

STATE TAX COMMISSION

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 24, 1984 at 9:15 A.M. Petitioner appeared by Charles R. Fausel, C.P.A. The Audit Division appeared by John P. Dugan, Esq., (William Fox, Esq., of counsel).

ISSUE

Whether the audit procedures used by the Audit Division in an examination of petitioner's books and records were proper.

FINDINGS OF FACT

1. Petitioner, Americo Service Station, Inc., operated a Getty gasoline service station. Petitioner did not perform any service or repair work. The business was sold on approximately June 15, 1981.

2. On September 22, 1981, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due against petitioner covering the period June 1, 1978 through May 31, 1981 for taxes due of \$19,126.80, plus interest of \$2,442.02, for a total of \$21,568.82.

3. On audit, the Audit Division selected the period June through August, 1980 to verify taxable sales reported by petitioner. The gross sales reported for this period were \$267,026.00. The Audit Division deducted the state gasoline tax of \$15,180.56 included in that amount, as well as the sales tax of \$10,060.61, to arrive at taxable sales of \$241,785.00. Petitioner reported taxable sales of \$201,212.00 for the same period, leaving additional taxable sales of \$40,573.00 which represented an underreporting factor of 20.16 percent. The Audit Division did not employ the foregoing procedures for any other period. Instead, the error factor was applied to taxable sales reported for the audit period to determine total unreported sales of \$382,536.00 and additional taxes due thereon of \$19,126.80.

4. Petitioner did not maintain records of receipts, except for bank deposit records. Purchase invoices were not available for examination except for the period January, 1981 through May 31, 1981.

5. At a pre-hearing conference held on October 20, 1972, the Audit Division agreed to recompute taxable sales using actual gallons of gasoline purchased. The purchases were obtained from petitioner's supplier (Getty Oil). The average selling price of gasoline for each period under audit was applied to the gallons purchased to determine gross sales of \$2,252,091.00. After excluding the state gasoline tax and the sales tax, the taxable sales amounted to \$1,990,136.00 as compared to reported taxable sales of \$1,809,058.00, for a

difference of \$181,078.00. The additional taxes due were revised to \$9,053.90¹.

6. Petitioner argued that the audit methods used by the Audit Division were improper in that all the available books and records were not utilized in determining the liability.

Petitioner offered no evidence to establish that the results of the audit were in any way erroneous.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that "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" and authorizes where necessary, an estimate of tax due "on the basis of external indices" including purchases.

Although there is statutory authority for the use of a test period to determine the amount of tax due, resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which make it virtually impossible to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

B. That petitioner maintained inadequate and incomplete books and records (Finding of Fact "4"). Moreover, the analysis of gasoline sales for the period June through August, 1980 disclosed a substantial underreporting of taxable sales which further established the unreliability of petitioner's books and records. Because of petitioner's inadequate record keeping, the Audit Division's

1 The schedule recomputing the taxable sales (Exhibit G) showed a revised liability of \$11,159.20. However, there was an error in the computation for the period ending November 30, 1979 which overstated additional taxable sales by \$42,106.00.

use of a test period and markup audit as a basis for determining petitioner's liability was proper in accordance with section 1138(a) of the Tax Law (Matter of Sakran v. State Tax Commission, 73 A.D.2d 989; Matter of Chartair, Inc., supra).


If the audit method was reasonable, the burden then rests upon the taxpayer 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 Organization v. Tully, 85 A.D.2d 858). Petitioner has failed to overcome this burden of showing error.

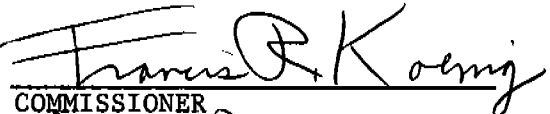
C. That the petition of Americo's Service Station, Inc. is granted to the extent that the taxes due are reduced to \$9,053.90. In all other respects the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 22, 1981 is sustained.

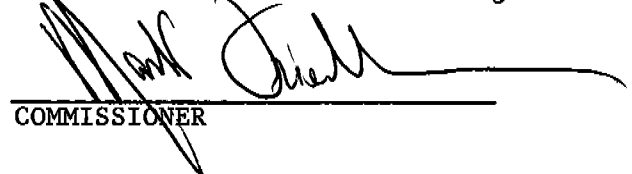
DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER