

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
MASHOMACK FISH & GAME PRESERVE CLUB, INC.	:	DECISION
and DANIEL DALY, OFFICER	:	
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1979	:	
through February 28, 1983.	:	

Petitioners, Mashomack Fish & Game Preserve Club, Inc. and Daniel Daly, Officer, P.O. Box 308, Pine Plains, New York 12567, 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 March 1, 1979 through February 28, 1983 (File Nos. 47197 and 47198).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on January 21, 1986 at 1:15 P.M., with all briefs to be submitted by April 25, 1986. Petitioners appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the Audit Division's determination and assessment of additional sales and use taxes against petitioners was correct.

II. Whether penalties assessed for failure to timely file certain sales and use tax returns should be reduced or abated.

FINDINGS OF FACT

On June 15, 1983, the Audit Division issued to petitioner Mashomack Fish & Game Preserve Club, Inc. ("Mashomack") a Notice of Determination and

Demand for Payment of Sales and Use Taxes Due for the period March 1, 1979 through August 31, 1982 and a similar notice for the period September 1, 1982 through February 28, 1983. Said notices assessed tax due in the aggregate amount of \$36,335.39, plus penalty based on late filing of returns, and interest. Also on June 15, 1983, two notices of determination and demand covering the same periods were issued to petitioner Daniel Daly, as an officer of Mashomack, assessing sales tax due in the aggregate amount of \$25,675.78, plus penalty (as above) and interest. Validated consents extending the period of limitation on assessments had been previously executed, the latest of which allowed assessment for the aforementioned period to be made on or before December 20, 1983.

2. Mashomack operates a sports facility, namely a private fish and game club. Petitioner Daniel Daly is Mashomack's president.

3. The above-noted assessments result from an Audit Division audit of Mashomack's activities for the period March 1, 1979 through February 28, 1983. Mashomack concedes and does not contest the fact that adequate and complete books and records were not maintained and made available for audit of the period in question, as required. Those records available and utilized by the Audit Division included bank reconciliation records for 1979, cash receipts records for the period January, 1980 through May 31, 1982 and sales journals for the period June 1, 1982 through February 28, 1983.

4. From the above available information, the Audit Division determined Mashomack's total monthly receipts and, after allowance (reduction) for, inter alia, intercompany transactions, returned checks, bad debts, and loans to Mashomack, determined its net monthly receipts. In turn, from such net monthly receipts, the Audit Division determined taxable sales of \$486,806.00 for the period in question, based on receipts from members' dues, sales of food,

beverages and lodging, and receipts from fees charged for shooting and fishing. Sales tax assessed, after allowance for sales tax remitted per Mashomack's returns, amounted to \$25,675.78.

5. The Audit Division also determined use tax due on purchases of birds and bird feed. There were no purchase records for 1979 and 1980, and purchase amounts for such years were taken from Mashomack's Federal income tax returns. For 1981, 1982 and 1983, purchase amounts were taken from disbursement journals and from available (though incomplete) purchase invoices. Use tax determined and assessed by the Audit Division consisted of \$9,216.20 on bird purchases of \$175,752.97 and \$1,443.41 on bird feed purchases of \$27,038.80, for a total use tax assessed of \$10,659.61.

6. During the course of the audit, no records were presented to indicate any breakdown of amounts billed or received by Mashomack from members as opposed to amounts received from guests, nor were there records presented as to the number of guests using Mashomack's facilities.

7. As the result of pre-hearing conferences, the sales tax assessment was reduced from \$25,67.78 to \$22,471.86, and the use tax assessment was reduced from \$10,659.61 to \$9,216.20. These reductions were allowed based on evidence of cancelled sales (i.e. reservations made but events cancelled), of non-members participating in some events (resulting in approximately \$1,000.00 out of the total reduction), and of sales to an exempt organization. More specific evidence relating to these reductions was not offered at the hearing.

8. Although no records were presented, it is asserted that ninety-five percent of Mashomack's receipts are generated from "shoots", either "tower shoots" or "walk ups," with the balance generated by fees charged for fishing, for "blind" shooting (wild duck and goose hunting from a blind in a marshy

area), and from sales of the other items mentioned including food, beverages, lodging, etc.

9. A "tower shoot" or "release stand" involves the release of a given number of birds (usually pheasants or ducks) from a tower located on a hill, with participants shooting at the birds from designated stands surrounding but below the tower. A fee is charged and the participants are guaranteed to take home at least fifty percent of the number of birds released. If less than fifty percent of the birds released are actually shot by the participants, Mashomack makes up the shortfall up to fifty percent.

10. A "walk up" or "field shoot" involves an average of three or four participants led by a guide and dog through a given area. A fee is charged and the participants are guaranteed twenty fair shots at birds, and are guaranteed to take home at least ten birds. If less than ten birds are shot, Mashomack makes up the difference; if more than ten birds are shot, there is an additional fee for each additional bird shot.

11. It is Mashomack's position that while some tax is due, a large portion of the receipts subjected to sales tax consists of amounts paid on behalf of guests, which receipts should not be taxable. Testimony was given by Daniel Daly, on behalf of Mashomack, indicating that while some of the tower shoots and walk ups involved club members splitting the fee amongst themselves, it was more common that such shoots involved a member and guests (business associates, clients or friends) such that at least a portion of the fee should not be taxable. The percentage of guests using Mashomack's facilities on any given day was variously estimated at fifty percent, sixty percent and as high as seventy-five percent.

12. In organizing its activities, including shoots, daily sheets or logs were prepared listing the members and guests, number of stands, number or guns,

number for lunch, etc. These sheets were neither made available at the time of audit nor were they offered at the hearing, nor was it clear that they were retained by Mashomack for any period of time.

13. Petitioner Daniel Daly contests the assessment against Mashomack, but does not contest that, as president of Mashomack, he is a person responsible to ensure collection and remittance of tax properly due and owing on behalf of Mashomack.

CONCLUSIONS OF LAW

A. That Tax Law section 1105(f)(2) imposes tax upon "dues paid to any social or athletic club in this state if the dues of an active annual member, exclusive of the initiation fee, are in excess of ten dollars per year,...".

Tax Law section 1101(b)(6) defines "dues" as:

"[a]ny dues or membership fee including any assessment, irrespective of the purpose for which made, and any charges for social or sports privileges or facilities, except charges for sports privileges or facilities offered to members' guests which would otherwise be exempt if paid directly by such guests...". (Emphasis supplied.) [See also 20 NYCRR 527.11(b)(2)(i) and (ii).]

B. That where, as here, complete, adequate and accurate records are neither maintained nor made available for audit, as required, it is well settled that the Audit Division may resort to such information as is available, including external indices, in arriving at a reasonably calculated determination of tax liability (Tax Law sections 1135, 1142.5 and 1138).

C. That here, in the face of admittedly inadequate records, the Audit Division utilized all of those records made available in arriving at the determination and assessment of tax. After assessment, as noted, reductions were allowed on the basis of additional evidence supplied by Mashomack.

D. That Mashomack has not presented evidence sufficient to support any further reduction of the assessments. No records or figures were supplied,

other than various estimated percentages, as to inter alia the breakdown and source of Mashomack's receipts, the number of guests in relation to members using the facilities, etc. In sum, petitioner has failed to prove the dollar amount of its receipts properly exempt from tax, or to substantiate its entitlement to further exemption on its receipts, under Tax Law sections 1105(f)(2) and 1101(b)(6), in addition to that already allowed. Finally, the facts support the conclusion that the participants in a shoot were entitled to a guaranteed number of birds as part of the fee paid for the social/sporting privilege of the shoot and that, although cleaned and dressed, such birds were not exempt from tax as food for human consumption.

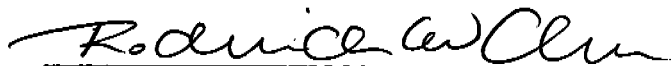
E. That no evidence has been submitted which explains any cause or justification for the untimely filing of returns and remittance of tax such as to warrant reduction or cancellation of the penalties imposed.


F. That the petitions of Mashomack Fish & Game Preserve Club, Inc. and Daniel Daly, Officer, are denied and the notices of determination dated June 15, 1983, as reduced per pre-hearing conferences (see Finding of Fact "7"), are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 30 1986


PRESIDENT


COMMISSIONER


COMMISSIONER