

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

HARRY'S 1000 BAYCHESTER AVENUE SERVICE CENTER, INC.

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, 1980 through February 28, 1982.

Petitioner, Harry's 1000 Baychester Avenue Service Center, Inc., 1000 Baychester Avenue, Bronx, New York 10475, 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, 1980 through February 28, 1982 (File No. 48420).

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 October 28, 1986 at 1:45 P.M. Petitioner appeared by Salvatore Zaffos. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Harry's 1000 Baychester Avenue Service Center, Inc., operated a service station at 1000 Baychester Avenue, Bronx, New York during the years at issue.

2. An audit disclosed that petitioner did not have accurate books and records. Third party verification of purchases was obtained and gasoline and labor were marked up resulting in additional sales of \$92,166.57 for 1980 and \$84,228.78 for 1981.

3. On October 20, 1983, the Audit Division issued to petitioner a Notice of Determination and Demand **for** Payment of Sales and Use Taxes Due for **\$8,793.29** in tax, \$2,198.31 in penalty and \$3,012.90 in intarest, for a total of **\$14,004.50**,

4. At the hearing, petitioner and the Audit Division agreed that sales and use tax owed by petitioner was \$7,293.31. Petitioner, however, maintained that penalty should be cancelled and interest reduced to the minimum.

5. No testimony or documentary evidence was offered by petitioner. Petitioner relies on: (a) the fact that tax returns were filed and the amounts **shown** due on the returns were paid; and (b) the fact that the field audit report did not state a specific reason for imposition of penalty.

CONCLUSIONS OF LAW

A. That Tax Law § 1145(a) imposes penalty and maximum interest on any person "failing to file a return ~~or~~ to pay or pay over any tax...." (Emphasis added.) Accordingly, penalty and maximum interest may be imposed on the additional tax due, even though returns were filed and the taxes **shown** due on the returns were paid.

B. That Tax Law § 1145(a) also provides that penalty **may** be remitted and interest reduced if the State Tax Commission determines that such failure was due to reasonable cause and **not** willful neglect. Here, petitioner offered **no** testimony or documentary evidence to establish reasonable cause; consequently, the penalty and maximum interest are to be sustained.

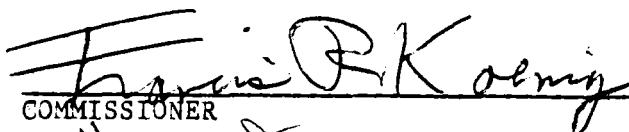
C. That the amount of tax is to be reduced to \$7,293.31 as provided in Finding of Fact "4" and penalty and interest are to be computed on such amount. Except for such adjustments, the petition of Harry's 1000 Baychester Avenue Service Center, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 20 1987

PRESIDENT


COMMISSIONER


COMMISSIONER