

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JERRY MAURO and ANGELA MAURO	:	DECISION
OFFICERS of JERRY MAURO, INC.	:	
	:	
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 May 31, 1982.	:	

Petitioners, Jerry Mauro and Angela Mauro, officers of Jerry Mauro, Inc., 51 Strathmore Village Drive, Centereach, New York 11720, each 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 May 31, 1982 (File Nos. 38979/48569/48570/49878/49879).

A consolidated hearing was commenced before Sandra F. Heck, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 18, 1986 at 1:15 P.M. and continued to conclusion on March 25, 1986 at 1:15 P.M., with all briefs to be submitted by May 27, 1986. Petitioners appeared by Eugene T. White, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether petitioner Angela Mauro was an officer or employee of Jerry Mauro, Inc. during the period at issue and, as such, personally liable for tax assessed against such corporation.

II. Whether the Audit Division properly determined additional sales tax due from Jerry Mauro, Inc. for the period at issue.

III. Whether petitioners were properly subject to the fraud penalty for willful failure to pay sales tax.

FINDINGS OF FACT

1. Jerry Mauro, Inc. was formed on August 11, 1971 by petitioner Jerry Mauro and operated as a gasoline and service station known as Jerry's Exxon. Petitioner Jerry Mauro was the president, secretary and sole stockholder of the corporation. Both petitioner Jerry Mauro and his wife at the time, Rosalie Mauro, were authorized to sign corporate checks. In 1974, petitioner Jerry Mauro married petitioner Angela Mauro, whom petitioners' bank, the National Bank of North America, allowed to sign corporate checks, though she was never on file as being an authorized signatory.

2. Petitioner Jerry Mauro became disabled in 1978 and was unable to service automobiles after this time. Petitioner claimed that he never hired a mechanic after he became disabled and that Jerry's Exxon continued to operate solely as a gasoline station, with one attendant running the station, until Jerry Mauro, Inc. was dissolved in 1982. However, the records of the corporation's parts supplier contained numerous parts sales to the station through 1981, indicating that repairs were being provided. Additionally, an information sheet completed by the auditor following his visit to the station in February 1982 stated that the station employed three gas attendants and one mechanic.

3. Petitioner Angela Mauro had a full-time job as an Amway distributor during the entire period at issue. The business, 51 Strathmore Drive, Limited, was operated by petitioner out of her home. She did not participate in the bookkeeping or daily activities of Jerry Mauro, Inc., nor was she an officer of the corporation.

4. The first accountant for Jerry Mauro, Inc. was Mr. Julius Veit, who handled all of the corporation's business and tax records, and removed records from the station on a regular basis. It is unclear whether all of these records were returned.

5. In August 1981, Jerry's Exxon was burglarized, and it was then discovered that a large portion of the corporation's records were missing.

6. In November 1981, the Audit Division commenced an audit of Jerry Mauro, Inc. At about this time, petitioner Jerry Mauro hired a new accountant, Jerry Palmer, to reconstruct the missing corporate records. Before his findings could be utilized, Mr. Palmer died. Petitioners tried to retrieve corporate records from both Mr. Palmer's widow and Mr. Veit, but without success. The only records petitioners could find were a few cancelled checks, and cash receipts journals and sales tax returns covering a portion of the audit period. No Federal or state corporate income tax returns were made available for review, nor is there any record of such state returns having ever been filed.

7. Due to the inadequacy of the records made available to the Audit Division, a field audit was conducted to estimate the corporation's sales tax liability for the period in issue. In response to a request by the Audit Division, Exxon Corporation supplied third-party verification of the number of gallons of gasoline purchased by Jerry's Exxon. This information was broken down into sales tax quarters and multiplied by an average retail selling price to arrive at gross gasoline sales. From this, gasoline tax and sales tax, which were included in the average retail selling price, were removed to determine taxable gasoline sales for each quarter.

8. Non-gasoline sales, which included service, tow truck operations, tires, batteries, and accessories, were estimated by multiplying taxable

gasoline sales by 32.352 percent. This percentage was based upon another audit of a similar business with the same number of service bays, also located on a state highway in a reasonably well-traveled area. No actual observation test was conducted at Jerry's Exxon in determining the percentage of non-gasoline sales.

9. On September 12, 1982, the Audit Division issued notices of determination and demands for payment of sales and use taxes due for the period December 1, 1978 through May 31, 1980 against Jerry Mauro, Inc. and petitioner, Jerry Mauro, as an officer of Jerry Mauro, Inc., for taxes due of \$78,734.76, plus penalty of \$19,683.66 and interest of \$26,277.29, for a total amount due of \$124,695.71. On September 20, 1983, the Audit Division issued notices of determination and demands for payment of sales and use taxes due for the period June 1, 1980 through August 31, 1980 against Jerry Mauro, Inc., and petitioner Jerry Mauro and petitioner Angela Mauro as officers of Jerry Mauro, Inc., for taxes due of \$11,790.67, plus penalty of \$5,895.34 and interest of \$4,580.41, for a total amount due of \$22,266.42. On November 21, 1983, the Audit Division issued notices of determination and demands for payment of sales and use taxes due for the period September 1, 1980 through May 31, 1982 against Jerry Mauro, Inc., and petitioners, as officers thereof, for taxes due of \$80,886.12, plus penalty of \$40,443.07 and interest of \$24,230.64, for a total amount due of \$145,559.83. The total amount asserted due from the corporation, including penalty and interest, was \$292,521.96.

10. In February 1982, petitioner Jerry Mauro executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1978 through May 31, 1979 to September 20, 1982. Petitioner contends that he was coerced into signing this consent by a threat of having

his station closed if he refused. This fact was not relayed to petitioner to coerce him into signing the consent, but merely to inform him of his choices. Petitioner was free to seek the advice of an attorney before signing the consent, but chose to sign without first doing so.

11. The Audit Division's issuance of the notices of determination against petitioner Angela Mauro as an officer of Jerry Mauro, Inc., was based upon copies of cancelled checks and sales tax returns which appeared to bear her signature. On a few of these documents the title of secretary appeared next to her name. Petitioner Angela Mauro argues that she is not an officer of Jerry Mauro, Inc. nor did she sign any of the aforementioned documents, and that she should not be personally liable for taxes due from the corporation. An examination of these documents revealed that the signatures contained thereon were different from Angela Mauro's signature as contained on her notarized power of attorney.

12. Petitioners argue that the Audit Division's assessment of sales tax due is incorrect, in that Jerry's Exxon has not serviced automobiles since petitioner Jerry Mauro became disabled, and that the gasoline sold by the station during the period in issue was sold at prices substantially below the figures used by the Audit Division in assessing sales tax due.

13. It is not disputed that petitioner Jerry Mauro was an officer of Jerry Mauro, Inc.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides, in part, that every person required to collect the taxes imposed under the Sales Tax Law is also personally liable for the tax imposed, collected, or required to be collected under such law. Section 1131(1) of the Tax Law defines "persons required to

collect tax" as used in section 1133(a) to include any officer or employee of a corporation, or a dissolved corporation, who as such officer or employee is under a duty to act for the corporation in complying with any requirement of the Sales Tax Law.

B. That 20 NYCRR 526.11(b)(2) describes an officer or employee who is under a duty to act as a person who is authorized to sign a corporation's tax returns or is responsible for maintaining the corporate books, or is responsible for the corporation's management. Other "[i]ndicia of this duty... include factors... such as the officer's day-to-day responsibilities and involvement with the financial affairs and management of the corporation" and "the officer's duties and functions" (Vogel v. New York State Department of Taxation and Finance, 98 Misc 2d 222, 225).

C. That petitioner Angela Mauro was not a person required to collect sales tax within the meaning of Tax Law §1131(1). Petitioner Angela Mauro was not an officer or employee of Jerry Mauro, Inc., nor did she participate in the financial affairs, management, or day-to-day activities of the corporation. The documents upon which the Audit Division based its belief that petitioner Angela Mauro was an officer of Jerry Mauro, Inc. (see Finding of Fact "11") were not, in fact, prepared or signed by her.

D. That section 1135 of the Tax Law requires every person required to collect tax, to maintain records of its 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... that the method of audit or the amount of the tax assessed was erroneous" (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858).

E. That petitioners have not sustained their burden of proving the Audit Division's assessment or methodology erroneous. In the absence of any records from which sales could be verified, the Audit Division properly resorted to external indices to determine petitioners' tax liability (Tax Law § 1138[a][1]; Matter of Sakran v. State Tax Comm., 73 AD2d 989). Moreover, the audit methodology, which consisted of the use of third-party verification and an audit of a substantially similar business, was reasonably calculated to reflect the sales and use taxes due. Petitioners provided no credible evidence that the amount of non-gasoline sales was less than the percentage arrived at by the auditor or that the selling price of gasoline sold was less than the average retail selling price utilized by the auditor in calculating taxable gasoline sales.

F. That section 1145(a)(2) of the Tax Law was added by section 2 of chapter 287 of the laws of 1975. During the period in issue, this paragraph provided:

"If the failure to file a return or to pay over any tax to the tax commission within the time required by this article is due to fraud, there shall be added to the tax a penalty of fifty percent of the amount of the tax due (in lieu of the penalty provided for in subparagraph (i) of paragraph one), plus interest".

G. Section 1145(a)(2) of the Tax Law was enacted by the Legislature with the intention of having a penalty provision in the Sales and Use Tax Law which was similar to that which already existed in the Tax Law with respect to deficiencies of, inter alia, personal income tax (N.Y. Legis. Ann., 1975, p. 350). Thus, the burden placed upon the Audit Division to establish fraud at a hearing involving a deficiency of sales and use tax is the same as the burden placed upon the Audit Division at a hearing involving a deficiency of personal income tax. A finding of fraud at such a hearing "requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and

intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing" (Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982).

H. That based on the evidence presented, the Audit Division has not sustained its burden of proving that the imposition of a fraud penalty was warranted.

I. That the petition of Angela Mauro is granted and the notices of determination and demands for payment of sales and use taxes due issued against her on September 20, 1983 and November 21, 1983 are hereby cancelled.

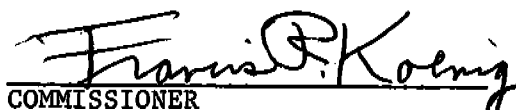
J. That the petition of Jerry Mauro is granted to the extent indicated in Conclusion of Law "H"; the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued against petitioner Jerry Mauro, dated September 12, 1982, September 20, 1983 and November 21, 1983; and, except as so granted, the petition of Jerry Mauro is denied.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER