

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

FOXHURST SERVICE CENTER, 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 June 1, 1980
through August 31, 1982.

Petitioner, Foxhurst Service Center, Inc., 247 Long Beach Road, Oceanside,
New York 11572, 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
June 1, 1980 through August 31, 1982 (File No. 48225).

On June 14, 1986, petitioner, by its president, Alexander Russo, executed
a waiver of hearing and submitted its case for decision based upon the
existing record, together with additional evidence to be submitted on or before
June 20, 1986. After due consideration, the State Tax Commission hereby
renders the following decision.

ISSUE

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

FINDINGS OF FACT

1. On September 1, 1983, pursuant to an audit of Foxhurst Service Center,
Inc., the Audit Division issued to petitioner a Notice of Determination and
Demand for Payment of Sales and Use Taxes Due for the period June 1, 1980
through August 31, 1982 in the amount of \$58,376.94 plus penalty of \$13,383.72
and interest of \$14,437.26, for total amount due of \$86,197.92. The Audit

Division subsequently revised this assessment to \$28,003.38 plus statutory penalty and interest.

2. On June 12, 1985, petitioner, by its president, Alexander Russo, executed a Withdrawal of Petition and Discontinuance of Case agreeing to the assessment of tax as revised by the Audit Division. Petitioner did not, however, agree to the imposition **of** penalty and interest and requested that the issue of such penalty and interest be submitted to the State Tax Commission for decision based upon the entire record.

3. Petitioner filed a New York State and Local Sales and Use Tax Return and paid the amount of tax shown to be due on the return for each of the sales tax quarters at issue herein. For the period at issue, Alexander Russo was the sole officer and shareholder of petitioner and, as such, signed each of the said returns on behalf of petitioner.

4. In support of petitioner's assertion that the penalty and interest should be reduced or abated, Mr. Russo asserts, by letter dated April 13, 1985, that, during the period at issue, both his home and business had been burglarized and he had incurred substantial medical expenses due to the death of his father and the illness of his daughter.

CONCLUSIONS OF LAW

A. That there is no statutory authority in the Tax Law for the abatement of interest imposed upon an assessment.

B. That section 1145(a)(1)(i) of Articles 28 of the Tax Law requires the imposition of a penalty (at the rate specified therein) for failure to file a return or to pay over any tax under such Article in a timely manner. Tax Law section 1145(a)(1)(~~iii~~) 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."

C. That 20 NYCRR 536.1(b) (currently 536.5(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).

D. That the evidence presented does not establish that the failure to pay the tax imposed pursuant to Articles 28 and 29 of the Tax Law was due to


reasonable cause and not due to willful neglect. Petitioner presented **no** evidence to show that a burglary **of** the business premises did, in fact, occur and that such burglary resulted in a **loss** or destruction of business records or an inability to obtain and assemble essential information required for the preparation of a complete tax return. Imposition of penalty and statutory interest by the Audit Division was proper and neither reduction of interest nor abatement of penalty is warranted herein.

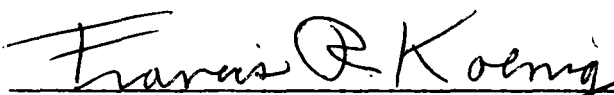
E. That the petition of Foxhurst Service Center, Inc. is granted only **to** the extent indicated in Finding of Fact "1"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 1, 1983 accordingly; and that, except as **so** granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 09 1987


PRESIDENT


COMMISSIONER


COMMISSIONER