

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
WILLIAM SAVINO	:	DECISION
d/b/a WILLY'S SERVICE STATION	:	
for Revision of Determinations or for Refunds of	:	
Sales and Use Taxes under Articles 28 and 29 of	:	
the Tax Law for the Period August 1, 1965	:	
<u>through November 30, 1983.</u>	:	

The Division of Taxation and the petitioner, William Savino, d/b/a Willy's Service Station, 1014 Flushing Avenue, Brooklyn, New York 11237, filed exceptions to the determination of the Administrative Law Judge issued on November 6, 1987 with respect to petitioner's petition for a revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period August 1, 1965 through November 30, 1983 (File No. 802090). Petitioner appeared by Norman F. Russakoff, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq. of counsel).

Neither the petitioner nor the Division of Taxation requested oral argument or submitted a brief in support of their respective positions. After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division's use of \$1.25 per gallon for gasoline and \$30.00 per hour for repair sales for each quarter of the audit period resulted in an audit method which reasonably calculated the taxes due for the period August 1, 1965 through November 30, 1983.

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.

To summarize these facts, petitioner, William Savino, d/b/a Willy's Service Station, operated a gasoline service and repair station located at 1014 Flushing Avenue, Brooklyn, New York during the period in issue.

On April 11, 1984, the Division issued to petitioner the following notices of determination and demands for payment of sales and use taxes due:

<u>Period</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
August 1, 1965 - November 30, 1968	\$32,008.65	\$16,004.26	\$70,451.97	\$118,464.88
December 1, 1968 May 31, 1971	28,327.67	14,-163.83	51,605.46	94,096.96
June 1, 1971 - August 31, 1974	44,011.91	22,005.89	63,883.62	129,901.42
September 1, 1974 February 28, 1978	53,774.56	26,887.28	54,241.36	134,903.20
March 1, 1978 - August 31, 1981	53,774.56	26,887.28	29,858.49	110,520.33
September 1, 1981 November 30, 1983	31,288.28	15,644.12	5,701.35	52,633.75

The amount of tax due on the foregoing notices was estimated due to petitioner's failure to produce books and records for audit. The records of the Division did not indicate that petitioner was a registered vendor for sales tax purposes nor was there any record of the filing by petitioner of any sales tax returns. As a result, the Division of Taxation assessed petitioner for all periods back to the inception of the Sales Tax Law. Counsel for the Division conceded

that the burden of proving fraud could not be met and alternatively argued that penalty should be imposed under the provisions of section 1145(a)(1) of the Tax Law.

Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1980 through February 28, 1982 to May 30, 1984.

The Division estimated gasoline sales from information obtained from petitioner's supplier of gasoline. The supplier's records showed that petitioner purchased 8,458 gallons of gasoline during the period December 1, 1980 through February 28, 1981. Gasoline sales of \$10,572.00 were estimated for this period by applying an average retail selling price of \$1.25 to the gallonage. Repair sales were also estimated due to the lack of records. The Division of Taxation determined sales of \$37,440.00 for the above period based on prior audit experience (\$30.00 per hour x two mechanics x 8 hours per day x 6 days per week x 13 weeks per quarter). The combined taxable sales for the period amounted to \$48,013.00 This amount was considered sold in each of the sales tax reporting periods from August 1, 1965 through August 31, 1982. For the periods September 1, 1982 through November 30, 1983, only the repair sales were used in determining the taxes due.¹

OPINION

The Administrative Law Judge held that the method of audit employed by the Division of Taxation did not reasonably calculate the taxes due for the portion of the audit period August 1, 1965 through November 30, 1973, but did reasonably calculate the taxes due for the period from December 1, 1973 through November 30, 1983. On exception, the petitioner argues that

¹Effective September 1, 1982, the retailer of gasoline no longer collected the sales tax (L 1982, ch 454, 469).

the audit method chosen did not reasonably calculate the taxes due for the entire audit period.

On exception, the Division argues that the petitioner failed at the hearing to meet his evidentiary burden of disproving the accuracy of the examiner's calculations and that the method should be sustained for the entire period.

Inasmuch as the petitioner failed to keep any books and records of the business, alternative audit procedures were indeed warranted and the resort to external indices was appropriate (Matter of Urban Liquors v. State Tax Commn., 90 AD2d 576). Under the circumstances present here, exactness is not required of the Division's audit (Matter of Meyer v. State Tax Commn., 61 AD2d 223). However, the Division still has the duty to choose an audit method reasonably calculated to reflect the taxes due (Matter of Grant Co. v. Joseph, 2 NY2d 196, 204 [1957]).

The entire audit methodology at issue was based on two assumptions applied uniformly throughout the 18 year audit period. The first assumption was that the petitioner charged \$30.00 per hour for repair services. The record reveals scant information about the source of this figure. The supervisor of the auditor who performed the audit testified "We used this \$30 an hour in many audits based upon our audits of gasoline stations" (transcript p.18). There is no testimony as to what year or years this audit experience was derived from, from what number of repair facilities, nor their type or geographic location.

The second assumption was that petitioner sold gasoline at \$1.25 per gallon for the portion of the audit period from August 1, 1965 through August 31, 1982. The source of the \$1.25 figure is even less certain than the repair estimate. This figure was derived from Division form AU-250.9 which transcribed information that was obtained from the audit of petitioner's

gasoline supplier. This form, in addition to setting forth a gallonage figure, stated that the average taxable price was \$1.25 per gallon. There is no further testimony or documentary evidence with respect to the source of this figure or its applicability to the petitioner's sales price over the audit period.

In, Grecian Square, Inc. v. State Tax Commn. (119 AD2d 948), the Appellate Division, Third Department noted that considerable latitude is given to an auditor to estimate sales where the taxpayer lacks books and records. The Court in Grecian Square, Inc. had before it an audit which estimated a bar's sales based on an auditor's wide experience in auditing other bars. Because there was no testimony or evidence in the record detailing the nature or applicability of this audit experience to the bar in question, the Court concluded that there had been insufficient evidence before the State Tax Commission to determine whether a rational basis existed for the auditor's computation. As a result, the Court remanded the case back to the State Tax Commission for further testimony from the auditor with respect to his audit experience (Grecian Square, Inc. v. State Tax Commn., *supra* at 950).

The problem presented in Grecian Square, of having no means to evaluate the rationality of the audit experience relied on, is exacerbated in the instant case because the undescribed audit experience in the case of the hourly repair service estimate is applied uniformly, without any adjustment, over an 18 year period. Since the record does not reveal that the audit experience of \$30.00 per hour for repair service was rationally applied to the petitioner's circumstances at any given time, there is no rational basis to apply this experience over an 18 year period.

Likewise, the audit experience in the case of the price per gallon of gasoline is applied uniformly without any adjustment over a 17 year period at \$1.25 per gallon. Since the record does not reveal the appropriateness of this price at any given time, there is no rational basis to apply this experience over a 17 year period.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The case is remanded to the Administrative Law Judge for further proceedings not inconsistent herewith to establish a rational basis for the audit experience used to arrive at the per hour cost of repair service and the per gallon cost of gasoline over the audit period.

Dated: Albany, New York
SEP 22 1988

John P.-Dugan
President

Francis R. Koenig
Commissioner