

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HOLIDAY MOTEL OF BRONX, 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 December 1, 1978	:	
through August 31, 1981.	:	

Petitioner, Holiday Motel of Bronx, Inc., 2991 New England Thruway, Bronx, New York 10475, 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 December 1, 1978 through August 31, 1981 (File No. 37455).

A hearing was commenced before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 3, 1984 at 9:15 A.M., continued before Arthur Johnson, Hearing Officer, at the same offices on April 5, 1985 at 9:30 A.M., and continued to conclusion before James Hoefer, Hearing Officer, at the same offices on October 9, 1985 at 1:30 P.M., with all briefs to be submitted by January 31, 1986. Petitioner appeared by Murray Appleman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether a corporation is required to file sales tax returns and pay sales tax, penalties and interest when a court appointed receiver is in control and possession of the books and records of the corporation.

II. Whether the Audit Division properly estimated the sales tax deficiency for the petitioner for the audit period.

FINDINGS OF FACT

1. On December 20, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Holiday Motel of Bronx, Inc., covering the period December 1, 1978 through August 31, 1981. The notice was issued as a result of a field audit and asserted sales tax due of \$49,834.56, plus penalty of \$10,958.10 and interest of \$10,953.90, for a total due of \$71,746.56.

2. During the audit period, petitioner owned a motel in northeastern Bronx, adjacent to the New England Thruway, with thirty-three rentable rooms.

3. In or about October of 1981, the Audit Division commenced a field audit of petitioner's business operation. Petitioner failed to provide the auditor with any books and records of its business. The auditor estimated the sales tax due based on sales tax returns filed by petitioner prior to the audit period and on returns filed at the time of the assessment, with adjustments made to reflect increases in price during the audit period, inflation and comparable prices of similar businesses.

4. On October 17, 1978, Raleigh L. Davenport, Esq. was appointed as the receiver of petitioner corporation by order of the Bronx Supreme Court. The order appointing the receiver was not introduced at the hearing, nor was there any testimony presented by petitioner as to the powers and authority granted to the receiver by said order of appointment.

5. The receiver was relieved of his appointment by order of the Bronx Supreme Court effective December 9, 1980. The order required the receiver to file his final accounting and move for judicial settlement within 30 days from December 11, 1980, the date of the order. The receiver has failed to provide said accounting to petitioner.

6. During that portion of the audit period when petitioner corporation was in receivership, from December 1, 1978 until December 9, 1980, petitioner was unable to provide the auditor with its books and records because they were in possession and control of the receiver.

7. During the field audit, the auditor attempted to obtain the books and records from the receiver by requesting them in a certified letter. The receiver did not contact the auditor, nor cooperate in furnishing the books and records.

8. The receiver appeared at the hearing held on October 3, 1984 and agreed to make every effort to make the books and records available to both the State Tax Commission and the petitioner. Following the hearing, the auditor attempted to contact the receiver by telephone and by twice presenting himself personally at the hotel where the receiver maintained his office. The auditor was unsuccessful in his efforts to contact the receiver or to obtain the books and records of the petitioner's business.

9. At the hearing held on October 9, 1985, petitioner introduced the following evidence of its attempts to compel the receiver to produce the books and records of petitioner corporation for the period when the corporation was in receivership:

a) A subpoena issued to Raleigh L. Davenport, Esq. commanding him to appear at the State Tax Commission hearing scheduled for October 3, 1984 and to produce the books and records of petitioner for the period October, 1978 to August, 1981. No proof of service of said subpoena was introduced.

b) A letter, dated October 1, 1985, from petitioner's representative to the Administrative Judge of the Bronx County Supreme Court in which a request was made for the receiver's current address.

10. Petitioner presented no evidence of any attempts to enforce the subpoena described in Finding of Fact "9(a)" hereof, or to enforce the court order described in Finding of Fact "5" hereof.

11. During the audit period, petitioner was registered with the Tax Commission under the provisions of Article 28 of the Tax Law, vendor identification number 13-2533680. There was no evidence presented that petitioner amended its certificate of registration or in any way notified the Tax Commission of the change in the form of the business following the appointment of the receiver. Petitioner did not file sales tax returns nor pay any sales tax during the period of receivership.

12. The receiver registered with the Tax Commission under the provisions of Article 28 of the Tax Law under the name, Holiday Motel Raleigh Davenport, Receiver, vendor identification number 13-2955965. A sales tax return was filed with the receiver's identification number on April 12, 1979 for the period September 1, 1978 to November 30, 1978, a period prior to the audit period herein. There was no evidence presented that sales tax returns were filed by the receiver during the audit period.

13. During that portion of the audit period when petitioner was not in receivership, from December 10, 1980 through August 31, 1981, petitioner filed a partial sales tax return, together with payment, for the period ended February 28, 1981, and filed sales tax returns, together with payment, for the periods ended on May 31, 1981 and August 31, 1981.

14. The assessments for the periods ended February 28, 1981, May 31, 1981 and August 31, 1981 reflect the difference between the amount the Audit Division estimated petitioner should have paid less what it actually paid.

15. Petitioner timely filed sales tax returns for all periods except those for which it was in receivership.

16. Petitioner raised no objection regarding the validity of the audit procedure, nor was any evidence produced to refute the amount of sales tax assessed.

CONCLUSIONS OF LAW

A. That a receiver has no legal power except as is specifically conferred upon him by order of the court. Investors Ins. Co. v. Gorelick, 109 Misc.2d 35, 441 N.Y.S.2d 151 (1979). That petitioner failed to present any evidence concerning the powers and authority of the receiver in the instant case.

B. That where tax returns are either insufficient or not filed, the Tax Commission is authorized to determine the amount of tax due, notify persons deemed liable and conduct hearings. Tax Law § 1138(a)(1). The Audit Division was justified in deeming the petitioner herein as liable for collection and payment of sales tax based on petitioner's valid certificate of registration to collect sales tax, its ownership of the subject property, its history of filing sales tax returns prior to the audit period, and its failure to notify the Department of Taxation and Finance, in accordance with 20 NYCRR §533.1(e), that there had been a change in the form of the business.

C. That the burden of proof to overcome a tax assessment rests upon the taxpayer. (See, Matter of Young v. Bragalini, 3 N.Y.2d 602, 170 N.Y.S.2d 805, 148 N.E.2d 143 [1958]; Grace v. New York State Tax Commission, 37 N.Y.2d 195, 371 N.Y.S.2d 715, 332 N.E.2d 886 [1975].) Petitioner has failed to show that the assessment was erroneously applied to it.

D. That section 1135 of the Tax Law requires every person required to collect tax to maintain records of sales and to make these records available for audit. When records are not provided or are incomplete and insufficient, it is the Tax Commission's duty to select a method reasonably calculated to reflect the taxes due. The burden then rests upon the taxpayer to demonstrate

by clear and convincing evidence that the method of audit or the amount of tax was erroneous. Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 A.D.2d 858, 446 N.Y.S.2d 451 (1981).

E. That petitioner failed to establish that it took the necessary legal action to obtain its books and records from the receiver. That petitioner has failed to overcome the burden of showing that the method of audit or the amount of tax was erroneous.

F. That section 1145(a)(1)(iii) provides that the Tax Commission may remit penalties and interest in excess of the statutory minimum where the failure to file returns was due to reasonable cause and not due to willful neglect. Inasmuch as petitioner's failure to report and pay sales tax during the period December 1, 1978 through December 9, 1980 was attributable to the fact that its assets and records were under the control of a court appointed receiver, and based upon petitioner's history of timely filed sales tax returns when not under receivership, penalties and interest in excess of the minimum statutory rate are abated.

G. That the petition of Holiday Motel of Bronx, Inc. is granted to the extent indicated in Conclusion of Law "F"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 20, 1981; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1986

Rodriguez
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark Tush
COMMISSIONER