

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter **of** the Petition

of

ABITT WINE & LIQUOR CORP.

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, 1978  
through August 31, 1981.

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DECISION

In the Matter of the Petition

of

**JAMES** McDONALD

OFFICER OF ABITT WINE & LIQUOR CORP.

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, 1978 :  
through August 31, 1981.

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Petitioner, Abitt Wine & Liquor Corp., 85 Avenue D, New York, New York 10009, 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, 1978 through August 31, 1981 (File No. 39522).

Petitioner, James McDonald, 85 Avenue D, New York, New York 10009, 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, 1978 through August 31, 1981 (File No. 43995).

A hearing was commenced before James Hoefer, Hearing Officer, at the offices **of** the State Tax Commission, Two World Trade Center, New York, New York, on June 4, 1985 at 9:15 A.M. and continued to conclusion before the same Hearing Officer, at the **same** location, on February 6, 1986 at 2:45 P.M., with

all briefs to be submitted by April 30, 1986. Petitioners at all times appeared by Fein, Silberbush, Katz & Linn (Charles B. Linn, Esq., of counsel). The Audit Division at all times appeared by John P. Dugan, **Esq.** (Angelo A. Scopellito, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly assessed against petitioners a penalty of 50 percent based upon fraud.

II. Whether petitioners, if not found subject to the fraud penalty, **are** liable for the penalty imposed pursuant to Tax Law section 1145(a)(1).

111. Whether reasonable cause existed for petitioners' failure to pay the proper sales tax due, thereby warranting cancellation of interest charges in excess of minimum interest.

#### FINDINGS OF FACT

1. On March 20, 1982 and January 20, 1983, the Audit Division, as the result of a field examination, issued notices of determination and demands for payment of sales and use taxes due to Abitt Wine and Liquor Corp. (hereinafter "Abitt"). The notice dated March 20, 1982, which encompassed the period September 1, 1978 through August 31, 1979, assessed sales tax due of \$25,507.60, plus a 50 percent fraud penalty of \$12,753.80 and interest of \$9,114.78, for a total amount due **of** \$47,376.18. The notice dated January 20, 1983, which included the period September 1, 1979 through August 31, 1981, assessed sales tax due of \$91,793.76, plus a 50 percent fraud penalty of \$45,896.62 and interest **of** \$25,563.25, for a total amount due of \$163,253.63. Notices, also dated March 20, 1982 and January 20, 1983, were issued against James McDonald individually as an officer of Abitt. The notices issued to James McDonald assessed amounts identical **to** those assessed against Abitt.

2. On November 13, 1981, Abitt executed a consent extending the period of limitation for assessment for the period September 1, 1978 through November 30, 1978 to March 20, 1982. Abitt executed a second consent, dated November 13, 1982, extending the period of limitation for assessment for the period September 1, 1979 through November 30, 1979 to March 20, 1983.

3. At the hearing held herein, petitioners conceded that the sales tax as assessed in the notices issued to Abitt was due and owing. It was also conceded that Mr. McDonald was personally liable as an officer **of** Abitt for payment **of** the sales taxes determined to be due from said corporation. In this proceeding petitioners seek to have the 50 percent fraud penalty cancelled and to have statutory interest reduced **to** minimum interest. The Audit Division argued that the 50 percent fraud penalty should be sustained and, in the alternative, argued that if petitioners' failure to report the proper sales tax due was not based upon fraud, that the imposition of a penalty pursuant to Tax Law section 1145(a)(1) was warranted.

4. During the period at issue Abitt was engaged **in** the retail sale of wine and liquor. James McDonald was president of Abitt and its sole officer and stockholder. Sometime in 1982 the Audit Division commenced a field examination of petitioner's books and records. Said books and records consisted **of** a cash receipts journal and a cash disbursements journal. Petitioner did not maintain sales invoices, cash register tapes or any other verifiable record of taxable sales.

5. During the course of its examination the Audit Division compared gross receipts per the cash receipts journal (\$296,582.00) to gross receipts reported on the sales tax returns and found no discrepancies. Purchases per Abitt's cash disbursements journal totalled \$221,978.00 and, when compared to reported

gross sales, petitioner showed an overall markup percentage of 133.609 percent (\$296,582.00 divided by \$221,978.00).

6. Since Abitt's books and records were inadequate, the Audit Division resorted to a purchase mark-up analysis to verify the accuracy of reported gross sales. In order to verify purchases shown per Abitt's cash disbursement journal, the Audit Division requested information from Abitt's suppliers concerning purchases made by Abitt during the period in question. Information received from said suppliers revealed that Abitt had made cash purchases of wine and liquor totalling \$1,303,274.00. Audited purchases of \$1,303,274.00 were marked up 135.263 percent, producing an audited gross sales figure of \$1,762,849.00. Reported sales were subtracted from audited sales, resulting in additional taxable sales of \$1,466,267.00 and additional sales tax due of \$117,301.36.

7. The Audit Division asserted the 50 percent fraud penalty against petitioners based solely upon the fact that purchases per Abitt's books and records were understated by \$1,081,296.00 and that sales per Abitt's books and records were understated by \$1,466,267.00. Other than the large understatements of sales and purchases, there was no other evidence presented to prove fraud.

8. During the period at issue James McDonald was over 70 years old and in poor health. Mr. McDonald did not appear at either of the hearings held herein to offer his testimony. The only evidence presented by petitioner was his letter dated July 22, 1985 and an affidavit from a liquor salesman who serviced Abitt. In both these documents it was asserted that Mr. McDonald was an absentee owner and that the large discrepancy between audited sales and reported sales and between audited purchases and reported purchases was due to after hour sales being made by Abitt's employees.

CONCLUSIONS OF LAW

A. 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 paragraph (1)), plus interest... " .

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 in 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).

B. That based on the evidence presented, the Audit Division has not sustained its burden of proving that the imposition of a fraud penalty is warranted. However, there nonetheless emerges a pattern of conduct by Abitt and James McDonald sufficient to warrant the imposition of a penalty pursuant to Tax Law section 1145(a)(1) for the period September 1, 1978 through August 31, 1981. Furthermore, the evidence presented by petitioners is insufficient

to show that reasonable cause existed for failure to pay the proper sales tax due. Accordingly, the assertion of Tax Law section 1145(a)(1) penalty and the imposition of statutory interest charges are both sustained.


C. That the petitions of Abitt Wine and Liquor Corp. and James McDonald are granted to the extent indicated in Conclusion of Law "B", supra; and that, except as so granted, the petitions are in all other respects denied.

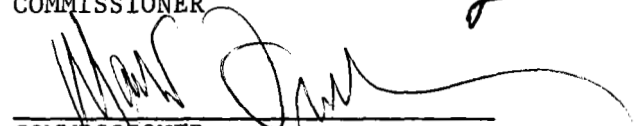
DATED: Albany, New York

STATE TAX COMMISSION

SEP 15 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 319 372 941  
 RECEIPT FOR CERTIFIED MAIL  
 NO INSURANCE COVERAGE PROVIDED  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794  PS Form 3800, June 1985	Sent to <u>Charles B. Linn</u>	
	Street and No. <u>Fein, Silberbush, Katz &amp; Linn</u>	
	P.O., State and ZIP Code <u>187 Main St., P.O. Box 457</u>	
	<u>Tuckahoe, N.Y. 10707</u>	
	Postage	\$
	Certified Fee	
	Special Delivery Fee	
	Restricted Delivery Fee	
	Return Receipt showing to whom and Date Delivered	
	Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees		\$
Postmark or Date		

P 319 372 940  
 RECEIPT FOR CERTIFIED MAIL  
 NO INSURANCE COVERAGE PROVIDED  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794  PS Form 3800, June 1985	Sent to <u>Abitt Wine + Liquor Corp</u>	
	Street and No. <u>85 Avenue D</u>	
	P.O., State and ZIP Code <u>N.Y., N.Y. 10009</u>	
	<u>N.Y., N.Y. 10009</u>	
	Postage	\$
	Certified Fee	
	Special Delivery Fee	
	Restricted Delivery Fee	
	Return Receipt showing to whom and Date Delivered	
	Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees		\$
Postmark or Date		

P 319 372 942  
 RECEIPT FOR CERTIFIED MAIL  
 NO INSURANCE COVERAGE PROVIDED  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

★ U.S.G.P.O. 1985-480-794  PS Form 3800, June 1985	Sent to <u>James McDonald</u>	
	Street and No. <u>Officer of Abitt Wine +</u>	
	P.O., State and ZIP Code <u>85 Avenue D</u>	
	<u>Liquor Corp.</u>	
	<u>New York, N.Y. 10009</u>	
	Postage	\$
	Certified Fee	
	Special Delivery Fee	
	Restricted Delivery Fee	
	Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom, Date, and Address of Delivery		
TOTAL Postage and Fees		\$
Postmark or Date		