

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

JAMES DURANTE, AS OFFICER OF  
JIMMY DURANTE'S SUPERSTOCK PERFORMANCE, INC.

DECISION

for Revision of a Determination for Refund  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1979  
through August 31, 1982.

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Petitioner, James Durante, 56-12 202nd Street, Bayside, New York 11383,  
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, 1979  
through August 31, 1982 (File No. 44451).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the  
offices of the State Tax Commission, Two World Trade Center, New York, New York  
on September 12, 1986 at 9:00 A.M., with additional evidence to be submitted by  
October 14, 1986. Petitioner appeared by Stephen Hochberg, Esq. The Audit  
Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

#### ISSUES

I. Whether the assessment of tax should be reduced due to a bad debt owed  
by a customer.

II. Whether penalty should be cancelled and interest reduced to the  
minimum.

#### FINDINGS OF FACT

1. Petitioner, James Durante, was president and sole shareholder of  
Superstock Performance, Inc. and its successor, Jimmy Durante's Superstock  
Performance, Inc. ("the corporations").

2. The corporations operated an automobile service station at 86-22 Corona Avenue, Elmhurst, New York.

3. A sales tax field audit of the corporations covered the period June 1979 through November 1980 with respect to Superstock Performance, Inc. and the period December 1980 through August 1982 with respect to Jimmy Durante's Superstock Performance, Inc. The station was not in operation during the month of November 1980.

4. The amount of gross sales per books was in close agreement with gross sales per the Federal income tax returns. The amount of purchases per books also agreed with purchases per said returns. Gasoline purchases, as recorded by the corporations, were in substantial agreement with third party verification received from the supplier.

5. The auditor determined that the corporations incorrectly computed sales tax. The method used in computing sales tax was to apply the appropriate tax rate to recorded sales of tires, batteries, accessories and repairs and to add to the result 3.5 cents per gallon of gasoline sold. The total was then divided by the tax rate to arrive at taxable sales, which amount was also reported as gross sales.

6. The auditor used gross sales as per the corporations' books and determined that the following taxes were due: (a) Superstock Performance, Inc., additional ~~tax~~ \$8,851.77; (b) Jimmy Durante's Superstock Performance, Inc., additional tax \$11,123.19.

7. The Audit Division issued the following notices of determination and demands for payment of sales and use taxes due: (a) on March 14, 1983 to James Durante, President of Superstock Performance, Inc., tax due \$8,851.87, penalty \$2,212.95, interest \$2,880.57, **for** a total of \$13,945.39; (b) on April 20, 1983

to James Durante, Officer of Jimmy Durante's Superstock Performance, Inc., tax due \$11,123.00, penalty \$2,126.89, interest \$1,960.75, for a total of \$15,210.64. Petitioner timely protested both assessments.

8. The sales and use tax returns for the periods at issue were prepared by the corporations' former accountant. The accountant visited petitioner's home once each month to review the corporations' records and to obtain the information used in preparing the returns..

9. The corporations' books and records were complete and were clearly adequate for the accountant to have properly calculated tax.

10. Petitioner has an eighth grade education and was a truck driver for twelve years prior to entering the service station business. Petitioner's wife assisted him in maintaining the corporations' records.

11. Petitioner was the only full time employee of the corporations, as the station was essentially a one man operation. The corporations **also** employed part-time workers on an irregular basis.

12. The corporations did not accept credit cards during the years at issue, but sold gasoline on a credit basis to a nonmedallion taxi cab company. The taxi cab company failed, owing Jimmy Durante's Superstock Performance, Inc. \$20,775.00. Petitioner consulted an attorney in an attempt to collect the obligation, but the attorney concluded that the debtor had virtually no assets and that any judgment would be uncollectible. No part of the obligation was ever received by said corporation or petitioner.

13. Petitioner concedes that he **is** liable for taxes due, except for taxes determined to be due with respect to bad debts. **He** has asked, however, that penalties be cancelled and interest be reduced to the minimum.

CONCLUSIONS OF LAW

A. That petitioner has substantiated that the sum of \$20,775.00 constituted an uncollectible bad debt. Accordingly, petitioner is entitled to credit for tax attributable to said amount of sales,. (Tax Law § 1132[e]; 20 NYCRR 534.7.)


B. That petitioner has established that the failure to pay the proper amount of tax was due to reasonable cause and not due to willful neglect. Accordingly, the penalty is to be cancelled and interest is to be reduced to the **minimum** rate. (Tax Law § 1145[a][1]; 20 NYCRR 536.5.) Petitioner kept detailed records on behalf of the corporations and retained an accountant to prepare the tax returns. The accountant's error would not ordinarily have been discernable by a person **of** petitioner's education and experience.

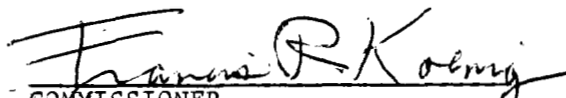
C. That the petition of James Durante **is** granted to the extent provided in Conclusions of Law "A" and **"B"**; and except as so granted, the petition is denied and the notices of determination and demands for payment of sales and use taxes due are otherwise sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 11 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER