

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
DON PAT SERVICE, INC. AND	:	DECISION
PATRICK ORLANDO, PRESIDENT	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and	:	
29 of the Tax Law for the Period June 1, 1979	:	
through December 15, 1981.	:	

Petitioners Don Pat Service, Inc. and Patrick Orlando, President, 89-04 159th Avenue, Howard Beach, New York 11414 filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1979 through December 15, 1981 (File Nos. 43559, 49391 and 54021).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 4, 1985 at 1:15 P.M. Petitioners appeared by John J. Napolitano, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether the Audit Division, using third party verification of purchases, properly determined petitioners' sales tax liability.

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

FINDINGS OF FACT

1. As a result of a field audit, the Audit Division issued three notices of determination and demands for payment of sales and use taxes due against petitioner Don Pat Service, Inc. as follows:

<u>Date</u>	<u>Period</u>	<u>Tax</u>	<u>Fraud Penalty</u>	<u>Interest</u>	<u>Total Due</u>
2/16/83	6/1/79-8/31/80	\$361,696.48	\$180,848.24	\$132,472.22	\$675,016.94
12/12/83	9/1/80-2/28/81	\$175,732.08	\$87,866.04	\$67,266.30	\$330,864.42
6/8/84	3/1/81-12/15/81	\$267,034.27	\$133,517.13	\$111,896.53	\$512,447.93

Identical notices were also issued against petitioner Patrick Orlando, President of Don Pat Service, Inc.

2. Petitioner¹ owned and operated a gas station which sold only gas and oil. No repairs, other than of an occasional flat tire, were performed. On December 15, 1981, petitioner sold the business. On audit, the auditor found that petitioner maintained no books and records of any type. The auditor, therefore, obtained information on gasoline purchases from petitioner's suppliers. From June, 1979 through September, 1981, petitioner obtained all his gasoline from Getty Oil Company and from October, 1981 until termination of the business on December 15, 1981, petitioner obtained all his gasoline from Lou Halperin Distributors.

3. The information obtained from the suppliers indicated that petitioner purchased 8,401,361 gallons of gasoline during the audit period. The auditor applied average gasoline selling prices obtained from 10 truck stops around the state to the gallons purchased to arrive at taxable sales of \$10,271,859.00, less reported taxable sales of \$248,149.00, resulting in additional taxable

¹ For the sake of convenience, all references to petitioner will be to Patrick Orlando.

sales of \$10,023,710.00. Because of the large discrepancy between reported taxable sales and taxable sales per audit, the Audit Division imposed the fraud penalty. No other evidence of fraud was presented at the hearing.

4. Petitioner maintains that he never received the total number of gallons reported delivered by Getty Oil and Lou Halperin. He signed a delivery ticket each time gas was delivered, however, all of his tickets were apparently stolen and he did not attempt to obtain copies from his former suppliers. Petitioner presented no other evidence that he received fewer gallons during the period. He did speculate that the truck drivers were making deliveries to other stations but reporting his station as the delivery location, however, he was able to produce no evidence that this occurred. Moreover, he was never in arrears on his payments to his suppliers and he could not account for the fact that all the deliveries were paid for in a timely fashion.

5. Petitioner submitted his personal checking account bank statements which indicated he deposited approximately \$4,500,000.00 from cash sales during the audit period. This amount did not include credit card sales for the period.

CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law, in effect during the period in issue, requires every person required to collect sales tax to keep records of every sale and of the tax payable thereon. "Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum...". Section 1138(a) provides that if a sales tax return "is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices...".

"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 A.D.2d 858.

B. That, inasmuch as petitioner had no corporate books and records available for audit, it was proper for the auditor to resort to an audit method which relied on information supplied by petitioner's suppliers. Moreover, petitioner has failed to sustain his burden of proving that the amount of tax assessed was erroneous. There was no showing that the delivery figures supplied by Getty Oil and Lou Halperin were in error and petitioner's personal checking account statements, alone, do not explain the discrepancy between taxable sales per audit and taxable sales as reported. Mere speculation that the delivery truck drivers were delivering the gas to other stations is insufficient to meet petitioner's burden of proof.

C. That section 1145(a)(2) of the Tax Law provides:

"[i]f 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...".

The standard of proof necessary to support a finding of fraud 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 Cardinal Motors, Inc., State Tax Commission, July 8, 1983; Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982. The only basis for imposition of the fraud penalty put forth by the Audit Division was the discrepancy between reported taxable sales and

taxable sales per audit. The audited sales were admittedly estimates and, while such estimates are sufficient to sustain an audit, they do not suffice to prove every element of fraud. Since no other evidence of fraud was produced, the fraud penalty imposed under section 1145(a)(2) of the Tax Law is cancelled.


D. That the petitions of Don Pat Service, Inc. and Patrick Orlando, President of Don Pat Service Inc. are granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is directed to modify the notices of determination and demands for payment of sales and use taxes due issued February 16, 1983, December 12, 1983 and June 8, 1984 accordingly; and that, except as so granted, the petitions are in all other respects denied.

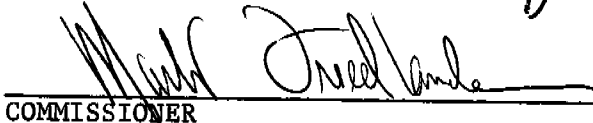
DATED: Albany, New York

STATE TAX COMMISSION

MAR 11 1986


PRESIDENT


COMMISSIONER


COMMISSIONER