

STATE OF NEW YORK
STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| of | : | |
| PATRICK'S FOOD SERVICE, INC. | : | AMENDED 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 September 1, 1975 | : | |
| through February 28, 1981. | : | |

Petitioner, Patrick's Food Service, Inc., 7 Broad Street, Glens Falls, New York 12801, 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 September 1, 1975 through February 28, 1981 (File Nos. 25737 and 35923).

On November 18, 1985, petitioner's representative, Rowley, Forrest and O'Donnell, P.C. (Robert S. Hite, Esq., of counsel), and the representative of the Audit Division, John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel), executed a stipulation of facts. On January 15, 1986, petitioner's representative executed, on petitioner's behalf, a waiver of hearing and submitted its case for decision based solely upon said stipulation with the accompanying exhibits, together with briefs to be submitted by the parties on or before April 16, 1986. After due consideration, the State Tax Commission hereby renders the following decision.

ISSUE

Whether petitioner is entitled to a refund of that portion of interest which was compounded by the Audit Division after petitioner paid the full amount of tax asserted to be due for the purpose of preventing further accumulation of interest.

FINDINGS OF FACT

1. Based upon an audit of the records of Patrick's Food Service, Inc. (hereinafter "petitioner"), the Audit Division issued to petitioner three Notices of Determination and Demand for Payment of Sales and Use Taxes Due, to wit: Notice Number S781205010A issued December 11, 1978 for the period November 30, 1975 through August 31, 1978 asserting total tax due of \$62,438.77, plus penalty of \$11,791.50 and interest of \$7,724.34, for a total amount due of \$81,954.61; Notice Number S781220007A issued December 22, 1978 for the period November 30, 1975 through August 31, 1978 (issued in addition to assessment issued December 11, 1978 under Notice Number S781205010A) asserting total tax due of \$3,101.10, plus penalty of \$481.38 and interest of \$335.48, for a total amount due of \$3,917.96; and Notice Number S811020117C issued October 20, 1981 for the period September 1, 1978 through February 28, 1981 asserting total tax due of \$22,960.81, plus interest of \$3,902.02, for a total amount due of \$26,862.83.

2. As a result of a stipulation entered into between petitioner's representative and the representative of the Audit Division, John P. Dugan, Esq. (Harry Kadish, Esq., of counsel), on May 3, 1983, a Withdrawal of Petition and Discontinuance of Case executed by petitioner's representative on May 19, 1983 and payment of tax due from petitioner, all of the substantive issues relating to the aforesaid notices of determination and demand for payment of sales and use taxes due were resolved.

3. Pursuant to a stipulation entered into between the parties on November 18, 1985, it was agreed by and between the parties that the only remaining issue herein is whether the Audit Division is authorized to compound the interest due from petitioner on sales and use taxes assessed pursuant to the Notice of

Determination and Demand for Payment of Sales and Use Taxes Due bearing Notice Number S811020117C which was issued to petitioner on October 20, 1981 for the period September 1, 1978 through February 28, 1981.

4. On January 20, 1983, petitioner's representative sent a letter to Harry Kadish, Esq. and enclosed therein a draft bearing the date January 19, 1983 in the amount of \$22,960.81. The letter provided, in pertinent part, as follows:

"In accordance with your suggestion regarding the deposit of money with the New York State Department of Taxation and Finance, in order to prevent further accumulation of interest on the sales and use tax liability claimed against Patrick's Food Service, Inc., we enclose herewith a draft in the amount of twenty-two thousand nine hundred sixty dollars and eighty-one cents (\$22,960.81) payable to the New York State Department of Taxation and Finance. This draft is intended as a deposit on the tax claimed to be due pursuant to Notice Number 5811020117C (sic) dated October 20, 1981 for the purpose of preventing any further accumulation of interest on the amount of the tax claimed to be due thereunder. By making this deposit, we do not waive any rights to continue to challenge the assessment and we specifically reserve the right to pursue the appeal regarding this assessment and the assessment under Notice Number 791205010A."

At this time, petitioner did not pay any of the interest asserted by the Audit Division to be due on the tax assessed pursuant to this said Notice.

5. On January 17, 1986, petitioner paid the full amount of interest then due on the tax assessed to petitioner pursuant to Notice Number S811020117C which was paid by petitioner by means of its draft of January 19, 1983. At the same time, petitioner paid additional amounts which represented interest due on additional notices, but, pursuant to the stipulation of November 18, 1985, seeks a refund of only that portion of interest on the tax liability due pursuant to Notice Number S811020117C which was compounded by the Audit Division from September 1, 1983 to January 17, 1986, the date of payment thereof. Petitioner contends that the full amount of tax due was paid in January, 1983 for the express purpose of preventing further accumulation of interest and that, by

reason of the stipulation entered into between the parties on May 3, 1983 and correspondence between petitioner's representative and the representative of the Audit Division, an agreement was reached which supersedes the compound interest provisions of section 1142(9) of the Tax Law which took effect on September 1, 1983, a date which is subsequent to the aforesaid stipulation and correspondence.

6. In accordance with the provisions of the waiver of hearing executed by petitioner's representative on January 15, 1986, said representative submitted a written argument, in letter form, to the State Tax Commission on February 28, 1986. Attached thereto was a written stipulation, entered into on said date, between petitioner's representative and the representative of the Audit Division, John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel) which agreed as follows:

"At the time that petitioner deposited with the New York State Department of Taxation and Finance the sum of Twenty-two Thousand Nine Hundred Sixty 81/100 Dollars (\$22,960.81) as payment of the principal tax liability claimed to be due under Assessment Notice No. S811020117C, there existed between petitioner and the New York State Department of Taxation and Finance an agreement that the deposit of such sum was for the express purpose and upon the express understanding that such deposit would fix interest and prevent any further accumulation of interest due under Assessment No. S811020117C."

CONCLUSIONS OF LAW

A. That section 1142(9) of the Tax Law provides, in pertinent part, as follows:

"In computing the amount of any interest required to be paid under this article by the tax commission or by the taxpayer, or any other amount determined by reference to such amount of interest, such interest and such amount shall be compounded daily."

This language was added to section 1142(9) by section 98 of Chapter 15 of the Laws of 1983.

B. That section 101 of Chapter 15 of the Laws of 1983, the effective date provision of Chapter 15, provides, in pertinent part, as follows:

"sections...ninety-eight, ...of this act shall take effect September first, nineteen hundred eighty-three and shall apply to interest accruing on or after such date on amounts (including interest) remaining unpaid on or after such date, ...".

C. That, in January, 1983, at the time when petitioner paid the tax asserted to be due from petitioner by the Audit Division pursuant to the Notice of Determination and Demand for Payment of Sales and Use Taxes Due bearing Notice Number S811020117C, the provisions of section 1142(9) of the Tax Law did not provide for the daily compounding of interest.

D. That at the time that petitioner paid the principal tax liability (\$22,960.81) claimed to be due under Assessment Notice No. S811020117C, the agreement by the Audit Division that such payment would fix interest and prevent further accumulation of interest due was based upon the statutory language of section 1142(9) of the Tax Law as of the date of the said payment. Petitioner chose to pay only the tax liability asserted in the Notice; it could have also paid the interest which had accrued on the tax liability and, in the event of a successful challenge to this assessment, would have been entitled to a refund with interest. Should said successful challenge have occurred after September 1, 1983, the effective date of the compound interest provisions of section 1142(9) of the Tax Law, the State Tax Commission would have been required to issue the refund to petitioner with interest which was compounded daily.

E. That at the time that such agreement was made between petitioner and the representative of the Audit Division, said representative could not have had knowledge that section 1142(9) of the Tax Law would subsequently be amended so as to provide for the daily compounding of interest. Moreover, no duty

exists, statutorily or otherwise, which requires the Audit Division to advise petitioner of legislative changes in the Tax Law which may serve to adversely affect petitioner.

F. That section 1145 of the Tax Law provides statutory authority for remittance of penalty by the State Tax Commission, but no such statutory authority exists with respect to interest.

G. That the petition of Patrick's Food Service, Inc. for a refund of interest paid on January 17, 1986 is denied.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 08 1986

Rodrick W. Clem
PRESIDENT

Francis R. Koening
COMMISSIONER

Mark J. [Signature]
COMMISSIONER