

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CAROUSEL BEVERAGE CORPORATION	:	DETERMINATION
for Revision of a Determination or for Refund of Sales and	:	DTA NO. 828402
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period March 1, 2014 through February 28, 2015.	:	

Petitioner, Carousel Beverage Corporation, 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 March 1, 2014 through February 28, 2015.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, on September 10, 2019, at 10:30 a.m., in New York, New York, with all briefs to be submitted by January 13, 2020, which date began the six-month period for issuance of this determination. Petitioner appeared by its president, Mark A. Caruselle, and its vice president, Mark W. Caruselle. The Division of Taxation appeared by Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly imposed penalties on petitioner for failing to file an information return as an alcoholic beverage wholesaler for the period in issue.

FINDINGS OF FACT

1. Petitioner, Carousel Beverage Corporation, is licensed as an alcoholic beverage wholesaler by the New York State Liquor Authority (SLA) and is located in Brooklyn, New York. Mark A. Caruselle is the president of petitioner.

2. Pursuant to legislation enacted in 2009, every alcoholic beverage wholesaler licensed by the SLA that sells alcoholic beverages without collecting sales or use tax became required to file an annual transaction information return (information return) with the Division of Taxation (Division). The new filing requirement covered sales by alcoholic beverage wholesalers primarily to retail vendors for resale (Tax Law § 1136 [i]; *see* L 2009, ch 57, pt V-1, subpt G, eff April 7, 2009; *Empire State Beer Distrib. Assn., Inc. ex rel. Alcoholic Beverage Wholesalers v Patterson*, No. 09 CIV. 10339 DAB, SD NY [Mar. 1, 2010], WL 749828).

3. As an alcohol beverage wholesaler, petitioner is required to file an annual information return electronically with the Division through its web site. The web site contains instructions describing how to file the “Annual Beer, Wine, & Liquor Wholesalers Transaction Information Return” by downloading an Excel spreadsheet template from a provided link, entering the necessary data, and then uploading the completed file to the Division’s online tax system.

4. The information required to be provided on the return, for each vendor located in New York State to whom the alcoholic beverage wholesaler made a sale without collecting sales or use tax, is: the vendor’s legal name; the vendor’s doing business as (DBA) name; the vendor’s SLA license address, including the city, state and zip code; the vendor’s telephone number; the vendor’s mailing address, including the city, state and zip code; the vendor’s SLA license number; the vendor’s Federal Tax Identification number (EIN); the vendor’s New York State Sales Tax Identification number; the year and month of reported sales; and the total monthly net sales amount.

5. There is no dispute that petitioner failed to file the information return for the period ending February 28, 2015. Therefore, the Division issued a notice of determination (notice), assessment number L-045372298, dated August 17, 2016, assessing the maximum penalty for

failure to file an informational return pursuant to Tax Law § 1136 (i) for the tax period ending February 28, 2015. It is noted that the Division did not conduct a sales tax field audit.

Moreover, the Division never made a request for books and records, prior to the imposition of the maximum penalty.

6. Petitioner filed a request for conciliation conference (request) with the Bureau of Conciliation and Mediation Services protesting the notice. A conciliation order, CMS# 272400, dated July 14, 2017, was issued that denied the request and sustained the notice. Thereafter, this petition was timely filed with the Division of Tax Appeals, protesting the notice and a formal hearing was held.

7. David D. Viall, who is employed as an auditor with the Division, testified regarding the assessment issued to petitioner in this case. He explained the two components that resulted in the computation of the maximum penalty imposed. The auditor testified that the penalty is comprised of a penalty for failure to file a return and a penalty for each omission of information, required to be provided pursuant to Tax Law § 1136 (i) (2), for each reporting requirement throughout the year on said return. When questioned about his decision to impose the maximum penalty on petitioner, the auditor said that the Division had no way of knowing how many retailers petitioner sold to and, because of that, the maximum penalty was justified.

8. In support of the audit findings in this case, the Division submitted “event logs.” The auditor testified that this is a record of contacts with a taxpayer throughout the audit. This event log began in May of 2013 and ended on July 29, 2019. Clearly, the notes contained numerous contacts with petitioner from years both before and after the period at issue in this case. From a review of the event logs, it appears that roughly a handful of the 27 entries pertain to the assessment at issue. The Division noted in the event logs that petitioner refused to submit the

information return because it stated that the information sought was proprietary in nature. No written requests were made by the Division to review petitioner's books and records or for any other information.

9. Petitioner presented the testimony of Mark A. Caruselle, who testified that he made the decision not to file the information return due to the fact that, in his opinion, the requirement to electronically furnish such sensitive information was not a secure method of providing the information to the Division. Mr. Caruselle testified that he did not want the information requested to be available on the internet. He testified that he requested the Division to visit petitioner's office in order to review the information sought on the return, and that the Division refused. He testified that he deemed the information sought by the Division on the information return was proprietary in nature and, if such information was ever made public, it would destroy his business.

CONCLUSIONS OF LAW

A. Tax Law § 1136 requires the filing of certain returns with the Division. As it concerns this matter, Tax Law § 1136 (i) provides, in relevant part, as follows:

“(1) The following persons must file, in addition to any other return required by this chapter, annual information returns with the commissioner providing the information specified below about their transactions with vendors, hotel operators, and recipients of amusement charges:

* * *

(C) Every wholesaler, as defined by section three of the alcoholic beverage control law, if it has made a sale of an alcoholic beverage, as defined by section four hundred twenty of this chapter, without collecting sales or use tax during the period covered by the return, except (i) a sale to a person that has furnished an exempt organization certificate to the wholesaler for that sale; or (ii) a sale to another wholesaler whose license under the alcoholic beverage control law does not allow it to make retail sales of the alcoholic beverage. For each vendor, operator, or recipient to whom the wholesaler has made a sale without collecting sales or compensating use tax, the return must include the total value of those

sales made during the period covered by the return (excepting the sales described in clauses (i) and (ii) of this subparagraph) and the vendor's, operator's or recipient's state liquor authority license number, along with the information required by paragraph two of this subdivision. . . .

(2) The returns required by paragraph one of this subdivision must also include, for each vendor, operator, or recipient about whom information is required to be reported under such paragraph, the name and address, and the certificate of authority or federal identification number, and any other information required by the commissioner. The commissioner may, in the commissioner's discretion, require the reporting of less than all the information otherwise required to be reported by this paragraph and paragraph one of this subdivision.

(3) The returns required by paragraph one of this subdivision must be filed annually on or before March twentieth and must cover the four sales tax quarterly periods immediately preceding such date. Notwithstanding section three hundred five of the state technology law or any other law to the contrary, the returns must be filed electronically in the manner prescribed by the commissioner.

(4) Any person required to file a return under paragraph one of this subdivision must, on or before March twentieth, give to each vendor, operator, or recipient about whom information is required to be reported in the return the information pertaining to that person. The commissioner may prescribe a form to be used to provide the information required to be given by this paragraph.

(5) Nothing in this subdivision is to be construed to limit the persons from whom the commissioner can secure information or the information the commissioner can require from those persons pursuant to the commissioner's authority under section eleven hundred forty-three of this part of any other provision of law."

Tax Law § 1136 (i) requires that beverage wholesalers file annual information returns providing the Division with certain details of all sales of alcoholic beverages made to retailers where sales or use taxes are not collected. There is no dispute that petitioner, as an alcohol beverage wholesaler, was required to file an annual information return and did not do so.

B. Tax Law § 1145 imposes penalties and interest for certain failures to file returns or pay tax to the Division as due. Tax Law § 1145 (i) provides, in relevant part, as follows:

"(1) Every person required to file an information return by subdivision (i) of section eleven hundred thirty-six of this part who (A) fails to provide any of the information required by paragraph one or two of subdivision (i) of section eleven

hundred thirty-six of this part for a vendor, operator, or recipient, or who fails to include any such information that is true and correct (whether or not such a report is filed) for a vendor, operator, or recipient, or (B) fails to provide the information required by paragraph four of subdivision (i) of section eleven hundred thirty-six of this part to a vendor, operator, or recipient specified in paragraph four of subdivision (i) of section eleven hundred thirty-six of this part, will, in addition to any other penalty provided in this article or otherwise imposed by law, be subject to a penalty of five hundred dollars for ten or fewer failures, and up to fifty dollars for each additional failure.

(2) Every person failing to file an information return required by subdivision (i) of section eleven hundred thirty-six of this part within the time required by subdivision (i) section eleven hundred thirty-six of this part will, in addition to any other penalty provided for in this article or otherwise imposed by law, be subject to a penalty in an amount not to exceed two thousand dollars for each such failure, provided that the minimum penalty under this paragraph is five hundred dollars.

(3) In no event will the penalty imposed by paragraph one, or the aggregate of the penalties imposed under paragraphs one and two of this subdivision, exceed ten thousand dollars for any annual filing period as described by paragraph three of subdivision (i) of section eleven hundred thirty-six of this part.

(4) If the commissioner determined that any of the failures that are subject to penalty under this subdivision was entirely due to reasonable cause and not due to willful neglect, the commissioner must remit the penalty imposed under this subdivision. *These penalties will be determined, assessed, collected, paid, disposed of and enforced in the same manner as taxes imposed by this article and all the provisions of this article relating thereto will be deemed also to refer to these penalties*" (emphasis added).

C. In this case, the Division assessed penalties under Tax Law § 1145 (i) in the amount of \$10,000.00, the maximum amount under the statute. As set forth above, this penalty is comprised of two components. Tax Law § 1145 (i) (1) imposes penalties on a person required to file an information return who fails to provide any of the information required on the return. For a failure to provide any item of information, a vendor would be subject to a penalty of \$500.00 for ten or fewer failures, and up to \$50 for each additional failure. The Division stated that it did not know how many failures were made by petitioner, since the petitioner failed to file the

information return. Therefore, the auditor testified that since no return was filed, it was presumed that petitioner is liable for the maximum amount.

Tax Law § 1145 (i) (4) states that penalties will be determined in the same manner as taxes imposed by article 28. Thus, the principles that guide the determination of tax due when a return is not filed, incorrect or insufficient, must be similarly applied to the determination of penalties under this section. When a sales tax return has not been filed or is incorrect or insufficient, the Division may determine the amount of tax due from available information, and such determinations may be estimated (Tax Law § 1138). It is well established that in order to determine the adequacy of a taxpayer's records for an audit, the Division must request and examine the taxpayer's books and records (*Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003). The purpose of such examination is to determine whether such records are, in fact, so insufficient that it is "virtually impossible to verify taxable sales receipts and conduct a complete audit" (*id.*, quoting *Matter of Chartair, Inc. v State Tax Commn.*, 65 AD2d 44 [3d Dept 1978]).

In this case, the Division failed to make a request for petitioner's books and records. Therefore, the penalties imposed under Tax Law § 1145 (i) (1) lacked a rational basis and must be cancelled.

D. The second component to the penalties at issue are pursuant to Tax Law § 1145 (i) (2) for the imposition of penalty of not less than \$500.00 but up to \$2,000.00, for failure to file an information return. There is no dispute that petitioner failed to file the return. Petitioner's refusal to file is based upon its position that the return must be filed electronically. Petitioner states that the internet is not a secure platform. Moreover, petitioner maintains that the information sought is sensitive and proprietary. Petitioner argues that the information required to

be disclosed on the return is unconstitutional. It states that the Division is using it to gain information about its customers in violation of the law. This argument is rejected.

It is well settled that the Division of Tax Appeals lacks jurisdiction to consider claims alleging that a statute is unconstitutional on its face (*see Matter of A & A Service Sta.*, Tax Appeals Tribunal, October 15, 2009; *Matter of R.A.F. General Partnership*, Tax Appeals Tribunal, November 9, 1995) and at the administrative level, statutes are presumed to be constitutional (*see Matter of Lunding v Tax Appeals Trib.*, 218 AD2d 268 [1996], *revd* 89 NY2d 283 [1996], *cert granted* 520 US 1227 [1997], *revd* 522 US 287 [1998]). It is noted that the constitutionality of Tax Law §§ 1136 (i) and 1145 (i) has already been decided in *Empire State Beer Distrib, Assn., Inc. ex rel. Alcoholic Beverage Wholesalers v Patterson*. In *Empire*, the Court ruled that a rational basis for Tax Law § 1136 (i) exists in these provisions as a means of collecting information from liquor wholesalers in order to verify the accuracy of tax reports from retailers, who frequently operate as cash businesses. Therefore, the imposition of the \$2,000.00 penalty for failure to file the information return is sustained.

E. The petition of Carousel Beverage Corporation is hereby granted to the extent indicated in conclusion of law C, but is otherwise denied, and the notice of determination, dated August 17, 2016, is modified in accordance therewith.

DATED: Albany, New York
July 09, 2020

/s/ Donna M. Gadiner
ADMINISTRATIVE LAW JUDGE