

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BOWEN'S ARCO	:	DECISION
(Pete Bowen, d/b/a Bowen's Arco)	:	
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 December 1, 1978	:	
through November 30, 1981.	:	

Petitioner, Bowen's Arco (Pete Bowen, d/b/a Bowen's Arco), 2555 Monroe Avenue, Rochester, New York, 14618, 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 December 1, 1978 through November 30, 1981 (File No. 39986).

A small claims hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on December 6, 1984 at 10:45 A.M. with all briefs to be submitted by May 1, 1985. Petitioner appeared by Goldman, Newman & Shinder, Esqs. (Alan N. Newman, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner's failure to timely remit sales tax was due to reasonable cause and not to willful neglect, thus warranting cancellation of the penalty asserted pursuant to Tax Law section 1145(a).

FINDINGS OF FACT

1. On March 4, 1982, petitioner, by its owner, Pete Bowen, executed a consent allowing assessment of sales and/or use taxes for the period December 1,

1978 through May 31, 1979 to be made at any time on or before September 20, 1982.

2. On August 20, 1982, the Audit Division issued to petitioner, Bowen's Arco, a total of twelve notices of determination and demand for payment of sales and use taxes due assessing additional sales tax, plus penalty and interest, for each of the following quarterly sales tax periods:

<u>Period Ended</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
Feb. 28, 1979	\$ 3,052.00	\$ 767.00	\$ 1,314.24	\$ 5,133.24
May 31, 1979	3,699.00	917.25	1,460.70	6,046.75
Aug. 31, 1979	5,259.00	1,314.75	1,934.63	8,508.38
Nov. 30, 1979	4,152.00	1,038.00	1,403.21	6,593.21
Feb. 29, 1980	4,865.00	1,216.25	1,500.21	7,581.46
May 31, 1980	5,455.00	1,363.75	1,517.15	8,335.90
Aug. 31, 1980	5,713.00	1,428.25	1,416.13	8,557.38
Nov. 30, 1980	5,798.00	1,449.50	1,263.72	8,511.22
Feb. 28, 1981	6,199.00	1,363.78	1,167.71	8,730.49
May 31, 1981	10,365.00	1,969.35	1,638.92	13,973.27
Aug. 31, 1981	11,563.00	1,850.06	1,453.94	14,867.02
Nov. 30, 1981	9,000.00	1,170.00	817.56	10,987.56
TOTAL	<u>\$75,090.00</u>	<u>\$15,847.96</u>	<u>\$16,888.12</u>	<u>\$107,826.08</u>

2. Petitioner, Bowen's Arco, a sole proprietorship operated by Pete Bowen, is a gasoline service station located at 2555 Monroe Avenue, Rochester, New York. Petitioner timely filed New York State and Local Sales and Use Tax Returns (Forms ST-100) and remitted the taxes shown as due thereon for each of the sales tax quarterly periods at issue.

3. Bowen's Arco has been operated by Pete Bowen since his purchase of the business in May of 1968. Mr. Bowen has very little formal education of any kind and no education at all pertaining to tax matters of any nature. His expertise is in auto and truck mechanics acquired through observation and hands-on experience.

4. When Mr. Bowen purchased the business in May of 1968, he also hired the public accounting firm of Charles J. LaFrance ("the Firm") to keep his

books and to prepare all necessary Federal and State tax returns and reports for the business. The Firm was advertised as a public accounting firm and had been recommended to petitioner by another gas station owner for whom Mr. Bowen had formerly worked.

5. In 1975, Charles J. LaFrance, the principal owner of the Firm, died. Shortly thereafter, Mr. Bowen was called by Mrs. LaFrance (Charles LaFrance's widow) and urged to continue his relationship with the Firm. Mr. Bowen questioned Mrs. LaFrance as to "who was going to take care of everything", and was advised by Mrs. LaFrance that "she had accountants there working for her right along, even had them when Charlie was living" and that they were "all licensed and everything, all set up."

6. Mr. Bowen gave the Firm all necessary information to accurately prepare the business' books and its sales and use tax returns. Certain relatively minor items of information supplied to the Firm by Mr. Bowen were inadvertently omitted from the journals by the Firm's tax preparer and some amounts were also not properly totalled in the journals by the preparer.

7. The reason for the shortfall in taxes reported on petitioner's returns was that the Firm's tax preparer used an incorrect method of computing sales tax liability. It is not disputed that tax liability calculated directly from using petitioner's sales journals as prepared by the Firm for the period March 1, 1979 through November 31, 1981, and employing the correct method of computing tax due, would result in \$66,728.00 out of the \$75,090.00 liability determined on audit. Furthermore, if the inadvertently omitted items and mistotalled items were included, the tax figure derived from the journals would be \$69,780.00. The difference between audited tax due (\$75,090.00) and tax due per the journals had they been properly posted and added by the Firm and had

the Firm's preparer used the correct method of computing the tax (\$69,780.00), is thus \$5,310.00. This amount would also be further reduced since the noted journal analysis spans only the period from 3/1/79 through 11/30/81, whereas the audit period includes an additional prior quarterly period (11/30/78 through 2/28/79).

8. Mr. Bowen also utilized the Firm to prepare his personal income tax returns. An income tax audit prior to the period at issue herein, in which the Firm represented Mr. Bowen, resulted in no additional liability.

9. In or about 1981, petitioner began making a rough estimate per quarter of his potential sales tax liability and holding this money in reserve to be available at the time the returns were due to be filed. However, this estimate did not include credit card sales made by petitioner, since it was Mr. Bowen's belief that sales tax due on credit card sales was to be paid by Arco.

10. Petitioner has paid the tax assessment, and protests only the imposition of the penalty and of interest in excess of the minimum statutory rate. Petitioner maintains the failure to timely pay sales tax was occasioned solely by the negligence of the Firm and was not due to willful failure.

CONCLUSIONS OF LAW

A. That Tax Law section 1145(a)(1)(i) authorizes the imposition of penalties and interest charges in instances, such as the present, where taxes due are not timely remitted. Tax Law section 1145(a)(1)(ii) provides as follows:

"If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit all of such penalty and that portion of such interest that exceeds the interest that would be payable if such interest were computed at the rate set by the tax commission pursuant to section eleven

hundred forty-two. The tax commission shall promulgate rules and regulations as to what constitutes reasonable cause."

B. That paragraph six of 20 NYCRR 536.1, enacted during the period at issue herein, provides that reasonable cause includes:

"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 will not, however, be considered reasonable cause."

C. That petitioner has established, under of the facts and circumstances described, that late payment of the taxes at issue was due to reasonable cause and not due to his negligence or willful intent. Mr. Bowen, a man of very limited education, retained and relied upon a public accounting firm to prepare petitioner's books and all tax returns, and gave to this firm all information needed to prepare such items accurately. Mr. Bowen acted reasonably in retaining and relying upon a publicly advertised firm which had been recommended to him. Petitioner's relationship with this firm was longstanding. Mr. Bowen sought and received assurances that the firm would continue, after the death of its principal owner in 1975, to take care of the taxes in the same manner and with the same personnel as had been involved in such matters all along. Almost the entire underpayment by petitioner was occasioned by the incorrect method of computation used by this firm which petitioner had no reason to believe, based on its past performance, was in any manner less than competent. Finally, petitioner promptly paid the tax due upon audit determination that the firm had incorrectly prepared the returns. This is not an instance where a party has attempted to abrogate a responsibility justly his, but rather is an instance of late payment occasioned by reasonable cause.

D. That the petition of Bowen's Arco is hereby granted and the assessment is to be revised to reflect abatement of penalty and reduction of interest to the minimum statutory rate.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 28 1985

Roderich W. Allen
PRESIDENT

Francis Q. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER