

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
THOMAS S. SIUTA : 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, 1980.

Petitioner Thomas S. Siuta, 3362 Lockport Road, Sanborn, New York 14132, 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, 1980 (File No. 42320).

A small claims hearing was held before Richard L. Wickham, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 20, 1984 at 10:45 A.M. Petitioner appeared by Victor J. Orzechowski, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUES

- I. Whether petitioner Thomas S. Siuta is personally liable for the taxes reported but not paid by Astro Guard International Sales, Inc.
- II. Whether the penalty and that portion of interest exceeding the minimum statutory rate assessed against petitioner should be cancelled.

FINDINGS OF FACT

1. On November 16, 1982, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against petitioner, Thomas S. Siuta, as

the responsible officer of Astro Guard International Sales, Inc., ("the corporation"). Said Notice scheduled a tax, penalty and interest due as follows:

| <u>Period Ending</u> | <u>Tax Due</u> | <u>Penalty Due</u> | <u>Interest Due</u> |
|----------------------|----------------|--------------------|---------------------|
| Feb. 29, 1980 | \$1,145.17 | \$457.77 | \$228.15 |
| May 31, 1980 | 901.39 | 353.50 | 159.13 |
| Aug. 31, 1980 | 599.78 | 230.68 | 92.28 |

2. Petitioner, Thomas S. Siuta, the corporation's sole shareholder, conceded, at the hearing, that he was a person required to collect tax on behalf of the corporation pursuant to sections 1131(1) and 1133 of the Tax Law. Mr. Siuta disputes the amount of tax, penalty and interest assessed.

3. During the period under review, petitioner delegated to a manager the corporate management functions. The manager neglected to either maintain or retain sales and purchase records and failed to file the required New York State and local sales and use tax returns for the quarterly periods that ended February 29, 1980, May 31, 1980 and August 31, 1980.

4. Petitioner, upon discovery that the corporation was delinquent in filing its sales and use tax returns, late filed the returns in December 1980. For the periods ended February 29, 1980 and August 31, 1980, petitioner reported tax due of \$1,145.17 and \$599.78 respectively, or approximately double the average of the tax reported on previously filed returns for similar quarters.* Petitioner estimated a tax due of \$901.39 for the period ended May 31, 1980 even though no tax was previously reported for this quarterly period.

* Astro Guard International Sales, Inc. reported a tax due on the returns for the periods ended February 28, 1978 and February 28, 1979 of \$541.82 and \$683.90, respectively. A tax due of \$313.39 and \$388.00 was reported for the periods ended August 31, 1978 and August 31, 1979, respectively.

5. Petitioner's estimate of tax due was based on information provided by his accountant and his lawyer who advised petitioner to report at least twice what had been previously reported. While the sales and use tax returns which petitioner filed were not marked estimated returns, petitioner anticipated that amended returns would be filed at the time he became aware of the actual sales and use taxes due for the corporation. Due to the condition of the corporate records left by the manager and petitioner's inability to obtain records from the manager or other sources, petitioner has not been able to reconstruct the corporate sales and determine the actual tax due.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in part, that "(i)f a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available."

B. That the tax due reported on the returns of Astro Guard International Sales, Inc. for the periods ended February 29, 1980, May 31, 1980 and August 31, 1980 was an estimate in excess of the actual tax due grounded on the credible testimony of the petitioner. Lacking the essential records needed to compute the actual tax, the tax due for the quarterly period ended February 29, 1980 shall be computed at 125 percent of the due as reported on the return for the period ended February 28, 1979 and the tax due for the period ended August 31, 1980 shall be computed at 125 percent of the tax due as reported for the period ended August 31, 1979. With respect to the sales tax quarterly period ended May 31, 1980, the tax due reported on the return for said period shall be reduced by 37.45 percent which is one-half the amount of tax due reported plus 25 percent.

C. That the tax commission may remit the penalty assessed and that portion of the interest in excess of the minimum interest where the taxpayer establishes that the failure to comply with the law was due to reasonable cause and was not due to willful neglect [20 NYCRR 536.1].


D. That while petitioner's action in filing the delinquent returns of Astro Guard International Sales, Inc. is admirable, it is essential to note that petitioner was an officer of the corporation and admittedly the responsible officer. In addition, petitioner filed the corporate returns without any remittance. This commission finds that no reasonable cause exists for the abatement of penalty and interest.


E. That the petition of Thomas S. Siuta is granted to the extent of Conclusion of Law "B" and the Audit Division is hereby directed to accordingly modify the Notice and Demand for Payment of Sales and Use Taxes Due issued November 16, 1982. Except as so granted, the petition is in all respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER