

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**COR BROTHERS SERVICE STATION, INC.** :  
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 December 1, 1978 through August 31, 1984. :

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In the Matter of the Petition :  
of :  
**PETER CORAPI** :  
**OFFICER OF COR BROTHERS SERVICE STATION, 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 December 1, 1978 through August 31, 1984. :

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In the Matter of the Petition :  
of :  
**DOMENICO CORAPI** :  
**OFFICER OF COR BROTHERS SERVICE STATION, INC.** :  
: :  
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 December 1, 1978 through August 31, 1984. :

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Petitioners Cor Brothers Service Station, Inc., Peter Corapi, Officer of Cor Brothers Service Station, Inc. and Domenico Corapi, Officer of Cor Brothers Service Station, Inc., 167 Lakeville Road, New Hyde Park, New York 11040 each filed an exception to the determination of the Administrative Law Judge issued on June 22, 1989 with respect to their petitions 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 December 1, 1978 through August 31, 1984 (File Nos. 800930, 801553, 801721, 800928, 801554, 801730, 800929, 801561 and 801719). Petitioners filed a

brief on exception. The Division of Taxation filed a letter in response to the petitioners' exceptions and brief.

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

### ***ISSUE***

I. Whether the records of Cor Brothers Service Station, Inc. were incomplete or insufficient, thus authorizing the Division of Taxation to estimate sales and use taxes owed by said petitioner.

II. Whether the audit methodology properly determined sales and use taxes due.

III. Whether penalties should be imposed.

IV. Whether petitioner Domenico Corapi was a person required to collect tax on behalf of Cor Brothers Service Station, Inc.

### ***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. We also find an additional fact as indicated below.

Petitioner Cor Brothers Service Station, Inc. ("the corporation") operated a Getty gasoline service station, at 167 Lakeville Road, New Hyde Park, New York 11040 during the period at issue. It appears that the station was still in business at that location at the time of the hearing.

### **The Audit**

An audit of the corporation's books and records for the period December 1, 1978 through February 28, 1981 was conducted as follows:

(a) It was determined that the corporation's records were inadequate for the following reasons:

(i) Gasoline purchases reported by petitioners' supplier, Getty Refining and Marketing Company ("Getty") exceeded sales reported.

(ii) Only a small amount of purchase invoices were made available for examination.

(iii) The corporation had routinely discarded copies of sales invoices a few weeks after each sale.

(b) Gasoline purchases of \$2,855,666.00 for the period December 1, 1978 through August 31, 1981 reported by Getty were marked up 10%, based on office experience, resulting in total audited taxable gasoline sales of \$3,141,233.00.

(c) Repair sales were estimated at \$2,500.00 per week for each of two service bays, based on office experience with similar operations, to arrive at audited repair sales of \$715,000.00 for the period December 1, 1978 through August 31, 1981.

(d) Reported gross and taxable sales for the period December 1, 1978 through August 31, 1981 were \$1,541,775.00. Total additional taxable gasoline and repair sales for said period were found to be \$2,314,458.00 and additional sales tax due was \$162,012.06.

(e) The percentage of error for the period December 1, 1978 through August 31, 1981 was 150.11643 percent.

(f) The percentage of error of 150.11643 percent was applied to taxable sales reported for the period December 1, 1978 through February 28, 1981 of \$1,308,836.00 resulting in \$1,964,779.00 in additional taxable sales and \$137,534.53 in additional tax due for said period.

A follow-up audit for the period March 1, 1981 through August 31, 1981 was conducted as follows:<sup>1</sup>

(a) Taxable gasoline purchases per the third-party verification from Getty for the period March 1, 1981 through August 31, 1981 were marked up 10 percent yielding adjusted taxable gasoline sales of \$606,509.23.

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<sup>1</sup>It is unclear why the auditor did not use the error percentage calculated for the period December 1, 1978 through August 31, 1981.

(b) Repair sales for the period March 1, 1981 through August 31, 1981 were again estimated at \$2,500.00 per bay per week, for each of two bays, for a total of \$130,000.00.

(c) Total adjusted taxable sales for the period March 1, 1981 through August 31, 1981 were \$736,509.23. As the corporation reported \$232,939.00 for said period, additional taxable sales were \$503,570.23.

(d) Additional tax due for the period March 1, 1981 through August 31, 1981 was determined to be \$35,249.91.

The audit was continued for the period September 1, 1981 through August 31, 1984 in the following manner:

(a) Based upon the additional taxable gasoline sales for the period December 1, 1978 through November 30, 1981<sup>2</sup> a percentage of error of 82.64 percent was found. This was applied to taxable sales reported for the period September 1, 1981 through August 31, 1982 resulting in adjusted taxable gasoline sales of \$1,287,174.00 (effective September 1, 1982 gasoline sales were no longer subject to tax at the retail level).

(b) Repair sales were again estimated at \$65,000.00 per quarter, generating additional repair sales of \$780,000.00.

(c) Total adjusted taxable sales for the period came to \$2,067,174.00. As \$757,850.00 in taxable sales had been reported, additional taxable sales were \$1,309,324.00.

(d) Additional tax due for the period September 1, 1981 through August 31, 1984 was \$97,824.07.

(e) It is noted that books and records were not examined by the auditor for the period after August 31, 1981, except that gasoline sales for the quarter ending November 30, 1981 appear to have been reviewed. The auditor's checklist of records available during audit and list of records requested and not made available for the period March 1, 1981 through August 31, 1984 was not completed but bears the notation: "All audit work was based on the prior audit. Thus no additional records were examined". This statement, however, seems to

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<sup>2</sup>This figure was separately calculated by the auditor.

apply only to the period after August 31, 1981, as records prior to said date were clearly audited.

The corporation executed consents extending the period of limitation for assessment of sales and use taxes as follows:

(a) Consent dated November 2, 1981 extending the period for the sales tax quarters December 1, 1978 through August 31, 1981 to December 20, 1982.

(b) Consent dated November 5, 1982 extending the period of limitation for the same quarters to December 20, 1983.

The following notices of determination and demands for payment of sales and use taxes due were issued pursuant to the audit:

(a) On December 20, 1983 notices were issued to the corporation and to Domenico Corapi and Peter Corapi, as officers, for the period December 1, 1978 through February 28, 1981 in the amount of \$137,534.53 in tax, \$68,767.27 as a fraud penalty and \$65,741.23 in interest, for a total due of \$272,043.03.

(b) On September 20, 1984, notices were issued to the corporation and to Peter Corapi and Domenico Corapi, as officers, for the period March 1, 1981 through August 31, 1981 for \$35,249.91 in tax, \$17,624.56 as a fraud penalty and \$15,727.65 in interest, for a total of \$68,602.12.

(c) On December 20, 1984, notices were issued to the corporation and to Peter Corapi and Domenico Corapi, as officers, for the period September 1, 1981 through August 31, 1984 in the amount of \$97,824.07 in tax, \$48,912.05 as a fraud penalty and \$27,780.78 in interest, for a total amount due of \$174,516.90.

#### Business Operations

Petitioners have operated the station since 1973. During the period at issue, the station had two gasoline pumps for regular leaded gasoline and two pumps for unleaded gasoline. It had three service bays with lifts. The corporation's employees were petitioners Peter and Domenico Corapi, who were mechanics, and one gas attendant. The station, which was a full-

service gasoline station, was open from 7 A.M. to 6 P.M.; however, the number of days per week the station was open does not appear in the record.

We find as an additional fact that the Getty Refining and Marketing Company approved the execution of a dealer contract with petitioners herein for a period of seven (7) years commencing January 15, 1981. This was a five year extension of the existing contract which expired January 14, 1983. The approval further points out that this contract will yield a volume estimate of 7,980,000 gallons of gasoline during the seven (7) year period.

While petitioners Peter and Domenico Corapi were mechanics, they also pumped gasoline.

Peter Corapi was president of the corporation and handled the recordkeeping and bookkeeping. He also signed the tax returns. Domenico Corapi was vice-president of the corporation. Both Peter Corapi and Domenico Corapi were authorized to sign checks, although most checks were signed by Peter Corapi. Peter and Domenico Corapi each owned 50% of the issued and outstanding stock of the corporation.

The corporation paid for gasoline on a C.O.D. basis, using credit card slips signed by its customers, with checks for the balance.

The auditor's contact sheet shows that a 7½ hour observation test of the station's repair business was performed on August 13, 1982. This test, however, is not in the record and is not reflected in the audit reports. Petitioners maintain that a week-long observation test was made by an auditor, but examination of all records available, including the Special Investigations Bureau file which was obtained after the hearing pursuant to Freedom of Information Act requests, showed no week-long test. It is noted that the contact sheet also shows that the auditor visited the station on February 26, 1982 spending 7½ hours with the following notation: "Went to station. Continued Audit."

The Markup

The auditor used a 10 percent markup on gasoline, using the Mobil wholesale price plus the Federal excise tax of four percent. Petitioner Peter Corapi, when asked what the station's markup was, testified as follows:

"Usually you don't work on percentage. You work on gallons. If you are going to make three or four cents a gallon, you are lucky. Most of the time you have to compete."

The "Gasoline Station Information Sheet" completed by the auditor on his initial visit to the station on October 26, 1981 shows that the selling price for regular gasoline was \$1.319, while the selling price for unleaded was \$1.369. Comparison to the Getty purchase records shows that the average purchase price exclusive of Federal and State taxes was \$1.074 per gallon for regular gasoline and \$1.118 for unleaded. Accordingly, the markup on suppliers' cost plus Federal excise tax (the price marked up at 10% by the auditor) works out to 12.5 cents per gallon or 11.6 percent for regular and 13.1 cents per gallon or 11.3 percent for unleaded. The information sheet also showed representative repair prices as follows: tune-up, four and six cylinder cars \$39.95, eight cylinder cars \$44.95; disc brake special, pack four wheel bearings, new pads, cut two rotors, \$79.95 (most American cars).

#### The Third-Party Verification

Petitioners claim that the third-party verification provided to the auditor by Getty was incorrect. Petitioners' brief specifically alludes to the months of January and February of 1979:

(a) January 1979: Petitioners alleged that the computer printout "showed that in fact 98,667 gallons were delivered to the station, despite the fact that the printout lists only 90,221. There were approximately 30 deliveries according to Getty's records. That would mean literally, a delivery of product every day of the month."

The printout, however, shows 38,061 gallons of premium and 52,086 gallons of unleaded for said month, a total of 90,147 gallons. Moreover, there were only 11 deliveries in that month, as it is clear from the corporation's check register (petitioners' exhibit "2") that both grades of gasoline were delivered and paid for at the same time. Comparison of the printout with the check



register ties in exactly to six purchases, but leaves five other deliveries reported by Getty unaccounted for.

(b) February 1979: Petitioners' brief claims that the printout showed nearly 200,000 gallons of gasoline with 36 deliveries.

The printout, however, shows 42,683 gallons of premium and 55,813 gallons of unleaded for a total of 98,496 gallons. Petitioners seem to be referring to the 196,992 monthly total figure, which includes the 98,496 gallons twice, first as a purchase, and then for the category "other" (product code 999) which appears to be a one-half cent per gallon charge. It is also noted that there were only 12 deliveries in February, not 36 (again premium and unleaded were delivered in the same shipment). The check register for February 1979 shows 8 deliveries, the majority of which may be tied in exactly to the printout, leaving four deliveries unaccounted for.

Petitioner Peter Corapi testified that one of the station's gasoline storage tanks became defective and was out of service from the fall of 1981 into 1982. Petitioners point out that the Getty printout shows a reduction in purchases for the quarter ending November 30, 1981 and the printout does in fact show 204,000 gallons for said quarter as compared with approximately 234,000 for each of the prior two quarters. It is noted, however, that the additional tax due on gasoline reflects the reduced volume. Petitioners did not introduce any evidence to show if any gasoline was lost and not sold due to the leak or defect involved.

In its memorandum filed after the hearing, the Division of Taxation withdrew the fraud penalty and sought to impose the penalty set forth in Tax Law § 1145(a)(1) as an alternative.

### ***OPINION***

In the determination below the Administrative Law Judge held that (1) petitioners' records were clearly incomplete and the Division of Taxation, pursuant to the authority granted to it in Tax Law § 1138(a), was authorized to estimate taxable sales using information available and further, had properly resorted to an audit methodology reasonably calculated to reflect the taxes due for the period December 12, 1978 through August 31, 1981; (2) while it was permissible for the Division of Taxation to estimate taxes in this case, the methodology used was unreasonable in

extending the audit to the quarters September 1, 1981 through August 31, 1984 as no additional books and records were examined and it appeared there was no actual request for petitioners' books and records for said period, thus, the amounts assessed for said period were cancelled; (3) it was improper for the Division of Taxation to disregard a one day observation test of the repair business, thus, repairs were reduced to a total of \$2,600.00 per week; and (4) while petitioners did not sustain their burden of proof to show that the audit was incorrect in any other respect and petitioner Domenico Corapi failed to sustain his burden of proof that he was not a person required to collect tax on behalf of the corporation pursuant to Tax Law §§ 1131(1) and 1133(a), penalties were cancelled as the fraud penalty was withdrawn and the late-payment penalty was not timely asserted.

On exception petitioners argue that (1) records of the corporation were complete but were lost by the Division; (2) the audit methodology was inappropriate; (3) the auditor who testified admitted no personal knowledge of the audit; (4) since there was limited access and parking area, the \$2,600.00 a week repair figure is extremely high and should be dismissed; and (5) the additional sales tax computed for gasoline sales should also be dismissed on the basis that there was no actual audit done by the State or by Getty.

In response, the Division argues that (1) the audit as performed was reasonably calculated to reflect the taxes due in view of the inadequacy and overall paucity of the corporation's records; (2) while the Division is not required to produce the employee who did the audit to give testimony, the Division acted reasonably in producing as a witness the auditor who had conducted the second part of the audit; (3) petitioners have failed to sustain their burden of proof on all other issues; and (4) based upon the facts and circumstances of the matter, the applicable law has been applied correctly and the Administrative Law Judge's determination is in all respects correct, including the adjustments made in conclusions of law "D" and "E".

We affirm the determination of the Administrative Law Judge.

With the exception of the additional finding of fact which supports the Getty third-party verification provided the auditor, we find no other basis in the record before us for modifying the

Administrative Law Judge's determination in any respect. The substance of petitioners' assertion that the auditor who testified admitted no personal knowledge of the audit has been decided in the Matter of Mira Oil Co. v. Chu, where the court stated "it is settled law, however, that an administrative determination supported by some substantial evidence retains its validity despite the fact that hearsay evidence was admitted and considered" (Matter of Mira Oil Co. v. Chu, 114 AD2d 619, 494 NYS2d 458, at 459).

Further, while petitioners allege the Division lost their records, there is no support whatsoever in the record to uphold said allegation.

Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in the determination.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Cor Brothers Service Station, Inc., Peter Corapi, Officer of Cor Brothers Service Station, Inc., and Domenico Corapi, Officer of Cor Brothers Service Station, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Cor Brothers Service Station, Inc., Peter Corapi, Officer of Cor Brothers Service Station, Inc., and Domenico Corapi, Officer of Cor Brothers Service Station, Inc. are granted to the extent indicated in conclusions of law "D" and "E" of the Administrative Law Judge's determination but are otherwise denied; and

4. The Division of Taxation shall modify the notices of determination accordingly but such notices are otherwise sustained.

DATED: Troy, New York  
July 26, 1990

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner

/s/Maria T. Jones  
Maria T. Jones  
Commissioner