc. *is* granted to the extent that the principal amount of tax *is* reduced from \$38,141.04 to \$21,933.91; the Audit Division *is* hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 20, 1982; and that, except as *so* granted, the petition *is* in all other respects denied.

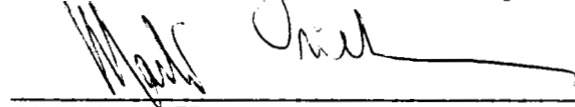
DATED: Albany, New York

STATE TAX COMMISSION

JUN 09 1987


PRESIDENT


COMMISSIONER


COMMISSIONER