

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

RICHARD KUTY
D/B/A BAY SHORE SWIMMING POOL MAINTENANCE

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 Periods Ended August 31,
1977 through August 31, 1978 and November 30,
1979 through February 29, 1980.

Petitioner, Richard Kutty d/b/a Bay Shore Swimming Pool Maintenance, 3807
Otisco Road, Marietta, New York 13110, 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 periods ended August 31, 1977 through August 31, 1978 and
November 30, 1979 through February 29, 1980 (File No. 63542).

A hearing was held before Timothy J. Alston, Hearing Officer, at the
offices of the State Tax Commission, 333 East Washington Street, Syracuse, New
York, on October 24, 1986 at 10:30 A.M. Petitioner appeared ~~pro se~~. The Audit
Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether petitioner's application for refund of penalty and interest at
issue herein was timely filed.

II. Whether the Audit Division's denial of petitioner's refund claim was
proper.

FINDINGS OF FACT

1. On November 9, 1984, petitioner, Richard Kutty, filed a letter requesting
a refund of penalty and interest paid with respect to his sales tax liability

for the periods ended August 31, 1977 through August 31, 1978, and November 30, 1979 through February 29, 1980.

2. On July 25, 1985 the Audit Division denied petitioner's refund claim in full.

3. Specifically, the amounts claimed herein by petitioner were as follows:

<u>Period Ended</u>	<u>Date Filed</u>	<u>Tax Due</u>	<u>Pymt . Date</u>	<u>Penalty</u>	<u>Pymt . Date</u>	<u>Interest</u>	<u>Pymt . Date</u>
8/31/77	9/84	\$ 643.26	6/78	\$ 32.16	9/84	\$ 51.46	9/84
11/30/77	9/84	635.01	9/84	158.75	9/84	527.06	9/84
2/28/78	9/27/78	71.28	9/27/78	7.84	9/84	5.05	9/84
5/31/78	10/22/79	215.39	10/22/79	45.23	9/84	39.03	9/84
8/31/78	10/22/79	1,118.74	10/22/79	201.38	9/84	164.58	9/84
11/30/79	12/19/80	330.75	9/84	82.68	9/84	217.04	9/84
2/29/80	12/10/80	33.32	9/84	8.32	9/84	20.77	9/84
TOTAL PENALTY & INTEREST				\$536.36		\$1,024.99	

4. Petitioner's sales tax liability arose from his ownership and operation of Bay Shore Swimming Pool Maintenance, a proprietary entity doing business in Bay Shore, New York. Petitioner closed down Bay Shore Swimming Pool Maintenance in late 1979. At about that time petitioner made an effort to satisfy certain of his outstanding sales tax obligations, and paid the base tax due for the periods ended May 31, 1978 and August 31, 1978. Petitioner contended he was unaware of any other outstanding sales tax liabilities at that time and that Tax Department employees had advised him that no other amounts were owed. Petitioner further contended that he never received notice of any of the amounts at issue herein; and only became aware of these liabilities at the time of sale of his home in 1984, when he discovered tax liens on the property. With respect to the period ended August 31, 1977, petitioner claimed that he paid the tax at the time he filed his return in 1978.

5. The Audit Division issued notices and demands to petitioner for each period at issue herein.

CONCLUSIONS OF LAW

A. That section 1139(a) of the Tax Law provides, in pertinent part, that an application for refund shall be filed with the Tax Commission "within three years after the date when such amount was payable under this article".

B. That during the periods at issue, section 1145(a)(1) of the Tax Law provided, in substance', the following with respect to the imposition of penalty and interest:

"Any person failing to file a return or to pay or pay over any tax to the tax commission within the time required by this article shall be subject to a penalty of 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 for each month of delay after such return was required to be filed or such tax became due. If, however, the tax commission **is** satisfied that the delay was excusable, it may remit all or any part of such penalty and it may remit that portion of such interest that exceeds the interest that would be payable if such interest were computed at the rate set by the tax commission pursuant to section eleven hundred forty-two, or **if** no rate is set, at the rate of six percent per year."

C. That penalty and interest become "payable" within the meaning of Tax Law § 1139(a) as such amounts accrue. Petitioner's refund claim was therefore untimely with respect to that portion of the penalty and interest which had accrued (pursuant to Tax Law § 1145(a)) more than three years prior to the filing of petitioner's refund claim.

1 Section 1145(a)(1) was amended during the periods at issue. Such amendments, however, made no substantive change with respect to the issues raised by petitioner herein.

D. That the interest at issue herein was properly imposed pursuant to section 1145 of the Tax Law.

E. That Article 28 of the Tax Law makes no provision for the suspension, waiver or abatement of interest properly imposed other than the remittance of that amount in excess of the minimum.

F. That, even assuming petitioner was, in fact, unaware of his outstanding tax liability until 1984, his late filing of sales tax returns for each of the periods at issue resulted in the Audit Division's proper imposition of penalty pursuant to Tax Law § 1145. It is noted that the Audit Division issued notices and demands to petitioner for each of the periods at issue; petitioner should therefore have been aware of the Audit Division's imposition of penalty for the periods at issue. Petitioner has failed to present any evidence to show that his failure to timely file returns was due to reasonable cause.

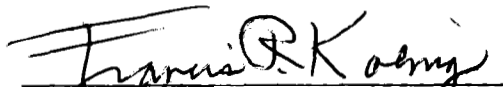
G. That the petition of Richard Kutty d/b/a Bay Shore Swimming Pool Maintenance is in all respects denied, and the Audit Division's letter of July 25, 1985, denying petitioner's refund claim, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 23 1987


PRESIDENT


COMMISSIONER


COMMISSIONER