

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
DOMINICK ADOVASIO	:	DECISION
d/b/a DA PERFORMANCE	:	
	:	
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 February 28, 1982.	:	

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Petitioner, Dominick Adovasio d/b/a DA Performance, 86 Durst Place, Yonkers, New York 10704 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 February 28, 1982 (File Nos. 41820 and 44319).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 11, 1984 at 10:45 A.M., with all briefs to be submitted by November 30, 1984. Petitioner appeared by Lawrence Giusto. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

- I. Whether petitioner timely applied for a hearing.
- II. Whether the Audit Division properly determined additional sales taxes due from petitioner based on an examination of available books and records.
- III. Whether penalty and that portion of interest exceeding the minimum statutory rate assessed on the notice issued March 1, 1983 should be cancelled.

FINDINGS OF FACT

1. Petitioner, Dominick Adovasio d/b/a DA Performance, operated a Power Test gasoline service station located at 3337 Boston Post Road, Bronx, New York. The business was discontinued sometime in February, 1981.

2. On June 20, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1979 through February 28, 1982 for taxes due of \$33,656.87, plus penalty and interest of \$10,664.53, for a total of \$44,321.40. The Audit Division issued said notice after it was unsuccessful in contacting petitioner to conduct an audit of his books and records.

3. On September 28, 1982, the Audit Division received a letter from petitioner protesting the above notice. The envelope in which the letter was mailed was postmarked by the United States Post Office on September 20, 1982.

4. The taxes due on the above notice were estimated on the basis of available information. The Audit Division was advised that petitioner purchased 39,000 gallons of gasoline for the period September 1, 1980 through November 30, 1980. The average statewide retail selling price of gasoline (excluding state gasoline tax) furnished by the Miscellaneous Tax Bureau was applied to 39,000 gallons for each period under audit to determine taxable gasoline sales of \$506,688.00. Sales of parts and service were estimated to be \$111,922.00 by applying 22.089 percent to the estimated gasoline sales. The percentage of parts and service sales in relation to gasoline sales was based on audits of similar businesses. The total estimated sales were \$618,610.00 as compared to reported sales of \$232,465.00 (no returns were filed for the period December 1, 1980 through February 28, 1982), leaving additional taxable sales of \$417,168.00 and tax due thereon of \$33,656.87.

5. After the issuance of the assessment, petitioner produced certain books and records for audit. These records included purchase invoices for gasoline, bank statements, cancelled checks and a profit and loss statement for 1979.

The Audit Division found that the gasoline purchases from the invoices agreed with the purchases provided by Power Test Corp. for the period March 1, 1980 through October 30, 1980. Therefore, taxable gasoline sales were revised to \$407,746.94 using the actual gallons purchased from petitioner's records.

The auditor visited the location where petitioner operated during the period at issue. The premises had one service bay and lift. Based on this observation, the Audit Division redetermined sales of parts and service by estimating the salary for one mechanic and applying a 100 percent markup to such salary to arrive at labor sales. Prior audit experience with service stations disclosed that the ratio of parts sales to labor was 71.12 percent. This percentage was used to determine sales of parts. The revised sales of parts and labor amounted to \$119,784.00. Based on the foregoing audit procedures, the additional taxable sales were reduced from \$417,168.00 to \$295,065.94 and the tax liability to \$23,605.27. The additional taxable sales found for the period March 1, 1979 through November 30, 1979 were greater than those estimated for the notice issued June 20, 1982. However, the statute of limitation for assessment had expired for these periods so that petitioner's liability for those periods was limited to the amount originally assessed. Accordingly, the tax due was further adjusted to \$20,683.19.

The additional taxable sales for the period December 1, 1979 through February 29, 1980 were also greater than previously estimated. Therefore, on March 1, 1983, the Audit Division issued an assessment for taxes due of \$3,333.10,

plus penalty of \$833.28 and interest of \$1,263.71, for a total of \$5,430.09 (the two notices equal the revised taxes due of \$20,683.19). On May 10, 1983, the Audit Division received payment of \$4,596.81 covering the tax and interest on the second notice. At that time petitioner requested that the penalty be abated.

6. On March 25, 1983, the Audit Division issued a Notice of Assessment Review which advised petitioner that the notice issued June 20, 1982 had been reduced to \$17,350.09, plus penalty and interest.

7. Petitioner did not provide any sales records to the Audit Division from which it could verify taxable sales reported. The bank statements showed deposits of \$493,722.42 as compared to reported taxable sales of \$232,465.00. Additionally, the profit and loss statement for 1979 showed sales of \$216,821.97 which were substantially the same as the audited taxable sales determined by the Audit Division for the same period.

8. During the period under audit, petitioner built a race car. He argued that the lift at the service station was used to build the race car rather than to perform repair services.

9. Petitioner failed to establish that the nonpayment of taxes for the period ending February 29, 1980 was due to reasonable cause.

#### CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that a notice of determination of tax due shall be given to the person liable for the collection or payment of the tax and such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the Tax Commission for a hearing.

B. That section 1147(a)(1) of the Tax Law provides that a notice of determination shall be mailed promptly by registered or certified mail and that any period of time which is determined according to the provisions of Article 28 by the giving of notice shall commence to run from the date of mailing of such notice.

Subsection (2) provides that if any return, claim, statement, application, or other document required to be filed within a prescribed period under Article 28 is delivered after such period, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery.

C. That the Audit Division gave petitioner notice of the additional taxes due on June 20, 1982. Petitioner's protest to the notice or application for a hearing with respect thereto was postmarked September 20, 1982, which is ninety-two days from the date the Audit Division gave notice of the taxes due. Accordingly, petitioner's liability was finally and irrevocably fixed.

D. That Issue II is moot.

E. That the Audit Division properly assessed penalty on the notice issued March 1, 1983 (Finding of Fact "5") in accordance with section 1145(a) of the Tax Law.

F. That the petition of Dominick Adovasio d/b/a DA Performance is denied and the notices of determination and demand for payment of sales and use taxes due issued June 20, 1982 (as revised pursuant to the Notice of Assessment Review) and March 1, 1983, are sustained.

DATED: Albany, New York

**MAY 29 1985**

STATE TAX COMMISSION

*Rodriguez*  
PRESIDENT

*Francis R. Koony*  
COMMISSIONER

*Mark J. Smith*  
COMMISSIONER