

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
THE FARM - DAL PRA ENTERPRISES, 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 March 1, 1979	:	
through August 31, 1983.	:	

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Petitioner, The Farm - Dal Pra Enterprises, Inc., 1419 Rosedale Avenue, Bronx, New York 10472, 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 March 1, 1979 through August 31, 1983 (File No. 53951).

On May 12, 1986, petitioner waived its right to a hearing and requested that a decision be rendered based on the entire record contained in the Audit Division's file. After due consideration of the record, the State Tax Commission hereby renders the following decision.

#### ISSUE

Whether the late payment of sales tax by petitioner was due to reasonable cause and, therefore, warrants the cancellation of penalty and interest in excess of the minimum statutory rate.

#### FINDINGS OF FACT

1. On June 20, 1984, the Audit Division, as the result of a field audit, issued to the petitioner, The Farm - Dal Pra Enterprises, Inc., two notices of determination and demands for payment of sales and use taxes due. The first notice (No. S840620548M) asserted a sales tax due of \$23,462.36, plus penalty of \$5,865.59 and interest of \$8,955.74, for a total due of \$38,283.69 for the period March 1, 1979 through August 31, 1982. The second notice (No. S840620549M)

asserted a sales tax due of \$15,805.29, plus penalty of \$2,704.45 and interest of \$2,208.98, for a total due of \$20,718.72 for the period September 1, 1982 through August 31, 1983. The petitioner, by signature of its president, David Dal Pra, executed six (6) consents extending the period of limitations for assessment of sales and use taxes the last of which extended the period March 1, 1979 through February 28, 1983 to June 20, 1984.

2. During the period at issue, the petitioner operated a retail produce store in the Parkchester area of the Bronx. Petitioner determined taxable sales by marking up taxable purchases.

3. On audit, the petitioner made available for review a check disbursements journal, purchase invoices and monthly bank statements. The auditor requested but was not provided with cash register tapes, sales invoices or a general ledger.

4. In view of the inadequacy of petitioner's books and records, the auditor used a test period to determine petitioner's sales tax liability. The auditor first conducted a taxable ratio test which indicated the following:

<u>Period</u>	<u>Taxable Ratio Percentage</u>
3/1/79 to 11/30/80	8.24%
12/1/80 to 11/30/81	21.12%
12/1/81 to 11/30/82	22.83%
12/1/82 to 8/31/83	29.22%

The auditor next increased reported gross sales by 10% (the markup percentages per Federal tax returns were considered too low) and applied the taxable ratios per test to audited gross sales as follows:

<u>Audited Gross Sales</u>	<u>Taxable Ratio</u>	<u>Audited Taxable Sales</u>
\$1,454,467.00	.0824	\$ 119,848.00
1,181,376.00	.2112	249,507.00
1,374,250.00	.2283	313,741.00
1,101,846.00	.2922	321,959.00
<u>\$5,111,939.00</u>		<u>\$1,005,055.00</u>

Audited taxable sales of \$337,013.00 were assessed at 8%, resulting in audited tax due of \$26,961.04. Credit was given for tax paid of \$13,843.76, resulting in tax due of \$13,117.28. Audited taxable sales of \$668,042.00 were assessed at 8½%, resulting in audited tax due of \$55,113.46. Credit was given for tax paid of \$28,963.09, resulting in tax due of \$26,150.37. The total tax due is \$39,267.65 on the additional taxable sales.

5. As a result of negotiations between petitioner's representative and a representative of the Audit Division, the petitioner submitted a Withdrawal of Petition and Discontinuance of Case whereby it withdrew its petition for review of the notices and agreed to a revised tax due of \$23,350.17. The petitioner is only protesting the imposition of penalty and interest.

6. Petitioner has not submitted any evidence that the failure to pay the above liability was due to reasonable cause and not due to willful neglect.

#### CONCLUSIONS OF LAW

A. That during the period at issue, Tax Law section 1145(a)(1)(i) imposed penalty and interest for failure to file a return or to pay tax within the time limitations prescribed by Articles 28 and 29 equal to:

"five percent of the amount of tax due if such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate; plus interest at the rate of one percent of such tax or one-twelfth of the annual rate of interest set by the tax commission pursuant to section eleven hundred forty-two, whichever is greater, for each month of delay after such return was required to be filed or such tax became due."

(This section was subsequently amended by Chapter 65 of the Laws of 1985, effective September 1, 1985).

Where this Commission determines that such failure or delay is due to reasonable cause and not due to willful neglect, it is authorized to cancel the penalty

and that portion of interest in excess of the interest computed at the rate established pursuant to section 1142 (Tax Law § 1145[a][1][iii]).

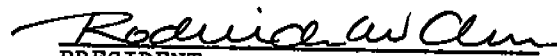
B. That petitioner, The Farm - Dal Pra Enterprises, Inc., has failed to demonstrate a cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of gross negligence or willful intent to disobey the tax statutes, so as to warrant the cancellation of penalty and interest in excess of the minimum statutory rate (20 NYCRR 536.5[b][6]).

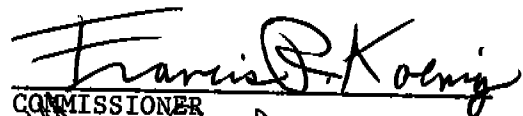
C. That the petition of The Farm - Dal Pra Enterprises, Inc. is denied and the notices of determination and demands for payment of sales and use taxes due issued June 20, 1984 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

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PRESIDENT

  
COMMISSIONER

  
COMMISSIONER