

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

LOU ANN SERVICE STATION, 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 December 1, 1979
through August 31, 1982. :

Petitioner, Lou Ann Service Station, Inc., 8601 Liberty Avenue, Jamaica, New York 11417, 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, 1979 through August 31, 1982 (File No. 41796).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 5, 1985 at 2:45 P.M., with all briefs to be submitted by September 15, 1985. Petitioner appeared by Bloom & Amrod (John B. Amrod, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, 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 January 10, 1983, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due. Said Notice, which encompassed the period December 1, 1979 through August 31, 1982,

determined additional sales and use taxes due of \$142,913.62, plus penalty of \$25,923.41 and interest of \$24,227.77, for a total amount due of \$193,064.80.

2. Based on information submitted at a pre-hearing conference, the additional tax due was reduced from \$142,913.62 to \$103,672.69. Petitioner's representative executed a partial withdrawal of petition agreeing to the revised tax due of \$103,672.69. The only issue remaining for consideration is whether there existed reasonable cause for petitioner's failure to pay over the tax on time, thereby permitting cancellation of penalty and reduction of that portion of interest which exceeds the minimum statutory rate.

3. During the period at issue petitioner operated a service station and automobile repair shop. Louis Brini is President and sole stockholder of petitioner and Mr. Brini has personally operated said service station for approximately the last twenty-five years.

4. Mr. Brini has the equivalent of a third grade education and a very limited ability to read and write. Mr. Brini's lack of formal education was due to the fact that, as a young boy, he had been trapped in a house which had caught on fire and he sustained burns which left him incapacitated for almost twelve years.

5. Prior to the period at issue, Mr. Brini utilized the services of one Larry Goldberg as his accountant. Mr. Goldberg maintained petitioner's books and also prepared its sales tax returns. During Mr. Goldberg's tenure as its accountant, petitioner did not experience any problems with the various taxing authorities.

6. Mr. Goldberg passed away prior to the period in question herein and Mr. Brini, on advice received from Mr. Goldberg's brother-in-law, hired a new accountant allegedly experienced with service stations and sales taxes. As

before, Mr. Brini relied entirely on the new accountant to maintain petitioner's books and to correctly prepare all necessary returns, including sales tax returns.

7. When the Audit Division commenced its examination, Mr. Brini handed the entire matter over to his new accountant. The new accountant assured Mr. Brini that he would take care of it and that there was no tax due. Sometime after the Audit Division issued the Notice dated January 10, 1983, Mr. Brini concluded that the new accountant had not maintained petitioner's books in a proper manner and that the sales tax returns filed were inaccurate. Mr. Brini dismissed the new accountant and immediately thereafter retained the services of both a public accountant and an attorney.

8. Petitioner timely filed sales tax returns throughout the period in question and Mr. Brini at all times cooperated with the Audit Division.

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 negligence or willful intent. Mr. Brini, a man of very limited education, retained and at all times relied upon an accountant to prepare petitioner's books and all tax returns. Mr. Brini, once he determined that his new accountant was not competent, immediately dismissed said accountant and retained a public accountant and an attorney. 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 Lou Ann Service Station, Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated January 10, 1983, as revised at the pre-hearing conference, is to be further revised to reflect abatement of penalty and reduction of interest to the minimum statutory rate.


DATED: Albany, New York

JAN 28 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER