

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
TERRY CLARK AND ROBERT BOISE	:	DECISION
D/B/A CLARK'S CITGO	:	
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, 1981.	:	

Petitioners, Terry Clark and Robert Boise d/b/a Clark's Citgo, 24 Curtis Street, Sodus, New York 14551, 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, 1981 (File No. 40959).

A formal 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 17, 1984 at 9:15 A.M., with all briefs to be submitted by December 17, 1984. Petitioners appeared by Sheldon G. Kall, Esq. (Richard Reilly, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether the audit procedures used by the Audit Division in an examination of petitioners' books and records were proper and whether the additional taxable sales determined as a result thereof were correct.

FINDINGS OF FACT

1. Petitioners, Terry Clark and Robert Boise d/b/a Clark's Citgo, operated a gasoline service station located at 24 Curtis Street, Sodus, New York. Petitioners also sold fuel oil. The business was sold in April, 1981.

2. On June 18, 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 petitioners covering the period March 1, 1979 through May 31, 1981 for taxes due of \$23,343.06, plus penalty and interest of \$12,370.42, for a total of \$35,713.48.

3. On audit, the Audit Division examined the cash receipts journal and found that petitioners recorded one amount for receipts from all sources (gasoline, fuel oil, accessories) and there was no record of nontaxable sales. Total receipts recorded in the cash receipts journal exceeded gross sales reported on sales tax returns filed during the audit period. The other records available for audit were the purchase journal, purchase invoices, fuel oil sales invoices for the period March 1, 1980 through September 30, 1980, and federal and state income tax returns. Fuel oil sales invoices for the period April 1, 1979 through January 31, 1980, sales invoices for parts and accessories and records of gasoline sales were not available.

The Audit Division reviewed all available fuel oil sales invoices (March 1, 1980 to September 30, 1980) which totalled \$29,839.09. Petitioner reported fuel oil sales of \$9,172.00 for the same period resulting in an error factor of 225.3 percent. This percentage was applied to reported fuel oil sales for the audit period of \$118,279.00 to arrive at additional fuel oil sales of \$266,482.00 and tax due thereon of \$12,168.26.

In order to determine gasoline sales, the Audit Division contacted petitioners' suppliers of gasoline and obtained the total gallons purchased. The gallonage furnished by the suppliers was in substantial agreement with the gallons sold from the pump meter readings and with the amounts shown on the purchase invoices for the period September 1, 1980 through November 30, 1980.

Based on this comparison, the Audit Division accepted the accuracy of gasoline purchases recorded in the books and records. The gallons of gasoline sold by quarter were determined from the pump meter readings. The average retail selling price¹ of gasoline was applied to the gasoline purchases to determine sales of \$472,595.00. The taxable amount after deducting the state gasoline tax was \$410,857.00.

Sales of parts and accessories, tires, oil, candy, cigarettes and soda were determined by applying the following markup percentages to purchases of such items as recorded in the purchase journal:

a) parts and accessories	--	100%
b) tires	--	20%
c) oil	--	20%
d) candy and cigarettes	--	20%
e) soda	--	33%

The markups were estimated based on office experience with audits of similar service station businesses. The total sales of the miscellaneous items were found to be \$64,738.00. The taxable gasoline sales were combined with the miscellaneous sales for a total of \$475,595.00. Petitioners reported sales of such items amounted to \$327,540.00, leaving additional taxable sales of \$148,055.00, with tax due thereon of \$10,363.85.

When the business was sold, petitioners transferred assets consisting of a customer list, a 1977 Dodge van and a 1969 fuel oil truck. The sales price of the customer list was \$9,000.00 and the trucks sold for \$2,585.00. Petitioners did not collect sales tax on these transactions and the Audit

1 The Rochester District Office conducted a survey of the retail selling prices of gasoline in the Rochester area. The information was taken from newspaper articles on various dates during 1979 through 1982. The Audit Division used the average price on a date within or nearest the applicable quarterly period.

Division held petitioners liable for the taxes they failed to collect which amounted to \$810.95.

4. Petitioners acknowledged that there was an error in the fuel oil sales computed for the period March 1, 1980 through May 31, 1980. However, they did not agree that substantial errors occurred in other periods.

Petitioners analyzed purchase invoices and determined that they purchased 232,225 gallons of fuel oil and kerosene for the period March 1, 1979 through November 30, 1980 (sales tax on home heating oil was eliminated effective December 1, 1980). The average selling prices were applied to the gallons purchased by quarter to arrive at sales of \$174,809.46, as compared to \$266,482.00 determined by the Audit Division. The selling prices were determined from available sales invoices.

Petitioners argued that they made nontaxable sales of fuel oil amounting to approximately \$25,000.00 over the audit period to various tax exempt organizations. Petitioners submitted exemption certificates from Sodus Free Library and VFW Post 7273, but did not substantiate the amount of sales to these organizations. Exemption certificates for the other organizations named by petitioners were not submitted.

5. Petitioners consumed 7,300 gallons of fuel oil for their personal use (heating residences and business premises). The retail sales prices for such fuel oil was \$6,935.00 and the cost was \$5,840.00.

6. Petitioners' service station was located in Wayne County. The retail selling price of gasoline in Wayne County is less than in the City of Rochester. Petitioners established the average selling price of gasoline for each quarter during the audit period through monthly statements issued to charge customers. Petitioners applied these selling prices to the gallons sold, as determined by the Audit Division, to arrive at taxable gasoline sales of \$396,191.29.

Petitioners each used 15 gallons of gasoline a week for their personal automobiles. An additional 45 gallons a week was used in the fuel truck for eight months during the year. The sales price of the self-consumed gasoline was \$6,984.00 and the cost to petitioners was \$5,820.00.

Petitioners claimed that they made nontaxable gasoline sales of \$200.00 a month to Rochester Gas and Electric Co. Petitioners submitted a Direct Payment Permit furnished by Rochester Gas and Electric; however, they did not substantiate the amount of sales or whether the sales tax was in fact deducted from the sales price shown on the pump.

7. The Audit Division classified certain purchases as "parts". The following purchases were erroneously included in the parts category:

a) oil, antifreeze, washer solvent and transmission fluid (these purchases should have been recorded under oil and supplies)	\$1,874.62
b) supplies not resold	544.22
c) services on which sales tax was paid	203.08
d) parts used to replace damaged parts caused by petitioners	597.39

The adjusted purchases of parts amounted to \$10,069.75. The purchases under (a) above should be added to the purchases classified as "oil" by the Audit Division which had a markup of 20 percent.

Petitioners used \$1,200.00 in parts and \$1,000.00 in tires for their own personal automobiles.

8. Petitioners' markup on parts was 61 percent rather than the 100 percent estimated by the Audit Division. Petitioners did not contest the other markup percentages referred to in Finding of Fact "3".

9. Petitioners each took two cartons of cigarettes a week for personal use, the total cost amounting to \$1,063.20.

The Audit Division included soda machine rental charges of \$161.82 in soda purchases. Also included were Coca Cola purchases of \$1,283.40 which were consumed by petitioners and their families rather than resold.

10. Petitioners argued that the liability for the tax on the customer list and the trucks rests with the purchaser of the business.

CONCLUSIONS OF LAW

A. 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.

Petitioners maintained inadequate and incomplete books and records. Moreover, the inconsistencies between the books and records and the tax returns, as well as the substantial underreporting of taxable sales disclosed by the audit, further established the unreliability of petitioners' books and records. Accordingly, the Audit Division's use of a test period and markup audit as a basis for determining petitioners' 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).

B. That the audit methods were reasonable under the circumstances and, as such, the burden was upon the taxpayer 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 v. Tully, 85 A.D.2d 858).

With respect to fuel oil sales, petitioners failed to sustain this burden. In light of petitioners' inadequate record keeping, it cannot be presumed that the purchases of fuel oil submitted at the hearing were complete.

Petitioners also failed to sustain the burden of proof required by section 1132(c) of the Tax Law regarding the alleged nontaxable sales of fuel oil and gasoline set forth in Findings of Fact "4" and "6".

C. That based on Findings of Fact "5", "6", "7", "8" and "9", the additional taxable sales are revised as follows:

Fuel oil sales	\$266,482.00
Less: self-consumption	<u>6,935.00</u>
Revised fuel oil sales	\$259,547.00
Revised gasoline sales based on reduced selling prices	\$396,191.29
Less: self-consumption at retail	<u>6,984.00</u>
Revised gasoline sales	\$389,207.29
"Parts" per audit	\$ 13,269.06
Less: adjustments per Finding of Fact "7"	<u>3,199.31</u>
	\$ 10,069.75
Less: self-consumed	<u>1,200.00</u>
	\$ 8,869.75
61% markup	<u>5,410.55</u>
Revised sales of parts	\$ 14,280.30
Oil purchases per audit	\$ 3,667.06
Plus: purchases erroneously included in parts	<u>1,874.62</u>
	\$ 5,541.68
20% markup	<u>1,108.33</u>
Revised oil sales	\$ 6,650.01
Tire purchases per audit	\$ 15,098.37
Less: self-consumed	<u>1,000.00</u>
Adjusted purchases	\$ 14,098.37
20% markup	<u>2,819.67</u>
Revised tire sales	\$ 16,918.04
Cigarettes and candy purchases per audit	\$ 6,515.26
Less: self-consumed	<u>1,063.20</u>
Adjusted purchases	\$ 5,452.06
20% markup	<u>1,090.41</u>
Revised cigarette and candy sales	\$ 6,542.47

Soda purchases per audit	\$ 5,875.43
Less: self-consumed	<u>1,445.22</u>
Adjusted purchases	\$ 4,430.21
33% markup	<u>1,461.96</u>
Revised soda sales	\$ 5,892.17

Petitioners are liable for use tax on the following purchases:

a) fuel oil	\$ 5,840.00
b) gasoline	5,820.00
c) supplies not resold	544.22
d) parts used to replace damaged parts caused by petitioners	577.37
e) parts	1,200.00
f) tires	1,000.00
g) cigarettes	1,063.20
h) soda	<u>1,283.40</u>
Total	\$17,328.21

D. That petitioners are liable for the sales taxes of \$810.95 which they failed to collect from the purchaser on the bulk sale of business assets in accordance with section 1133(a) of the Tax Law.

E. That the petition of Terry Clark and Robert Boise d/b/a Clark's Citgo is granted to the extent indicated in Conclusion of Law "C"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 18, 1982; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985

Roderick A. Allen
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Smith
COMMISSIONER