

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition                 | : |          |
|   | : |          |
| of  | : |          |
|   | : |          |
| SHAHEN GUIRAGOSSIAN                           | : |          |
| D/B/A TUFAROS SERVICE STATION                 | : | DECISION |
| 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 September 1, | : |          |
| 1978 through May 31, 1981.                    | : |          |

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Petitioner, Shahan Guiragossian, d/b/a Tufaros Service Station, 122-44 Roosevelt Avenue, Corona, New York 11368, 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 September 1, 1978 through May 31, 1981 (File No. 38212).

A 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 May 7, 1985 at 1:15 P.M. Petitioner appeared by Sidney Meyers, Esq. and Morton Cytryn, CPA. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq. of counsel).

ISSUE

Whether the Audit Division properly determined petitioner's additional sales tax due.

FINDINGS OF FACT

1. On May 20, 1982, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner, Shahan Guiragossian, d/b/a Tufaros Service Station,

for taxes due of \$36,955.04, plus interest of \$8,687.54, for a total amount due of \$45,642.58 for the period September 1, 1978 through May 31, 1981.

On December 14, 1981, the petitioner executed a consent extending the statute of limitations for issuing an assessment for sales and use taxes for the period September 1, 1978 through May 31, 1979 to June 20, 1982.

2. On June 28, 1982, the petitioner timely filed a petition with regard to the notice of determination. It is petitioner's position that (i) no allowance was made for sales to the City of New York Department of Parks and Recreation, (ii) industry wide shrinkage due to evaporation was 4% of sales and not 2% as allowed by the Audit Division, (iii) no allowance was made for exempt sales to a local church, (iv) no allowance was made for leakage from tanks, (v) no allowance was made for the inaccurate pump meter, in disregard of report from the City of New York Department of Consumer Affairs, (vi) no allowance was made for gasoline taken by employees for their own use, (vii) no allowance was made for short gallonage on deliveries, (viii) no allowance was made for gasoline used in petitioner's three vehicles, and (ix) petitioner did not sell special unleaded gas as alleged by the Audit Division.

Petitioner further contends that errors of the Audit Division in performing the audit have discredited the entire audit and, therefore, the notice of determination should be cancelled.

3. Petitioner, Shahen Guiragossian, operates a Mobil gas station with four pumps on the corner of 114th Street and Roosevelt Avenue in Queens, New York. Petitioner also performs automobile repairs and has a towing service. Petitioner is an AAA affiliated station. The petitioner utilized three vehicles in his business, a large tow truck, a small pickup truck and a car. Petitioner's

sales and use tax returns were prepared as follows (example of November 30, 1979 return):

|   |               |
|---|---------------|
| Total Deposits  | \$120,670     |
| Less: loans and rental income (31%*)  | <u>37,355</u> |
| Total gas and repair sales  | \$ 83,315     |
| Gas sales (75%* of \$83,315)  | \$ 62,485     |
| Less: N.Y.S. gas tax, City of New York<br>tax on leaded motor fuel and,<br>sales tax (15%*) | <u>9,399</u>  |
|   | \$ 53,086     |
| Plus: repair sales (25%* of \$83,315)   | <u>20,834</u> |
|   | \$ 73,920     |
| Less: non-taxable sales   | <u>28,000</u> |
| Taxable sales   | \$ 45,920     |

\* Estimated

4. On or about June 16, 1981, Anthony Vano, an examiner for the Audit Division, initiated an audit of petitioner's books and records. Mr. Vano performed some preliminary work and was subsequently replaced on or about October 16, 1981 by Harold Kaplan when Mr. Vano left the Department to take a position with another agency. Mr. Kaplan deemed the petitioner's books and records inadequate to perform a detailed audit since petitioner failed to maintain purchase or sales invoices. Mr. Kaplan therefore used gas and oil purchases as supplied by the Mobil Oil Corporation ("Mobil").

5. Mr. Kaplan first determined that petitioner had gas sales for the audit period of \$1,008,850.00 using costs and selling prices obtained from his initial visit at petitioner's station. However, this computation was disregarded when the more reliable cost prices were obtained from Mobil.

Mr. Kaplan then computed gas sales for the audit period of \$909,549.00. However, his supervisor discovered an error in the number of gallons used and this second computation was also disregarded.

Mr. Kaplan next determined the additional taxes assessed in the notices of determination. Mr. Kaplan first computed markups on regular and super unleaded gas of 12.189% and 18.375%, respectively, utilizing current costs and selling prices. The selling prices of regular and super unleaded were next computed by multiplying the markups times the cost per gallon as determined from the information supplied by Mobil. The selling price of special unleaded was determined to be the selling price of super unleaded less 3.4¢. The number of gallons purchased by month, extrapolated from the information supplied by Mobil, was reduced by 2% as an allowance for evaporation, leakage, overdispensing by inaccurate pump and other losses of purchased gas, to determine the number of gallons sold. The number of gallons sold was multiplied by the appropriate selling price to compute gross gas sales for the audit period of \$815,637.00. From this amount, New York State gas tax and City of New York tax on leaded fuel of \$61,281.00 and sales tax of \$55,878.00 were subtracted to compute net gas sales of \$698,478.00.

6. Mr. Kaplan next computed repair sales of \$174,619.00 (estimated to be 25% of gas sales based on petitioner's method of preparing his sales and use tax returns) and oil sales of \$11,529.00 based on costs supplied by Mobil and current markups. Mr. Kaplan next deducted substantiated non-taxable sales to the City of New York Department of Parks and Recreation of \$23,661.00 to determine audited taxable sales of \$860,965.00. Taxable sales reported of \$398,688.00 were subtracted from this amount to determine additional taxable sales of \$462,277.00 which represented a margin of error of 116%. The margin of error was applied to taxable sales reported by sales tax quarter to determine audited taxable sales, then tax due per audit (by multiplying by the appropriate

sales tax rate), and finally additional taxes due of \$36,955.04 (after giving credit for taxes paid).

7. Pursuant to the report furnished by Mobil, the petitioner sold regular gas, super unleaded gas and special unleaded gas in 1978. Thereafter and for the remainder of the audit period, the petitioner sold only regular and super unleaded gas. During 1978, the petitioner purchased 20,884 gallons of special unleaded gas.

8. At the hearing, the petitioner testified that, during the audit period, he did not sell special unleaded gas. Petitioner explained that his station has the capacity for only two grades of gas. Mr. Guiragossian further testified that his station was on a hill which resulted in the theft by deliverymen of approximately 25 gallons for each 500 gallons of gas which was supposed to be delivered (the delivery truck was angled in such a way that not all the gas would come out when the valve was opened); that one pump was broken resulting in the loss of 1/10 gallon of gas on every 5 gallons sold; that daily he used \$45.00, \$20.00, and \$15.00 worth of gas in his tow truck, pickup truck and car, respectively; that he permitted his employees to daily fill their cars with gas free of charge (averaging \$17.00 to \$21.00 per fill); that he made tax exempt sales to the City of New York Department of Parks and Recreation (more than allowed by the Audit Division); that he made tax exempt sales (at a discount) to a local church; and that one of his four tanks was shut down for two weeks during the audit period because of a leak.

9. On November 17, 1981, (after the audit period) an inspector from the City of New York Department of Consumer Affairs issued a Certificate of Inspection condemning one of petitioner's pumps.

10. The petitioner offered no substantial evidence, other than his testimony, to support his allegations.

CONCLUSION OF LAW

A. That since the books and records of Shahen Guiragossian, d/b/a Tufaros Service Station, were incomplete and inadequate, the Audit Division properly determined additional taxes due from such information as was available and external indices, in accordance with section 1138(a)(1) of the Tax Law (Matter of George Korba v. State Tax Commission, 84 A.D.2d 655). Although errors were made in performing the audit, said errors were corrected and, absent evidence to the contrary, the notice is deemed to be accurate.

B. That the Audit Division reasonably calculated the tax liability of Shahen Guiragossian and petitioner has failed to demonstrate by clear and convincing evidence that the audit method or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 A.D. 2d 858). Under the circumstances herein, petitioner's testimony, absent any corroboration by documentation, is inadequate to overcome his burden of proof.

C. That the petition of Shahen Guiragossian, d/b/a Tufaros Service Station, is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 20, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985

Roderick A. Can  
PRESIDENT

Francis R. Koeng  
COMMISSIONER

[Signature]  
COMMISSIONER