

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of : DECISION
P & D AUTO REPAIR, 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 November 30, 1981. :
:

Petitioner, P & D Auto Repair, Inc., Rts. 59 & 17, Ramapo, New York 10931, 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 November 30, 1981 (File No. 37131).

A 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 July 23, 1985 at 9:15 A.M. with all briefs to be submitted by September 30, 1985. Petitioner appeared by Sanford Katz, CPA. The Audit Division appeared by John P. Dugan, Esq. (Joseph Pinto, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly estimated petitioner's sales tax liability on the basis of external indices.

II. Whether Phyllis Denino and Janice Denino are personally liable for the taxes determined due from petitioner.

FINDINGS OF FACT

1. Petitioner, P & D Auto Repair, Inc., operated a gasoline service station located at Rts. 59 and 17, Ramapo, New York. Petitioner also provided towing services, minor repair work and motor vehicle inspections.

2. On March 20, 1982 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period December 1, 1978 through November 30, 1981 for taxes due of \$42,925.12, plus penalty and interest of \$15,894.42, for a total of \$58,819.54. The amount of taxes due were estimated because petitioner did not produce books and records for audit. Petitioner alleged that the books and records were stolen from the premises in a burglary which took place a few months prior to the time it was contacted by the Audit Division.

3. At the time the audit was scheduled (November 20, 1981), the only record provided by petitioner was an incomplete cash disbursements journal. The auditor observed two service bays with no lifts, nine gasoline pumps, including one for diesel which was not in use, and two tow trucks. In order to verify taxable sales reported, the Audit Division contacted petitioner's supplier of gasoline to obtain the gallons purchased during the period under audit; however, the supplier did not furnish the information. Because of the lack of books and records, the auditor estimated taxable sales of \$40,000.00 a month based on his observations and experience with other audits of similar businesses, as follows:

gallons sold a day	1000
x number of days	30
gallons sold per month	<u>30,000</u>
average selling price	1.12
gasoline sales per month	<u>\$33,600</u>
repair sales: \$100 a day per service bay	\$ 100
number of bays	2
repair sales per day	<u>\$ 200</u>
number of days	20
repair sales per month	<u>\$ 4,000</u>
sales of soda, cigarettes, oil and accessories per day	\$ 80
number of days	30
miscellaneous sales per month	<u>\$ 2,400</u>

The total estimated sales for the audit period amounted to \$1,440,000.00 as compared to reported taxable sales of \$374,372.00, leaving additional taxable sales of \$1,065,628.00 and tax due thereon of \$42,925.12.

4. During the audit, petitioner was represented by John Denino. Mr. Denino initially held himself out to be a corporate officer. On March 11, 1982, Mr. Denino indicated he was not an officer and the following persons were the officers:

Phyllis Denino - President
Janice Denino - Vice President
Duann Denino - Treasurer

New York State corporation franchise tax reports for 1978 and 1979 list Phyllis Denino as the president. Phyllis Denino signed sales tax returns for the periods ending May 31, 1981 and August 31, 1981 as president. Based on the foregoing information, the Audit Division issued notices of determination and demand for payment of sales and use taxes due against Phyllis Denino and Janice Denino individually as officers of petitioner. Said notices were in the same amount as the notice against petitioner. Neither Phyllis Denino nor Janice Denino filed petitions for revision of the determinations.

5. Petitioner took the position that the sales estimated by the Audit Division were excessive for the following reasons:

- a. the station was located near the New Jersey border and gas sold for .10 cents a gallon less in New Jersey
- b. the station was closed for approximately three months during 1980
- c. large quantities of gasoline were lost because of a leak in the storage tank
- d. the soda and cigarette vending machines were owned by another party and it only received a commission based on the receipts from the machines
- e. no consideration was given to non-taxable sales

6. Petitioner was closed from June, 1980 through August, 1980 in order to replace the gasoline pumps. John Denino was the only person who repaired vehicles. He also pumped gas. With respect to the remaining arguments above, petitioner offered no credible evidence to show their effect, if any, on the amount of sales estimated by the Audit Division.

7. Following a pre-hearing conference with the Tax Appeals Bureau, petitioner submitted bank statements and gasoline delivery receipts for certain months during the audit period. The Audit Division's analysis of the documents showed that bank deposits averaged in excess of \$100,000.00 per quarter and gasoline purchases for the month of January (year unknown) were 51,480 gallons. The Audit Division did not make any revisions to the original estimate of \$120,000.00 in taxable sales per quarter because the records submitted were incomplete and they in fact substantiated the position that taxable sales were underreported.

8. An audit of a radiator and air conditioning repair business located in Suffern, New York established that petitioner made purchases on a regular basis from April, 1979 through May, 1981.

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". Since petitioner did not have books and records available for audit, the estimate procedures used by the Audit Division to determine taxable sales were proper in accordance with section 1138(a) of the Tax Law.

B. That the Audit Division reasonably calculated the taxes due based on the limited information available and its audit experience with similar

businesses. Petitioner has the burden of showing that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 A.D.2d 858). Petitioner established that it was closed for three months during the audit period. Accordingly, the additional taxable sales are reduced by \$120,000.00. In addition, since petitioner had only one mechanic, the repair sales are reduced to \$100.00 per day. Except for these adjustments, petitioner failed to sustain its burden of showing that the assessment was erroneous.

C. That since Phyllis Denino and Janice Denino did not apply to the Tax Commission for a hearing within ninety days of the Audit Division's notice of determination as required by section 1138(a) of the Tax Law, such determinations were finally and irrevocably fixed. However, Phyllis Denino and Janice Denino shall receive the benefit of the reduction in the assessment against petitioner as set forth in Conclusion of Law "B".

D. That the petition of P & D Auto Repair, Inc. is granted to the extent indicated in Conclusion of Law "B". The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 20, 1982, and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, NY

APR 28 1986

STATE TAX COMMISSION

Rodrich W. Cln
PRESIDENT

Francis Q. Kolmg
COMMISSIONER

Mark Oush
COMMISSIONER