

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

NICHOLAS KUCHEROV
D/B/A NICK'S MARINE

:

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, 1977 :
through August 31, 1979.

Petitioner, Nicholas Kucherov, d/b/a Nick's Marine, Route 434, Apalachin, New York 13732, 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, 1977 through August 31, 1979 (File No. 44390).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on June 19, 1986 at 9:15 A.M., with all briefs to be submitted by October 10, 1986. Petitioner appeared by Frederick A. Griffen, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the Audit Division's assertion of a fraud penalty against petitioner pursuant to section 1145(a)(2) of the Tax Law was proper, and, if not, whether the notice of determination at issue herein is barred by the applicable statute of limitations.

11. Whether the notice of determination at issue herein was invalidated with respect to certain of the periods at issue due to the issuance of a prior notice of determination for the same periods.

FINDINGS OF FACT

1. On March 17, 1983, following an audit, the Audit Division issued to petitioner, Nicholas Kucherov d/b/a Nick's Marine, two notices of determination and demands for payment of sales and use taxes due asserting additional sales tax due together with penalty and interest for the period June 1, 1977 through August 31, 1982.

2. Petitioner subsequently withdrew his petition with respect to the period September 1, 1979 through August 31, 1982. As a result, the period June 1, 1977 through August 31, 1979 remains at issue with the additional sales tax asserted by the Audit Division in the amount of \$31,620.77 together with fraud penalty and interest asserted due thereon. The fraud penalty asserted herein amounts to \$15,810.41 and is asserted pursuant to section 1145(a)(2) of the Tax Law.

3. During the period at issue, petitioner owned and operated a proprietary entity doing business under the name "Nick's Marine". Nick's Marine was primarily in the business of selling boats and trailers at retail. Additionally, Nick's Marine sold snowmobiles, chainsaws and lawn equipment. Petitioner ran Nick's Marine, although the Audit Division conceded that persons other than petitioner, acting as employees, may have written up invoices.

4. On audit, the Audit Division first compared petitioner's sales tax returns for the audit period with his sales journals for the same period. The Audit Division found underreporting errors in petitioner's returns when compared to his journals and based upon such errors asserted \$2,247.43 in additional tax due throughout the audit period. The Audit Division also reviewed petitioner's invoices and noted a discrepancy between the number of boat trailers sold and boats sold. Based upon this discrepancy the Audit Division reviewed Department

of Motor Vehicle records listing numbers assigned to vehicles sold by petitioner for registration purposes. (At all times relevant herein petitioner was registered as a dealer with the Department of Motor Vehicles. He therefore issued "MY-50" certificates to customers purchasing boats from him, thereby certifying that sales tax had been collected by him and allowing the purchaser to register the boat as required by law.) This review revealed certain of petitioner's boats had been registered by apparent customers of petitioner during the audit period, but **no** sales of such boats were recorded in petitioner's journals and **no** invoices for such boats were available. The Audit Division also reviewed petitioner's floor plan financing records at First City Bank, Binghamton, New York. The Audit Division found that some of petitioner's boats had been removed from the floor plan prior to the due date on the loan financing such boats, and **no** sales of such boats were recorded in petitioner's journals and **no** invoices for such boats were available. The Audit Division also took a physical inventory of boats located on petitioner's premises.

5. Based upon the foregoing analyses, the Audit Division determined that boats for which petitioner had issued MV-50's, had, in fact, been sold by petitioner. The Audit Division also determined that boats which had been removed from the floor plan prior to the due date of their respective loans and which were not located **on** petitioner's premises during the Audit Division's physical inventory of said premises had also been sold by petitioner.

6. The Audit Division subsequently mailed inquiries to approximately 100 of petitioner's customers regarding their purchases from petitioner. The Audit Division mailed these inquiries to apparent customers of petitioner as determined from information obtained from the Department of Motor Vehicles. Additionally, the Audit Division mailed inquiries to some of petitioner's customers listed in

his sales journal for whom the purchase price appeared, in the Audit Division's judgment, to be low.

7. The Audit Division received some 53 responses to its mailed inquiries. Thirty-one of the responses indicated that the customers had paid a higher price for the boats purchased than indicated in petitioner's sales journal. These responses also indicated that the customers had paid sales tax to petitioner based upon the higher sales price. Twenty-two of the responses indicated that completely unreported sales had been made by petitioner and sales tax had been paid to petitioner based upon such sales.

8. Many of the respondents to the Audit Division's inquiry returned photocopies of invoices received from Nick's Marine. These invoices revealed that Nick's Marine had issued two different sets of invoices to its customers during the audit period. One set was serially numbered while the other was serially numbered and prefixed with the letter "Q".

9. Of the invoices received in response to the inquiry, including both the serially numbered invoices and the "Q prefix" invoices, 14 were marked with the initials "N.K.", referring to petitioner, and 17 were initialed "R.K.S.". No evidence was received as to whom "R.K.S." referred.

10. Three customers returned two different invoices for the same transaction with each invoice listing a different sales price.

11. With respect to those inquiries for which no reply was received, the Audit Division asked petitioner for the lowest selling price for the boats in question. Petitioner recalled some of the transactions and provided the requested information with respect to 16 of his customers. These 16 transactions had not previously been reported by petitioner.

12. In total, the Audit Division found \$202,514.34 in additional unreported taxable sales based upon the results of its survey and information provided by petitioner. These additional sales occurred in each period at issue and resulted in \$13,341.53 of the additional sales tax asserted due herein by the Audit Division.

13. The balance of the additional tax asserted due herein was calculated by means of a 25% markup on the remainder of boats deemed sold via removal from the floor plan prior to the due date on the bank's loan to petitioner and also by means of a markup of other reported sales of snowmobiles and chainsaws.

14. Petitioner did not take issue with the audit methodology employed by the Audit Division herein, nor did he dispute the amount of additional tax asserted due herein.

15. On December 10, 1982 a judgment convicting petitioner of grand larceny in the second degree pursuant to section 155.35 of the Penal Law was entered in the Supreme Court of the County of Tioga. This conviction was related to the Audit Division's audit of petitioner. No evidence was received regarding the precise time period during which petitioner committed grand larceny, nor was any evidence received regarding the manner in which petitioner committed larceny (as that term is defined in Penal Law § 155.05).

16. The audit herein arose from information provided to the Audit Division by the United States Coast Guard regarding the purchase of a boat in July 1979 by one Wendell Mead. Mr. Mead had complained to the Coast Guard that the hull identification number had been falsified on a boat purchased by him from Nick's Marine. As a result of its investigations, the Coast Guard found that the hull number of the boat in question had, in fact, been falsified and assessed a

penalty therefor. The Coast Guard's investigation and actions were taken against one Vera Shubovich d/b/a Nick's Marine.

17. Vera Shubovich had advised the Coast Guard that she had purchased the boat in question from Eastern Marine, 500 Bensel Drive, Landing, New Jersey.

The Coast Guard's letter to Vera Shubovich's attorney advised that:

"Inquiries conducted by the Coast Guard and the New Jersey State Police failed to establish any present or prior record **of** Eastern Marine doing business at the 500 Bensel Drive, Landing, New Jersey address."

18. No evidence was received as to the nature or extent **of** the Coast Guard's investigation of Eastern Marine.

19. Invoices provided to the Audit Division by petitioner included two invoices which indicated a sale of 28 new boats and 29 used boats to Eastern Marine.

20. Petitioner's returns were prepared by his accountant using information, including sales journals, provided by petitioner. **In** this regard, petitioner executed a written statement, dated June 9, 1981, absolving his accountant of any additional charges imposed with respect to his taxes.

21. Petitioner's sales tax returns for the periods ended November 30, 1978, February 28, 1979, May 31, 1979 and August 31, 1979 were filed **on** January 25, 1980. Petitioner's returns for the earlier periods at issue herein were filed prior to January 25, 1980.

22. Petitioner was cooperative with the Audit Division during the course of the audit, providing records and appearing at the Audit Division's offices upon request.

23. The Audit Division issued notices of determination and demands to petitioner for the periods ended November 30, 1978, May 31, 1979 and August 31,

1979 prior to the issuance of the notices of determination referred to in Finding of Fact "1".

CONCLUSIONS OF LAW

A. That section 1145(a)(2) of the Tax Law was added by L 1975, ch 287, § 1, and 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....

B. 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 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 at 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). The Audit Division need not prove that the entire amount of the deficiency is due to fraud, but only that some portion of the deficiency for each period at issue is due to fraud (Tax Law § 1145[a][2]).

C. That upon review of the evidence presented, the Audit Division has sustained its burden of proving that the imposition of the fraud penalty was proper. Among those facts found at hearing which collectively establish a

fraudulent intent on the part of petitioner were his use of two sets of invoices throughout the audit period; his duplication of invoices for the same transaction; his failure to report certain sales and his underreporting of certain sales for which he issued MV-50's; the fact that all 53 responses to the Audit Division's questionnaire indicated an underreporting or a failure to report sales; the "disappearance" of boats from the floor plan and the premises prior to the due date for the loans on such boats. Taken together, these facts establish by clear and convincing evidence, a knowing, willful and deliberate intent by petitioner to evade payment to the State of sales tax collected from his customers.

D. That, with respect to petitioner's contention that the Audit Division could not, as a matter of law, sustain its burden herein absent a finding of fraud through non-hearsay evidence, it is noted that non-hearsay evidence **was** introduced into the record by the Audit Division. Included among this evidence were petitioner's statements to the Audit Division regarding the selling price of certain boats, and petitioner's written statement absolving his accountant of any additional charges imposed with respect to his taxes. Additionally, it is noted that legally admissible evidence is not required for the Commission to reach a determination in this or any matter, as the so-called "legal residuum rule" is no longer followed in New York (see Matter of Eagle v. Patterson, 57 NY2d 831, 833; 300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 45 NY2d 176, 180 n).

E. That section 1147(b) of the Tax Law limits the time for assessment of additional sales and use taxes to **no** more than three years from the date of the filing of a return, "except in the case of a willfully false or fraudulent return with intent to evade the tax", when assessment may be made at any time.

Inasmuch as the Audit Division has sustained its burden of proving fraud herein, the notice of determination in this matter was timely issued pursuant to section 1147(b) notwithstanding its issuance more than three years from the date of filing of such returns for each period at issue.


F. That Article 28 of the Tax Law does not preclude the Audit Division from issuing more than one notice of determination to a taxpayer for a particular period. Accordingly, the issuance of the notice of determination at issue was not barred with respect to the three periods for which a previous notice was issued.


G. That the petition of Nicholas Kucherov d/b/a Nick's Marine is in all respects denied, and the notices of determination at issue (Finding of Fact "2"), dated March 17, 1983, are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1987


PRESIDENT


COMMISSIONER


COMMISSIONER