

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions
of
DFK 11 TRINITY PLACE CORP.
for Revision of Determinations or for Refunds
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Periods June 1, 1977
through May 31, 1980 and June 1, 1980 through
February 28, 1981.

DECISION

Petitioner, DFK 11 Trinity Place Corp., 11 Trinity Place, New York, New York 10006, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1977 through May 31, 1980 and June 1, 1980 through February 28, 1981 (File No. 38373).

On November 15, 1984, petitioner waived its right to a hearing and requested that a decision be rendered based on the entire record contained in the Audit Division's file and briefs to be submitted by December 4, 1984. After due consideration of the record, the State Tax Commission hereby renders the following decision.

ISSUE

Whether reasonable cause existed for the failure of petitioner to timely pay the proper amount of taxes due under Articles 28 and 29 of the Tax Law.

FINDINGS OF FACT

1. On March 19, 1982, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due under Articles 28 and 29 of the Tax Law against the petitioner, DFK 11 Trinity Place Corp., for taxes due of \$23,567.25, plus penalty of \$5,891.81 and

interest of \$8,979.21, for a total amount due of \$38,438.27 for the period June 1, 1977 through May 31, 1980.

Also, on March 19, 1982, the Audit Division issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner for taxes due of \$7,798.94, plus penalty of \$1,487.68 and interest of \$1,262.31, for a total amount due of \$10,548.93 for the period June 1, 1980 through February 28, 1981.

2. The petitioner, by signature of its secretary-treasurer, Michael Keane, executed consents extending the statute of limitations for issuing an assessment for sales and use taxes for the period June 1, 1977 through February 28, 1981 to June 20, 1982.

3. On June 15, 1982, the petitioner timely filed petitions for a hearing on the aforementioned notices and on December 6, 1983 submitted a perfected petition. The petitioner contends, in regard to the additional taxable food sales, that it sold cold, unprepared food in bulk to local residents; that people knew about it and would stop in for a pound of roast beef, ham, etc. Additionally, the petitioner claims that it acted in good faith and in accordance with previous instructions; therefore, penalty should not be imposed.

4. The petitioner is a "Blarney Stone" bar/restaurant located in the financial district in Manhattan. Blarney Stone bars are known for their relatively low markups on food and liquor and for catering to a working class clientele. As the auditor observed, the petitioner "serves his customers very thick sandwiches and meat platters."

5. On audit, the auditor determined that the petitioner had gross sales, as well as taxable sales, for the period at issue of \$2,217,306.00 as compared

to reported taxable sales of \$1,827,878.00. Additional taxable sales were therefore determined to be \$389,428.00 with a tax due thereon of \$31,154.40.

6. As the result of evidence presented by the petitioner at a pre-hearing conference, the Audit Division made a substantial reduction in petitioner's liquor and beer sales which reduced petitioner's overall additional taxable sales to \$258,665.00 with a tax due thereon of \$20,691.52. Of the \$258,665.00 additional taxable sales, \$225,140.00 represent additional food sales. The Audit Division also determined additional tax due on purchases of furniture and fixtures of \$211.79 and additional tax due on employee drinks of \$702.00 for a total amount now due of \$21,605.31. Petitioner concedes that the revised amount is due. Petitioner is now protesting the imposition of penalty and interest in excess of the minimum statutory rate.

7. For the period June 1, 1977 through May 31, 1980, the petitioner did not include on sales tax returns 25 percent of food sales that the petitioner claimed to be non-taxable sales. When questioned by the auditor, the petitioner's accountant stated that the 25 percent reduction represented take-out sales of bulk meat. After the audit had been initiated and the accountant questioned about the reduction, the petitioner discontinued the reduction. Therefore, for the final three quarters of the audit period (June 1, 1980 through February 28, 1981), all of petitioner's food sales were reported as taxable.

8. The auditor, on several visits to petitioner's premises, saw no evidence that the petitioner made take-out sales of bulk meat (e.g. there was no scale present for weighing food for bulk sales).

CONCLUSIONS OF LAW

A. That Tax Law section 1145(a)(1)(i) imposes penalty and interest for failure to file a return or to pay tax within the time limitations prescribed by Articles 28 and 29 equal to:

"...five percent of the amount of tax due if such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate; plus interest at the rate of one percent of such tax or one-twelfth of the annual rate of interest set by the tax commission pursuant to section eleven hundred forty-two, whichever is greater, for each month of delay after such return was required to be filed or such tax became due."

Where this Commission determines that such failure or delay is due to reasonable cause and not due to willful neglect, it is authorized to cancel the penalty and that portion of interest in excess of the interest computed at the rate established pursuant to section 1142. Section 1145(a)(1)(ii).

B. That petitioner, DFK 11 Trinity Place Corp., has failed to demonstrate a cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay in paying sales and use taxes and which clearly indicates an absence of gross negligence or willful intent to disobey the tax statutes, so as to warrant the cancellation of penalty and interest in excess of the minimum statutory rate. 20 NYCRR 536.1(b)(6).

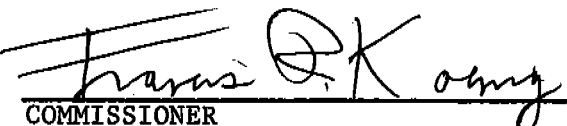
C. That the petitions of DFK 11 Trinity Place Corp. are denied.

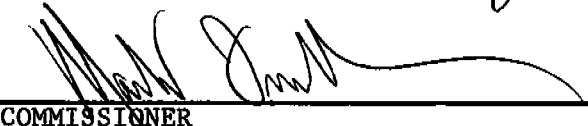
DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1985


PRESIDENT


COMMISSIONER


COMMISSIONER