

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition

of

**DOUBLE B. AUTO, 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 May 31, 1983.

DECISION

: D T A N O S .  
801331/801332

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In the Matter of the Petition

of

**BENJAMIN FEINSTEIN**  
**OFFICER OF DOUBLE B. AUTO, 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 May 31, 1983.

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Petitioners, Double B. Auto, Inc., 15 Ocean Avenue, Brooklyn, New York 11225, and Benjamin Feinstein, Officer of Double B. Auto, Inc., 35 Seacoast Terrace, Brooklyn, New York 11235 filed an exception to the determination of the Administrative Law Judge issued on January 14, 1988 with respect to their 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 December 1, 1978 through May 31, 1983 (File Nos. 801331 and 801332).

Petitioners appeared by Benjamin Feinstein. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

The parties did not request oral argument nor file briefs on this exception.

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

**ISSUE**

Whether a field audit properly determined sales and use taxes due from petitioner Double B. Auto, 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.

During the period at issue, petitioner Double B. Auto, Inc. ("the corporation") operated a gasoline service station at 15 Ocean Avenue, Brooklyn, New York. The station was a Gulf station until November 1982 at which point it became a Getty station. The corporation also rented cars from the station and from two other locations in Queens, New York. The corporation filed one sales tax return quarterly, covering both the gasoline service station and the auto rental operations.

The Division of Taxation performed a sales tax audit of the corporation's books and records for the period December 1, 1978 through May 31, 1983:

- (a) The corporation produced no books or records for the period December 1, 1978 through November 30, 1980. Books and records were available for the period December 1, 1980 through May 31, 1983.
- (b) Gulf Oil Corporation gasoline purchase records indicated gasoline purchases by the corporation for the period March 1, 1979 through February 28, 1982 totalling \$776,092.00. The auditor estimated gasoline purchases for the other months in the audit period based on the monthly average of the Gulf verification. Accordingly, total gasoline purchases for the period December 1, 1978 through May 31, 1983 were determined to be \$970,114.99.
- (c) For the period January 1, 1981 through February 28, 1982, the corporation purchased \$380,921.00 in gasoline but recorded only \$252,968.00 on its books. This resulted in a margin of error of 50.58%.
- (d) The 50.58% margin of error on gasoline was applied to other purchases and repairs on the basis that the corporation's records were incomplete. Applying the error factor to the corporation's parts purchases per its books of \$402,624.99 resulted in audited parts purchases of \$606,272.70. Applying the error factor to diesel fuel purchases of \$41,932.55 resulted in audited diesel purchases of \$63,142.03.
- (e) Gasoline purchases for the month of December 1981 were examined and a markup test was performed which resulted in a markup of 18.06% for gasoline. The markup was then applied to audited gasoline purchases of \$970,114.99 ([b] supra) and audited diesel purchases of \$63,142.03 ([d] supra) resulting in gross audited gasoline sales of \$1,145,317.70 and gross audited diesel sales of \$74,595.48. Included in gasoline and

diesel sales was the state tax which was exempt from sales tax. The nontaxable percentage for gasoline and diesel sales was determined to be 6.90%. Thus, the gross audited sales were reduced by 6.90% resulting in net audited gasoline sales of \$1,066,290.80 and net audited diesel sales of \$70,188.68.

- (f) An estimated markup of 100% was applied to all other purchases and repairs. Applying the markup to audited parts purchases resulted in total audited repair sales of \$1,212,545.40.
- (g) Rental sales were tested for the period March 1 through May 31, 1983. Upon examination, it was determined that 486 invoices were missing. The average rental sale was determined to be \$93.42 and this figure was applied to the 486 missing invoices to arrive at additional sales not reported on the books. The result was divided by rental sales reported on the books to arrive at an error percentage of 50.989% of car rentals unreported.
- (h) Total audited taxable sales of \$4,663,310.67 were reduced by reported taxable sales of \$129,309.00. Additional taxable sales determined as per the above audit methods were \$3,367,002.00, resulting in \$272,865.89 in additional tax.
- (i) Fixed assets sold were estimated based on sales of automobiles per the Federal tax returns. This resulted in \$20,595.02 in tax.

Consents extending the period of limitation for assessment were executed by Benjamin Feinstein, as president of the corporation.

On March 27, 1984 the Division of Taxation issued the following notices of determination and demands for payment of sales and use taxes due:

- (a) To Double B. Auto, Inc., for the period December 1, 1979 through May 31, 1982, tax due of \$231,116.39, \$115,558.15 as a fraud penalty, plus interest.
- (b) To Double B. Auto, Inc., for the period June 1, 1982 through May 31, 1983, tax due of \$62,344.52, \$29,927.57 as a fraud penalty, plus interest.
- (c) To Benjamin Feinstein, officer of Double B. Auto, Inc., for the period December 1, 1979 through May 31, 1982, tax due of \$231,116.39, \$115,558.15 as a fraud penalty, plus interest.
- (d) To Benjamin Feinstein, officer of Double B. Auto, Inc., for the period June 1, 1982 through May 31, 1983, tax due of \$62,344.52, \$29,927.57 as a fraud penalty, plus interest.

### ***OPINION***

The Administrative Law Judge determined that the audit performed by the Division was appropriate and correct due to the lack of books and records, except as it pertained to the repair portion of the business. As a result, adjustments were made to properly reflect the taxes due on the repairs. The Administrative Law Judge also determined that the Division of Taxation failed to

sustain its burden of proof as it pertained to the fraud penalty and, accordingly, this penalty was cancelled. The Division did not seek to impose penalty pursuant to section 1145(a)(1)(i) of the Tax Law as an alternative to the fraud penalty. The Administrative Law Judge sustained the audit in all other respects, concluding that the petitioners failed to meet their burden of proof to show that either the audit method or assessment was erroneous.

The petitioners have taken exception because in their opinion the Division did not prove that Double B. Auto, Inc. was in operation prior to December 1980 and that it purchased gasoline from Gulf Oil as asserted by the Division. Because of this failure, it is the petitioners' position that the assessments were arbitrary and erroneous.

"The burden . . . rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or the amount of the tax assessed was erroneous." (In the Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858, 859.) Therefore, the petitioner has the burden of proof while " . . . the Audit Division is not responsible for demonstrating the propriety of the assessment, including the basis for its audit." (Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 438.) As a result of this burden on the taxpayer, a presumption of correctness has been attributed to tax assessments (In the Matter of Cousins Service Station, Tax Appeals Tribunal, August 11, 1988, citing Welsh v. Helvering, 290 US 112 [1933]; Tavolacci v. State Tax Commn., 77 AD2d 759, 760 [3d Dept 1980]). To rebut this presumption, the petitioners, and not the Division, were required to introduce evidence to prove the amount of the gasoline purchases and the years of operation. The petitioners have failed to introduce such evidence and therefore, they have failed to meet their burden of proof to show that the audit was erroneous.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioners is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of the petitioners are granted to the extent indicated in Conclusions of Law "D", "F" and "H" of such determination and except as granted are in all other respects denied.

Dated: Albany, New York  
September 1, 1988

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

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