

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

TRIPLE D SERVICE CENTER, 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 September 1, 1979 :
through August 31, 1982.

Petitioner, Triple D Service Center, Inc., c/o Itzhak Diel, President,
1078 East 58th Street, Brooklyn, New York 11234, 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 September 1, 1979 through August 31, 1982
(File No. 41719).

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 June 17, 1986 at 1:15 P.M. and continued to conclusion before the same
Hearing Officer at the same location on September 9, 1986 at 1:15 P.M., with
all briefs to be filed by November 24, 1986. Petitioner appeared by Sidney J.
Leshin, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin A.
Levy, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined the number of gallons
of gasoline and quarts of motor oil purchased and subsequently sold by petitioner
during the audit period.

II. Whether the Audit Division properly computed petitioner's taxable repair
sales for the audit period.

111. Whether petitioner ceased all business operations effective on or about March 1, 1982 and is therefore not liable for any taxes asserted due after said date.

IV. Whether the Audit Division properly assessed against petitioner a penalty of 50% based upon fraud.

FINDINGS OF FACT

1. On December 20, 1982, the Audit Division, as the result of a field examination, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, Triple D Service Center, Inc. Said notice, which encompassed the period September 1, 1979 through August 31, 1982, assessed additional sales tax due of \$48,845.40, plus a 50% fraud penalty of \$24,422.69 and interest of \$10,238.78, for a total amount due of \$83,506.87.

2. Petitioner operated a gasoline service station and automotive repair shop located at 2831 West 8th Street, Brooklyn, New York. For the period September 1, 1979 through February 28, 1982, petitioner timely filed returns wherein it reported sales of \$88,295.00. On its returns, petitioner reported identical amounts for gross sales and taxable sales. No returns were filed for the quarters ending May 31, 1982 and August 31, 1982.

3. Petitioner, during the course of the field audit, never presented or produced any books and records for examination. The Audit Division, therefore, resorted to the use of external indices and estimates to compute the tax asserted due in the notice dated December 20, 1982.

4. (a) To compute taxable gasoline sales, the Audit Division obtained information from the petitioner's supplier of gasoline, Battery Oil Corp. ("Battery"), which indicated that petitioner purchased a total of 333,500 gallons of gasoline during the period September 1, 1979 through April 30, 1982.

For the four remaining months of the audit period, the Audit Division estimated that petitioner purchased 6,000 gallons of gasoline per month. The 357,500 gallons of gasoline purchased during the audit period (333,500 plus 24,000) were multiplied by an average taxable selling price per gallon of \$1.25 to produce taxable gasoline sales of \$446,875.00.

(b) Motor oil sales of \$6,444.00 were also computed based on information received from Battery. For a nine month period Battery indicated that petitioner had purchased a total of 1,614 quarts of oil, which averages out to 179 quarts per month. The Audit Division multiplied the 179 average quarts of motor oil purchased per month by the number of months in the audit period (36) to determine total quarts of oil sold (6,444). Using an estimated selling price of \$1.00 per quart resulted in motor oil sales of \$6,444.00.

(c) To compute taxable repair sales, the Audit Division determined that petitioner employed one mechanic who worked 48 hours a week. It was estimated that repairs were charged at \$30.00 per hour (\$20.00 for labor and \$10.00 for parts), thereby producing weekly repair sales of \$1,440.00 (48 hours x \$30.00 per hour). Weekly repair sales of \$1,440.00 were multiplied by the number of weeks in the audit period (156) to compute taxable repair sales of \$224,640.00.

5. By combining audited taxable gasoline sales (\$446,875.00), audited motor oil sales (\$6,444.00) and audited taxable repair sales (\$224,640.00) the Audit Division arrived at total taxable sales of \$692,345.00¹ and tax due of \$48,845.40. The 50% fraud penalty was asserted against petitioner based solely

1 Because of an addition error and errors in multiplication, the Audit Division erroneously computed a total taxable sales figure of \$692,345.00

on the fact that the audit produced a substantial understatement of taxable sales. Other than the purported large understatement, the Audit Division presented no further evidence to prove fraud.

6. The information concerning the volume of gasoline and motor oil purchased by petitioner from Battery was furnished to the field auditor by the Audit Division's central office located in Albany, New York. Said information was received by the central office directly from Battery. Petitioner asserts that since the auditor did not review any original documents, statements or invoices from Battery, it was improper for him to rely on the information received from the Audit Division's central office. Petitioner further asserts that the document or documents received by the Audit Division directly from Battery were not submitted in evidence and, therefore, the calculation of gasoline and motor oil sales were not based on external indices. Petitioner submitted no credible documentary or other evidence to show the number of gallons of gasoline and quarts of oil it purchased during the audit period and the selling price of said gasoline and motor oil.

7. During the audit period petitioner performed a substantial number of nontaxable vehicle inspections. Petitioner averaged 50 New York State inspections per month and received a fee of \$3.00 per inspection during the 7 month period from September 1, 1979 through March 31, 1980 and a \$6.00 fee per inspection for the remaining 29 months of the audit period. Petitioner also averaged 125 inspections per month for the New York City Taxi and Limousine Commission at a fee of \$10.00 per inspection. Nontaxable inspection fees totaled \$54,750.00 for the audit period.

8. Petitioner maintains that it ceased all business operations on or about March 1, 1982 and that it has since that time been engaged in no business operations.

formed for the purpose of conducting an automotive repair business at petitioner's former location. Copies of sales and use tax returns filed by I. & D. Goodwill, Inc. for the quarters ending May 31, 1982 and August 31, 1982 were submitted in evidence as proof that petitioner was not engaged in business after March 1, 1982 and, therefore, not liable for any sales taxes accruing after said date. No further credible documentary or other evidence was adduced to show that petitioner ceased all business operations on or about March 1, 1982.

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 the 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".

B. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

C. That petitioner provided inadequate and incomplete books and records for purposes of verifying taxable sales. Accordingly, the Audit Division's use of third party verification of purchases and average selling prices as a basis for determining petitioner's gasoline and motor oil sales was proper pursuant to section 1138(a) of the Tax Law. Petitioner has submitted no evidence whatsoever to refute the figures used by the Audit Division in the calculation of taxable gasoline sales and motor oil sales.

D. That the estimates used by the Audit Division to calculate taxable repair sales of \$224,640.00 were reasonable under the circumstances. When a taxpayer's recordkeeping is found to

audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223). Petitioner has, however, established that it received \$54,750.00 in nontaxable inspection fees. Accordingly, total audited taxable sales are reduced to \$623,209.00 (\$677,959.00 - \$54,750.00).

E. That petitioner has failed to establish that it was not engaged in business on or after March 1, 1982. The evidence presented by petitioner is insufficient to show a cessation of business activities on or after March 1, 1982.

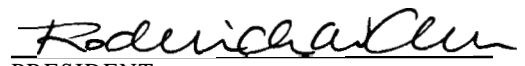
F. That Tax Law section 1145(a)(2) imposes a penalty of 50% "[i]f the failure to file a return or pay over any tax to the tax commission within the time required by this article is due to fraud". The burden of proving fraud rests with the Audit Division (Matter of Abitt Wine & Liquor Corp., State Tax Commission, September 15, 1986). Based on the evidence presented, the Audit Division has not sustained its burden of proving that the imposition of a fraud penalty is warranted.

G. That the petition of Triple D Service Center, Inc. is granted to the extent indicated in Conclusions of Law "D" and "F", supra; that the Audit Division is directed to recompute the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 20, 1982 consistent with the conclusions reached herein; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 24 1987


PRESIDENT

