

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JOHN J. LOPEDITO

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 August 31, 1982.

Petitioner, John J. Lopedito, 4941 Albart Drive, Syracuse, New York 13215, 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 August 31, 1982 (File No. 40974).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on July 7, 1986 at 1:45 P.M. and was continued to conclusion before James Hoefer, Hearing Officer, at the same offices on January 26, 1987 at 1:15 P.M, with all briefs to be submitted by April 3, 1987. Petitioner appeared by Jan M. Roswig, CPA. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether an assessment of unpaid sales tax was properly issued against petitioner.

11. Whether a fraud penalty equal to 50 percent of the unpaid taxes due should be sustained.

FINDINGS OF FACT

1. Petitioner, John J. Lopedito, operated an Arco Service Station at 201 South Geddes Street, Syracuse, New York during the period at issue. The station was known as "Lopedito's Arco" and/or "Lopedito's Atlantic Service".

2. A sales tax audit of petitioner's business was conducted by the Audit Division:

(a) Purchases of gasoline were examined for the quarter ended November 30, 1980 and it was determined that a substantial discrepancy existed between taxable sales reported and petitioner's actual taxable sales.

(b) Purchase invoices for the audit period from petitioner's suppliers, Atlantic Richfield Company ("Arco"), Clark's Petroleum Service, Inc., Farm and Home Fuel Co., Spot Oil Co. and Hendricks Oil Co. were compared to gallons sold per petitioner's daily, monthly and cash receipts journals. It was found that gallons purchased and sold substantially agreed with the figures shown in the journal.

(c) Since gallons purchased and sold substantially agreed, no markup was performed. However, gasoline sales per petitioner's cash receipts book were used as audited gross gasoline sales. Gasoline tax and sales tax were deducted, resulting in net audited gasoline sales of \$822,479.00 for the audit period. Additional towing charges were determined to be \$12,350.00 based on ten tows per month at \$32.50 each. Petitioner had reported only those towing payments received for AAA towing, but had advertised and been engaged in a general towing business. Taxable sales reported were \$324,927.00, which

reflected a discrepancy of \$509,902.00 for the audit period.¹ Accordingly, the Audit Division determined additional tax due of \$35,693.14.

(d) Petitioner's Federal and State income tax returns were examined and found to be in agreement with petitioner's books and audited gross sales. It was noted that the income tax returns were prepared by petitioner's accountant, but petitioner prepared his own sales tax returns.

3. On September 15, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to "Lopedito Atlantic Services John J. Lopedito" for the period June 1, 1979 through August 31, 1982 in the amount of \$36,148.14 in additional tax due, \$16,904.71 as a fraud penalty and interest of \$7,778.27. The fraud penalty was imposed, according to the auditor, because of "the large percentage of discrepancy in audited and reported taxable sales".

4. The assessment included \$455.00 in tax on a bulk sale for the quarter ended August 31, 1982, as the auditor believed petitioner had sold the business to his son during the month of August 1982. The Audit Division subsequently conceded that no bulk sale took place. The Audit Division also conceded that petitioner was entitled to a credit of \$296.45, due to an error in the calculation of sales tax on gas sales.

5. Subsequent to the issuance of the first assessment on September 15, 1982, the Audit Division learned that petitioner's tow trucks had towed illegally parked cars out of parking lots pursuant to agreements with the lot owners. After reviewing police records as to the towed vehicles, the Audit Division

¹ The sales tax return for the period ended August 31, 1982 had not been filed at the time of the analysis. Petitioner subsequently filed a return for this period and paid tax of \$600.32.

issued to petitioner an additional assessment of \$4,399.47 in tax, \$2,199.70 as a penalty for fraud and interest of \$1,029.78, on February 25, 1983. As a result of a courtesy conference held in the Syracuse District Office on August 17, 1983, the Audit Division, by Notice of Assessment Review, reduced this assessment to \$1,652.84 in tax, \$826.40 in fraud penalty and \$435.16 in interest. The reduction was due to the elimination of periods prior to March 1, 1981, when the parking lot towing started, and to the fact that although tax had been separately stated on the towing invoices, the prices used by the auditor had included the tax.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides, in pertinent part, as follows:

"If a return required by this article is not filed, or 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. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That where a taxpayer's records are incomplete or insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous. (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858.)

C. That the sales tax returns filed by petitioner were clearly incorrect and were, in fact, inconsistent with petitioner's own records. Accordingly, it was proper for the Audit Division to estimate tax based on petitioner's gas receipts records plus additional towing charges. Petitioner did not sustain

his burden of proof to show that either the method of audit or the amount of tax assessed was erroneous.

D. That the burden of proof with respect to the fraud penalty provided under Tax Law § 1145(a)(2) is upon the Audit Division. The Audit Division is required to show by clear and convincing evidence every element of fraud including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations by petitioner and resulting in deliberate nonpayment or underpayment of taxes due and owing (Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982).

E. That based on the evidence presented, the Audit Division has not sustained its burden of proof to show that the imposition of a fraud penalty is warranted. However, there nonetheless emerges a pattern of conduct by petitioner sufficient to warrant the imposition of a penalty pursuant to Tax Law § 1145(a)(1)(i) for the period at issue herein. Furthermore, the evidence presented by petitioner is insufficient to show that reasonable cause existed for failure to pay the proper sales tax due. Accordingly, the assertion of Tax Law § 1145(a)(1)(i) penalty and the imposition of statutory interest charges are both sustained.


F. That the notices of determination and demands for payment of sales and use taxes due issued on September 15, 1982 and February 25, 1983 are to be reduced by the credits noted in Finding of Fact "4", by the adjustment specified in the Notice of Assessment Review set forth in Finding of Fact "5", by the amount of tax reported and paid for the quarter ended August 31, 1982 (see footnote to Finding of Fact "2[c]") and as provided in Conclusion of Law "E". Except for such modifications, the aforesaid notices of determination and

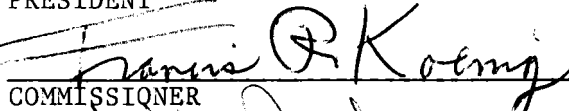
demands for payment of sales and use taxes due are sustained and the petition of John J. Lopedito, to the extent inconsistent therewith, is denied.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 3 11981


PRESIDENT


COMMISSIONER


COMMISSIONER