

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

HPS CAPITOL, 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 Ending August 31,
1981. :

Petitioner, HPS Capitol, Inc., 1124 First Avenue, New York, New York 10021, 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 ending August 31, 1981 (File No. 42639).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 29, 1984 at 2:45 P.M., with all briefs to be submitted on or before December 17, 1984. Petitioner appeared by Friedland, Laifer & Robbins (Seth D. Friedland, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether penalties and interest were properly assessed against petitioner for the late filing of sales and use tax returns for the months of June, July and August, 1981.

FINDINGS OF FACT

1. On December 1, 1981, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due which assessed sales and use taxes as follows:

<u>Period Ended</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Payments/ Credits</u>	<u>Balance</u>
June 30, 1981	\$ 34,858.24	\$1,742.92	\$ 263.53	\$34,858.24	\$ 2,006.45
July 31, 1981	34,153.20	1,707.66	157.44	34,153.20	1,865.10
August 31, 1981	31,960.64	2,237.24	882.75	0.00	35,080.63
Total	\$100,972.08	\$5,687.82	\$1,303.72	\$69,011.44	\$38,952.18

2. According to the computer records of the Department of Taxation and Finance ("Department"), the payment due for June, 1981 was made on August 12, 1981. The July, 1981 remittance was made on September 1, 1981 and the August, 1981 remittance was made on October 8, 1981 and not credited to petitioner's account until October 26, 1981. The foregoing computer records for the months of June and July, 1981 do not indicate whether the dates that the Audit Division asserts that payments were made were based upon the dates that the remittances of sales and use taxes were received by the Department or the dates that the remittances of sales and use taxes were credited to petitioner's account.

3. Petitioner was required to file sales and use tax returns on a monthly basis.

4. Petitioner operated three automobile service stations in Manhattan which were engaged in gasoline sales and automobile repair services.

5. During the period in issue, the sales and use tax returns were prepared by Mr. Robert Hinckley, who served as petitioner's comptroller. After the returns were prepared, Mr. Kalish, who was petitioner's president, and another individual would review the returns. Thereafter, the returns, with a remittance, would be mailed.

6. It was petitioner's practice to mail the sales and use tax returns on the twentieth day of each month.

7. The sales and use tax return for the month of June, 1980 was prepared between the tenth and fourteenth of July, 1981 and mailed on July 20, 1981.

8. The sales and use tax return for the month of July, 1981 was prepared during the beginning to the middle of August and mailed on August 20, 1981.

9. The sales and use tax return for August, 1981, and accompanying check dated October 5, 1981, were mailed late because of illness within the company. On October 8, 1981, petitioner's check was received by the Department and on October 9, 1981, the check was dishonored by petitioner's bank. The reason petitioner's check was dishonored was because, on October 7, 1981, the Department placed a levy on petitioner's bank account. At the time petitioner prepared its check which accompanied the August, 1981 return, there were sufficient funds in petitioner's bank account to honor the check.

10. Petitioner has been operating since 1975 or 1976 and has never been charged with making a late payment until the Notice at issue herein.

CONCLUSIONS OF LAW

A. That section 1145(a)(1)(ii) of the Tax Law provides for the remission of penalty, and that portion of interest exceeding the minimum amount prescribed by law when it is determined by the Commission that the delay or failure to file or pay the tax due is for reasonable cause and not willful neglect.

B. That petitioner timely prepared and mailed its sales and use tax returns for the months of June, 1981 and July, 1981 (see Matter of Engineers Country Club, Inc., State Tax Commission, April 6, 1983). Accordingly, the penalty and interest imposed for the months of June, 1981 and July, 1981 is cancelled.

C. That petitioner has not clearly established reasonable cause for the delay in filing the sales and use tax return due for the monthly period ended August, 1981. However, since petitioner did remit the sales and use taxes due by October 8, 1981 and since the reason petitioner's check was not honored was

because the Department of Taxation and Finance levied upon petitioner's account, the penalty and interest in excess of the statutory minimum for the period of time after October 8, 1981 is cancelled.


D. That the petition of HPS Capitol, Inc. is granted to the extent of Conclusions of Law "B" and "C" and the Audit Division is directed to modify the Notice and Demand for Payment of Sales and Use Taxes Due, dated December 1, 1981, accordingly.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985


PRESIDENT


COMMISSIONER


COMMISSIONER