

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
M & M 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 March 1, 1979
through May 31, 1980.

DECISION

In the Matter of the Petition
of
S & G 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 September 1, 1980
through August 31, 1982.

Petitioner M & M Shell, Inc., 300 East Houston Street, New York, New York 10002, 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 March 1, 1979 through May 31, 1980 (File No. 39414).

Petitioner S & G Shell, Inc., 1 Cooper Square, New York, New York 10003, 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, 1980 through August 31, 1982 (File No. 59201).

A consolidated hearing was commenced before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 2, 1985 at 9:30 A.M. Petitioners appeared by Isaac Sternheim & Co. (Isaac Sternheim, CPA). The Audit Division appeared by

John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel). The hearing was to be continued on July 9, 1985 at 9:15 A.M., and notice thereof was given to petitioners and their authorized representative. Petitioners failed to appear. The decision is rendered, therefore, on the record made at the April 2, 1985 hearing.

ISSUES

I. Whether the Audit Division was warranted in its resort to markup procedures to verify petitioners' taxable sales, and if so, whether such procedures were reasonably calculated to reflect the taxes due.

II. Whether petitioners' failure to pay over the correct amount of sales tax in a timely manner was due to reasonable cause and not to willful neglect on their part.

FINDINGS OF FACT

1. On June 20, 1982, the Audit Division issued to petitioner M & M Shell, Inc. ("M & M") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1979 through May 31, 1980 in the principal amount of \$49,463.80, plus interest and a fraud penalty pursuant to section 1145(a)(2). The Audit Division subsequently re-evaluated the assessment and on January 16, 1985, issued to M & M a Notice of Assessment Review, advising the corporation that the fraud penalty had been cancelled and delinquency penalties assessed in lieu thereof.

On November 20, 1983, the Audit Division issued to petitioner S & G Shell, Inc. ("S & G") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes for the period September 1, 1980 through August 31, 1982 in the principal amount of \$68,604.49, plus

interest and delinquency penalties. On October 13, 1983, Mr. George Cohen, as president of S & G, had executed a consent which served to extend the period of limitations for assessment for the period September 1, 1980 through August 31, 1981 to June 20, 1984, inclusive.

2. Each petitioner operated a gasoline service station during the relevant period and was supplied with oil and three grades of gasoline exclusively by Shell Oil Corporation ("Shell"). Mr. Cohen was president of both corporations.

3. For the period March 1, 1979 through May 31, 1981, M & M filed sales and use tax returns on a quarterly schedule, using identification number 13-2978598 and listing an address of 1-9 Cooper Square, New York, New York 10009; for the period June 1, 1981 through February 28, 1982, M & M filed sales and use tax returns under the same identification number, listing its address as 300 East Houston Street, New York, New York 10002. M & M submitted its federal corporation income tax return for the fiscal year ended March 31, 1980 indicating its address as 1-9 Cooper Square, and its federal return for the fiscal year ended March 31, 1981 indicating its address as 300 East Houston Street. Thus, during the period April 1, 1980 through March 31, 1981, M & M did not report its business location to the Audit Division and to the Internal Revenue Service in a consistent manner.

For the period March 1, 1979 through May 31, 1981, S & G filed its sales and use tax returns utilizing identification number 13-2973410 and stating its address as 300 East Houston Street; for the period June 1, 1981 through February 28, 1982, S & G filed its returns utilizing the aforementioned identification number and stating its address as 1-9 Cooper Square. S & G filed its federal corporation income tax return for the fiscal year ended February 29, 1980, indicating its address as 300 East Houston Street and its

federal return for the fiscal year 1981 indicating its address as 1-9 Cooper Square. During the March 1, 1980 to February 28, 1981 interval, therefore, S & G did not report its business location to the Audit Division and to the Internal Revenue Service in a consistent manner.

4. During the course of the sales tax examination which resulted in the assessments under consideration, the two related corporations presented few records to the examiner. Aside from the sales tax and federal corporation income tax returns above-mentioned, Shell purchase invoices for a one-year period constituted the only records available.

On its sales tax returns for the period March 1, 1979 through February 28, 1981, M & M reported gross sales in the amount of \$1,113,192.00, as compared with gross sales per its federal corporation income tax return of \$2,068,174.00. On its sales tax returns for March 1, 1979 through February 28, 1982, S & G reported gross sales of \$1,269,089.00, as compared with gross sales reported for federal income tax purposes of \$1,856,487.00.

Via subpoena served on Shell, the Audit Division obtained a schedule of deliveries of gasoline and oil (including volume and prices) to 1-9 Cooper Square during the period March, 1979 through November, 1981. The examiner relied upon the portion of this schedule encompassing the period March, 1979 through February, 1980 in arriving at the assessment issued against M & M. He calculated an average markup percentage of 8.38 percent for regular, unleaded and premium unleaded gasoline, by reference to selling prices as displayed on the gasoline pumps (exclusive of excise tax and sales tax) and cost as reflected in the information furnished by Shell (exclusive of excise tax). For oil, he employed a markup over cost of 100 percent, premised on office experience. He

then multiplied M & M's purchases of gasoline and oil by the applicable markup percentages.

Audited gasoline sales	
Gasoline purchases 3/1/79-5/31/80	\$1,198,998
Less: excise tax	(128,366)
	\$1,070,632
Markup 8.38%	89,719
Audited gasoline sales	\$1,160,351
Audited oil sales	
Oil purchases 3/1/79-5/31/80	\$ 12,286
Markup 100%	12,286
Audited oil sales	\$ 24,572
Additional taxable sales and sales tax	
Audited gasoline and oil sales	\$1,184,923
Less: reported taxable sales	(568,575)
Additional taxable sales	\$ 616,348
Sales tax 8%	\$ 49,307.84*

* The record does not disclose the reason for the \$155.96 discrepancy between this amount and the amount assessed by the Notice of Determination and Demand.

The assessment against S & G was also predicated on the Shell schedule exhibiting deliveries to the Cooper Square location. Employing markup procedures identical to those previously described, the examiner developed a margin of error of 218.5 percent for the period March 1, 1979 through August 31, 1981 and of 23.8 percent for the period September 1, 1981 through May 31, 1982.¹ He then applied the appropriate rate to S & G's taxable sales reported for the corresponding periods.

Petitioners presented no evidence to show that the audit procedures were improper or the results thereof incorrect.

¹ Presumably, purchases by M & M (at the Cooper Square location) during the period March 1, 1979 through May 31, 1981 were marked up and contrasted with taxable sales reported by S & G (at the East Houston Street location) for the same period to compute the 218.5 percent error rate.

5. Petitioners seek abatement of the delinquency penalties asserted against them. The responsibility for maintaining the books of original entry rested with Mrs. Sandra Cohen (the wife of the corporations' president), an experienced bookkeeper. During the periods under consideration, however, she was very seriously ill and unable to satisfactorily fulfill this responsibility.

CONCLUSIONS OF LAW

A. That petitioners presented no evidence to establish that their record-keeping was sufficient to enable the Audit Division to verify their reported taxable sales. The Audit Division was therefore justified in its reliance upon external indices. Nor did petitioners present any evidence to show the results of the Audit Division's methodology were erroneous; the results must accordingly be sustained.

B. That in view of the serious illness of the person charged with the responsibility of maintaining petitioners' books and records, the delinquency penalties assessed are cancelled (20 NYCRR 536.1[b][1]).

C. That the petition of M & M Shell, Inc. is granted to the extent indicated in Conclusion of Law "B"; the assessment issued on June 20, 1982 and revised on January 16, 1985 is to be modified in accordance therewith; and the petition is in all other respects denied. The petition of S & G Shell, Inc. is granted to the extent indicated in Conclusion of Law "B"; the assessment issued on November 20, 1983 is to be modified in accordance therewith; and the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 22 1985

PRESIDENT

Harold R. Koenig
COMMISSIONER

Mark Dub
COMMISSIONER

I dissent.

Richard A. Chen