

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SUKHWINDER SINGH	:	DECISION
	:	DTA NO. 830167
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, 2015 through May 31,	:	
2018.	:	

Petitioner, Sukhwinder Singh, filed an exception to the determination of the Administrative Law Judge issued on October 19, 2023. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on December 26, 2023, the date that petitioner's reply brief was due.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

Whether the Division of Taxation appropriately assessed penalties against petitioner for the failure to maintain and provide proper books and records pursuant to Tax Law § 1145 (i) and the failure to maintain and provide records in electronic format pursuant to Tax Law § 1145 (k).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 2, 3, 4, 7, and footnote 2 for clarity. We have also added an additional finding of fact, numbered 8 herein, and renumbered findings of fact 8 through 18 of the determination accordingly as findings of fact 9 through 19 below. As so modified and renumbered, the findings of fact are set forth below.

1. Petitioner concedes that he was a responsible officer of the liquor store, Babu Wine and Liquor, Inc. (Babu), for the period at issue, September 1, 2015 through May 31, 2018.

2. The Division of Taxation (Division) conducted a sales and use tax audit of Babu for the period at issue. The Division had previously conducted a sales and use tax audit of Babu for the three-year period ending August 2015 (prior audit). As a result of the prior audit, the Division assessed Babu additional tax owed and interest in the total amount of \$134,957.59. During that audit, Babu provided only bank statements and check stubs in response to a records request. The Division found that Babu failed to maintain source documents, such as sales records and cash register tapes, and that its records were not computerized. Babu agreed with the Division's assessment of additional tax and represented that it would thereafter use an electronic point of sale (POS) system to account for the business going forward. As a result of this representation, and because Babu had no prior audit history, the Division did not assess Babu penalties for either failing to remit the proper amount of tax or for failure to maintain proper books and records for the prior audit period.

3. The Division sent Babu an appointment letter, dated June 21, 2018, informing Babu of the audit for the current period at issue requesting that Babu make its relevant books and records available to the Division. The letter stated that all documentation to support the filed tax returns

must be provided in “auditable form and electronic form (if available).” Attached to the appointment letter was an information document request (IDR No. 1), that specified a detailed listing of records that were to be available for the entire period at issue, including: sales tax returns; worksheets and cancelled checks; federal income tax returns; general ledger; general journal and closing entries; sales invoices; all exemption documents supporting nontaxable sales; chart of accounts; fixed asset purchase and sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, cancelled checks and deposit slips; cash receipts journal; cash disbursements journal; the corporate book, including minutes, board of directors, and articles of incorporation; depreciation schedules; lease contracts; State Liquor Authority licenses; utility bills; guest checks; and cash register tapes. In response to IDR No. 1, Babu provided its federal income tax returns, a limited number of merchandise purchase invoices, bank statements and utility bills, but otherwise failed to provide the information requested.

4. During the audit, a representative for Babu indicated that Babu’s sales tax returns were completed based upon its bank statements. Soon after the audit commenced, Babu’s representative informed the Division that the POS system was damaged due to flooding. The Division informed Babu’s representative that Babu should hold onto the POS system hardware so that the Division could attempt to conduct a “POS extraction” whereby the Division would attempt to obtain necessary sales information from the damaged POS system hardware. Babu agreed to such an arrangement.

5. On November 15, 2018, the Division sent Babu a second IDR (IDR No. 2) requesting the documentation included in IDR No. 1 that had not been provided to the Division. In

response to IDR No. 2, Babu indicated that additional documentation would be forthcoming to the Division; however, no additional documentation was provided at that time.

6. On February 12, 2019, the Division sent Babu a third IDR (IDR No. 3) requesting the documentation included in IDR No. 1 and IDR No. 2 that had not been provided to the Division. In addition, on February 12, 2019, the Division sent Babu a penalty intent letter explaining that the records it had provided were inadequate and the Division was allowing Babu an additional 30 days to provide the requested records or penalties would be imposed.

7. On March 21, 2019, the Division sent Babu a statement of proposed audit change, form AU-346, indicating that an assessment of \$106,000.00 in penalties for the failure to maintain and provide proper books and records would be forthcoming. The \$106,000.00 represented penalties assessed of \$5,000.00 for each quarter in the period at issue, except for the first quarter in which the penalties assessed were \$1,000.00, for the failure to maintain appropriate records and make them available to the commissioner, and \$5,000.00 for each quarter in the period at issue for the failure to make records available and accessible to the commissioner in electronic format.

8. On March 27, 2019, after petitioner's failure to provide the electronic POS records, the Division advised Babu's representative that it wanted to extract the records from the POS system that was allegedly damaged by flooding.

9. On April 30, 2019, Babu informed the Division that it did have the POS system functioning and would be providing the requested information.

10. On May 14, 2019, Babu presented the Division with reports from its POS system (POS summary reports) that only provided the gross total quarterly sales, exempt sales, taxable

sales, tax collected and total number of transactions for the quarters ending November 2015, February 2016 and May 2016.

11. On June 11, 2019, the Division sent Babu a second form AU-346 indicating that an assessment of \$106,000.00 in penalties for the failure to maintain proper books and records would be forthcoming.

12. The Division determined that it was unable to perform a detailed audit based upon the documentation that Babu provided. Instead, it estimated the tax due based on, among other items, a mark-up of Babu's purchases, information in federal income tax returns, and the Division's third-party database for beer, wine and liquor stores.¹ On June 28, 2019, the Division issued notice of determination number L-050141457, assessing Babu civil penalties of \$106,000.00 for the failure to maintain proper books and records. In addition, on June 28, 2019, the Division issued the subject notice of determination number L-050144798, assessing petitioner civil penalties of \$106,000.00 as a responsible person of Babu.

13. Although not discussed by the Division, the audit records in evidence indicate that on September 12, 2019, Babu provided the Division additional POS summary reports for the quarters ended August 2016, November 2016, February 2017, May 2017, August 2017, November 2017, February 2018 and May 2018.

14. Petitioner requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) for notice of determination number L-050144798. By order dated October 30, 2020 (CMS No. 000314401), notice of determination number L-050144798 was sustained by BCMS.

¹ Based on its estimate, the Division assessed additional sales tax, penalties and interest against Babu, and petitioner as a responsible person, for the periods at issue. Such assessments are not at issue in this case as they were not part of the petition for this matter.

15. On December 3, 2020, petitioner filed a petition challenging CMS No. 000314401.²

16. At the hearing, Althea Alexander, sales tax auditor, testified for the Division and discussed the audit. Kuldip Madan, an accountant, testified for petitioner. Mr. Madan testified that a flood had damaged Babu's POS system but that it had been repaired. Petitioner did not discuss or explain what happened to Babu's other records including Babu's purchase and sales invoices and receipts, general ledgers or cash register tapes.

17. The Division was not given access to Babu's POS system and never received any of Babu's purchase and sales invoices or receipts, general ledgers, or cash register tapes in hard copy or electronic format.

18. On July 18, 2022, the Division filed a notice of motion, and supporting documentation, seeking an order from the Division of Tax Appeals dismissing the petition or for summary determination in its favor for "notice of determination L-051187793." The notice of motion's caption refers to petitioner and the applicable DTA number for this case. The Administrative Law Judge indicated that the motion would be ruled on in due course with the determination for this case.

19. Notice of determination number L-051187793 was not referred to or challenged in the petition. Although the Division now concedes that the Division of Tax Appeals does not have jurisdiction over notice of determination number L-051187793, the Division did not withdraw its motion.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

² The petition lists both petitioner herein and Babu Wine and Liquor, Inc. as petitioners. For administrative purposes, the Division of Tax Appeals treated petitioner's protest separately from the protest of Babu Wine and Liquor, Inc., essentially deeming a single petition document as two separate petitions. The petition identifies CMS No. 000314401 and notice of determination number L-050144798, both of which were issued to petitioner, as the "notice/assessment ID number(s) being challenged." The petition also contests L-050141457-6 and L-051179494-3. Those assessment numbers are the subject of *Matter of Babu Wine and Liquor, Inc.*, Tax Appeals Tribunal, March 14, 2024.

The Administrative Law Judge began his determination by noting petitioner's concession that he was a responsible officer of Babu during the period at issue. The Administrative Law Judge next observed that petitioner bears the burden of proof to overcome the presumed correctness of the Division's assessment. He reviewed the record keeping requirements for parties who collect tax and the provisions of the Tax Law regarding penalties for the failure to maintain records and to make records available to the Commissioner.

The Administrative Law Judge determined that Babu failed to maintain the records required under the Tax Law or provide an explanation as to the location of those records. Additionally, he determined that Babu failed to provide the Division with records in electronic format or access to its POS system. The Administrative Law Judge found that the summary sale statements provided by Babu were not a substitute for access to the POS system or the records required to be maintained and provided to the Division. Based on the foregoing, the Administrative Law Judge determined that the Division's assessment of penalties was appropriate.

The Administrative Law Judge observed that the penalties assessed by the Division may be abated upon a showing of reasonable cause. He found, however, that petitioner had not established reasonable cause and that petitioner's actions in this matter, particularly, his failure to give the Division access to its POS system, were indicative of willfulness to thwart the requirements of the Tax Law. Given the foregoing, the Administrative Law Judge determined that a waiver of penalties was not justified.

Finally, the Administrative Law Judge denied the Division's motion for summary determination or dismissal finding that the subject of the motion, notice of determination number L-051187793 was not challenged or referenced in this proceeding.

ARGUMENTS ON EXCEPTION

Petitioner argues that no information was deliberately, willfully, or negligently withheld from the Division and that Babu and petitioner provided all the records they were asked to provide. He asserts that the POS system was damaged in flooding that took place in the store. For the first time on exception, he also alleges that paperwork and inventory were damaged by flooding. Petitioner asserts that neither he nor his accountant ever received a request for the damaged POS system. Petitioner alleges that he paid to have the POS system repaired and that he provided all the information that was retrievable from the system after it was repaired. He states that Babu has since gone out of business and that the physical POS system was disposed of since no one had requested it. Given the foregoing allegations, petitioner contends that all penalties should be abated.

The Division argues that the Administrative Law Judge correctly determined that the civil penalties assessed against petitioner as a responsible person of Babu were appropriate and that petitioner failed to establish reasonable cause for abatement of those penalties. Specifically, the Division asserts that petitioner failed to provide the Division with any purchase records, sales invoices or receipts, general ledgers, or cash register tapes, all of which must be maintained and provided to the Division upon request. Further, the Division asserts that petitioner failed to provide those records in electronic format or give the Division access to Babu's POS system.

The Division contends that the POS sales summary statements that petitioner did provide only listed the gross amounts of quarterly information and are not a substitute for access to the POS system itself or all the documents, books and records required to be maintained and provided by a taxpayer. The Division asserts that such failure on the part of Babu and petitioner

was indicative of a willfulness to thwart the requirements of the Tax Law and, therefore, the Division argues that the abatement of penalties is not justified.

OPINION

We begin by noting our agreement with the Administrative Law Judge's denial of the Division's motion, dated July 18, 2022, for summary determination or dismissal with regard to a notice of determination bearing assessment number L-051187793. There is no evidence that petitioner ever protested this notice at BCMS or by petition to the Division of Tax Appeals (*see* Tax Law § 2008 [1]).

As noted by the Administrative Law Judge, the jurisdiction of the Division of Tax Appeals is limited to statutory notices properly challenged in a petition (*see* Tax Law § 2008 [1]). The Division's motion attempts to address a notice of determination that was not challenged or referenced by petitioner in this proceeding. Given the foregoing, the Division of Tax Appeals lacked jurisdiction to entertain the Division's motion and, therefore, it was properly denied below (*see* Tax Law § 2008 [1]; Tax Law § 173-a [2]).

Turning to the merits of the instant proceeding, Tax Law § 1133 (a) imposes personal liability for sales tax upon all individuals who may be considered persons required to collect tax (*see Matter of Coppola v Tax Appeals Trib. of State of N.Y.*, 37 AD3d 901, 902-903 [3d Dept 2007]). Tax Law § 1131 (1) defines "persons required to collect tax" to include, as relevant here, "every vendor of tangible personal property or services" and "any officer, director or employee of a corporation or of a dissolved corporation . . . who as such officer, director, or employee is under a duty to act for such corporation . . . in complying with any requirement of [the sales tax law]." Further, the amount of a corporation's liability for which an officer or employee under a duty to act may be held liable, though denominated a tax determination, includes not only tax,

but also interest and penalty (*see Matter of Dong Ming Li v Commissioner of Taxation & Fin.*, 65 AD3d 763, 764 [3d Dept 2009]; *Lorenz v Division of Taxation of Dept. of Taxation & Fin. of State of N.Y.*, 212 AD2d 992 [1995], *affd* 87 NY2d 1004 [1996]).

Petitioner does not contest that Babu was required to collect sales tax or that he is a responsible officer of Babu. Further, petitioner does not challenge the Division's general authority to assess penalties against a responsible officer or employee of a corporation. Instead, petitioner challenges the imposition of \$106,000.00 in penalties assessed against him individually for failure to maintain and provide adequate books and records of sales and for failure to maintain and provide such records in electronic format.

Tax Law § 1135 (a) (1) requires every person required to collect tax, including petitioner herein, to keep records of every sale, all amounts and charges paid, and the sales tax paid on such sales in such form as the commissioner of taxation and finance may by regulation require (*see* 20 NYCRR 533.2; *Matter of Rodriguez v Tax Appeals Trib. of the State of N.Y.*, 82 AD3d 1302, 1304 [3d Dept 2011], *lv denied* 17 NY3d 702, [2011]). Required sales records include copies of each sales slip, invoice, receipt, cash register tape, guest check, and any other original sales document (*see* 20 NYCRR 533.2 [b] [1]). These records must be sufficient to verify all transactions; kept in a manner suitable to determine the correct amount of tax due; and available for the Division's inspection upon request for a period of three years (*see* Tax Law § 1135 [g]; 20 NYCRR 533.2 [a] [1] [2] [3]). In addition, any person who has elected to maintain records in an electronic format may be required to make the electronic records available and accessible to the commissioner, notwithstanding that the records are also maintained in a hard copy format (*see* Tax Law § 1135 [h]; 20 NYCRR 533.2 [a] [2]).

Tax Law § 1145 (i) and (k) provide penalties for the failure to maintain and provide the required records. Under Tax Law § 1145 (i), a person required to maintain records under article 28, who fails to maintain those records, or who fails to make the records available to the commissioner, is subject to a penalty of up to one thousand dollars for the first quarter and up to five thousand dollars for each additional quarter during which such failure occurs (*see* Tax Law § 1145 [i]). For taxpayers who have elected to maintain records in an electronic format, Tax Law § 1145 (k) provides an additional quarterly penalty of up to five thousand dollars for the failure to properly maintain and provide those records in electronic format (*see* Tax Law § 1145 [k]).

If the commissioner determines that a failure to maintain or make available records, in electronic format or otherwise, in any quarter was entirely due to reasonable cause and not due to willful neglect, the commissioner must remit the penalty imposed for that quarter (*see* Tax Law § 1145 [i] [k]).

The Division had previously conducted a sales and use tax audit of Babu for the three-year period ending August 2015. The prior audit resulted in additional tax and interest being assessed against Babu. During that audit, the Division determined that Babu had failed to maintain proper sales records and source documents pertaining to sales and use tax liability. The Division did not assess civil penalties against Babu at that time, however, because that was the first audit of the business and petitioner agreed to maintain records and install an electronic POS system going forward (*see* finding of fact 2).

In June 2018, the Division commenced a follow up sales tax audit of Babu for the period at issue here, September 2015 through May 2018. During the course of the audit, the record shows that the Division made several clear and explicit requests for a complete set of Babu's

records pertaining to sales and use tax liability during the audit period (*see* findings of fact 3-6). Between June 21, 2018 and February 12, 2019, the Division sent three separate information document requests (IDRs) to Babu requesting a detailed list of source documents and records that the auditor determined were necessary to ascertain the amount of Babu's sales and the proper amount of sales tax due. The Division made multiple calls, sent multiple emails, and scheduled multiple in-person meetings that were either missed or cancelled by petitioner or his representative. In addition to requesting hard copies of all the documents required to be maintained, the Division also requested records in electronic format and access to Babu's electronic POS system. The record reveals that, although petitioner produced some business records in response to the Division's demands, he did not provide hard copies of source documents, such as sales receipts, sales invoices, cash register tapes, or any other original sales records that could be used to verify Babu's asserted taxable and gross sales and the amount of sales tax collected from its customers during the audit period (*see* 20 NYCRR 533.2 [b] [1] [2]). In addition, petitioner failed to provide any records in electronic format or provide the Division with access to Babu's POS system.

The Division ultimately determined that it was unable to perform a detailed audit based upon Babu's inadequate documentation and, instead, estimated the tax due based on, among other items, a mark-up of Babu's purchases, information in federal income tax returns, and the Division's third-party database for beer, wine and liquor stores (*see* finding of fact 12). As a result of the audit, the Division separately assessed additional sales tax, penalties, and interest against Babu and petitioner for the periods at issue. While those assessments are not a subject of this proceeding (*see* footnote 1), the Division did issue to petitioner as a responsible person of Babu, the subject notice of determination L-050144798, assessing civil penalties totaling

\$106,000.00 for the failure to maintain and make available proper books and records pursuant to Tax Law § 1145 (i) and the failure to maintain and provide records in electronic format as required by Tax Law § 1145 (k).

These penalties must be sustained unless the failure to maintain and provide records was entirely due to reasonable cause and not willful neglect (*see* Tax Law § 1145 [i] [k]; 20 NYCRR 2392.1 [a] [1]). The burden of establishing reasonable cause as well as the absence of willful neglect rests with the taxpayer (*see Matter of Laham*, Tax Appeals Tribunal, October 27, 2016; *Matter of MCI Telecom. Corp.*, Tax Appeals Tribunal, January 16, 1992 *confirmed* 193 AD2d 978 [3d Dept 1993]).

On exception, as noted, petitioner contends that reasonable cause exists for the abatement of penalties because he alleges that he provided all the documentation requested by the Division and there was no willful withholding of information. He also claims that the POS system was severely damaged due to flooding, and that he had it repaired and retrieved from it any information that was available. He asserts that neither he nor his accountant ever received a request for the damaged POS system. He also contends for the first time on exception that Babu's other records and inventory were also damaged by flooding that occurred in the store. These allegations are simply not supported by record before us.

Certainly, the destruction of petitioner's place of business, business records, and equipment by a flood may constitute reasonable cause where the casualty is documented and the taxpayer establishes that the records or equipment were damaged or destroyed (*see* 20 NYCRR 2392.1 [d] [2] [i]). Here, the record lacks any evidence of the casualty, such as when the flood allegedly occurred, the extent of the damage, and whether the business continued to operate or

was interrupted by the flood. Petitioner provided no documentary proof to establish damage or destruction of business records or of the physical POS system.

The record shows that once the Division had been informed by petitioner's representative that the POS system allegedly had been damaged, the Division requested that Babu retain the POS system so that the Division could perform a "point of sale extraction" of records for the audit period. Petitioner agreed to that arrangement. On March 27, 2019, the Division specifically requested an extraction of the POS system. Notwithstanding the Division's requests, petitioner advised the Division on April 10, 2019 that a new POS system was put into place and that the new system did not have records for the audit period. Petitioner also alleges that he paid to have the old POS system repaired. When questioned at the hearing, petitioner's representative was unable to provide the name of the person or company that repaired the POS system. The representative also did not deny that the Division had requested access to the old POS system. Petitioner provided only summary sales statements for each quarter from 2015 to 2018 alleging that those were the only documents retrievable from the damaged POS system. He alleged that those documents were sufficient for the Division to complete the audit. Petitioner asserts that Babu has since gone out of business and the physical POS system was disposed of since no one had requested it.

Reasonable cause and the absence of willful neglect may be determined to exist only where the taxpayer has acted in "good faith" (*see* 20 NYCRR 2392.1 [g] [1]). The most important factor to be considered in determining whether reasonable cause exists is the "extent of the taxpayer's efforts to ascertain the proper tax liability" (*see* 20 NYCRR 2392.1 [g] [2]). Based on the record in this matter, we agree with the determination of the Administrative Law Judge that the Division's assessment of penalties pursuant to Tax Law § 1145 (i) and (k) was

appropriate. As noted above, it was petitioner's burden to demonstrate that the penalty was improper (*see Matter of Shuai Yin v. State Dept. of Taxation and Fin.*, 151 AD3d 1497, 1501 [3d Dept 2017]). Petitioner, who had previously been audited under similar circumstances, produced no more than conclusory allegations as to why he did not provide the documentation required to be maintained and/or provide access to Babu's POS system. Petitioner has thus failed to sustain his burden of establishing reasonable cause for the abatement of penalties. Based on the foregoing, we find that the record lacks any basis for modifying the assertion of penalties in this proceeding (*Matter of Hwang v Tax Appeals Trib. of State of N.Y.*, 105 AD3d 1151, 1154 [3d Dept 2013]; *Matter of S. H. B. Super Mkts. v Chu*, 135 AD2d 1048, 1050 [3d Dept 1987]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sukhwinder Singh is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Sukhwinder Singh is denied; and
4. The notice of determination, L-050144798 dated June 28, 2019, is sustained.

DATED: Albany, New York
June 3, 2024

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner