

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
	:	
of	:	
	:	
GREAT NECK SERVICE STATION, INC.	:	DECISION
	:	DTA #800538
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, 1979	:	
through August 31, 1982.	:	

Petitioner, Great Neck Service Station, Inc., 265 East Shore Road, Manhasset, New York 11030, filed an exception to the determination of the Administrative Law Judge issued on September 27, 1987 with respect to its 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, 1979 through August 31, 1982 (File No. 800538). Petitioner appeared by Robert M. Markman, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Michael Infantino, Esq., of Counsel).

Petitioner filed a brief on exception. The Division filed a letter in opposition to the exception. Neither party requested oral argument.

ISSUE

Whether the Division of Taxation made an adequate request for petitioner's books and records.

FINDINGS OF FACT

We adopt the findings of fact stated by the Administrative Law Judge and such facts are incorporated herein by this reference. These facts may be summarized as follows:

Petitioner, Great Neck Service Station, Inc., operated a Chevron service station at 265 East Shore Road, Manhasset, New York. Petitioner sold Chevron brand gasoline and oil, tires, batteries and accessories, and performed repair and towing services. The station had three service bays.

Petitioner had two tow trucks registered in its name. A third truck, which was based at the station, was registered in the name of Scott Balterman, son of petitioner's president.

The sales tax field audit was commenced on April 9, 1982, when the auditor made an unannounced visit to the station. A letter left with petitioner stated that petitioner's sales tax returns had been scheduled for a field examination and notified petitioner of an appointment date. The letter stated, in pertinent part, as follows:

"All books and records pertaining to your Sales Tax liability for the period under audit should be available. This would include journals, ledgers, Sales invoices, purchase invoices, cash register tapes, exemption certificates and all Sales Tax records. Additional information may be required during the course of the audit."

The records made available to the auditor were as follows:

- a) Sales tax returns and related worksheets;
- b) Federal and State income tax returns;
- c) Cash receipts journal;
- d) Sales invoices (test period);
- e) Check disbursements journal; and
- f) General ledger.

Records not made available were:

- a) Purchase invoices;
- b) Cash register tapes; and
- c) Towing sales invoices.

Due to the absence of purchase invoices, cash register tapes and towing sales invoices, the auditor for the Division of Taxation determined that petitioner's records were inadequate to conduct a complete audit. Accordingly, external indices were used to derive taxable sales using markups on purchases of gasoline, motor oil, tires, batteries and accessories.

In addition to the markups, the Division of Taxation increased petitioner's taxable receipts by \$300,906.00 an amount which was recorded on petitioner's books and records as "Other income", and by \$156,843.00 an amount which was recorded on petitioner's books as being derived from towing performed for the American Automobile Association.

In combination these adjustments yielded \$1,679,510 in audited taxable sales for the period June 1, 1979 through February 28, 1982. Reported taxable sales for the same period were \$1,038,263.00, resulting in a difference of \$641,247.00, and in an error percentage of 61.76 percent. This percentage was applied to reported taxable sales for the audit period, as extended to August 31, 1982, resulting in additional sales tax due of \$54,935.06. Analysis of fixed assets resulted in use tax determined to be due of \$62.09. Petitioner did not contest the use tax assessment.

On March 18, 1983, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner for the period June 1, 1979 through August 31, 1982 in the amount of \$54,997.15 in additional tax due, \$11,467.17 in penalty due, plus \$13,221.02 in interest, for a total of \$79,685.34.

In addition to the facts found by the Administrative Law Judge, we find that the Division of Taxation's letter requested books and records only for the audit period June 1, 1979 to February 28, 1982. Although the audit period was later extended to August 31, 1982, no request was made by the Division for the books and records for this additional period.

We also find that at the hearing the Administrative Law Judge instructed the petitioner to present the books and records it claimed to have to the Division of Taxation after the hearing for the purpose of resolving the audit issues. The petitioner was directed to make the submission to the Division by September 2, 1986 and to send the Administrative Law Judge a copy of the transmittal. If no resolution of the issues could be made between the Division and the petitioner, the petitioner was to submit all of the material to the Administrative Law Judge by October 2, 1986. The petitioner claims to have delivered documents to the Division. However, no copy of a transmittal to the Division was received by the Administrative Law Judge, nor did the Administrative Law Judge receive the documents from the petitioner.

OPINION

On exception petitioner argues that the Division of Taxation did not make an adequate request for petitioner's books and records and thus the Division improperly resorted to external

indices and the markup audit to compute taxable sales. Petitioner does not attack the audit methodology itself, only that resort to it was improper.

With respect to the initial audit period, June 1, 1979 to February 28, 1982, the Division requested in the letter scheduling the audit, "[a]ll books and records pertaining to your Sales Tax liability for the period under audit" This letter specifically requested "journals, ledgers, Sales invoices, purchase invoices, cash register tapes, exemption certificates" This request does not appear to us as a "weak and casual request" as the petitioner would characterize it to come within the rule of Christ Cella v. State Tax Commn. (102 AD2d 352). Moreover, there is no indication in the instant record that the auditor received all requested records but chose to disregard them as apparently did the auditor in Christ Cella (*supra*, at 354).

Accordingly, we find that the Division of Taxation's request for the records for the period June 1, 1979 through February 28, 1982 was proper. The petitioner's failure to produce adequate books and records in response to this request justified the use of external indices and the test period audit for this period (Matter of Chartair v. State Tax Commn., 65 AD2d 44; Matter of Korba v. State Tax Commn., 84 AD2d 655).

The audit period in this case was extended to August 31, 1982, but as found above no request was made for the books and records for this extended period. The petitioner asserts he has adequate books and records for this extended period, as well as for the entire audit period. Under the Appellate Division, Third Department's recent decision in Matter of Adamides v. Chu (134 AD2d 776), the combination of the Division of Taxation's failure to request records for the extended audit period and petitioner's assertion that it has adequate books and records for such period, requires that the assessment for the period, March 1, 1982 through August 31, 1982, be cancelled.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Great Neck Service Station, Inc. is granted to the extent that the portion of the assessment relating to the period March 1, 1982 through August 31, 1982 is cancelled, and except as so modified, is in all other respects denied;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above, and except as so modified, is in all other respects affirmed; and

3. The petition of Great Neck Service Station, Inc. is granted to the extent indicated in paragraph "1" above, and except as so granted, is in all other respects denied; the Division of Taxation is directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on March 18, 1983; and, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
May 26, 1988

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner