

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions

of

BRONX FORDHAM SERVICE STATION, INC.,  
and JOHN HILBERT, AS OFFICER OF  
BRONX FORDHAM SERVICE STATION, INC.

DECISION

for Revision of Determinations or for Refunds  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period December 1, 1979  
through November 30, 1981.

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Petitioners, Bronx Fordham Service Station, Inc. and John Hilbert, as president of Bronx Fordham Service Station, Inc., 31 Valley View Drive, Elmsford, New York 10523, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1979 through November 30, 1981 (File Nos. 44232 and 49850).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Building #9, W. A. Harriman State Office Campus, Albany, New York, on May 27, 1986 at 1:15 P.M., with all briefs and additional documents to be submitted by October 16, 1986. Petitioners appeared by Michael Horn, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Michael B. Infantino, Esq., of counsel).

#### ISSUE

Whether the penalties and interest in excess of the statutory minimum should be waived.

#### FINDINGS OF FACT

1. On December 20, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Bronx Fordham

Service Station, Inc. The notice assessed sales and use taxes for the period ending November 30, 1979 in the amount of \$10,856.00, plus penalty of \$2,714.00 and interest of \$4,072.95, for a total amount due of \$17,642.95. On the same date, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner John Hilbert, as president of Bronx Fordham Service Station, Inc., assessing the same amount of taxes, penalty and interest which were assessed against the corporation.

2. On March 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Bronx Fordham Service Station, Inc. assessing a deficiency of sales and use taxes for the period December 1, 1979 through November 30, 1981 in the amount of \$97,275.00, plus penalty of \$24,008.74 and interest of \$25,813.65, for a total amount due of \$147,097.39. On the same date, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to John Hilbert, as president of Bronx Fordham Service Station, Inc., assessing the same amount of taxes, penalty and interest which were assessed against the corporation.

3. Prior to the hearing, the Audit Division and petitioners' representative were given an opportunity to confer. As a result of those discussions, the Audit Division and petitioner agreed that the amount of tax due for all quarters and periods assessed was \$80,233.08. Therefore, the only items remaining in issue are penalty and interest in excess of the statutory minimum.

4. At the hearing, the Audit Division maintained that its assessment of penalty and interest in excess of the statutory minimum was proper because on two occasions, i.e., February 11, 1982 and March 25, 1982, the Audit Division attempted to schedule a field audit and petitioners did not cooperate. The requests to schedule a field audit were sent to the service station.

5. During the periods in issue, Mr. Hilbert owned the outstanding stock of Bronx Fordham Service Station, Inc. In or about October 1981, Mr. Hilbert sold the stock of the service station to a Mr. Roger Rini. Therefore, the foregoing requests to schedule a field examination were sent to the service station after Mr. Hilbert terminated his association with the service station.

6. On or about December 30, 1980, petitioners' accountant suffered a heart attack and became disabled for several years. Petitioners' accountant was not aware that the Audit Division had attempted to conduct an audit until 1983.

7. In or about October 1982, Mr. Hilbert fell from a ladder which resulted in an injury to his left hip. The injury led to a disintegration of the hip joint and arthritis. As a result, Mr. Hilbert experienced increasing pain and an inability to work.

8. After the notices were issued, Mr. Hilbert and his representative had a meeting with the Audit Division. It was observed that Mr. Hilbert was hunched over and utilized two canes.

#### CONCLUSIONS OF LAW

A. That Tax Law §1145(a)(1) provides that "[a]ny person failing to file a return or to pay or pay over any tax to the tax commission within the time required by this article shall be subject to a penalty". However, if the taxpayer establishes that the failure to comply with the law was due to reasonable cause and not willful neglect, said penalties and interest in excess of the minimum prescribed under Tax Law 11145 will be remitted (Tax Law §1145[a]; 20 NYCRR 536.1[a]).

B. That petitioners have established why there was a lack of cooperation with the field audit. However, petitioners have not presented any evidence


with respect to why there was a substantial discrepancy between the actual sales and what petitioner reported as sales. Although Mr. Hilbert's accountant was in poor health, petitioners have not presented any evidence as to how the accountant's poor health, which commenced well after the audit period started, had an impact on the sales and use tax reported throughout the audit period. Moreover, it is noted that Mr. Hilbert did not suffer from poor health until after the conclusion of the audit period. Therefore, petitioners have not established that the failure to comply with the Tax Law was due to reasonable cause and not willful neglect. In sum, there is no basis for the remission of penalties and interest in excess of the statutory minimum.


C. That the petitions of Bronx Fordham Service Station, Inc. and John Hilbert, as president of Bronx Fordham Service Station, Inc., are denied and the notices, as modified by Finding of Fact "3", are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

**FEB 24 1987**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER