

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DOR MOTORS, LTD.	:	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 Sales Tax Quarterly	:	
Periods Ended November 30, 1975 through	:	
August 31, 1978.	:	

Petitioner, Dor Motors, Ltd., 1043 Northern Boulevard, Roslyn, New York 11576, 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 sales tax quarterly periods ended November 30, 1975 through August 31, 1978 (File No. 43378).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on October 31, 1984 at 1:15 P.M., with all briefs to be submitted by February 20, 1985. Petitioner appeared by Bond, Schoeneck & King, Esqs. (Richard L. Smith, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. On January 20, 1982, the Audit Division issued to petitioner, Dor Motors, Ltd., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the sales tax quarterly periods ended November 30, 1975 through

August 31, 1978 in the amount of \$85,665.85, plus interest and a fifty percent fraud penalty imposed pursuant to Tax Law section 1145(a)(2).

2. Petitioner operated an auto dealership in Roslyn Heights, New York during the period at issue. The dealership sold autos both at wholesale and retail and, in addition, the dealership furnished auto repair services to the public.

3. The officers of petitioner during the period at issue were Mr. Edward Rutherford, president, and Mr. Robert Filardi, vice president. Mr. Filardi signed most of the sales tax returns filed by the corporation during the period at issue, with Mr. Rutherford also signing some returns filed for the period. Mr. Filardi had been involved in the automobile business since 1955 or 1956, first as a salesman and later, for 18 or 19 years, as a sales manager. In or about early 1975, Mr. Filardi purchased forty-nine percent of petitioner's outstanding stock. Although unspecified, it is presumed that Mr. Rutherford owned the remaining fifty-one percent of petitioner's outstanding stock.

4. In September, 1978, Ms. Emma Smalik, an auditor with the Mineola district office of the Audit Division, commenced a sales tax audit of petitioner. This audit revealed substantial discrepancies between the petitioner's own accounting records and the information reported on its sales tax returns as filed for the period at issue. Specifically, the audit revealed that petitioner's books reflected gross sales substantially in excess of the gross sales reported on the sales tax returns as filed. In addition, petitioner's sales tax payable account reflected large sums of money credited to such account which were not reported on petitioner's sales tax returns. This account differential was written off at the end of each year by means of adjusting journal entries. These year-end debit entries to the sales tax payable account did not relate to

any remittance of sales tax to the State of New York. Ms. Smalik requested but was not supplied with the accounting records or entries which explained these year-end debits to the sales tax payable account for amounts which were not reported or remitted to the State.

5. Ms. Smalik also reviewed the corporation's sales invoices for the month of May, 1978, which examination revealed that the corporation had collected sales tax on repair services. In addition, this review test confirmed that the petitioner's books accurately reflected gross sales and sales tax collected.

6. Based on the results of the initial field audit, the district office referred the case to the Audit Division's Special Investigations Bureau ("the S.I.B."). The S.I.B. examiner, Mr. William Kennedy, reviewed the petitioner's records and confirmed both the discrepancy between gross sales per the petitioner's books and gross sales reported on the sales tax returns filed by petitioner, and the discrepancy between sales tax reflected as collected pursuant to petitioner's sales tax payable account and sales tax as reported on petitioner's sales tax returns.

7. Upon conclusion of the S.I.B. audit, the case was referred to the Attorney General's office for criminal prosecution. On December 12, 1979, the Nassau County Grand Jury returned a multiple count indictment against petitioner and against Robert Filardi, specifically charging each with 11 counts of Grand Larceny, Second Degree and 11 counts of Filing False New York State and Local Sales and Use Tax Returns.

8. On June 29, 1982, petitioner pleaded guilty to Grand Larceny, Second Degree, under count one of the above indictment in satisfaction of the entire indictment and was subsequently sentenced to pay a fine in the amount of \$10,000.00. Count one of the indictment pertained to the sales tax quarterly

period ended August 31, 1977. Also on June 29, 1982, Robert Filardi pleaded guilty to Filing a False New York State and Local Sales and Use Tax Return under count eleven of the above indictment in satisfaction of the entire indictment, and was subsequently sentenced to pay a fine in the amount of \$1,000.00. Count eleven of the indictment pertained to the sales tax quarterly period ended August 31, 1977.

9. Petitioner has paid the tax and interest assessed and does not contest such items. However, petitioner does contest the imposition of a fraud penalty pursuant to Tax Law section 1145(a)(2).

10. Petitioner's principals were aware that petitioner was not remitting all the sales taxes collected. Although petitioner's books correctly reflected sales and sales tax collected, repair service sales receipts were not reported on petitioner's sales tax returns nor was there remittance with such returns of sales tax collected on such sales receipts. Rather, sales tax monies collected from customers by petitioner were placed in petitioner's general checking account and used in the business as needed, with petitioner remitting "what it could (afford)" with its sales tax returns. The returns were accordingly computed to reflect thereon sales related in amount to the amount of tax being remitted, rather than the actual amount of sales by petitioner.

11. The foregoing situation existed until the end of the period at issue when new accountants were retained to handle petitioner's accounts. It is asserted that the petitioner's prior bookkeepers and accountants had begun the practice of omitting sales tax from the returns. Mr. Filardi indicated his awareness of the underpayment of sales tax, and testified that when he questioned petitioner's accountants in regard thereto, he was advised that:

"[i]f we didn't have (money to pay sales tax), to report a certain amount of sales tax, underpay it, and then, when we got the money, pay it. And [he] told me, '[i]f you don't ever have an audit, I wouldn't worry about it.'. We underpaid sales tax."

12. It is asserted that there was no intent to defraud the government, that no duplicate or false books were maintained and that petitioner was in essence the victim of bad legal and accounting advice. Finally, it is asserted that the imposition of a fraud penalty is unduly harsh since petitioner and its principal, Mr. Filardi, have already paid tax, interest, criminal penalties and legal fees in connection with this matter in an aggregate amount of approximately \$226,000.00.

13. In April or May of 1978, an attorney became associated with petitioner by loaning \$500,000.00 to petitioner and Dor Porsche-Audi, which loan was guaranteed by Mr. Filardi and Mr. Rutherford. It is alleged, inter alia, that this individual was actively involved with petitioner's business, but instead of taking action toward rectifying the past underreported sales tax advised petitioner's principals not to pay such amounts but to wait until a bill was sent.

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 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..."

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 sustained its burden of proving that the imposition of a fraud penalty is warranted. Not only are there the multiple count indictments and guilty pleas in satisfaction thereof by petitioner and one of its principals, as described, but there is clear evidence that petitioner's returns during the period in issue were knowingly and deliberately filed in a manner which reflected false information and underreporting and underremittance of tax collected and due. Sales tax monies collected by petitioner were appropriated for uses other than payment of such taxes. Petitioner's returns were intentionally and fraudulently filed with the knowledge that the correct amount of tax due was neither reported thereon nor remitted therewith.

C. That the petition of Dor Motors, Ltd. is hereby denied.

DATED: Albany, New York

JUL 16 1985

STATE TAX COMMISSION

Radcliffe A. Chen
PRESIDENT
Francis D. Kolm
COMMISSIONER
[Signature]
COMMISSIONER