

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter	of the Petition	:	
	of	:	
REMLIN AUTO	SERVICE, 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 February 28, 1982.		:	

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Petitioner, Remlin Auto Service, Inc., 1940 Flatbush Avenue, Brooklyn, New York 11210, 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 February 28, 1982 (File No. 41156).

A hearing was commenced before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 9, 1985 at 10:00 A.M. and continued to conclusion on July 24, 1985 at 1:30 P.M., with all briefs to be submitted by October 10, 1985. Petitioner appeared by Sidney J. Leshin, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly employed external indices to verify petitioner's taxable sales, and if so, whether the results of such procedures were correct.

#### FINDINGS OF FACT

1. On November 30, 1982, the Audit Division issued to petitioner, Remlin Auto Service, Inc. ("Remlin"), 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 June 1, 1979 through February 28, 1982 in the principal amount of \$45,067.92, plus accrued interest. On August 30, 1982, Mr. Guy DeFonzo, as president of the corporation, had executed a consent serving to extend the period of limitations for assessment for the taxable period June 1, 1979 through November 30, 1979 to March 20, 1983, inclusive.

2. Remlin operates a full-service gasoline station, equipped with four pumps and two repair bays. It sells unleaded gasoline and diesel fuel which it purchases from two independent suppliers, Energy Distributors Corp. ("Energy") and Kings County Fuel Oil Transportation Corp. ("Kings County"), respectively. Business hours are 7:00 A.M. to 8:00 P.M. Mondays through Saturdays, and 7:00 A.M. to 2:00 P.M. Sundays.

3. Mr. DeFonzo is a skilled mechanic and devotes himself full-time to Remlin's business. During the audit period, petitioner employed one assistant to pump fuel and perform simple repairs, on a 40-hour per week schedule and at an annual salary of approximately \$8,000.00.

4. The records petitioner maintained for accounting and tax purposes consisted of delivery tickets, indicating gallons of fuel delivered and the cost thereof; bank statements and cancelled checks, including checks for petitioner's purchases of accessories and parts; and deposit slips, reflecting deposits of receipts to the corporate account. Petitioner generally furnished its customers with sales invoices for repair services rendered but did not retain copies for its own record keeping. Petitioner's independent accountant prepared its sales and use tax returns as follows: he computed gasoline and diesel fuel sales by reference to the delivery tickets, subtracted fuel sales from total deposits to the corporate account, and considered the difference as receipts from repair services and sales of tires, batteries and accessories

("TBA"). Presumably, he took cognizance of the sales and use taxes included in deposits. He also prepared worksheets exhibiting Remlin's purchases; the record is unclear regarding whether these served as corroboration for the sales of repair services and TBA arrived at as above-described.

5. Mr. DeFonzo owned several taxicab corporations, which purchased from Remlin approximately 40 percent of its total fuel sold. In addition, Mr. DeFonzo and his assistant repaired and serviced the taxis, charging the related corporations Remlin's cost of services and parts but not collecting sales tax.

6. In May, 1982, the Audit Division commenced an examination of Remlin's operations and records. Deeming petitioner's documentation of its purchases and sales incomplete, the examiner relied on external indices to verify its taxable sales as reported.

(a) Gasoline and diesel fuel sales. By examination of the accounts receivable and the sales invoices of Energy and Kings County for the test period September 1 through November 30, 1980, the Audit Division determined that petitioner purchased 40,000 gallons of fuel during such period (26,000 gallons of unleaded gasoline and 14,000 gallons of diesel fuel). A survey of ten selected truck stops conducted by the Audit Division revealed that the average selling price of regular gasoline, including the federal and New York excise tax and the sales tax, was \$1.272 per gallon during the quarter ended November 30, 1980. The examiner multiplied 40,000 gallons purchased by an average selling price of \$1.25 to arrive at sales of gasoline and diesel fuel during the test quarter of \$50,000.00.

(b) Repair services and TBA sales. The examiner estimated repair services and TBA sales for the test quarter of \$37,440.00, based upon the following assumptions: that two mechanics worked 8 hours per day, 6 days per

week; and that sales totalled \$30.00 per hour, with \$10.00 allocated to TBA and the remainder to labor (2 mechanics x \$30/hour x 8 hours/day x 6 days/week x 13 weeks/quarter).

The examiner then calculated an error rate of 165.9 percent, by comparison of audited taxable sales (\$87,440.00) with reported taxable sales (\$32,879.00) for the test quarter. She applied the error rate to taxable sales reported throughout the audit period, which computation yielded additional taxable sales of \$559,992.00 and sales tax due of \$45,067.92.

7. In 1980, the average price charged by Remlin for both unleaded gasoline and diesel fuel ranged from \$1.12 to \$1.25. When the sales tax examiner visited the business premises on May 3, 1982, the selling price for unleaded gasoline was \$1.19 and for diesel, \$1.25, including all applicable taxes.

#### CONCLUSIONS OF LAW

A. That petitioner failed to maintain sufficient records of its sales of fuel, repair services and accessories. Its record keeping procedures thus being deficient, the Audit Division was authorized by Tax Law section 1138(a)(1) to rely upon external indices to verify petitioner's taxable sales as reported on its returns.


B. That petitioner established that: (1) the selling prices of unleaded gasoline and of diesel fuel should be adjusted to \$1.19 and \$1.25, respectively, including the federal and New York excise taxes and the sales tax; and (2) it employed only one skilled mechanic. The Audit Division is therefore directed to recalculate audited fuel sales using such prices, and to reduce audited repair and TBA sales for the test period September 1 through November 30, 1980 to \$18,720.00.

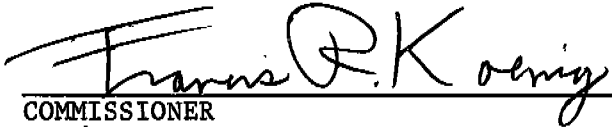
C. That the petition of Remlin Auto Service, Inc. is granted to the extent indicated in Conclusion of Law "B"; the assessment issued on November 30, 1982 is to be modified accordingly; and except as so modified, the assessment is in all other respects sustained.

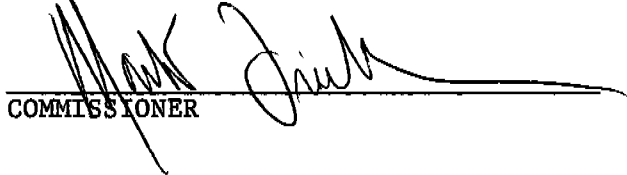
DATED: Albany, New York

STATE TAX COMMISSION

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