

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

OCEAN AVENUE GARAGE, INC.

for Redetermination of a Deficiency or for
Refund **of** Corporation Franchise Tax under
Article **9-A** of the Tax Law for the Fiscal
Years Ended December 31, 1979 and December 31, :
1980.

In the Matter of the Petition

of

FRED GAROFALO

DECISION

for Redetermination **of** a Deficiency or for
Refund of New York State and New York City
Personal Income Taxes under Article 22 of the
Tax Law and Chapter **46**, Title T of the
Administrative Code **of** the City of New York
for the Years 1979 and 1980.

In the Matter of the Petitions

of

OCEAN AVENUE GARAGE, INC.

and FRED GAROFALO,

OFFICER **OF** OCEAN AVENUE GARAGE, 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 March 1, 1980
through February **28**, 1981.

Petitioner, Ocean Avenue Garage, Inc., 2042 Ocean Avenue, Brooklyn, New
York 11230, filed a petition for redetermination of a deficiency **or** for refund
of corporation franchise tax under Article 9-A of the Tax Law for the fiscal

Petitioner, Fred Garofalo, 2105 Quentin Road, Brooklyn, New York 11230, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1979 and 1980 (File No. 47707).

Petitioners, Ocean Avenue Garage, Inc., 2042 Ocean Avenue, Brooklyn, New York 11230 and Fred Garofalo, officer of Ocean Avenue Garage, Inc., 2105 Quentin Road, Brooklyn, New York 11230, 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, 1980 through February 28, 1981 (File Nos. 47958 and 47959).

A consolidated hearing was commenced before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 6, 1986 at 1:15 P.M. and continued to conclusion on April 29, 1986 at 9:15 A.M., with all briefs to be submitted by June 30, 1986. Petitioners appeared by Emanuel Kuflik, CPA. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether, based upon a source and application of funds audit and an examination of available books and records, the Audit Division properly found additional funds subject to personal income tax, corporation franchise tax and sales tax.

II Whether the Audit Division properly disallowed a claimed rental property loss deduction on the personal income tax return of petitioner Fred Garofalo for the year 1979.

III. Whether petitioner Fred Garofalo was a person required to collect and pay over sales tax on behalf of Ocean Avenue Garage, Inc. within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the period at issue.

IV. Whether penalty asserted against petitioners should be reduced or abated.

FINDINGS OF FACT

1. In or about December of 1981, the Audit Division commenced an audit of petitioners Fred Garofalo and Ocean Avenue Garage, Inc. (hereinafter "the corporation"). On January 18, 1983, petitioners, by their representative, Emanuel Kuflik, CPA, executed consents extending the period of limitation of the assessment of corporation franchise tax and personal income tax for the **year ended December 31, 1979, agreeing that corporation franchise taxes for** said period could be assessed at any time on or before March 15, 1984 and that personal income taxes could be assessed at any time on or before April 15, 1984.

2. On April 8, 1983, the Audit Division issued to Fred Garofalo; a Statement of Personal Income Tax Audit Changes which advised him that, as a result of audit findings and the disallowance of a claimed rental **loss**, total additional tax (both New York State and New York City personal income tax) was due in the amount of \$3,816.98 for the year 1979 and \$2,688.26 for the year 1980. On July 21, 1983, the Audit Division issued to Fred Garofalo a Notice of Deficiency asserting additional tax due for the years 1979 and 1980 in the amount of \$6,505.24, plus penalty (Tax Law § 685[a][2]) and interest, for a total amount due of \$8,932.96.

3. On April 8, 1983, the Audit Division issued to the corporation, a

audit of the corporation and of the personal income tax return of a stockholder (Fred Garofalo), total additional franchise tax was due in the amount of \$2,660.00 for the year ending 1979 and \$1,188.00 for the year ending 1980. On July 25, 1983, the Audit Division issued to the corporation a Notice of Deficiency pursuant to Article 9-A of the Tax Law for each of the periods ended December 31, 1979 and December 31, 1980, asserting, for the period ending December 31, 1979, tax due in the amount of \$2,660.00, plus interest and penalty, for a total amount due of \$3,846.09 and, for the period ending December 31, 1980, tax due in the amount of \$1,188.00, plus interest and penalty, for a total amount due of \$1,616.

4. On July 26, 1983, the Audit Division issued to the corporation and to Fred Garofalo, as officer of the corporation, notices of determination and demands for payment of sales and use taxes due for the period March 1, 1980 through February 28, 1981, asserting additional sales tax due from each in the amount of \$9,899.44, plus interest, for a total amount due of \$13,025.35.

5. On or about December 18, 1981, the Audit Division commenced a field audit of petitioner Fred Garofalo and Marie Garofalo, his wife. For the years at issue, they had filed New York State income tax resident returns under the filing status "married filing separately on one return". For the period at issue, the auditor requested that petitioner Fred Garofalo provide all of his books and records in order that a source and application of funds audit could be performed. Petitioner provided the auditor with all records but one savings account passbook, the interest from which had been reported on his income tax returns. However, petitioner provided no documentation to support his claimed rental loss deduction for 1979. A source and application of funds audit analysis was performed, the results of which are set forth as follows:

<u>Sources of Funds</u>	1979	1980
Salaries - net (per 1040)	\$ 3,970.60	\$ 3,829.80
Pension fund (per 1040)	800.00	2,400.00
Rental income (per 1040)	-0-	3,250.00
<u>Savings account net decrease</u>	<u>5,000.00</u>	<u>5,000.00</u>
Total funds available	<u>\$ 9,770.60</u>	<u>\$14,479.80</u>
 <u>Applications of Funds</u>		
Deposits to checking accounts	\$ 6,000.00	\$ 8,000.00
Deposits to savings accounts	20,560.00	15,356.00
Loan to Ocean Ave. Garage. Inc.	4,360.00	5,800.00
<u>Living Allowance</u>	<u>7,080.00</u>	<u>7,080.00</u>
Total applications of funds	<u>\$38,000.00</u>	<u>\$36,236.00</u>
Excess of applications over sources	<u>\$28,229.40</u>	<u>\$21,757.80</u>

For the purpose of computing living expenses, the Audit Division asked Mr. Garofa. for all of his records relative to these expenses. He had no books, records or receipts except for his personal checking account. The Audit Division, therefore, referred to the standard economic table prepared by the Bureau of Statistics to determine personal living expenses for the years at issue.

6. For the year 1979, petitioner Fred Garofalo claimed a rental loss deduction in the amount of \$2,271.00 which was calculated by claiming 50 percent of the depreciation and the expenses incurred on his personal, two-family residence as a rental loss. Since petitioner had no rental income from his residence in 1979, the Audit Division allowed only 50 percent of the rental loss claimed (the amount attributable to depreciation) and disallowed the remainder. The Audit Division determined, therefore, that Mr. Garofalo had additional unreported income consisting of the entire excess of applications over sources, as determined in Finding of Fact "5", supra, plus, for the year 1979, 50 percent of the rental loss claimed.

7. For purposes of a corporation franchise tax audit of the corporation,

deposits were analyzed, with non-sales and return deposits being eliminated to determine gross sales deposited. After sales tax was determined and deducted from the gross sales, the balance was compared to the gross income reported on the corporation's franchise tax returns. Additional income in the amounts of \$7,540.00 and \$817.00 were found for the years ending December 31, 1979 and December 31, 1980, respectively. The additional income attributed to ~~Mr.~~ Garofal pursuant to the personal income tax audit was also deemed by the Audit Division to be additional income of the corporation since, with the exception of certain interest and pension income, ~~Mr.~~ Garofalo's sole source of income was derived from the corporation.

8. The Audit Division also performed a sales tax field audit of the corporation. All purchase invoices and cancelled checks used to pay for purchases were examined. The auditor determined that the bulk of the corporation's credit card sales were offset against purchases from its gasoline supplier and were not, therefore, recorded in its books as purchases or sales. The credit card sales were summarized and reconciled with total sales reported on the corporation's sales ~~tax~~ returns filed. By combining the credit card sales with the cash sales, the auditor determined that the corporation had additional sales for the periods at issue. The additional income attributed to petitioner Fred Garofalo pursuant to the source and application of funds income tax audit was also presumed, by the Audit Division, to be additional sales of the corporation, since ~~Mr.~~ Garofalo's **only** source of income was from the corporation. All of the corporation's income was derived from sales which were subject to sales tax. Total additional sales of the corporation were, therefore, calculated by adding the credit card sales to the amounts determined to be additional income

9. Petitioner Fred Garofalo was the sole officer and shareholder of the corporation for the periods at issue. ~~Mr.~~ Garofalo signed the corporation's sales tax returns and all of its checks. The auditor visited the service station operated by the corporation and determined that ~~Mr.~~ Garofalo supervised the entire operation. ~~As~~ a result thereof, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to Fred Garofalo as officer of the corporation.

10. Petitioners contend that in computing petitioner Fred Garofalo's sources of funds, the Audit Division failed to take into account the fact that he also received Social Security benefits. The auditor stated that in the initial audit interview of Mr. Garofalo, he specifically asked whether ~~Mr.~~ Garofal had any sources of funds, such as inheritances, loans, insurance proceeds, Social Security benefits or other pensions, which had not been set forth on his personal income tax returns. The auditor stated that ~~Mr.~~ Garofalo did not indicate that he had any additional sources of funds. ~~Mr.~~ Garofalo was not present at the hearing **held** herein. Petitioner's representative was allotted 30 days from the date of the hearing to submit evidence of ~~Mr.~~ Garofalo's receipt of Social Security benefits, but no such evidence was ever presented.

11. In the notices of deficiency issued to Fred Garofalo pursuant to the personal income tax audit and to the corporation pursuant to the corporation franchise tax audit, the Audit Division asserted penalty pursuant to sections 685(a)(2) and **1085(a)(2)** of the Tax Law, respectively, for failure to pay tax required to be shown on a return. No penalty was asserted by the Audit Division in the sales **tax** assessments. Petitioners contend that the penalties should be reduced or abated.

CONCLUSIONS OF LAW

A. That pursuant to the provisions of section 689(e) of the Tax Law and section T46-189.0(e) of the Administrative Code of the City of New York, petitioner bears the burden of proving the inaccuracy of the personal income tax deficiency asserted herein. Petitioner Fred Garofalo produced **no** credible evidence to indicate that the additional income held to be subject to personal income tax which resulted from the source and application of funds audit – analysis performed by the Audit Division was excessive. **In** addition, petitioner failed to sustain his burden of proving entitlement to a rental **loss** deduction **in** excess of that portion allowed by the Audit Division.

B. That pursuant to the provisions of section 1089(e) of the Tax Law, petitioner bears the burden of proving the inaccuracy of the corporation franchise tax deficiency asserted herein. Petitioner Ocean Avenue Garage, Inc. failed to introduce any evidence to indicate that the Audit Division erred in its bank deposit analysis or in its having deemed the additional income of Fred Garofalo as additional income of the corporation.

C. That, with respect to the sales tax audit performed herein, the burden of proof rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization v. Tully, 85 AD2d 858). Petitioners offered no evidence which would sustain such burden.

D. That section 1133(a) of the Tax Law provides, in part, that:

"every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article."

Section 1131(1) of the Tax Law defines "persons required to collect tax" as

in complying with the provisions of Article 28 of the Tax Law. Petitioner Fred Garofalo was the sole officer and shareholder of Ocean Avenue Garage, Inc. He signed corporate sales tax returns and all corporate checks and he supervised the day-to-day operations of the service station. Within the meaning and intent of sections 1133(a) and 1131(1) of the Tax Law, petitioner Fred Garofalo was a person required to collect tax on behalf of the corporation and, as such, was personally liable for the tax imposed, collected or required to be collected by Ocean Avenue Garage, Inc.


E. That petitioners have not **shown** that their failure to pay the tax required to be shown on the personal income tax and corporation franchise tax returns was due to reasonable cause and not due to willful neglect. Accordingly, the penalties imposed pursuant to sections 685(a)(2) and 1085(a)(2) of the Tax Law are sustained.

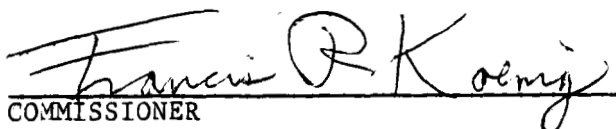
F. That the petitions of Ocean Avenue Garage, Inc. and Fred Garofalo are denied and the Notice of Deficiency issued to Fred Garofalo on July 21, 1983, the notices of deficiency pursuant to Article 9-A of the Tax Law issued to Ocean Avenue Garage, Inc. on July 25, 1983 and the notices of determination and demands for payment of sales and use taxes due issued to Ocean Avenue Garage, Inc. and to Fred Garofalo on July 26, 1983 are hereby sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 24 1987


PRESIDENT


COMMISSIONER

