

STATE TAX COMMISSION

State of New York :

SS. :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of November, 1986, he/she served the within notice of Decision by certified mail upon The Farm - Dal Pra Enterprises, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
12th day of November, 1986.

David Parschuck
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

State of New York :
County of Albany : ss.:

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of November, 1986, he served the within notice of Decision by certified mail upon Richard E. DeCurtis, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard E. DeCurtis
24 Cooper St.
Yonkers, NY 10704

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
12th day of November, 1986.

David Parshuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Smay

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

November 12, 1986

The Farm - Dal Pra Enterprises, Inc.
1419 Rosedale Ave.
Bronx, NY 10472

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Richard E. DeCurtis
24 Cooper St.
Yonkers, NY 10704

STATE OF NEW YORK

STATE TAX COMMISSION

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.	:	

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

NOV 12 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to The Farm-DalPra Enterprises Inc.	
Street and No 1419 Rosedale Ave.	
P.O. State and ZIP Code Bronx, N.Y. 10472	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

P 319 372 987

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to Richard E. DeCurtis	
Street and No 24 Cooper St	
P.O. State and ZIP Code Yonkers, N.Y. 10704	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	