

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

GARAGE SHALOM, INC.

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 December 1, 1978
through May 31, 1981.

Petitioner, Garage Shalom, Inc., c/o H. Wapnick, **2024** East 18th Street,
Brooklyn, New York 11229, 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 May 31, 1981 (File No. 39287).

A hearing was held before James Hoefer, Hearing Officer, at the offices of
the State Tax Commission, Two World Trade Center, New York, New York, on
September 10, 1986 at 2:45 P.M. Petitioner appeared by Fireman & Kramer, Esqs.
(Carl H. Becker, Esq., of counsel). The Audit Division appeared by John P.
Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined audited sales by
increasing petitioner's reported sales by a multiple of fifteen.

II. Whether reasonable cause existed for petitioner's failure to pay the
proper sales tax due, thereby warranting cancellation of both the penalty
imposed under Tax Law § 1145(a)(1)(i) and those interest charges in excess of
minimum interest.

FINDINGS OF FACT

1. On January 20, 1982, the Audit Division, as the result of a field examination, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, Garage Shalom, Inc. Said notice, which encompassed the period December 1, 1978 through May 31, 1981, assessed tax due of \$46,914.56, plus penalty of \$9,952.67 and interest of \$8,109.90, for a total amount due of \$64,977.13.

2. From early 1978 until approximately mid-May of 1981, petitioner operated an automotive repair shop at 438 Tenth Avenue, New York, New York. Petitioner vacated said premises at the request of the landlord and in June of 1981 the building, a gas station, was demolished. Petitioner had not removed its books and records from said building prior to demolition and, therefore, all its books and records were destroyed.

3. The auditor assigned to this case contacted both petitioner's president and its accountant in an effort to locate petitioner's books and records. After learning that all books and records had been destroyed, the auditor next visited the premises at 438 Tenth Avenue and found "an empty lot". From her inspection of the property, the auditor was able to determine that gasoline storage tanks were still in place on the premises. The auditor also questioned an employee of a hardware store which was located adjacent to petitioner's business and was informed that petitioner operated a gas station. The auditor did not inquire of this employee whether or not petitioner ever sold gasoline, but rather assumed that gasoline was sold because of the existence of gasoline storage tanks.

4. Petitioner's reported taxable sales for the audit period totalled \$41,888.00, an average of \$4,188.80 per quarter. The auditor deemed reported

taxable sales insufficient for a gasoline station located in Manhattan and, since no books and records were available for audit, she multiplied reported taxable sales of \$41,888.00 by fifteen to compute audited taxable sales of \$628,320.00. Application of the eight percent tax rate to additional taxable sales of \$586,432.00 (\$628,320.00 minus \$41,888.00) produced the tax due figure of \$46,914.56. The auditor determined reported taxable sales insufficient and used a multiplication factor of fifteen premised on the belief that petitioner sold gasoline on a regular and continuous basis.

5. When petitioner first leased the premises at 438 Tenth Avenue, rental payments totalled \$400.00 per month. In 1980, petitioner's rent was increased to \$1,000.00 per month. Prior to the rent increase, petitioner generated its sales solely from the repair of automobiles and was not engaged in the retail sale of gasoline. When its rent was increased, petitioner attempted to increase revenues through the retail sale of gasoline. Petitioner purchased 2,500 gallons of no lead gasoline from Pronto Petroleum Corp. on each of three separate occasions in early 1980. The 7,500 gallons of gasoline purchased in early 1980 represented petitioner's total gasoline purchases for the audit period. After the 7,500 gallons of gasoline were sold, no further purchases were made because (i) the entrance to the station was restricted, thus reducing gasoline sales; (ii) the station had only one island containing two pumps; and (iii) the gasoline storage tanks at the station had a combined capacity of only 2,500 gallons and petitioner's supplier of gasoline refused to make any further deliveries since it was cost ineffective to deliver such a small quantity.

6. Petitioner specialized in low cost brake repairs and oil changes and its president, Jacob Melamed, testified that repair sales totalled approximately \$1,000.00 per week.

CONCLUSIONS OF LAW

A. That absent adequate books and records, it is permissible for the Audit Division to resort to the use of estimates to determine tax due (Tax Law § 1138[a]). In the instant matter, the Audit Division computed audited taxable sales by increasing reported taxable sales fifteen times. Said multiplication factor was determined based on the belief that petitioner was engaged in the retail sale of gasoline. Petitioner, however, has established that it was not engaged in the retail sale of gasoline on a regular and continuous basis during the audit period. Accordingly, it was improper, in the case at hand, to increase reported taxable sales fifteen times to compute audited taxable sales.

B. That petitioner's taxable repair sales were \$1,000.00 per week, or a total of \$13,000.00 per quarter. Since there are ten quarters in the audit period, taxable repair sales total \$130,000.00. Taxable gasoline sales total \$8,625.00 (7,500 gallons x \$1.15¹). Audited taxable sales total \$138,625.00 (\$130,000.00 + \$8,625.00) and, when compared to reported taxable sales of \$41,888.00, produces \$96,737.00 of additional taxable sales and a tax due of \$7,738.96.

C. That Tax Law § 1145(a)(1)(ii) provides for the waiver of penalty and that portion of interest charges in excess of minimum interest if it is determined that failure to pay the proper sales tax "was due to reasonable cause and not due to willful neglect". Petitioner, in the instant matter, has failed to

1 For purposes of this decision, the taxable selling price of each gallon of unleaded gasoline was estimated at \$1.15. Petitioner presented no evidence to establish what its actual selling price of gasoline was during the audit period.


establish reasonable cause for its failure to remit the proper sales tax and, therefore, penalties and statutory interest are sustained.

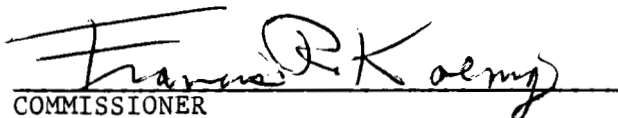
D. That the petition of Garage Shalom, Inc. is granted to the extent indicated in Conclusions of Law "A" and "B", supra; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 1 1987


PRESIDENT


COMMISSIONER


COMMISSIONER