

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of

DOGAN AYGOREN & ILHAN GULDAL  
D/B/A D & I SERVICE STATION

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 June 1, 1980  
through November 30, 1980.

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Petitioners, Dogan Aygoren and Ilhan Guldal d/b/a D & I Service Station, c/o Harry Schochat & Co., P.C., 325 Broadway, New York, New York 10007, 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 June 1, 1980 through November 30, 1980 (File No. 42318).

A hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 16, 1986 at 2:00 P.M., with all briefs to be filed by September 8, 1986. Petitioners appeared by Harry Schochat, C.P.A. and Seth D. Friedland, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined the additional sales tax due from petitioners, Dogan Aygoren and Ilhan Guldal d/b/a D & I Service Station, for the period June 1, 1980 through November 30, 1980.

11. Whether a penalty asserted against petitioners on the basis of fraud is proper and should be sustained.

FINDINGS OF FACT

1. On May 20, 1982, the Audit Division, as the result of a field audit, issued to petitioners, Dogan Aygoren and Ilhan Guldal, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a sales tax due of \$100,670.43, plus a 50 percent fraud penalty of \$50,335.22 and interest of \$20,322.51, for a total due of \$171,328.16 for the period June 1, 1980 through November 30, 1980. On August 18, 1982, the petitioners timely filed an application for a hearing to review the notice.

2. During the period at issue, the petitioners operated, as a partnership, a gas station doing business as D & I Service Station ("D & I") at the corner of Main Street and Motor Avenue in Farmingdale, New York. For the period at issue, the petitioners filed two sales and use tax returns which provided the following information relative to their business:

<u>Period Covered by Return</u>	<u>Taxable Sales Reported</u>	<u>Sales Tax Due</u>
June 1 - August 31, 1980	\$16,273.00	\$1,139.11
September 1 - November 30, 1980	11,862.00	830.34

3. On November 18, 1981, the Audit Division initiated an audit of D & I's books and records. Petitioners presented the auditor with a check disbursements journal. The auditor requested but was not provided with daily sheets, sales and purchase invoices, and books of original entry. The auditor therefore decided to use external indices to determine D & I's sales tax liability.

4. The Audit Division first determined, based upon a review of the records of D & I's gasoline distributor, Vantage Petroleum Corp. ("Vantage"), that for the three-month period of September, October and November 1980, D & I purchased 494,556 gallons of regular and unleaded gasoline, summarized as follows:

<u>Month</u>	<u>Regular</u>	<u>Unleaded</u>	<u>Total Gallons</u>
September	173,142	54,308	227,450
October	136,080	41,608	177,688
November	64,509	24,909	89,418
			<u>494,556</u>

This amount was multiplied by the average selling price of gasoline for this period as determined by the Audit Division of \$1.25, to compute taxable sales of \$618,195.00. It should be noted the \$1.25 price per gallon was net of the 8 cents per gallon State gasoline tax and the State and local sales tax. The taxable sales for this three-month period were compared to taxable sales reported for said period of \$11,862.00, resulting in a margin of error of 5,111.6 percent. The margin of error was applied to taxable sales reported for the audit period to compute additional taxable sales of \$1,438,149.00 and additional sales tax due of \$100,670.43.

5. The Audit Division asserted a fraud penalty because the petitioners failed to present for audit the books and records which were requested, and also because of the magnitude of the additional taxes in relation to taxes reported by D & I on its sales tax returns.

6. Petitioners contend that they only operated the station between August 8 and October 31, 1980, and therefore did not purchase any gasoline in November 1980. Petitioners introduced a copy of an agreement, dated October 30, 1980, between themselves and Vantage which purportedly terminated their lease of the business premises effective at 11:59 P.M. on October 31, 1980.

7. Petitioners also argue that the station did not have the capacity to pump the approximately 165,000 gallons per month as determined from the information obtained from Vantage. Petitioners introduced a copy of an affidavit of Mr. Allen H. Fisher, a former vice-president of Vantage, wherein he indicated that during 1977 and 1978 the premises pumped an average of 47,929 gallons per month.

8. Lastly, petitioners maintain that the Audit Division, by failure to present as witnesses the auditors involved in the audit of Vantage or to submit other evidence regarding said audit, failed to show that they actually purchased the indicated gallons from Vantage and, therefore, the assessment should be cancelled.

9. Petitioners did not offer in evidence their books and/or records.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

B. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that if a sales and use tax return is not filed, or if filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. This section further provides that, **if** necessary, the tax may be estimated on the basis of external indices.

C. That the books and records of D & I Service Station were inadequate and incomplete for purposes of determining taxable sales or sales tax due. Therefore, the use of external indices is permissible (Matter of Korba v. New York State Tax Commission, 84 AD2d 655). Accordingly, the Audit Division's determination of additional tax due was proper pursuant to section 1138(a)(1) of the Tax Law. Exactness is not required where it is the taxpayer's own failure to maintain proper records which prevents exactness in the determination of sales tax liability (Matter of Markowitz v. State Tax Commission, 54 AD2d 1023).

D. 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...".

E. That 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.)

F. 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, since the petitioners have failed to demonstrate that the failure to pay the taxes at issue was due to reasonable cause and not due to willful neglect, a penalty pursuant to Tax Law section 1145(a)(1) is hereby imposed.

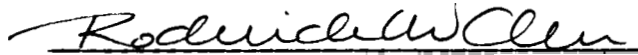
G. That the petition of Dogan Aygoren and Ilhan Guldal d/b/a D & I Service Station is granted to the extent indicated in Conclusion of Law "F"; the Audit


Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 20, 1982; and that, except as so granted, the petition is denied.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 24 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER