

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions
of
NARO AUTO REPAIR SERVICE CENTER, INC.
for Revision of Determinations or for Refunds
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period September 1, 1978
through August 31, 1982.

In the Matter of the Petitions
of
JOSEPH BENNICI
for Revision of Determinations or for Refunds
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period September 1, 1978
through August 31, 1982.

DECISION

In the Matter of the Petitions
of
STEFANO BENNICI
for Revision of Determinations or for Refunds
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period September 1, 1978
through August 31, 1982.

Petitioners, Naro Auto Repair Service Center, Inc., 925 Nepperhan Avenue, Yonkers, New York 10703, Joseph Bennici, 1673 Summit Street, Yorktown Heights, New York 10598, and Stefano Bennici, 2933 Mead Street, Yorktown Heights, New York 10598, 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 September 1, 1978 through August 31, 1982 (File Nos. 45911, 46038 and 46364).

A consolidated 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 April 1, 1985 at 1:15 P.M. Petitioners appeared by Vincent P. D'Andrea, Esq. and Dominick D'Ambrozio, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. On June 10, 1983, as the result of a field audit, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due against petitioner Naro Auto Repair Service Center, Inc. ("Naro"). The first notice was in the amount of \$165,614.70, plus fraud penalty of \$82,807.30 and interest of \$71,641.36, for a total due of \$320,063.36 for the period September 1, 1978 through February 28, 1982. The second notice was in the amount of \$11,131.83, plus fraud penalty of \$5,565.91 and interest of \$1,369.32, for a total due of \$18,067.06 for the period March 1, 1982 through August 31, 1982. On the same date, identical notices were issued against petitioners Joseph Bennici and Stefano Bennici as president and secretary-treasurer, respectively, of Naro.
2. Naro, by its president, Joseph Bennici, had executed consents extending the period of limitation for assessment of sales and use taxes for the period September 1, 1978 through February 29, 1980 to June 20, 1983.
3. Petitioners operate a service station which sells gasoline and provides auto repairs. On audit, the auditor discovered that bank deposits of Naro exceeded its gross sales reported on its sales tax returns by \$1,850,851.30 for

the entire audit period. Gross sales reported on Naro's federal corporation tax return agreed with the bank deposits. The records available for audit were incomplete; there were only scattered invoices and a cash disbursements journal available to do a markup test. The auditor conducted a markup test on gasoline, automobile parts, oil and cigarette sales and determined taxable sales to be \$2,982,357.91. Petitioners had reported taxable sales of \$780,469.00; thus, additional taxable sales were \$2,201,888.91 resulting in additional tax due of \$176,746.53. Because of the large discrepancy between gross sales reported on sales tax returns and gross sales reported on corporation tax returns and bank deposits, the Audit Division imposed the fraud penalty. Petitioners do not contest the amount of additional tax found to be due; rather, they are contesting only the imposition of the fraud penalty.

4. Joseph and Stefano Bennici were born in Sicily and attended school there through the fifth grade. They have received no formal education beyond that grade and neither petitioner can read or write English. Joseph Bennici learned automobile mechanics in the Italian Army and later worked as a mechanic in a foundry in France. The Bennicis came to the United States in 1960 and worked for various garages and auto dealers until 1978.

5. In 1978, the Bennicis organized Naro to operate their own service station. When the station first opened, two men visited the Bennicis and represented themselves to be a certified public accountant and an accountant, respectively, who specialized in keeping the books and records of service stations. In fact, the certified public accountant was not certified nor was he a licensed public accountant. The other man, who worked for the accountant, was not an accountant but was, at most, a bookkeeper. The Bennicis, however, due to their inability to read and write English, turned over all their books

and records to the accountant who assured them that he would handle all their bookkeeping and accounting matters.

6. Joseph Bennici took all statements and invoices which he received in the mail or from suppliers and placed them in a drawer in a desk and turned them over to the accountant periodically. The accountant or the bookkeeper reconciled petitioners' checking account, maintained Naro's books and records and prepared all checks and tax returns for Joseph Bennici's signature. An employee of Naro would assist Mr. Bennici in reviewing the mail to determine which statements should be saved for the accountant.

7. Petitioners had one gasoline supplier during the period in issue with whom they had a full maintenance agreement. The terms of the agreement called for the supplier to set the pump prices, supply gas and repair the pumps if there were problems. The supplier also provided signs with gasoline prices for the station. The pump prices were set by the supplier to allow petitioners to receive three cents per gallon profit. When gasoline was delivered, the truck driver made out the check for the proper amount and one of the Bennicis would sign it. Occasionally, when neither brother was going to be available at the time of delivery, a mechanic employed by petitioners would prepare a blank check payable to the supplier. Joseph Bennici would sign the check and leave it for the driver who would fill in the proper amount and leave a receipt.

8. During the audit, Joseph Bennici notified the accountant that there were problems. The accountant assured Mr. Bennici that he was "taking care of everything." In fact, the auditors were never able to contact the accountant, who has since entered a sanatorium. The auditors were able to meet with the accountant's employee once. During the meeting, he was uncooperative and could not explain the discrepancies in the books and records which he had prepared. After the meeting, the auditors could no longer contact the employee and

petitioners have not heard from or seen the employee since. Petitioners have instituted a lawsuit against the accountant and his employee.

9. The auditors advised petitioners to retain a new accountant and an attorney, which petitioners did. Moreover, the Bennicis cooperated to the best of their ability in providing the auditors with whatever records were requested once they discovered that their prior accountant and his employee were avoiding contact with the auditors.

CONCLUSIONS OF LAW

A. 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 large discrepancy between bank deposits and gross sales reported on sales tax returns. When viewed in light of the Bennici brothers' inability to read and write English, their limited formal education, and their complete reliance on an accountant who appears to have been less than reputable, the discrepancy factor in and of itself is not clear and convincing evidence of fraud. Therefore, the fraud penalty imposed under section 1145(a)(2) of the Tax Law is cancelled.

B. That the petitions of Naro Auto Repair Service Center, Inc., Joseph Bennici and Stefano Bennici are granted to the extent indicated in Conclusion of Law "A"; that the Audit Division is directed to modify the notices of determination and demands for payment of sales and use taxes due issued June 10, 1983 accordingly; and that, except as so granted, the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985


PRESIDENT


COMMISSIONER


COMMISSIONER