

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DICK'S ATLANTIC, 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 June 1, 1979	:	
through November 30, 1980.	:	

Petitioner, Dick's Atlantic, Inc., c/o Richard Bennett, Sr., 1021 Cayuga Street, Fulton, New York 13069, 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, 1979 through November 30, 1980 (File No. 39983).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 19, 1984 at 9:00 A.M. Petitioner appeared by Peter J. Conley, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUES

I. Whether the amount of taxes paid by petitioner to New York State at the time the business was sold fully satisfied its sales tax liability for the period June 1, 1979 through November 30, 1980.

II. Whether the Audit Division properly determined additional sales taxes due from petitioner based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioner, Dick's Atlantic, Inc., operated a gasoline service station in Fulton, New York. The business was sold on or about November 13, 1980.

Prior to the closing on the sale of the business, petitioner was advised by the Tax Compliance Bureau that it was required to pay \$37,039.63 to satisfy all New York State tax warrants that had been filed against it.

The warrants represented assessments issued for unpaid sales tax, penalty and interest for the periods ending November 30, 1978, February 28, 1979, May 31, 1979, August 31, 1979, November 30, 1979 and February 28, 1980.

Tax Compliance Agents attended the closing where they received payment of \$37,039.63.

2. On September 8, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period June 1, 1979 through November 30, 1980 for taxes due of \$4,261.80, plus interest of \$1,088.24, for a total of \$5,350.04.

3. Petitioner provided the following books and records for audit: cash register tapes, sales journal for 1980, and purchase invoices for miscellaneous expenses. The Audit Division determined that these records were inadequate for verifying taxable sales since the cash register tapes did not show individual sales but only a daily total and did not include gasoline sales; the sales journal for 1980 showed one amount for sales which included receipts from various sources (gas, repairs, parts, etc.); and the journal for 1979 was not available.

In order to verify petitioner's sales, the Audit Division obtained from Arco Oil Corp. the quantity of gasoline purchased by petitioner during the audit period. This amounted to 655,981 gallons. Arco also furnished the quantity of motor oil and grease purchased. The Audit Division reviewed completed audits of gasoline stations in the Fulton and Oswego area to determine

the selling prices of gasoline. The Audit Division applied the lowest prices found to the above gasoline purchases to arrive at sales of \$729,975.00. The state gasoline tax and the sales tax was excluded from said amount to determine taxable gasoline sales of \$650,400.00.

The Audit Division determined sales of oil and grease totalling \$6,696.00 by applying an estimated markup of 40 percent to the purchases furnished by Arco. Kerosene purchased from Babcock Oil Co. was marked up \$.12 per gallon to compute sales of \$10,114.00.

Sales of parts and repairs were determined by applying estimated markups of 40 percent for parts and 50 percent for labor to purchases shown on corporation tax returns. The estimated sales for parts and repairs amounted to \$88,033.00. The combined audited taxable sales totalled \$755,243.00 as compared to reported sales of \$648,698.00 for the same period, leaving additional taxable sales of \$106,545.00 and tax due thereon of \$4,261.80.

The estimated markups used by the Audit Division were based on audits conducted of other gasoline stations.

4. Petitioner believed that when it paid the \$37,039.63 at the closing that there were no further tax obligations to New York State.

5. In 1980, the Audit Division had conducted a corporation income tax audit of petitioner for the years 1978 and 1979, as well as a personal income tax audit of its president, Richard Bennett, for the years 1978, 1979 and 1980. Both audits disclosed no additional tax due.

6. All of petitioner's books and records were not available for the sales tax audit because Mr. Bennett was of the opinion that since a corporation tax and income tax audit had been completed and the sales tax warrants were satisfied when the business was sold, there was no need to retain them any longer.

The sales tax audit was conducted almost two years after the business was sold.

7. With respect to the audit, petitioner took the position that the audit did not consider the inventory on hand when the business was sold and that the markup percentages used to estimate sales were excessive.

Petitioner offered no evidence to establish the amount of ending inventory or that the markups were incorrect.

CONCLUSIONS OF LAW

A. That the taxes paid by petitioner on November 13, 1980 when the business was sold represented its liability for the nonpayment of sales taxes reported on returns filed through that date. The audit conducted in 1982 disclosed that petitioner underreported its sales tax for the period at issue and resulted in an assessment for the additional taxes determined due. The assessment of additional tax was made within three years from the date the returns were filed in accordance with section 1147(b) of the Tax Law.

B. 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" including purchases. Section 1135 of the Tax Law provides that books and records shall be preserved for a period of three years.

Although there is statutory authority for the use of a test period to determine the amount of tax due, resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

C. That petitioner provided inadequate and incomplete books and records for audit. Because of petitioner's inadequate record keeping, the Audit Division's use of a markup audit as a basis for determining petitioner's liability was proper in accordance with section 1138(a) of the Tax Law (Matter of Sakran v. State Tax Commission, 73 A.D.2d 989; Matter of Chartair, Inc., supra). The estimates used by the Audit Division based on office experience with similar businesses were reasonable and petitioner failed to demonstrate by clear and convincing evidence that the amount of tax assessed was erroneous (Matter of Skiadas v. State Tax Commission, 95 A.D.2d 971).

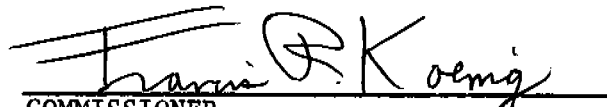
D. That the petition of Dick's Atlantic, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 8, 1982 is sustained.


DATED: Albany, New York

APR 15 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER