

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
MAX SERVICE CENTER	:	DETERMINATION
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.	:	

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Petitioner, Max Service Center, c/o N. Cankurt, 27 St. Stephens Lane, Scotia, New York 12302, filed a 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).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, W. A. Harriman State Office Campus, Albany, New York, on March 16, 1987 at 1:15 P.M., with all briefs to be submitted by July 31, 1987. Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (Kathleen D. Kalwa, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Arnold Glass, Esq., of counsel).

ISSUE

Whether the assessment of additional sales tax against petitioner based on the results of an Audit Division office audit should be sustained.

FINDINGS OF FACT

1. 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.

2. On February 2, 1983, the Audit Division 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. There was no response to this request. Thereafter, on March 7, 1983, a second request was sent to petitioner for the same information. 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. 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. 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."

3. The Audit Division, in a desk audit, compared the information concerning petitioner's business, as supplied on the returned questionnaire, with records in possession of the Audit Division, specifically a computer printout from Mobil Oil Company (petitioner's supplier) indicating the volume and dollar amount of petroleum products purchased by petitioner from Mobil. This comparison revealed a higher number of gallons of gasoline purchased from Mobil than was reported on the questionnaire returned by petitioner. The Audit Division also compared petitioner's selling prices, as reported 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. Finally, the Audit Division noted that total sales per petitioner's Federal partnership returns were different (higher) than the amount of sales reported on petitioner's sales tax returns.

4. The Audit Division, after noting the above discrepancies, determined to recompute petitioner's tax liability. The Audit 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 Audit Division took an average of the volume of gallons purchased by petitioner in the two prior years, 1980 and 1981. Thereafter, the Audit 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.

5. In addition to the above computation, the Audit 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.

6. On April 29, 1983, the Audit 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 Audit Division as detailed above.

7. Petitioner's method of preparing sales tax returns during the periods in issue was to total all checkbook deposits plus credit card receipts to arrive at total sales. Thereafter, petitioner deducted amounts for sales not subject to tax, consisting of New York State motor vehicle inspections and sales to nontaxable entities (e.g. sales to the City of Cohoes), to arrive at taxable receipts including sales tax. Thereafter, this figure was divided by 1.07 to remove sales tax included therein and arrive at taxable sales.

8. As a Mobil franchisee, petitioner's invoices from Mobil included amounts for rent payable to Mobil based on the amount of gasoline purchased by petitioner. Petitioner's credit card sales were turned over to Mobil in payment of rent due and gasoline purchased from Mobil. Any balance due to Mobil not covered by credit card sales was paid to Mobil by petitioner.

9. Petitioner requested records from Mobil to dispute the computer printout utilized by the

Audit Division. Petitioner received invoices from Mobil, and attempted to match such invoices to petitioner's records. Certain of the invoices could not be matched to any record of payment by petitioner. Petitioner submitted at hearing those invoices for which it had a record of payment. Petitioner does not claim that such invoices were the only invoices Mobil sent, but rather were the only invoices for which petitioner could match records of payment.

10. Petitioner could not specifically explain why the printout from Mobil indicated a higher number of gallons purchased than petitioner could show payment and purchase of by its records. Petitioner ordered gas approximately every three days, but at times petitioner's sales were not sufficient to have reduced its underground tanks to a level which would accommodate a full delivery by Mobil. Accordingly, petitioner at times cancelled deliveries previously called in to Mobil. Petitioner believes that these deliveries, originally ordered but not in fact made, may have appeared on the Mobil printout and may be the reason why such printout would indicate a greater volume of purchases than petitioner could verify.

11. In addition to the foregoing, petitioner produced records at the hearing, specifically, repair invoices sequentially numbered, which reflected every repair service performed by petitioner. As brought out by the testimony of one of petitioner's partners, as well as by the invoices of repair sales, a major portion of petitioner's "repair" services consisted of providing New York State inspections. Part of the reason for performing a high volume of inspections was that the station located next door to petitioner was primarily a repair station which, for a period of time during the audit period, had lost its New York State inspection license. This station continued to perform repair work, but referred numerous customers to petitioner for the purpose of performing inspections.

12. At hearing, petitioner's counsel pointed out certain errors in the audit computations. One such error involved transposition of the average gallonage per quarter for 1981 to 1980, and that for 1980 to 1981, in transposition of the two gallonage totals. It was pointed out that such transposition in conjunction with the application of the statewide average selling price (which increased in 1981) resulted in an erroneous overcalculation of the assessment. By its brief, the

Audit Division concedes the point raised by petitioner and supplied a recalculation eliminating the aforementioned transposition, the effect of which is to reduce the assessment at issue from \$62,652.38 to \$59,739.90, plus penalty and interest thereon.

13. In addition to the foregoing, petitioner also notes that while the Audit Division determined a 3.2 cents per gallon differential between the statewide average selling price and petitioner's selling price for gasoline, the audit calculations increased petitioner's selling price per gallon by 3.2 percent rather than by 3.2 cents per gallon. Inasmuch as the selling price exceeded one dollar per gallon, petitioner notes that using 3.2 percent results in an incorrect overcalculation of the assessment.

14. There is no evidence that petitioner maintained cash register tapes during the period in question, and it was admitted that petitioner did not take daily pump readings.

#### CONCLUSIONS OF LAW

A. That given the results of comparing the information supplied by petitioner on the filling station questionnaire, submitted as an accurate reflection of information contained in petitioner's books and records, with information in the Audit Division's possession, it was reasonable for the Audit Division to have concluded that petitioner's returns were incorrect as filed. Therefore, the Audit Division was permitted to determine an assessment of tax against petitioner based upon the use of external indices and information available, herein specifically the computer printout of purchases from petitioner's gasoline supplier. In turn, it is petitioner's burden to show error in the methods and/or results of the Audit Division's calculations (Matter of Chris Curcio d/b/a C & S Service Station, State Tax Commn., February 24, 1987).

B. That based on the evidence presented, petitioner has not borne the burden of proving that the computer printout of gallonage as supplied by Mobil was inaccurate. It is noted that invoices for gasoline purchases exist in addition to those for which petitioner had a record of payment. No evidence of Mobil's record of payments as received from petitioner was produced in evidence, and it is entirely possible that payments were made by petitioner other than through its checkbook. Accordingly, the Audit Division's use of the amount of gallonage reflected on the

computer printout of Mobil's records is accepted. However, the result thereof is concededly to be reduced based on the Audit Division's transposition of amounts in applying the gallonage per quarter, as noted in Finding of Fact "12". In addition, the Audit Division is directed to recalculate its determination of additional taxable gasoline sales by utilizing a basis of 3.2 cents per gallon in excess of the then statewide selling price, rather than 3.2 percent of such price. Petitioner's other assertions offered to explain the discrepancies in gasoline purchases and sales were unsubstantiated by the evidence adduced at hearing.

C. That petitioner has borne the burden of proving that the portion of the assessment relating to repair sales, based on the Audit Division's office standard of 38 percent of gasoline sales, is erroneous. Petitioner's submission in evidence of sequentially-numbered repair invoices indicating thereon the nature of each repair, the dollar amount thereof and other information is sufficient to warrant cancellation of the portion of the assessment based on repair sales.

D. That the petition of Max Service Center is granted to the extent indicated in Conclusions of Law "B" and "C" and the Audit Division is directed to recalculate the assessment accordingly; the petition, however, is in all other respects denied; and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated April 29, 1983, as recalculated and reduced in accordance herewith, is sustained.

DATED: Albany, New York  
October 16, 1987

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ADMINISTRATIVE LAW JUDGE