

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

A & A SERVICE STATION, INC. :

for Revision of a Determination or for Refund of Motor :
Fuel Tax and Tax on Petroleum Businesses under Articles :
12-A and 13-A of the Tax Law for the Period June 1, 1997 :
through May 31, 1998. :

DECISION
DTA NOS. 818683 &
818684

In the Matter of the Petition :

of :

A & A 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, 1996 through August 31, 1998. :

Petitioner A & A Service Station, Inc., 4260 Hicksville Road, Bethpage, New York 11714-6217, filed an exception to the determination of the Administrative Law Judge issued on December 26, 2002. Petitioner appeared by Thomas P. Murray, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Michael P. McKinley, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on October 9, 2003 in New York, New York.

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

ISSUES

I. Whether the field audit conducted by the Division of Taxation of a Long Island gasoline station, which also sold cigarettes and other small items, was reasonably calculated to reflect taxes due.

II. Whether in computing sales tax due on petitioner's gasoline sales, petroleum business tax was properly included by the Division of Taxation in the sales tax base.

III. Whether reasonable cause has been shown for abatement of penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Abdurrahman Adyin, who apparently used his initials for the name of his corporate entity, A & A Service Station, Inc. ("petitioner"), operated a Long Island gasoline station on Hicksville Avenue in Bethpage. The gasoline station had two islands with a total of ten fuel pumps, consisting of eight gasoline pumps, one diesel pump and one kerosene pump. The station had storage capacity of approximately 24,000 gallons of gasoline, 4,000 gallons of diesel and 2,000 gallons of kerosene. The station also included a small store which sold cigarettes, newspapers, soda, candy and other sundry items. Apparently a nonbranded gasoline station, petitioner's two

major suppliers of gasoline were T. Hutchinson and Power Petroleum,¹ who were responsible for arranging product delivery to the station.

During the period at issue for sales and use taxes, which consisted of seven sales tax quarters, petitioner reported the following sales subject to tax:

Sales tax quarter ended	Reported taxable sales of motor fuel	Reported taxable sales of diesel fuel	Reported taxable sales of cigarettes	Total reported taxable sales
02/28/97	\$144,677.00	\$1,500.00	\$57,513.00	\$203,690.00
05/31/97	156,025.00	-0-	72,041.00	228,066.00
08/31/97	145,211.00	-0-	84,568.00	229,779.00
11/30/97	136,658.00	-0-	71,096.00	207,754.00
02/28/98	136,281.00	-0-	73,807.00	210,088.00
05/31/98	145,765.00	-0-	57,648.00	203,413.00
08/31/98	153,399.00	-0-	80,975.00	234,374.00

Petitioner did not report its taxable sales of fuel based upon sales records such as cash register tapes or cash receipts related to the actual sale of fuel. Rather, it computed the amount of its taxable sales of motor fuel and diesel fuel by totaling the amount of fuel purchased during a sales tax quarter (by the distinct categories of regular, plus, and super) as shown on its purchase invoices and then multiplying such totals by an average per gallon cost for each respective category of fuel. For example, petitioner reported \$156,025.00 as its taxable sales of motor fuel for the quarter ended May 31, 1997, as noted in the above table. Its accountant calculated such amount by first determining how much gasoline petitioner purchased during the

¹ Petitioner's suppliers were listed on the schedules prepared by petitioner's accountant, which show his calculation of taxable sales of motor fuel by the analysis of purchase invoices. In addition to these two main suppliers, for the quarter ending 8/31/98, a supplier named Kuper Petroleum Corp of Valley Stream, N.Y. was also noted as having made three deliveries on 7/21/98, 7/27/98 and 8/11/98. No other suppliers of gasoline were noted.

quarter by analyzing its purchase invoices from its only supplier during this particular quarter, Power Petroleum, as follows:

Invoice date	Gallons of regular gasoline purchased	Gallons of plus gasoline purchased	Gallons of super gasoline purchased
3/01/97	3,001	3,500	3,400
3/06/97	7,450	-0-	2,351
3/12/97	7,200	2,199	-0-
3/18/97	6,999	-0-	2,900
3/25/97	7,002	3,002	-0-
3/31/97	8,369	-0-	3,636
4/06/97	6,253	-0-	2,951
4/12/97	8,552	-0-	651
4/17/97	7,750	-0-	1,350
4/23/97	7,865	-0-	4,135
4/29/97	7,801	-0-	2,200
5/05/97	6,800	-0-	2,399
5/12/97	9,132	-0-	875
5/16/97	7,803	-0-	950
5/23/97	7,844	-0-	1,076
5/31/97	6,752	-0-	2,251
Totals	116,573	8,701	31,125

Petitioner calculated per gallon selling prices during the quarter ending May 31, 1997 for regular gasoline of \$1.264, plus gasoline of \$1.379, and super gasoline of \$1.454 by averaging its opening per gallon price for the quarter and its ending per gallon price for the quarter. For example, the per gallon price for regular gasoline of \$1.264 was calculated by averaging petitioner's opening per gallon price for this category of gasoline of \$1.279 with its closing per

gallon price of \$1.249. Using these average per gallon prices, petitioner computed its total sales of gasoline for this quarter as \$204,603.00 calculated as follows. First it computed sales of regular gasoline of \$147,348.00 by multiplying \$1.264 by the total gallons shown in the table above for regular gasoline purchased during the quarter of 116,573. Similarly, total sales of plus gasoline for the quarter of \$11,999.00 were calculated by multiplying \$1.379 by the total gallons shown in the table above for plus gasoline of 8,701, and total sales of super gasoline for the quarter of \$45,256.00 were calculated by multiplying \$1.454 by the total gallons shown in the table above for super gasoline of 31,125. As noted above, petitioner reported taxable sales of motor fuel for the quarter ended May 31, 1997 of \$156,025.00 on its tax return not \$204,603.00. This lesser amount was the result of petitioner's subtracting petroleum business tax of \$22,443.00 and motor fuel tax of \$12,873.00 from the gross amount of \$204,603.00 and treating the resulting amount of \$169,287.00 as including sales and use tax. It then backed out the tax at the Nassau County rate of 8.5% to determine taxable sales for the quarter of \$156,025.00, which it reported on its sales and use tax return for the quarter. For the other six sales tax quarters at issue, petitioner calculated taxable sales of motor fuel by the same methodology.

The audit by the Division of Taxation ("Division") of petitioner's gasoline sales was prompted by a referral for audit by the Division's Office of Tax Enforcement ("Tax Enforcement"). Tax Enforcement had under surveillance a particular wholesaler and transporter of motor fuel in the late spring of 1998. An investigator from Tax Enforcement observed the transportation of gasoline originating at a terminal in Newark, New Jersey by this wholesaler and transporter to "a partial drop" at petitioner's premises with "the remainder of product" off-loaded at a second, unrelated station. After the load of gasoline had been completely delivered, the

investigator performed a regulatory fuel truck inspection and was informed by the driver where the gasoline had been picked up and that 5,000 gallons of fuel had been delivered to petitioner's location with no invoice for such delivery provided to petitioner. Subsequently, the matter was referred by Tax Enforcement for audit in order to determine whether petitioner had enough tax paid invoices to support all of the gallons of fuel it received and then sold at its retail service station.

By a letter dated September 23, 1998, with an attached schedule, the Division's auditor advised petitioner that he would be conducting a sales tax audit of its records for the period January 1, 1997 through August 31, 1998. The following request for records was made: "[A]ll books, records, worksheets, and other documents pertinent to the preparation of your tax returns." An attached checklist noted that the following specific records should be presented for audit: general ledger, cash out sheets and meter readings, cash disbursements journal and purchase journal if applicable, federal income tax returns, sales tax returns, merchandise purchase invoices, bank statements, canceled checks and deposit slips for all accounts.

On audit, petitioner produced its so-called "shift sheets" or "cash out sheets" which record meter readings, one for dollars, the other for gallons for each of petitioner's ten fuel pumps, and also noted petitioner's fuel inventories. The auditor performed a careful review of these sheets and determined that for the period June 1, 1997 through May 31, 1998, petitioner was unable to substantiate with tax paid invoices a total of 65,799 gallons of fuel as follows:

Sales Tax Quarter Ending	Gallons not substantiated with tax paid invoices
05/31/97	(158)
08/31/97	12,738

11/30/97	7,983
02/28/98	18,659
05/31/98	27,499
08/31/98	(922)
Total	65,799

The auditor calculated that motor fuel tax under Article 12-A in the amount of \$5,263.92, petroleum business tax under Article 13-A of \$9,482.72, and sales and use tax in the amount of \$10,534.72 were due on the 65,799 gallons of fuel for which tax paid invoices were not provided by petitioner allocated over the audit period as follows:

Sales tax quarter ending	Gallons not substantiated with tax paid invoices	Additional motor fuel tax due under Article 12-A	Additional petroleum business tax due under Article 13-A	Additional sales and use tax due ²
5/31/97	(158)	(\$12.64)	(\$22.67)	\$ 1,540.01
8/31/97	12,738	1,019.04	1,783.32	2,285.73
11/30/97	7,983	638.64	1,117.62	2,762.66
2/28/98	18,659	1,492.72	2,724.21	1,761.67
5/31/98	27,499	2,199.92	4,014.85	1,411.15
8/31/98	(922)	(73.76)	(134.61)	773.50
Totals	65,799	\$5,263.92	\$9,482.72	\$10,534.72

As noted above, petitioner operated a small store which sold cigarettes, newspapers, soda, candy and other sundry items. Nonetheless, as noted above, petitioner reported only cigarette sales on its sales and use tax reports. Further, its cigarette sales were not based upon sales

² Petitioner did not include the Article 13-A petroleum business tax in the sales tax base when it calculated its sales tax liability on fuel sales. The auditor included such tax in the receipts from fuel sales subject to sales tax which explains why for the two sales tax periods in this table where he calculated that petitioner had substantiated with tax paid invoices more gallons than reported, additional sales tax was nonetheless due.

records such as cash register tapes or cash receipts related to the actual sale of cigarettes. Rather, like its reporting of gasoline sales, petitioner estimated its cigarette sales by totaling its purchase invoices for cigarettes and then applying a percentage for mark-up.

In his audit of petitioner's cigarette sales, the auditor performed a careful review of petitioner's purchase invoices for cigarettes. He determined that 96% of the cartons purchased were premium brands and 4% were generic brands, and the total cartons reported purchased each tax period were allocated by these percentages. Then, relying on the minimum retail prices from the State's published Minimum Retail Cigarette Prices, the auditor calculated petitioner's taxable sales of premium cigarettes for the quarter. For pricing generic brands, the auditor added seven percent to petitioner's average purchase price on the invoices supplied for each quarter, which is the minimum mark-up allowed for retailers in New York. Combining the audited taxable sales of premium brands to the audited taxable sales of generic brands, the auditor calculated total audited taxable cigarette sales of \$574,017.00 for the audit period, an increase of \$103,783.00 to petitioner's reported taxable sales of cigarettes of \$470,234.00. Sales tax at the rate of 8.5% on the additional cigarette sales of \$103,783.00 equated to \$8,821.57 of additional sales tax due allocated over the audit period as follows:

Sales tax period ending	Audited cigarette sales	Reported cigarette sales	Variance	Additional tax due
2/29/97	\$ 58,087.00	\$ 57,513.00	\$ 574.00	\$ 48.79
5/31/97	83,253.00	72,041.00	11,212.00	953.02
8/31/97	102,249.00	84,568.00	17,681.00	1,502.89
11/30/97	89,186.00	71,096.00	18,090.00	1,537.65
2/28/98	85,813.00	67,925.00	17,888.00	1,520.48
5/31/98	67,121.00	51,760.00	15,361.00	1,305.69

8/31/98	88,308.00	66,331.00	22,977.00	1,953.05
Totals	\$574,017.00	\$470,234.00	\$103,783.00	\$8,821.57

The Division issued a Notice of Determination dated March 6, 2000 against petitioner asserting additional sales and use tax due of \$19,408.84 plus interest and penalty. The sales and use tax asserted due was allocated over the audit period as follows:

Tax Period Ended	Tax amount asserted due
2/28/97	\$ 48.76
5/31/97	2,492.96
8/31/97	3,788.52
11/30/97	4,328.66
2/28/98	3,301.94
5/31/98	2,727.51
8/31/98	2,720.49
Total	\$19,408.84

The Division also issued a Notice of Determination dated March 9, 2000 against petitioner asserting additional petroleum business tax due of \$9,640.00 plus interest and penalty. The petroleum business tax asserted due was allocated over the audit period as follows:

Tax Period Ended	Tax amount asserted due
8/31/97	\$1,783.32
11/30/97	1,117.62
2/28/98	2,724.21
5/31/98	4,014.95
Total	\$9,640.00

In addition, the Division issued a Notice of Determination dated March 9, 2000 against petitioner asserting additional motor fuel tax due of \$5,350.32 plus interest and penalty. The motor fuel tax asserted due was allocated over the audit period as follows:

Tax period ended	Tax amount asserted due
8/31/97	\$1,019.04
11/30/97	638.64
2/28/98	1,492.72
5/31/98	2,199.92
Total	\$5,350.32

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that petitioner did not maintain adequate sales records such as cash register tapes or cash receipts related to the actual motor fuel and cigarette sales transactions at issue. Rather, petitioner estimated its sales of cigarettes and motor fuel. Accordingly, the Administrative Law Judge concluded that the Division's auditors were entitled to resort to an estimate of petitioner's sales, as long as they selected an audit method reasonably calculated to reflect the sales and use taxes due (*see, Matter of Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75).

The Administrative Law Judge found that the auditor's careful review of petitioner's shift sheets or cash out sheets provided a reasonable basis for calculating petitioner's sales of motor fuel, and that the auditor's determination that petitioner had not substantiated that tax had been paid on 65,799 gallons of fuel was reasonable. Accordingly, the Administrative Law Judge concluded, the burden of proof was on petitioner to show, by clear and convincing evidence, that

the result of this audit of its fuel sales was unreasonably inaccurate or that the amount of tax assessed was erroneous.

The Administrative Law Judge noted that petitioner failed to produce any evidence to support its allegation that it had paid tax on deliveries of motor fuel which it claimed were arranged by its landlord or that it had paid tax on diesel fuel which it alleged the auditor had erroneously included in his calculation of 65,799 gallons of fuel on which tax was not paid. The Administrative Law Judge found that the unsworn statement³ of Mr. Adyin, dated March 25, 2002, fell far short of meeting this substantial evidentiary burden (*see, Matter of Center Moriches Monument Co. v. Commissioner of Taxation & Fin.*, 211 AD2d 947, 621 NYS2d 720). Furthermore, the Administrative Law Judge rejected petitioner's submission of a photocopied one-page letter, which petitioner sought to submit after the record had been closed to further evidence (*see, Matter of Ronon*, Tax Appeals Tribunal, October 24, 2002). Moreover, the Administrative Law Judge found the fact even if petitioner had been sent a letter by the Division of Tax Investigations to appear at the Attorney General's Office concerning its books and records related to its motor fuel tax obligations, that did not prove that petitioner paid tax on deliveries of approximately 45,000 gallons of fuel it asserted was arranged by its landlord. The Administrative Law Judge noted that petitioner's failure to even specify its landlord's name anywhere in the record as characteristic of the complete lack of any proof of its primary allegation, that tax had been paid on approximately 45,000 gallons of fuel. In addition, the Administrative Law Judge found most telling the fact that in the supporting schedules of

³The record had been left open at the close of hearing to give petitioner's representative an opportunity to obtain an affidavit from Mr. Adyin to be placed in evidence (*see*, Hearing Tr., pp. 120-122). Instead of an affidavit, petitioner submitted an unsworn statement.

petitioner's accountant, there is no listing of any supplier other than the three noted above in Footnote "1." If, in fact, petitioner received approximately 45,000 gallons of fuel from a supplier arranged by its landlord, the Administrative Law Judge found that the accountant's own schedule undermines this allegation.

The Administrative Law Judge also rejected petitioner's argument that the auditor incorrectly calculated sales and use tax due on a tax base which included petroleum business tax. The Administrative Law Judge noted that pursuant to Tax Law § 1111(k), petroleum business tax is required to be included in the calculation of "[r]eceipts subject to tax."

Petitioner's contention that the assessment of sales tax due on its cigarette sales was a retaliatory action by the auditor because it would not agree to pay additional tax due on its motor fuel sales was also rejected by the Administrative Law Judge. Rather, the Administrative Law Judge found that the record clearly establishes that the auditor proceeded with complete professionalism. The Administrative Law Judge found that the auditor's calculation of additional tax due on petitioner's cigarette sales using the State's published Minimum Retail Cigarette Prices was a reasonable methodology. In fact, the Administrative Law Judge noted, the auditor gave petitioner the benefit of accepting the amount of its purchases of cigarettes as claimed and did not seek to estimate petitioner's sales of other taxable items, such as soda and candy, which apparently were not reported at all.

Finally, the Administrative Law Judge found that petitioner had not established that its failure to pay tax was due to reasonable cause and not due to willful neglect. In establishing reasonable cause, the taxpayer faces an onerous task (*see, Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained why the task is onerous as follows:

By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted] (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed Matter of MCI Telecommunications Corp. v. Tax Appeals Tribunal*, 193 AD2d 978, 598 NYS2d 360).

The Administrative Law Judge noted that petitioner's emphasis on the percentage of underpayment, i.e., that it was not a high percentage, did not provide a basis to abate penalties in light of the fact that petitioner based its reporting and payment of tax due by merely *estimating* the amount of tax due. The Administrative Law Judge pointed out that in considering the abatement of penalties, one of the most important factors to be taken into account is the taxpayer's efforts to comply with its obligations under the Tax Law (*see, Matter of Northern States Contr. Co.*, Tax Appeals Tribunal, February 6, 1992). The Administrative Law Judge found that *estimating* one's tax liabilities does not reflect sufficient efforts to comply with obligations under the Tax Law. Moreover, the Administrative Law Judge noted, there is no way for petitioner to get around the fact that the auditor discovered, in the course of his audit, that petitioner did not have sufficient tax paid invoices to support the volume of motor fuel it had been selling.

Accordingly, the Administrative Law Judge denied the petitions of A & A Service Station, Inc. and sustained the notices of determination.

ARGUMENTS ON EXCEPTION

Petitioner on exception makes the same arguments as were presented below. Petitioner disagrees with the conclusion of the Administrative Law Judge that it did not maintain adequate sales records such as cash register tapes or cash receipts relating to cigarette and motor fuel

sales. Petitioner urges that its shift sheets described above are adequate for computing the tax. Petitioner also disagrees with the conclusion that it failed to substantiate that it had paid tax on 65,799 gallons of motor fuel. Petitioner claims that delivery of this gallonage was arranged by his landlord and should not be attributable to petitioner (*see*, Exception, p. 4, ¶ 8). Petitioner contends, as it did below, that it complained to the Division in the fall of 1998 that its landlord had delivered approximately 45,000 gallons of fuel without any documentation, and that it paid both the New York State excise tax and the petroleum business tax to the supplier. Further, petitioner claims that the auditor ignored, during audit, the bills of lading covering movement of 29,201 gallons of diesel fuel. According to petitioner, the Division, by including petroleum business tax in the tax base, incorrectly calculated sales and use tax due on the 65,799 gallons of fuel.

Petitioner continues to argue that the Division assessed additional sales and use tax on its cigarette sales as retaliation for its refusal to agree to pay additional tax on its motor fuel sales.

According to petitioner, its tax returns accurately reflect taxable sales, and petitioner believed it had every reasonable basis for not paying the taxes contained in the notices of determination. Further, petitioner contends that penalties should be reserved for willful avoidance of taxes, and that the assessments at issue were not based upon petitioner's willful disregard for paying total taxes due.

The Division counters that petitioner's books and records were inadequate and that the audit method adopted was reasonably calculated to determine petitioner's tax liability. It points out that the auditor used the actual sales figures (in dollars) recorded on the company's shift sheets. Further, the Division maintains that, petitioner had no documentation to prove that the

motor fuel excise tax and petroleum business tax were paid on 65,799 gallons of fuel. The Division also notes that under Tax Law § 1111(k), the petroleum business tax must be included in petitioner's tax base when calculating sales tax due.

The Division argues that the auditor's method of calculating sales tax due on petitioner's cigarette sales was reasonable. The auditor used petitioner's own records of cigarette purchases and marked up the purchase prices to reflect the minimum allowable retail prices. The Division rejects petitioner's claim that its audit of petitioner's cigarette sales was in any way retaliatory. Finally, the Division argues that penalties should be sustained because petitioner failed to maintain verifiable books and records sufficient to compute its tax liability and relied on estimates, rather than records, to determine its tax due.

OPINION

The record establishes that petitioner sold more motor fuel than it had allegedly purchased, did not maintain adequate books and records of its purchases or sales, and estimated the tax due to the State of New York. Petitioner's allegations notwithstanding, it failed to come forward at hearing with evidence sufficient to carry its burden of proof. We, therefore, affirm the determination of the Administrative Law Judge for the reasons stated therein. The Administrative Law Judge thoroughly and correctly addressed each of the issues raised by petitioner. Petitioner has raised no argument on exception that would justify our modifying the determination below in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of A & A Service Station, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of A & A Service Station, Inc. are denied; and
4. The Notice of Determination dated March 6, 2000 and the two Notices of Determination dated March 9, 2000 are sustained.

DATED: Troy, New York
February 5, 2004

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner