

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

PETER BAUTISTA  
D/B/A RIVERHEAD SERVICE CENTER

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 September 1, 1979 :  
through December 31, 1981.

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Petitioner, Peter Bautista d/b/a Riverhead Service Center, 35 Flanders Road, Riverhead, New York 11901, 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 September 1, 1979 through December 31, 1981 (File No. 41224).

Petitioner, by his duly authorized representative, Gatz, Arnoff & Czygier, Esqs. (Harvey Arnoff, **Esq.**, of counsel), waived a hearing and submitted his case for decision by the State Tax Commission based upon the entire file. After due consideration, the State Tax Commission renders the following decision.

ISSUE

Whether the penalty asserted against petitioner should be reduced or abated.

FINDINGS OF FACT

1. On December 20, 1982, the Audit Division issued to Peter C. Bautista and Al Carnival d/b/a Riverhead Service Center a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1979 through December 31, 1981 assessing additional tax due in the amount of \$60,506.79, plus penalty and interest.

2. A timely petition contesting the aforementioned assessment was filed in the name of Peter C. Bautista and Al Carnival d/b/a Riverhead Service Center

and signed by Peter C. Bautista. A subsequent perfected petition was filed in the name of Peter Bautista d/b/a Riverhead Service Center and signed by Peter C. Bautista. The only allegations raised in the petition and perfected petition were that (a) sales tax returns were filed and tax was paid for some of the quarterly periods in question, but no credit was given therefore and (b) that Peter C. Bautista was not personally liable for the entire amount assessed.

3. Riverhead Service Center ("Riverhead"), a Getty gasoline service station, was operated as a partnership during the period in issue by petitioner, Peter C. Bautista, and Al Carnival. Riverhead's operation included the sale of gasoline, oil, tires, batteries, accessories and automotive repair services.

4. The assessment issued herein arose as the result of a field audit following the failure to file returns and remit tax due for Riverhead for the quarterly periods ended August 31, 1981 and November 30, 1981 and the month of December, 1981.<sup>1</sup> The assessment represents the results of the Audit Division's reconstruction of petitioner's gasoline and repair sales for the audit period, based upon available information and external indices, which reconstruction was necessitated by the fact that Riverhead had failed to maintain and make available adequate and complete books and records. Penalty was imposed based upon Riverhead's failure to file returns for certain quarters, upon an alleged poor filing and payment record and upon the substantial understatement of gross sales, taxable sales and sales tax on those returns filed, as determined per audit.

5. Prior to the scheduled November 22, 1985 hearing of this matter, and pursuant to conferences between representatives for petitioner and for the

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1 Riverhead was sold at the end of December, 1981.

Audit Division, the assessment of tax herein was reduced from \$60,507.79 to \$57,931.36 based on lower repair sales than those upon which the original assessment was premised. In turn, petitioner agreed to the reduced assessment of \$57,931.36 plus interest (to be computed) and signed a partial withdrawal of petition signifying such agreement. Petitioner did not, however, agree to the imposition of penalty and requested that the issue of such penalty be submitted to the State Tax Commission for decision based on the case file without an oral hearing. Petitioner executed a waiver of hearing form to this effect, which form contained the following statement:

"The underlying taxes herein have been stipulated by the parties to be \$57,931.36 plus appropriate interest charges. This document is being filed for the purpose of submitting to the State Tax Commission without formal appearances, the issue of penalties waiver in the above matter."

Both the partial withdrawal and the waiver of hearing were executed on October 22, 1985.

6. Sales and Use Tax Returns (Forms ST-100) contained in the file were all signed by petitioner Peter Bautista. There is no evidence that petitioner's partner, Al Carnival, was involved with the audit or filed (or joined in the filing of) a petition to contest the assessment at issue. During the course of the audit, and apparently thereafter through the present, Mr. Carnival's whereabouts have remained unknown.

7. In support of the assertion that the penalty should be reduced or abated, petitioner's representative asserts, by letter dated June 21, 1985, that petitioner was essentially the "worker" in a two person partnership and that Mr. Carnival was responsible for keeping the partnership's books and records. It is asserted that Mr. Carnival failed to make payments of tax when

due and that petitioner was not aware of such non-payment until receipt of the notice of determination.

CONCLUSIONS OF LAW

A. That Tax Law Article 28, section 1145(a)(1)(i) authorizes the imposition of a penalty (at the rate specified therein) for failure to file a return or to pay or pay over any tax under such Article in a timely manner. Tax Law section 1145(a)(1)(ii) further 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 20 NYCRR 536.1(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." (Emphasis as in original.)


C. That the evidence presented does not establish that the failure to comply with the Tax Law was due to reasonable cause and not willful neglect. Petitioner signed the returns filed during the period in question and there is no allegation or evidence that he was denied access to the information from which complete books and records regarding Riverhead's operations could have been maintained. In fact, adequate books and records were not maintained or made available for audit. An arrangement or understanding between petitioner and Mr. Carnival whereby the latter would handle the books, records and reporting for the partnership does not relieve petitioner of the responsibility to assure that taxes such as those at issue are properly collected, accounted for and paid over, nor is it a viable reason whereby penalty for failure to comply should not be imposed. Without further allegations or evidence it was proper that the Audit Division imposed a penalty, and reduction or abatement thereof is not warranted.


D. That the petition of Peter Bautista d/b/a Riverhead Service Center is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 20, 1982, as modified, together with penalty and interest, is sustained.

DATED: Albany, New York

FEB 18 1986

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER