

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ROBERT CESARE :
d/b/a J & B SERVICE STATION :
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 June 1, 1975 :
through August 31, 1978. :

In the Matter of the Petition :
of :
HOSPITAL SHELL, 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 June 1, 1975 :
through August 31, 1978. :

DECISION

In the Matter of the Petition :
of :
JUST RITE TOWING, 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 June 1, 1975 :
through August 31, 1978. :

Petitioner Robert Cesare d/b/a J & B Service Station, 279 North Queens Avenue, North Massapequa, New York 11758, 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 June 1, 1975 through August 31, 1978 (File No. 36511).

Petitioner Hospital Shell, Inc., c/o Janet Cesare, President, 279 North Queens Avenue, North Massapequa, New York 11758, 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 June 1, 1975 through August 31, 1978 (File No. 36510).

Petitioner Just Rite Towing, Inc., c/o Janet Cesare, President, 279 North Queens Avenue, North Massapequa, New York 11758, 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 June 1, 1975 through August 31, 1978 (File No. 36509).

A consolidated hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 3, 1984 at 11:55 A.M. Petitioners Hospital Shell, Inc. and Just Rite Towing, Inc. did not appear nor did anyone appear on their behalf. Petitioner Robert Cesare d/b/a J & B Service Station appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined the additional sales tax due from petitioner Robert Cesare d/b/a J & B Service Station.

II. Whether a penalty asserted against petitioner Robert Cesare d/b/a J & B Service Station on the basis of fraud is proper and should be sustained.

FINDINGS OF FACT

1. During the period at issue, petitioner Robert Cesare d/b/a J & B Service Station ("petitioner") operated a Shell gasoline and service station at 2136 Hempstead Turnpike, East Meadow, New York. Petitioner had 9 pumps for

dispensing gasoline and 3 bays (2 with lifts) for servicing automobiles. Petitioner also had 2 tow trucks which were used for towing his customers' vehicles. Petitioner made no sales as J & B Service Station after August 31, 1978 and presently owns and operates a service station at 692 Jericho Turnpike, Jericho, New York.

2. In mid-1978, petitioner was in the midst of a divorce proceeding with his wife and apparently decided to divert the assets of his gasoline and service station from his control. Presumably, in order to accomplish this, in or about July, 1978, petitioner formed R. Cesare Service Station, Inc. and R. Cesare Towing Company (sic), a corporation. Originally, petitioner was president and sole stockholder of both corporations. Sometime between July, 1978 and December, 1978, R. Cesare Service Station, Inc. became Hospital Shell, Inc. and R. Cesare Towing Company became Just Rite Towing, Inc. through name changes. Janet R. Schulte, who, at a later date not specified here, became petitioner's wife, was listed as president of both corporations. After these changes occurred, petitioner had no further affiliation with the corporations either as an officer or employee.

3. On December 28, 1978, petitioner transferred the assets of his gasoline and service station (except for two tow trucks and other towing equipment) to Hospital Shell, Inc. and the two tow trucks and other towing equipment to Just Rite Towing, Inc.

4. In mid-1978, Maria Srivastava, an examiner for the Audit Division, initiated an audit of petitioner's books and records. Ms. Srivastava left State employment in August, 1978 and the case was assigned to Louis Delia. After repeated attempts to obtain an appointment from petitioner's accountant, Norman Levine, to review petitioner's books and records, an appointment was

made at the residence of petitioner's mother, 230 Fieldmere Street, Elmont, New York. Present at the meeting were Mr. Levine, petitioner and the examiner, Mr. Delia.

5. The records made available for the audit consisted of a day book and miscellaneous invoices. The day book listed sales on a daily basis. Sales were segregated into two columns, "Cash" and "Charge". At the end of each month, totals were taken which were transferred to a page in the back of the book and compiled in order to compute sales for the quarterly sales tax return and sales for income tax returns. Mr. Delia prepared a transcript of gross sales for the audit period. Gross sales per books totalled \$1,556,345.99, whereas gross sales reported on sales and use tax returns totalled \$653,436.00, a difference of \$902,909.89.

6. As a consequence of the preceding factors, the case was transferred to the Special Investigations Bureau ("S.I.B."). Richard Cantwell, a Senior Special Tax Examiner with S.I.B., completed the audit. In mid-1979, petitioner's accountant, Mr. Levine, died and presumably all books and records kept by Mr. Levine were "disposed of". Mr. Cantwell was therefore forced to use external indices to compute petitioner's tax liability.

7. Mr. Cantwell requested from Shell Oil Company ("Shell") petitioner's purchases of gasoline, oil, tires, batteries and accessories. Shell advised Mr. Cantwell that petitioner had sent a telegram instructing Shell not to release any information concerning petitioner. Therefore, Mr. Cantwell subpoenaed the required records from Shell. Mr. Cantwell applied a markup to petitioner's purchases which he felt "would protect the State's interest". Mr. Cantwell estimated repair sales based on the number of employees and the rate per hour that was posted in the station.

8. As a result of Mr. Cantwell's audit, on August 20, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Robert Cesare d/b/a J & B Service Station for taxes due of \$77,068.40, plus fraud penalty of \$35,499.31 and interest of \$31,107.41, for a total due of \$143,675.20 for the period June 1, 1975 through August 31, 1976. On the same date, the Audit Division issued similar notices to Hospital Shell, Inc. and Just Rite Towing, Inc. with the following explanation:

"The following taxes are determined to be due from Robert Cesare d/b/a J & B Service (sic) and represents (sic) your liability as purchaser in accordance with Section 1141(c) of the Sales Tax Law..."

9. On December 20, 1979, the Audit Division issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for taxes due of \$45,097.44, plus fraud penalty of \$22,548.72 and interest of \$14,959.78, for a total due of \$82,605.94 for the period September 1, 1976 through May 31, 1977. On the same date, the Audit Division issued similar notices against Hospital Shell, Inc. and Just Rite Towing, Inc. with an explanation identical to that contained on the August 20, 1979 notices.

10. Upon conclusion of the S.I.B. audit, the case was referred to the Attorney General's office for criminal prosecution. On March 6, 1980, the Nassau County Grand Jury returned a multiple count indictment against petitioner specifically charging him with Grand Larceny in the Second Degree (8 counts), Grand Larceny in the Third Degree (5 counts) and filing false New York State and Local Sales and Use Tax Returns (3 counts).

11. On March 19, 1980, petitioner was arraigned in County Court, County of Nassau, and entered a plea of "not guilty" to the above charges.

12. On July 18, 1980, petitioner withdrew his plea of not guilty to the indictment and entered a plea of "guilty" to the tenth count of the indictment

in satisfaction of the entire indictment. The tenth count charged him with Grand Larceny in the Third Degree, a Class E felony, and pertained to the sales tax quarterly period ended November 30, 1975. On September 19, 1980, petitioner was sentenced to five years probation upon the condition that he make restitution in the amount of \$35,000.00 to the New York State Department of Taxation and Finance.

13. The thirteen counts of the above indictment charging petitioner with Grand Larceny pertain to the thirteen sales tax quarterly periods of the audit period. The amount covered by the indictment was \$35,159.45. Mr. Cantwell computed this amount by taking petitioner's taxable cost of gasoline (\$1,138,063.15) and multiplying said amount by the appropriate sales tax rate to determine a sales tax due of \$82,834.26. This amount was then reduced by the sales tax reported on petitioner's sales tax returns ($\$82,834.26 - \$47,648.81 = \$35,159.45$). For purposes of this action, it was assumed that, at the very least, gasoline was sold at cost.

14. Subsequent to petitioner's guilty plea on July 18, 1980 and prior to his sentencing on September 19, 1980, petitioner presented additional books and records to Mr. Cantwell. As a result of this action, Mr. Cantwell performed a more detailed audit and, on April 20, 1981, the Audit Division issued three notices of determination and demand for payment of sales and use taxes due against petitioner. Notice number S790820173M Revised was an amendment of the notice issued August 20, 1979 and asserted a tax due of \$25,353.79, plus fraud penalty of \$12,676.89 and interest of \$15,139.96, for a total amount due of \$53,170.64 for the period June 1, 1975 through August 31, 1976. Notice number S791220352M Revised was an amendment of the notice issued December 20, 1979 and asserted a tax due of \$13,700.64, plus fraud penalty of \$6,850.32 and interest

of \$6,780.12, for a total amount due of \$27,331.08 for the period September 1, 1976 through May 31, 1977. Notice number S810420238M was in addition to the above notices and asserted a tax due of \$25,518.87, plus fraud penalty of \$12,759.42 and interest of \$9,634.16, for a total amount due of \$47,912.45 for the period June 1, 1977 through August 31, 1978.

15. The taxes now alleged to be due from petitioner total \$64,573.30. The adjustment was determined in part on an agreed upon markup on gasoline of 5 cents per gallon. Petitioner presented no evidence which could have been used to adjust the taxes determined to be due on sales of oil, tires, batteries and accessories.

16. On April 20, 1981, the Audit Division issued three (3) notices of determination and demand for payment of sales and use taxes due to both Hospital Shell, Inc. and Just Rite Towing, Inc. As in the case of petitioner, two of the notices amended the notices issued on August 20, 1979 and December 20, 1979, respectively, and one notice was in addition to the other two. The amounts were identical to those on the notices issued to petitioner.

17. At the hearing held herein, petitioner contended that due to competition from other stations, he sold gasoline at a price per gallon below cost (at a loss). Petitioner also asserted that he should not be held responsible for the loss of his books and records. He maintains that either the auditor (Mr. Delia) or his accountant (Mr. Levine) lost his records.

18. On August 3, 1984, pursuant to an order of the County Court, Nassau County (Santagata, J.), the judgment of conviction was vacated, counts one through thirteen of the indictment charging petitioner with Grand Larceny were dismissed, and the remaining three counts of the indictment, counts fourteen through sixteen, charging violation of Tax Law §1145(b) (filing a false New

York State and Local Sales and Use Tax Return), were reinstated and the case was restored to the Court's conference calendar for September 4, 1984.

19. On appeal, the Supreme Court, Appellate Division (Second Judicial Department), issued a decision on June 3, 1985 reversing the order of the County Court, Nassau County, insofar as appealed from, and reinstated the judgment of conviction rendered September 19, 1980.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

B. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices.

C. That the books and records of Robert Cesare d/b/a J & B Service Station were inadequate and incomplete for purposes of determining taxable sales or sales tax due (see Findings of Fact "5", "14" and "15"). Accordingly, the Audit Division's determination of additional tax due was proper pursuant to section 1138(a)(1) of the Tax Law.

D. That section 1145(a)(2) of the Tax Law provides, in pertinent part, that if the failure to file a return or to pay over any tax to the Tax Commission within the time required by Article 28 is due to fraud, there shall be added to the tax a penalty of fifty percent of the amount of the tax due.

E. That a finding of fraud requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and

intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing (Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982). The Audit Division has shown that petitioner Robert Cesare d/b/a J & B Service Station pled guilty to Grand Larceny, attempted to hinder the Audit Division's examination of his books and records, and substantially underreported his taxable sales and sales tax liability throughout the audit period. Therefore, in view of the foregoing, the Audit Division has sustained its burden of proof of establishing that Robert Cesare is liable for fraud penalty.

F. That the petition of Robert Cesare d/b/a J & B Service Station is denied and the notices of determination and demand for payment of sales and use taxes due issued August 20, 1979 and December 20, 1979 and revised on April 20, 1981 (see Findings of Fact "14" and "15") are sustained. Additionally, Notice number S810420238M issued April 20, 1981 is also sustained.

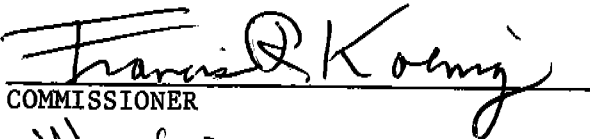
G. That petitioners Hospital Shell, Inc. and Just Rite Towing, Inc. did not appear nor did anyone appear on their behalf, and their petitions are denied based upon such default.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 06 1986


PRESIDENT


COMMISSIONER


COMMISSIONER