

STATE TAX COMMISSION

2. The taxes, penalty and interest assessed resulted from an audit. As the result of pre-hearing conferences, the taxes found due on audit and assessed

were revised downward to \$172,622.12 and said taxes are not in dispute. The only issue submitted is the abatement of penalty and interest as computed on the revised taxes due.

3. Petitioner, Fugazy Continental Corp., operates a business selling livery franchises for the New York City metropolitan area. In addition, it leases limousines to franchisees for their use in the operation of the franchises. The business has been in operation in New York State since March 1, 1973.

4. On or about August 17, 1976, the Audit Division started an audit on petitioner's books and records. The audit was initiated due to petitioner's filing with the Department of Motor Vehicles a Statement of Transaction - Casual Sale of Motor Vehicle whereon petitioner claimed that "Vehicle will be used exclusively for rental to customers. No tax is to be paid at this time. Sales and Use Tax will be paid by the customers to the rental agency and reported and paid by the agency to the Sales Tax Bureau."

5. On audit, the Audit Division determined that petitioner failed to collect the sales tax on its rentals of motor vehicles. A sales tax of \$107,363.58 was computed on said sales. In addition, the Division determined a liability for expense sales, recurring expense purchases, asset purchases, and customer list purchases of \$75,519.05; \$12,899.76; \$6,730.49 and \$39,404.79, respectively. The Division revised the taxes downward on expense sales and recurring expense purchases to \$9,627.72 and \$9,495.54 after petitioner's presentation of additional documentation at pre-hearing conferences.

6. Petitioner argues that its failure to meet the requirements of the New York sales and use tax law was due to its reasonable belief that no tax was due or that other persons were responsible for paying sales tax. The customer lists petitioner interpreted to be an intangible asset on which sales tax is

not imposed. Petitioner considered the franchisees responsible for paying sales tax based on the franchise agreement which at paragraph four provides, in part, "(t)he Franchisee shall be solely responsible for compliance with all federal, state, city and local taxes, fines, penalties and assessments arising out of the operation of his franchise under this agreement..."

7. During the period under review, petitioner leased the limousines to franchisees pursuant to lease agreements, paragraph ten of which provided: "Taxes. Lessor shall pay Federal, state and local excise, property and/or sales taxes as they become due and payable on Units leased hereunder and Lessee shall reimburse Lessor for such tax outlays."

8. Petitioner was not registered to collect or report sales tax at the time that it executed the Statement of Transaction - Casual Sale of Motor Vehicle which is referred to in Finding of Fact "4".

9. Petitioner failed to file New York State and Local Sales and Use Tax Returns for the period March 1, 1973 through November 30, 1976.

CONCLUSIONS OF LAW

A. That in accordance with Finding of Fact "2", the taxes due are reduced to \$172,622.12.

B. That section 1145(a) of the Tax Law, during the period under review, authorized the State Tax Commission to remit all penalties and interest in excess of the minimum statutory interest if the delay in filing a return or paying over any tax found due was found to be excusable.

C. That in light of petitioner's lease agreement providing for the collection of sales tax and petitioner's execution of the Statement of Transaction - Casual Sale of a Motor Vehicle indicating that sales tax collected on

lease receipts would be reported and paid, this commission finds no excuse to abate the penalty and interest assessed against petitioner.

D. That the petition of Fugazy Continental Corp. is granted in accordance with Conclusion of Law "A" above; that the Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 2, 1977; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JAN 06 1984

STATE TAX COMMISSION

Richard W. Cline
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Dineen
COMMISSIONER