

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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. :

DETERMINATION
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 a petition 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 and 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, 1996 through August 31, 1998.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, New York State Office Building, Hauppauge, New York, on March 14, 2002 at 10:30 A.M., with all briefs to be submitted by September 13, 2002, which date began

the six-month period for the issuance of this determination. Petitioner appeared by Thomas P. Murray, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel).

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 penalties should be abated if additional taxes are determined due.

FINDINGS OF FACT

1. 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.

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.

2. 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 |

3. 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 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 in Finding of Fact “2”, 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.

4. 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.

5. 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.

6. 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 |

7. 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 |

8. As noted in Finding of Fact “1”, petitioner operated a small store which sold cigarettes, newspapers, soda, candy and other sundry items. Nonetheless, as noted in Finding of Fact “2”, petitioner reported only cigarette sales on its sales and use tax reports. Further, its cigarette sales were not based upon sales 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.

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.

9. 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 |

10. 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 |

SUMMARY OF THE PARTIES' POSITIONS

11. Petitioner claims it was “an unsuspecting victim of an activity between his landlord and a wholesaler, Star Terminal” (petitioner’s letter brief, p. 2). It contends 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 NY State excise tax and the Petroleum Business tax to the supplier” (petitioner’s reply letter brief, p. 7). Further, it claims that the auditor ignored during audit the “bills of lading covering movement of 29,201 gallons” of diesel fuel (petitioner’s letter brief, p. 4). 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. In addition, petitioner asserts 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. Since its tax returns “accurately reflect taxable sales,” petitioner believed it “had every reasonable basis for not paying the taxes contained in these proposed assessments” (petitioner’s letter brief, p. 6). 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” (petitioner’s reply letter brief, p. 8).

12. The Division counters that its audit method 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" (Division's brief, p. 11), and asserts that petitioner "has no documentation to prove that the [motor fuel excise tax and petroleum business tax] were paid on 65,799 gallons of fuel" (Division's brief, p. 16). Further, according to the Division, 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; he used petitioner's records of cigarette purchases and marked up the purchase prices to reflect the minimum allowable retail prices. The Division rejects any claims that its audit of petitioner's cigarette sales was retaliatory. It maintains that the audit was simply conducted in segments. Finally, the Division argues that penalties should be sustained because petitioner "failed to maintain records sufficient to compute tax liability and relied on estimates, rather than records to determine its tax" (Division's brief, p. 19).

CONCLUSIONS OF LAW

A. Every person required to collect sales tax must maintain records sufficient to verify all transactions, in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a][1]). As noted in Findings of Fact "3" and "8", petitioner did not maintain 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 by marking up its purchase invoices by a certain percentage. In the case of motor fuel sales, it multiplied the quantity of fuel shown purchased on its invoices by an estimate of its per gallon selling price for the respective categories of fuel. Consequently, the auditor's right to resort to an estimate of petitioner's sales, as long as he selected an audit method reasonably calculated to reflect the

sales and use taxes due, remains unassailable (*see, Matter of Grant v. Joseph*, 2 NY2d 196, 204, 159 NYS2d 150, 157, *cert denied* 355 US 869).

B. The careful review by the auditor of petitioner's shift sheets or cash out sheets, as detailed in Finding of Fact "6" provided a reasonable basis for calculating petitioner's sales of motor fuel. Consequently, since the auditor's determination that petitioner had not substantiated that tax had been paid on 65,799 gallons of fuel was reasonable, the burden of proof is 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 (*Matter of Sarantopoulos*, Tax Appeals Tribunal, February 28, 1991).

C. 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 unsworn, brief statement of Mr. Aydin dated March 25, 2002, submitted after the hearing, fell far short of meeting this fairly substantial evidentiary burden (*see, Center Moriches Monument Co. v. Commr. of Taxation & Fin.*, 211 AD2d 947, 621 NYS2d 720). Furthermore, the photocopy of a one-paged letter, which petitioner sought to submit after the record had been closed to further evidence, may be accorded no weight. As the Tax Appeals Tribunal emphasized in its recent decision in *Matter of Ronon* (October 24, 2002):

We have held that a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not helpful towards that end and does not provide an opportunity for the adversary to question the evidence on the record [citations omitted].

Moreover, the fact that petitioner might have 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 certainly does not prove that it paid such tax on deliveries of approximately 45,000 gallons of fuel it asserted were arranged by its landlord. The fact that petitioner has never even specified its landlord's name anywhere in the record reflects the complete lack of any proof of its primary allegation, that tax had been paid on approximately 45,000 gallons of fuel which the Division now seeks to tax. In addition, most telling is the fact, as noted in Footnote "1", that in the supporting schedules of petitioner's accountant, there is no listing of any supplier other than the three noted in this footnote. If, in fact, petitioner received approximately 45,000 gallons of fuel from a supplier arranged by its landlord, the accountant's own schedule undercuts this allegation.

D. Petitioner's argument that the auditor incorrectly calculated sales and use tax due on a tax basis which included petroleum business tax is also without merit. Pursuant to Tax Law § 1111(k), petroleum business tax is required to be included in the calculation of "[r]eceipts subject to tax."

E. In addition, 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 is without any merit. Rather, the record clearly establishes that the auditor proceeded with complete professionalism in his audit of petitioner. His calculation of additional tax due on petitioner's cigarette sales by use of the State's published Minimum Retail Cigarette Prices, as detailed in Finding of Fact "9", was a reasonable methodology. In fact, he gave petitioner the benefit of accepting the amount of its purchases of cigarettes as claimed and

did not seek to estimate its sales of other taxable items, such as soda and candy, which apparently were not reported at all.

F. Finally, petitioner has not established that its failure to pay tax was due to reasonable cause and not due to willful neglect. In the words of the Tax Appeals Tribunal, in establishing reasonable cause, the taxpayer faces an “onerous task” (*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).

Petitioner’s emphasis on the percentage of underpayment, i.e., that it was not a high percentage, does not provide a basis to abate penalties in and of itself in light of the fact that petitioner based its reporting and payment of tax due merely by *estimating* the amount of tax due. The Tax Appeals Tribunal has noted on many occasions that in considering abatement of penalty the most important factor to be taken into account is the taxpayer’s efforts to comply with its obligations under the Tax Law (*e.g., Matter of Northern States Contracting*, Tax Appeals Tribunal, February 6, 1992). *Estimating* tax liabilities does not reflect sufficient efforts to comply with obligations under the Tax Law. Moreover, there is no way for petitioner to get around the fact that the auditor discovered, in the course of his careful audit, that petitioner did not have sufficient tax paid invoices to support the volume of motor fuel sold at its service station.

G. The petitions of A & A Service Station, Inc. are denied, and the Notice of Determination dated March 6, 2000 and the two notices of determination dated March 9, 2000 are sustained.

DATED: Troy, New York
December 26, 2002

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE