STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **MAX SERVICE CENTER** 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, 1980 through August 31, 1982.	:	DECISION DTA NO. 800570

Petitioner, Max Service Center, c/o N. Cankurt, 28 Willowbrook Road, Scotia, New York 12302, filed an exception to the determination of the Administrative Law Judge issued on October 16, 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 March 1, 1980 through August 31, 1982 (File No. 800570). Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (Kathleen D. Kalwa, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Arnold Glass, Esq., of counsel).

The petitioner filed a brief on exception. The Division filed a letter in opposition to the exception. Oral argument at the petitioner's request was held on April 12, 1988.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

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

II. Whether the Division of Taxation conducted a sufficient investigation of petitioner's books and records.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference except that we modify findings of fact "2", "3" and "4" of the determination as stated below. The relevant facts may be summarized as follows.

Petitioner, Max Service Center, was, until it ceased doing business in August of 1983, a Mobil franchise gasoline service station located in Cohoes, New York and operated by three partners. One of the partners worked full time at the station location. In addition, petitioner had one other full-time employee, and one part-time employee working evenings and weekends. Petitioner was located across the street from an Arco gasoline station, and next door to another service station primarily involved in performing repairs.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> On February 2, 1983, the Division of Taxation sent to petitioner a request to complete a service station questionnaire (enclosed therein) and to submit a copy of Federal Schedule C or Form 1120 for the years 1980 and 1981. The cover letter to the questionnaire read as follows:
>
> > "Gentlemen:
> >
> > We are currently auditing your New York State Tax Returns.
> >
> > We would appreciate your cooperation in supplying some additional information to aid in our audit. Please complete the enclosed questionnaire and return one copy in the enclosed return envelope. In addition, we will need a copy of Schedule C or Form 1120 of your Federal Tax Return for the years 1980 and 1981.
> >
> > Please return the requested information along with a copy of this letter within twenty (20) days."

There was no response to this request. Thereafter, on March 7, 1,983, a follow-up letter was sent to petitioner requesting that he respond to the February 2, 1983 letter. Sometime thereafter, petitioner responded to these requests for information by returning the service station questionnaire together with information from petitioner's partnership income tax returns. The questionnaire was completed with information with respect to the months of March, April and May of 1982. It is noted that page 2 of the questionnaire was not completely filled in, specifically with respect to furnishing breakdowns of the individual items comprising petitioner's sales. The petitioner reported the total gallons of motor fuel sold and the total dollar amount for all sales. Located above the signature line(s) on the questionnaire was the following statement:

> "I/We certify that the information provided in this questionnaire accurately reflects the books and records of the business described hereon."

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

> The Division never made a physical inspection of petitioner's books and records. Instead a desk audit was performed. This desk audit consisted of comparing petitioner's Federal partnership returns for 1980 and 1981 with petitioner's sales tax returns covering the same period. This comparison found that partnership returns stated greater total sales than those reported on the sales tax returns. The desk audit then turned to a computer printout from Mobil Oil Company (petitioner's supplier) indicating the volume and dollar amount of petroleum products purchased by petitioner from Mobil during the calendar years 1980 and 1981. The Division determined that the total cost of gasoline shown as purchased by petitioner on this computer printout was more than the total cost of goods sold as stated on petitioner's Federal partnership returns. The Division also compared petitioner's current selling prices, as reported, as of February 18, 1983, on the questionnaire, to the statewide average selling price of gasoline, finding that petitioner's selling price was, on average, 3.2 cents per gallon higher than the statewide average.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> The Division, after noting the discrepancy between petitioner's Federal partnership return and the State sales tax return, determined to recompute petitioner's tax liability. The Division took the total number of gallons of gasoline purchased by petitioner per year per Mobil printouts, and divided by four to arrive at an average amount purchased per quarter. For 1982, a period during which a Mobil printout was not available, the Division took an average of the volume of gallons purchased by petitioner in the two prior years, 1980 and 1981. Thereafter, the Division increased the statewide average selling price per

gallon per quarter by .032 (3.2%) to arrive at a selling price per gallon. This selling price was reduced by the fuel taxes (excise taxes) and sales tax included therein to arrive at a base selling price per gallon. This base price was multiplied by the number of gallons, as averaged per quarter, to arrive at audited gasoline sales.

In addition to the above computation, the Division, based on office experience and in view of the lack of information per the questionnaire with respect to a breakdown of petitioner's other sales, multiplied audited gasoline sales by 38 percent to arrive at audited other sales (comprising repair sales and services). The total audited gasoline sales, plus audited other taxable sales, was then multiplied by the applicable tax rate to arrive at tax due per audit which, after allowance for tax paid with petitioner's returns, resulted in a deficiency for each of the quarters covered by the audit period.

On April 29, 1983, the Division issued to petitioner, Max Service Center, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing additional sales tax for the period March 1, 1980 through August 31, 1982 in the amount of $62,652.38, plus penalty and interest. This assessment was based upon the mathematical calculations performed by the Division as detailed above.

OPINION

The Administrative Law Judge found that the petitioner proved by the submission of sequentially numbered repair invoices that the portion of the assessment relating to repair sales was erroneous and canceled this portion of the assessment.

With respect to the remainder of the assessment, the Administrative Law Judge found that the Division of Taxation rationally determined that petitioner's sales tax returns were incorrect as filed by comparing the information supplied by petitioner on the filling station questionnaire with information in the possession of the Division. On this basis the Administrative Law Judge held

the Division was permitted to resort to external indices, the Mobil computer printout, to assess tax. The Administrative Law Judge also found that the petitioner did not sustain his burden of proving that the computer printout was erroneous. The petitioner has taken exception to these conclusions.

We reverse the decision of the Administrative Law Judge for the reasons stated below.

The decision in Chartair, Inc. v. State Tax Commn. (65 AD2d 44) established that the resort to external indices as a method of computing tax liability must be founded on a determination of the insufficiency of the taxpayer's recordkeeping which makes it virtually impossible to verify sales receipts and conduct a complete audit.

The desk audit procedure conducted here was upheld as a valid audit method by the former State Tax Commission (see, Matter of Chris Curcio d/b/a C & S Service Station, State Tax Commn., February 24, 1987). This decision, which was relied on by the Administrative Law Judge, reflects the assumption that the desk audit procedure passed scrutiny under Chartair because there had been a valid determination of the insufficiency of the taxpayer's records based on an actual request for the books and records which satisfied the requirements of Christ Cella, Inc. v. State Tax Commn. (102 AD2d 352). Since the Tax Commission's decision in Matter of Chris Curcio, the Appellate Division has further restrained the Division's resort to external indices by holding that the Division must request books and records for the entire period of assessment (Matter of Adamides v. Chu, 134 AD2d 776) and make a thorough examination of such records (Matter of King Crab, Inc. v. State Tax Commn., 134 AD2d 51 (3d Dept 1987]) before proceeding to external indices to determine a taxpayer's sales tax liability. The issue is

then whether the desk audit conducted here can withstand scrutiny under the tests of Adamides and King Crab, Inc.

The only request made for petitioner's records is stated in the letter of February 2, 1983, with its request to fill out the attached questionnaire. In response to a question posed at the hearing by the presiding Administrative Law Judge that in terms of requesting records directly from the petitioner was there anything other than the February 2, 1983 letter, the examiner testified: "No sir. But you need your records to complete the questionnaire" (transcript p. 43). The letter of February 2, 1983 was the first communication to the petitioner that its sales tax returns were being audited. Nowhere does the letter contain a direct request to examine petitioner's books and records (see, Christ Cella v. State Tax Commn., supra) nor does it tell the petitioner the time frame of the audit that was being conducted. If the actual request for petitioner's records was made via the questionnaire, it could at best represent only a request to examine petitioner's records for the three month period supplied by the petitioner in the completed questionnaire. Assuming, without deciding, that the questionnaire could be a request to examine petitioner's books and records, we hold that the only request made on these facts was for petitioner's records for the months of March, April and May of 1982.

With a request for records limited to the months of March, April and May of 1982, the Division's determination that the books and records for the remainder of the audit period were inadequate, and a resort to external indices appropriate, cannot be sustained. Under Matter of Adamides v. Chu (supra) , a request and an examination of records for one period does not support a conclusion that records for another period are inadequate. Therefore, we annul the assessment for the period other than March, April and May of 1982.

With respect to March, April and May of 1982, still assuming that the questionnaire functions as a request for records. the issue remains whether the Division made a sufficient investigation of the requested records to support its conclusion that they were inadequate.

As introduced into evidence at the hearing, the information utilized by the Division to compare against the completed questionnaire, both Federal tax returns and the printouts received from Mobil reflecting purchases made by the petitioner, pertain to the years 1980 and 1981. We fail to see how information reflecting petitioner's operations during the years 1980 and 1981 can be a basis for determining the accuracy of information supplied by the petitioner corresponding to operations for the months of March, April and May of 1982. In fact, what appears from the record is that no determination was actually made as to the accuracy of the information supplied by the petitioner; the decision that petitioner's books were inadequate was made based on discrepancies between petitioner's sales tax and Federal partnership returns, and information obtained from petitioner's supplier. Here, in our view, the auditor did not make a sufficient inspection of the records made available to him to justify the conclusion that the records were incapable of supporting a complete audit (Matter of King Crab, Inc., supra). Therefore, the assessment for the months of March, April and May of 1982 must also be cancelled.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Max Service Center, is granted;

2. The determination of the Administrative Law Judge is reversed; and

3. The petition of Max Service Center is granted and the notice of determination issued on April 29, 1983 is canceled.

Dated: Albany, New York
September 29, 1988

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner