

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JACK PELLICANO	:	DECISION
T/A PELLICANO'S SERVICE STATION	:	
for Revision of a Determination or for Refund	:	
of Sales & Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1978	:	
through November 30, 1981.	:	

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Petitioner, Jack Pellicano t/a Pellicano's Service Station, 5 Fingerboard Road, Staten Island, New York 10305, 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. 40611).

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 April 25, 1985 at 1:15 P.M. with additional documentation to be submitted by petitioner on or before May 25, 1985. Petitioner appeared by Mercurio J. Caruselle, P.A. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales and use taxes due from Jack Pellicano t/a Pellicano's Service Station for the period December 1, 1978 through November 30, 1981.

FINDINGS OF FACT

1. On September 20, 1982, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and

Use Taxes Due against the petitioner, Jack Pellicano t/a Pellicano's Service Station, for taxes due of \$13,127.79, plus interest of \$3,033.65, for a total amount due of \$16,161.44 for the period December 1, 1978 through November 30, 1981.

2. On January 18, 1982, the petitioner executed a consent extending the statute of limitations for assessment of sales and use taxes for the period December 1, 1978 through May 31, 1979 to September 20, 1982.

3. It is the position of the Audit Division that petitioner's books and records were inadequate and that its use of a test period audit method and information supplied by a third party to determine petitioner's sales tax liability was proper.

4. On December 13, 1982, the petitioner timely filed a petition for a hearing to review the notice of determination. Petitioner contends that the amount of purchases of gasoline and accessories as well as the markup on these items used by the Audit Division were excessive. The petitioner also claims that no allowance was given for sales made at a discount.

5. In or about January 1982, the Audit Division initiated an audit of petitioner's books and records. Petitioner operated a Getty gas station at 5 Fingerboard Road, Staten Island, New York. Petitioner's records were inadequate to perform a detailed audit. Petitioner did not maintain sales slips for sales of repairs, oil, tires, antifreeze, batteries and accessories, and, therefore, sales as recorded in the cash receipts journal could not be verified. Petitioner also kept no record of his credit card sales. Finally, petitioner was missing purchase invoices, therefore, purchases per his books and invoices were not in agreement.

6. In determining taxable gasoline sales for the audit period, the auditor first computed the markup for gasoline, using January, 1982 costs and selling prices, as follows:

	<u>Unleaded</u>	<u>Leaded</u>
Selling price	\$ 1.48	\$ 1.44
Less: N.Y. State excise tax	.08	.09
	\$ <u>1.40</u>	\$ <u>1.35</u>
Divided by 100% plus sales tax rate	108.25	108.25
	\$ <u>1.293</u>	\$ <u>1.247</u>
Less: Cost	1.134	1.094
Markup	\$ <u>0.159</u>	\$ <u>0.173</u>
Percentage markup on cost	14.02%	15.81%

The above percentages were applied to petitioner's gasoline purchases of petitioner's as supplied to the Audit Division by the Getty Refining and Marketing Company ("Getty") to determine taxable gasoline sales of \$864,945.00.

7. It should be noted that the auditor made an error in computing the markup on leaded gasoline sales. The correct markup is actually \$0.153 and the percentage markup on cost is 13.99%.

8. In order to compute taxable sales of other items, the auditor first reviewed purchase invoices for the months of April, July and November, 1979; January and December, 1980; and September and November, 1981; and found that 68% of petitioner's purchases were of parts, 17% were of tires and batteries and 15% were of lubricants and oils.

The auditor next applied the above percentages to petitioner's purchases per his books to determine total purchases of said items.

The auditor then, using January, 1982 costs and selling prices, computed taxable sales of other items, including soda and cigarettes as follows:

<u>Category</u>	<u>Purchases</u>	X	<u>Markup + 100%</u>	<u>Sales</u>
Soda	\$ 1,602.00		156.3%	\$ 2,504.00
Cigarettes	1,602.00		155.3%	1,916.00
Oils & Lubricants	16,735.00		154.8%	25,906.00
Tires & Batteries	13,830.00		150.0%	20,745.00
Parts	55,320.00		300.0%	165,960.00
Total taxable sales of other items				<u>\$217,031.00</u>

It should be noted that the taxable sales of cigarettes was computed by deducting the New York State excise tax and that the 50% markup applied to tires and batteries was actually estimated but was agreed to by the petitioner. Also, the markup on parts was originally determined to be 433%, however, after further explanation by petitioner was reduced to 200%.

9. Total taxable sales of gasoline and other items was therefore determined to be \$1,081,976.00 less taxable sales reported of \$919,330.00 for additional taxable sales of \$162,646.00 with a tax due thereon of \$13,045.70. Petitioner was also found to be liable for use tax of \$16.80 on the purchase of a drill press, however, said amount is not at issue here. Total additional taxes due were therefore computed to be \$13,062.50.

It should be noted that the notice of determination indicates a tax due of \$13,127.79 and that this discrepancy was not explained at the hearing. Therefore, the amount computed as due herein is the amount due from petitioner less any adjustments which may result from this decision.

10. In preparing his sales and use tax returns, the petitioner estimated gasoline sales of 40,000 gallons per quarter. Sales of other items were also estimated since no reliable records were maintained. There is no evidence of a reconciliation being made.

11. At the hearing, petitioner submitted purchase invoices for the audit period for gasoline which included thereon an item identified as "other" and

"other charges" of 2¢ and 3¢ per gallon. Petitioner claims that these charges are actually additional rent charges and should be excluded from gasoline purchases before applying the markup. The invoices submitted also included thereon an item identified as "rent" of between 2¢ and 5¢ per gallon which was subtracted from gasoline purchases by the auditor before applying the markup.

12. Petitioner submitted a computer printout of its purchases of gasoline and other items during the audit period which it received from Getty. Petitioner also submitted two worksheets whereon it listed and totalled its purchases by category. Petitioner did not explain the relevance of these documents. However, the documents show that the purchase figures used by the auditor were substantially correct.

13. Petitioner presented no substantial evidence that it made sales at a discount or that the markups utilized by the auditor were excessive.

#### CONCLUSIONS OF LAW

A. That since the books and records of Jack Pellicano t/a Pellicano's 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) of the Tax Law (Matter of George Korba v. State Tax Commission, 84 A.D.2d 655).

B. That, under the circumstances herein, the Audit Division reasonably calculated the tax liability of petitioner and petitioner has failed to demonstrate by clear and convincing evidence that both the method used to arrive at the assessment and the assessment itself are erroneous (Matter of Ristorante Puglia, Ltd. v. Chu 102 A.D.2d 348, 351; Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully 85 A.D.2d 858, 859). Petitioner failed to show that the purchases or markups used by the Audit Division were excessive, or that he made sales at a

discount. Petitioner failed to sustain the burden of proof to show that the "other" and "other charges" were actually charges for additional rent.

C. That the petition of Jack Pellicano t/a Pellicano's Service Station is granted to the extent indicated in Findings of Fact "7" and "9". The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1982; and that except as so granted, the petition is denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 30 1985

Rodwan W. Chu  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

Mark J. Jans  
COMMISSIONER