

STATE OF NEW YORK
DIVISION OF TAX APPEALS

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. :

In the Matter of the Petition :
of :
PETER 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. :

DETERMINATION

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. :

Petitioner Cor Brothers Service Station, Inc., 167 Lakeville Road, New Hyde Park, New York 11040, 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 December 1, 1978 through August 31, 1984 (File Nos. 800930, 801553 and 801721). Petitioner Peter Corapi, Officer of Cor Brothers Service Station, Inc., 167 Lakeville Road, New Hyde Park, New York 11040, 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 December 1, 1978 through August 31, 1984 (File Nos. 800928, 801554 and 801730).

Petitioner, Domenico Corapi, Officer of Cor Brothers Service Station, Inc., 167 Lakeville Road, New Hyde Park, New York 11040, 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 December 1, 1978 through August 31, 1984 (File Nos. 800929, 801561 and 801719).

A consolidated hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 27, 1987, at 9:15 A.M., with all briefs and supplemental documentation to be submitted by November 30, 1988. Petitioners appeared by Eugene T. White, Esq. The Audit Division appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUES

- I. Whether the records of Cor Brothers Service Station, Inc., were incomplete or insufficient, thus authorizing the Division of Taxation to estimate petitioners' taxes.
- 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

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

The Audit

2. An audit of the corporation's books and records for the period December 1, 1978 through November 30, 1981 was conducted as follows:
 - (a) It was determined that the corporations' records were inadequate for the following

reasons:

(i) Gasoline purchases reported by petitioner's 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 discarded copies of sales invoices a few weeks after sale.

(b) Gasoline purchases of \$2,848,749.03 (including 4 cents per gallon Federal excise tax) reported by Getty were marked up 10%, based on office experience, resulting in total audited tax taxable gasoline sales of \$3,133,623.94. Taxable sales reported for the period December 1, 1978 through November 30, 1981 were \$1,715,726.00. Thus, additional taxable gasoline sales were computed at \$1,417,897.94.

(c) Repair sales were estimated at \$2,500.00 per week for each of two bays based on office experience with similar operations to arrive at audited repair sales of \$780,000.00.

(d) Total additional taxable gasoline and repair sales for the period were found to be \$2,197,897.94 and additional sales tax due was \$154,223.06.

(e) The auditor recommended that the audit period be extended, as it appeared the understatements continued through the period ending August 31, 1982.

3. A follow-up audit for the period March 1, 1981 through August 31, 1981 was conducted as follows:

(a) No additional books and records were examined by the auditor. The auditor's checklist for "Records Available During Audit" and list of "Records Requested Not Made Available" was not completed but bears the notation "all audit work was based upon the prior audit thus no additional records were examined."

(b) Taxable gasoline purchases per the third party verification from Getty for the period March 1, 1981 through August 31, 1981 were marked up 10% yielding adjusted taxable gasoline sales of \$606,509.23 (again the gasoline purchase prices used included the Federal excise tax of 4 cents per gallon.)

(c) 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.

(d) 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.

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

4. 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 an 82.64 percentage of error was found. This was applied to taxable sales reported for the period September 1, 1981 through August 31, 1982 resulting in taxable gasoline sales of \$1,287,174.00 (effective September 1, 1982 gasoline sales were no longer subject to tax and 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 have 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.

5. 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.

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

(a) On December 20, 1983 similar 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, a notice was 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 in fraud penalty and \$15,727.65 in interest, for a total of \$68,602.12.

(c) On December 20, 1984, a notice was 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 in fraud penalty and \$27,780.78 in interest, for a total amount due of \$174,516.90.

Business Operations

7. Petitioners operated the station at issue since 1973. 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 opened does not appear in the record.

8. While petitioners Peter and Domenico Corapi were mechanics, they also pumped gasoline. Neither spent all of his working time at the station as a mechanic.

9. 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. Both Peter and Domenico Corapi owned 50% of the issued and outstanding stock of the Corporation.

10. The corporation paid for gasoline on a C.O.D. basis, by credit card slips signed by

their customers, with checks for the balance.

11. An auditor visited the station on October 26, 1981 and observed that the selling price of regular leaded gasoline was \$1.319 and the selling price of unleaded was \$1.369.

12. 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 prepared 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

13. As noted in Finding of Fact "3(b)" the auditor used a 10% 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."

14. The "Gasoline Station Inspection 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 cents for regular and 13.1 cents per gallon or 11.3 percent for unleaded.

The Third Party Verification

15. 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: Petitioner 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 deliver of product every day of the month."

The printout, however, shows 38,061 gallons of premium and 52,086 of unleaded for said month, a total of 90,147. 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 six other purchases reported by Getty as 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 (petitioner seems to be alluding to the figure of 196,992 monthly total which includes the 98,496 gallons twice, versus a purchase, than for category "other" (product code 999) which applies to 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 4 deliveries as unaccounted for.

16. 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 gas was lost and not sold due to the leak or defect involved.

17. 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.

CONCLUSIONS OF LAW

A. That during the period at issue, Tax Law § 1138(a)(former [1]) provided, in pertinent part, as follows:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That where a taxpayer's records are incomplete or insufficient, the Division of Taxation may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous

(Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858).

C. That Tax Law § 1135 and 20 NYCRR 533.2 require every person required to collect tax to maintain records of every sale and to make such records available for inspection and examination. The records produced by the corporation in this case were clearly incomplete (see, Finding of Fact "2[a]") and, thus, the Division of Taxation was authorized to estimate taxable sales using information available and an audit methodology reasonably calculated to reflect the taxes due (Tax Law § 1138[a]; Matter of Grant Co. v. Joseph, 2 NY2d 196, 206, cert denied 355 US 869).

D. That although it was permissible for the Division of Taxation to estimate taxes in this case, the methodology used was unreasonable in several respects:

(1) It was improper to extend the audit without an examination of petitioners' books and records for the quarters March 1, 1981 through August 31, 1982. As noted in Findings of Fact "3" and "4", no additional books and records were examined and "all audit work was based upon the prior audit". It appears that there was no actual request for petitioners' books and records for the additional audit period. Accordingly, the amounts for said periods should be cancelled (see,

Ahmed S. Ahmed d/b/a A & A Grocery Store, Tax Appeals Tribunal, November 10, 1988).

(2) As an observation test of the repair business was conducted for at least one day, August 13, 1982 (Finding of Fact "12"), it was improper to disregard the test and apply an estimate of \$2,500.00 per week for each of the two bays. Unfortunately, the observation test is not in the record. Since petitioners established that the mechanics (the petitioners themselves) also pump gas, repairs are to be reduced to \$2,600.00 per week on the basis of 1½ mechanics (or bays) at 5½ days per week with 7 chargeable hours per day at \$45.00 per hour, including parts.¹

Petitioners did not sustain their burden of proof to show that the audit was incorrect in any other respect. Petitioners clearly did not account for all of the Getty deliveries. While the payments for additional gasoline do not appear in the corporation's checkbook, petitioners could have had another checking account or could have paid by bank checks or money orders. It is noted that petitioners did not subpoena Getty records to show what the several unidentified deliveries per month actually were. For the most part, the additional deliveries can readily be isolated by review of the check register and the Getty computer printout. Moreover, the 10% markup is less than the 11.6% markup for regular and the 11.3% markup for unleaded indicated in Finding of Fact "14".

E. That the assertion of the alternative penalty in the case was unique in two respects. First, it was made after the hearing in the Division of Taxation post hearing memorandum (Finding of Fact "17"). Second, the hearing in this case and the assertion of the alternative penalty were both prior to the decision of the Tax Appeals Tribunal in the Matter of Ilter Sener d/b/a Jimmy's Gas Station, Tax Appeals Tribunal, May 5, 1988. This case sets forth guidelines for the assertion of the alternative late payment penalty after the assessment of the fraud penalty. In Sener, the Tribunal essentially held that the Division of Taxation may wait until its answer to assert the late payment penalty as an alternative, but if it does, the burden

¹The \$45.00 per hour rate is estimated based on representative charges shown as per Finding of Fact "11".

of proof remains on the Division of Taxation, as it did with fraud. This raises a question as to whether the alternative penalty may be pleaded in the Division of Taxation's post hearing brief and memorandum and if so, whether petitioner should be afforded an opportunity to reopen the case to address that issue.² It is unnecessary to answer that question, however, since the Sener also cancelled the late payment penalty under facts quite similar to those in this case (i.e. a gasoline station with third party verification) on the basis that the Division of Taxation did not sustain its burden of proof to show that petitioners' failure to pay tax due was because of willful neglect and not to reasonable cause. In view of the similarities between the instant case and Sener, the Division of Taxation has not sustained its burden of proof as to the late payment penalty. Accordingly, all penalties are hereby cancelled.

F. That petitioner Domenico Corapi did not sustain his burden of proof to show that he was not a person required to collect tax on behalf of the corporation pursuant to Tax Law §§ 1131(1) and 1133(a). Domenico Corapi was a half owner of the corporation, an officer, he signed checks on the corporate checking account, and was on the premises on a day-to-day basis. He must have been aware of the discrepancy between reported gasoline sales and the gasoline purchases from Getty and cannot absolve himself from liability.

G. That the petitions of Cor Brothers Service Station, Inc. and Peter Corapi and Domenico Corapi, as officers, are granted to the extent set forth in Conclusions of Law "D" and

²Review of Federal income tax cases under Internal Revenue Code § 6214(a) indicates that the United States Tax Court has jurisdiction to determine a greater deficiency if claim therefor is made on or before a hearing or rehearing. The term "hearing" or "rehearing" indicates the whole proceeding, right down to the entry of the final decision (H.F. Campbell Co., 54 TC 1021).

"E" and except as so granted, the petitions are denied and the notices of determination and demand for payment of sales and use taxes due are otherwise sustained.

DATED: Albany, New York

ADMINISTRATIVE LAW JUDGE