

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DAVID C. HAGYMAS,	:	DECISION
AS OFFICER OF SKI ADVANTAGE, LTD.,	:	
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods Ended November 30,	:	
1978, February 29, 1980 and May 31, 1980.	:	

Petitioner, David C. Hagymas, as officer of Ski Advantage, Ltd., 2 Woodside Court, Troy, New York 12180, 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 periods ended November 30, 1978, February 29, 1980 and May 31, 1980 (File No. 43416).

A small claims hearing was held before Frank Landers, Hearing Officer, at the offices of the State Tax Commission, Building No. 9, State Campus, Albany, New York, on March 15, 1984 at 9:15 A.M. Petitioner appeared by Morton D. Shulman, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether the failure on the part of petitioner, David C. Hagymas, as officer of Ski Advantage, Ltd., to remit sales taxes due from said corporation was due to reasonable cause so as to warrant cancellation of penalty and interest pursuant to section 1145(a)(1)(ii) of the Tax Law.

FINDINGS OF FACT

1. On March 18, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against David C. Hagymas, as

officer of Sno Fun Ski & Tennis Shop (sic), Ski Advantage, Ltd., assessing sales taxes due of \$5,000.73, plus penalty of \$1,250.18 and interest of \$2,308.82, for a total amount due of \$8,559.73 for the quarterly periods ended November 30, 1978, February 29, 1980 and May 31, 1980.

2. Prior thereto, on February 23, 1981, Ski Advantage, Ltd. (hereinafter "the corporation") filed sales tax returns for the three quarterly filing periods at issue. These returns were filed without payment of the sales taxes shown to be due thereon and were signed by petitioner, David C. Hagymas, as president, on February 18, 1981.

3. On April 19, 1983, petitioner timely filed a petition to review the aforementioned notice of determination.

4. From 1976 throughout the periods at issue, petitioner was president of Ski Advantage, Ltd. which operated the Sno-Fun Ski Shop in West Sand Lake, New York. The Sno-Fun Ski Shop sold skiing equipment. At the hearing, petitioner conceded that he was responsible for the unpaid sales tax liability of the corporation.

5. Petitioner's position is that due to certain inactions on the part of the Tax Compliance Bureau and a specific assurance made to him by a Tax Compliance Agent, there was reasonable cause for failing to pay the sales tax at issue in a timely manner.

Petitioner contended that in 1979 he negotiated a demand loan for \$26,000.00 with the National Commercial Bank in order to purchase new inventory for the 1979-1980 ski season which would usually run from October through March. According to the terms of the loan agreement, the proceeds from the sale of inventory were to be accumulated in petitioner's checking account with

said bank. When a sufficient amount had accumulated, the bank withdrew enough to cover the principle and interest on the loan.

Petitioner testified that on or about September 25, 1979, because of poor business the previous season (1978-1979 ski season) and in anticipation of another poor season, he contacted the Tax Compliance Bureau and inquired what could be done to insure payment of sales tax that would be due later in the season. Petitioner was advised that, as a precautionary measure, the Bureau would proceed with the necessary paperwork to confiscate the business inventory in the event that the business failed.

As anticipated, sales for the 1979-1980 season were poor because of limited snowfall. Sometime during 1980, the corporation's inventory was confiscated and sold to satisfy the judgment of a creditor.

Petitioner further testified that on February 18, 1981, Irving Morgenstern, a Tax Compliance Agent, contacted petitioner, acknowledging that the Department was negligent in not seizing the inventory and stating that the assessment would be placed in the "uncollectible" category. Petitioner was advised that he should not be concerned with the sales tax debt any longer.

6. Petitioner contended that he was not aware that the sales tax return for the period ended November 30, 1978 had not been filed until it was signed by him on February 18, 1981. The corporation's books and records were maintained by a bookkeeper and its tax returns were prepared by an independent accountant.

7. Petitioner was aware that, with the exception of the National Commercial Bank and the Tax Department, the creditors of the corporation could not charge him for the payment of debts. Therefore, it was petitioner's intention to insure that the bank and the Tax Department would be paid.

CONCLUSIONS OF LAW

A. That section 1145(a)(1)(ii) of the Tax Law provides, in pertinent part, that:

"If the tax commission determines that such failure or delay [in filing a return or paying tax] was due to reasonable cause and not due to willful neglect, it shall remit all such penalty and that portion of such interest that exceeds the interest that would be payable if such interest were computed at a 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 regulation section 20 NYCRR 536.1(b) provides that grounds for reasonable cause 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."

C. That petitioner has failed to show that the failure to pay the sales taxes at issue was due to reasonable cause pursuant to Tax Law section 1145(a)(1)(ii) and regulation section 20 NYCRR 536.1(b). The Tax Department is under no obligation to seize business assets where the payment of sales taxes is in jeopardy. Sales taxes are to be collected at the time of sale and it is the

vendor's responsibility to safeguard said monies until remitted to the Tax Department.

Petitioner's reliance on the alleged assurance by the Tax Compliance Agent was unwarranted. Said agents do not have the authority to make such assurances.


D. That the petition of David C. Hagymas is hereby denied.

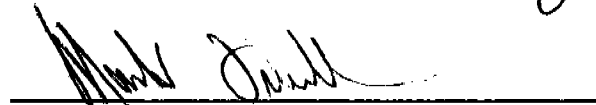
DATED: Albany, New York

STATE TAX COMMISSION

JUL 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER