

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
UTOPIA 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, 1981	:	
through August 31, 1982.	:	

Petitioner, Utopia Service Center, 181-05 Horace Harding Boulevard, Flushing, New York 11365, 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, 1981 through August 31, 1982 (File No. 801361).

A hearing was held before Daniel J. Ranalli, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on December 7, 1987 at 1:30 P.M., with all briefs to be filed by March 29, 1988. Petitioner appeared by Rudolph E. Greco, Jr., Esq. The Audit Division appeared by William F. Collins, Esq. (Mark Volk, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioner's taxable sales based on information supplied by petitioner and petitioner's supplier, rather than performing a complete audit of petitioner's books and records.

FINDINGS OF FACT

1. Petitioner, Utopia Service Center ("Utopia"), was a gasoline service station located at 181-05 Horace Harding Boulevard, Flushing, New York. Utopia sold gasoline and performed automobile inspections and repairs. It was operated as a sole proprietorship by Vincent Casella.

2. A desk audit of Utopia was conducted by the Central Office Audit Bureau. The records available to the auditor were: a Filling Station Questionnaire completed by Utopia's accountant,

Herbert Grodin; Mr. Casella's 1982 Resident Income Tax Return, including a copy of Federal Schedule C; purchase verification records for 1981 and 1982 obtained from Utopia's gasoline supplier, Mobil Oil Corporation ("Mobil"); Utopia's sales tax returns for the audit period; and a schedule of statewide average retail selling prices of regular gasoline prepared by the Miscellaneous Tax Section of the Division of Taxation.

3. The Filling Station Questionnaire contained the following declaration above Mr. Grodin's signature: "I/We certify that the information provided in this questionnaire accurately reflects the books and records of the business described here on [sic]."

4. To determine the accuracy and correctness of Utopia's filed sales tax returns, the auditor attempted to reconcile various information found on the documents described above.

(a) On the Filling Station Questionnaire, Utopia reported purchasing 75,000 gallons of gasoline from Mobil in December 1981. The Mobil purchase verifications showed that Utopia purchased an average of 78,000 gallons of gasoline per month in 1981. On the same questionnaire, Utopia reported that the amount paid for all gasoline purchases in December 1981 was \$98,747.12, while Mobil reported the same information as \$94,341.00.

(b) According to the questionnaire, Utopia had total gross sales in the quarterly period ended February 28, 1982 of approximately \$303,000.00 and had no tax exemption certificates on file. On its sales tax return for the period ended May 31, 1981, Utopia reported taxable sales and services of \$167,055.00.¹

(c) As reported on the questionnaire, Utopia's average selling price of gasoline (i.e., all grades of gasoline at both self-service and full service pumps) was \$1.325 per gallon, compared with the statewide average price of regular gasoline of \$1.277 per gallon.

(d) On his 1982 Federal Schedule C, Mr. Casella reported gross receipts from Utopia of \$1,096,615.00. The auditor took three-quarters of this amount to reflect the nine months

¹No reason was given for the comparison of different quarters. For the quarterly period ended February 28, 1982, Utopia reported taxable sales and services of \$217,440.00.

included in the sales tax period December 1, 1981 through August 31, 1982, arriving at a total of \$822,461.00. She compared this figure with Utopia's reported taxable sales of \$620,555.00 for the period December 1, 1981 through August 31, 1982, as shown on its New York State sales tax returns. The comparison disclosed a discrepancy of \$202,206.00.

5. Because of the disparities disclosed by her examination of the various documents filed on behalf of Utopia, the auditor deemed Utopia's sales tax returns to be incorrect and its books and records to be inadequate to verify Utopia's actual sales. Therefore, the auditor determined the amount of tax due from Utopia on the basis of information available to her.

(a) Mobil's purchase verifications were used to calculate Utopia's average quarterly gasoline purchases. For the period March 1, 1981 through November 30, 1981, it was determined that Utopia purchased an average of 183,381 gallons of gasoline per quarter. For the period December 1, 1981 through August 31, 1982, it was determined that Utopia purchased an average of 212,358 gallons of gasoline per quarter.

(b) The auditor determined that Utopia's average gasoline selling price was approximately three percent higher than the statewide average selling price of regular gasoline (see Finding of Fact "4[c]"). To determine Utopia's average taxable gasoline selling price for each quarterly period, she increased the statewide average selling price for a gallon of regular gasoline by three percent and reduced the result to adjust for excise taxes and State sales tax included in the selling price.

(c) Utopia's average taxable gasoline selling price (as calculated above) was applied to average gallons of gasoline purchased each quarter to determine audited gasoline sales.

(d) The auditor increased audited gasoline sales by seven percent to determine Utopia's total audited sales. The seven percent figure was calculated from Utopia's Filling Station Questionnaire which showed that seven percent of Utopia's total sales were of sales other than gasoline.

(e) The applicable sales tax rate was applied to audited taxable sales to determine sales tax due per quarter. Sales tax paid by Utopia was subtracted from sales tax due to determine total

tax due of \$27,811.04.

6. On April 26, 1984, the Audit Division issued to Utopia a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1981 through August 31, 1982, assessing tax due in the amount of \$27,811.04 plus penalty and interest.

7. When preparing the Filling Station Questionnaire, Utopia's accountant did not calculate the information requested from Utopia's books and records. Instead, he supplied information which he estimated based on his familiarity with those books and records.

8. Mr. Casella recorded Utopia's daily business transactions on daily sheets, where he entered gasoline meter readings at the beginning and end of each day and the pump price of each grade of gasoline. The accountant summarized information from the daily sheets and transcribed the summaries in a general ledger which was used as a basis for determining sales tax due.

9. Twelve other gasoline service stations operated in an eight-block area in the vicinity of Utopia. There were so many stations on Horace Harding Boulevard that it was referred to as "Gasoline Alley".

10. Because of financial hardships experienced by Utopia, it received rent adjustments from Mobil in January 1982 and July 1983. To obtain approval for these adjustments, Utopia's Mobil sales representative prepared a Service Station Operating Analysis for each of those months. The two analyses provide the following pricing information:

	<u>January 1982</u>		<u>June 1983</u>	
	<u>Full</u> <u>Service</u>	<u>Self</u> <u>Service</u>	<u>Full</u> <u>Service</u>	<u>Self</u> <u>Service</u>
Premium	149.9	147.9	146.9	---
Regular	134.9	129.9	126.9	---
Unleaded	139.9	137.9	131.9	---

11. The statewide average selling price of gasoline referred to in reference to the audit of Utopia is calculated by the Miscellaneous Tax Section from a quarterly survey of service stations throughout New York State. The price referred to is the price of regular gasoline including all taxes.

12. For the quarterly period ended February 28, 1982, the average statewide selling price

of regular gasoline was \$1.353. For the quarterly period ended August 31, 1983, the average statewide selling price of regular gasoline was \$1.298.

13. On its Filling Station Questionnaire, Utopia reported the following gasoline selling prices on February 18, 1984:

<u>Grade</u>	<u>Self-Service</u>	<u>Full Service</u>
Regular	119.9	123.9
Unleaded	127.9	131.9
Super	143.9	147.9

14. On at least one occasion after the notice of determination was issued, Mr. Grodin requested that the Audit Division conduct a complete audit of Utopia's books and records. Such an audit was not conducted.

CONCLUSIONS OF LAW

A. Utopia first argues that the Audit Division was prohibited from assessing any tax before conducting a complete audit of Utopia's books and records. It is true that a taxpayer who maintains records from which the exact amount of tax can be determined has a right to expect that those records will be used to determine his tax liability (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 46). However, the record establishes that the Audit Division had a reasonable basis for its determination that Utopia's books and records were not adequate for the purpose of verifying its taxable sales and the tax due on those sales. Most significantly, there was a disparity between taxable sales, as reported on Utopia's sales tax returns, and gross sales, as reported on the Filling Station Questionnaire completed by Utopia's accountant. The discrepancy could not be explained by the difference between Utopia's taxable and nontaxable sales, as the questionnaire indicated that Utopia had no tax exempt sales. The auditor found other discrepancies as well, and on the basis of those discrepancies reasonably concluded that Utopia's books and records were inadequate to verify reported taxable sales; therefore, the auditor was not required to perform an item by item analysis of those books and records (Matter of Korba v. New York State Tax Commn., 84 AD2d 655).

Utopia's accountant testified that he estimated the information provided in the Filling

Station Questionnaire because he did not realize the significance that would be attached to his answers. Nevertheless, he signed a declaration certifying that the information provided accurately reflected Utopia's books and records, and the Audit Division was entitled to rely on that certification. Utopia contends that it was denied an adequate opportunity to challenge the tax assessment by the Audit Division's decision not to conduct a complete audit of Utopia's records. That position is untenable. At hearing, Utopia was given the opportunity to present any evidence it wished to present in its own behalf.

B. Where, as here, a taxpayer's records are found to be insufficient to verify reported taxable sales, the Audit Division is required to determine the amount of tax due from such information as may be available; if necessary, the tax may be estimated on the basis of external indices (Tax Law § 1138[a][1]; *Matter of Carmine Restaurant v. State Tax Commn.*, 99 AD2d 581). The Audit Division must select a method of computing tax due which is reasonably calculated to reflect the taxpayer's actual tax liability. The audit method used here, essentially the application of selling prices to purchases, was such a method; therefore, the burden rested on Utopia to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858).

Primarily, Utopia argued that a thorough analysis of its books and records would establish the accuracy of its sales tax returns, but none of those books and records were offered into evidence; therefore it did not carry its burden of proof in this regard. In addition, Utopia challenged the accuracy of the Mobil purchase verifications and the gasoline selling prices used by the Audit Division. It presented no evidence regarding the purchase verifications. It did establish that at various times its selling price of regular gasoline was slightly less than the statewide average selling price of regular gasoline. However, it has not established that it is entitled to an adjustment on this basis. The Audit Division selected the lowest priced of three grades of gasoline to determine an average statewide selling price. It then compared Utopia's average selling price of three grades of gasoline with the statewide average price of regular

gasoline. It was not unreasonable for the Audit Division to conclude on the basis of that comparison that Utopia's average selling price for all grades of gasoline was approximately three percent higher than the statewide average selling price of regular gasoline. Evidence of actual selling prices presented by Utopia does not contradict the Audit Division's conclusion. The results obtained by the Audit Division's methodology are not exact, but exactness is not required where the taxpayer's faulty recordkeeping prevents it (*Matter of Day Surgicals v. State Tax Commn.*, 97 AD2d 865).

C. The petition of Utopia Service Center is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on April 26, 1984 is sustained.

DATED: Albany, New York
April 14, 1988

ADMINISTRATIVE LAW JUDGE