

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
E & M WITKOWSKI, 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, 1978	:	
through August 31, 1981.	:	

Petitioner E & M Witkowski, Inc., 357 Military Road, Buffalo, New York 14207, 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, 1978 through August 31, 1981 (File No. 41888).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on June 21, 1985 at 10:30 A.M. and continued to its conclusion on September 9, 1985 at 9:15 A.M., with all briefs to be submitted by January 9, 1986. Petitioner appeared by Albrecht, Maguire, Heffern & Gregg, P.C. (George M. Zimmermann, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioner's books and records were adequate for the purpose of verifying taxable sales.

II. Whether the Audit Division correctly determined additional taxable sales and sales tax due thereon on the basis of a markup of purchases.

FINDINGS OF FACT

1. On December 13, 1982, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and

Use Taxes Due against petitioner, E & M Witkowski, Inc., assessing sales and use taxes in the amount of \$21,354.88 plus interest of \$5,964.08 for a total amount due of \$27,318.96 for the period September 1, 1978 through August 31, 1981. A second notice was issued against petitioner on December 20, 1982 assessing sales and use taxes in the amount of \$752.50 plus interest of \$209.28 for a total amount due of \$961.78 for the same period as that covered by the first notice.

2. Petitioner operated a gasoline service station located at 357 Military Road, Buffalo, New York. Its bookkeeping procedures were established by its accountant. A cash register used by the petitioner produced a tape which identified various sales categories, for example, gas, accessories (acc), oil, miscellaneous (mcs). The tapes did not state sales tax separately, and the individual tapes were undated. Petitioner accepted three types of payments for sales: cash, credit cards and charges to personal accounts. Individual transactions of non-gasoline sales paid in cash, credit card sales and charge account sales were rung up separately on the cash register. Cash receipts from gasoline sales were kept on the person of petitioner's owner or employees, counted at the end of the day and rung up as a total on the cash register. The entire tape was totalled at the end of each day. Charge account sales were recorded on credit card slips. Petitioner furnished daily cash register tapes, charge slips, summaries of credit card sales and purchase invoices to its accountant. These documents were posted to a general ledger which stated total sales, purchases and expenses per day, but did not categorize purchases or sales by type.

3. Petitioner did not use the register tapes or general ledger to calculate tax due on gasoline sales. To determine monthly gasoline sales, petitioner took a meter reading of each pump at the beginning and end of each month. At

the end of each sales tax quarter, petitioner provided its accountant with a monthly summary sheet showing the grades of gasoline sold, the selling price of each grade as shown on the pump at the beginning of each month, the number of gallons of gasoline sold at each price and the total of all non-gasoline sales. The latter figure was derived from the daily cash register tapes. The figures furnished by petitioner were used by its accountant to determine petitioner's sales tax liability.

4. On audit, the sales tax auditor was provided with sales tax returns and related workpapers, federal and state tax returns with workpapers, depreciation schedules, a check disbursements journal and some purchase invoices. She deemed these records inadequate for the purpose of verifying reported sales and, consequently, resorted to external indices to determine taxable sales.

5. The auditor requested verification of petitioner's gasoline and other purchases from Sun Oil Co. and received complete purchase invoices for the period March 1, 1980 through August 31, 1981 which became the audit test period. Based on the Miscellaneous Tax Section's annual survey of truckstops in New York State, the auditor determined that during the test period the average selling price of regular gasoline, including all taxes, was 134.5 cents per gallon. This price was applied to all grades of gasoline and diesel fuel purchased by petitioner to determine taxable sales as follows:

	<u>GASOLINE</u>	<u>DIESEL</u>
Total gallons purchased	502,442	78,917
Average selling price per gallon	x 1.345	x 1.345
Total amount sold	\$675,784.49	\$106,143.36
State tax	- 40,195.36	- 7,891.70
Federal diesel fuel tax		\$ 98,251.66
		- 3,156.68
Total sales including sales tax	\$635,589.13	\$ 95,094.98
Divided by 1.07 to deduct sales tax	<u>1.07</u>	<u>1.07</u>
Total Taxable Sales	\$594,008.53	\$ 88,873.81

6. Purchases other than gasoline were determined for the test period using petitioner's purchase invoices as well as Sun Oil Co.'s invoices. Petitioner's books showed a markup of 129.8 percent; however, based on her auditing experience, the auditor determined that a more accurate markup figure would be 180 percent. She marked up purchases accordingly which resulted in taxable non-gasoline sales of \$15,228.00. The auditor added to this amount estimated receipts from snowplowing of \$1,200.00 for a total of \$16,428.00 in taxable sales other than gasoline.

7. Reported taxable sales for the test period were subtracted from total audited taxable sales resulting in additional taxable sales of \$176,694.91 with a tax due on that amount of \$12,365.45. An error rate of 33.8 percent was calculated by dividing additional tax due by sales tax reported of \$36,586.27. The error rate was applied to tax paid in each quarter to compute an additional tax due of \$20,847.85. In addition, a tax of \$1,259.53 was assessed on recurring expense purchases and the acquisition of fixtures and equipment, resulting in a total tax due of \$22,107.38. As the result of a mathematical error, the original notice issued assessed a tax of \$21,354.88. When the error was detected a second notice was issued in the amount of \$752.50. At hearing, petitioner conceded the tax of \$1,259.53 assessed on recurring purchases and asset acquisitions.

8. Documentation introduced at the hearing established that petitioner's markup on non-gasoline purchases was approximately 130 percent throughout the audit period. Charge slips and other records showed that the average selling price for gasoline during the test period was \$1.256 (regular: 1.206; unleaded: 1.2625; premium: 1.3000).

9. After the audit was completed, petitioner determined that it had underreported approximately \$129,000.00 in taxable gasoline sales with a tax due on that amount of approximately \$9,000.00. During the audit period, the petitioner began selling gasoline and diesel fuel in units of one liter rather than one gallon. However, in calculating its sales tax liability, petitioner continued to use gallons which led to the underreporting.

CONCLUSIONS OF LAW

A. That section 1135 (subd.[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. Petitioner did not provide the Audit Division with any document which would serve as a verifiable record of taxable sales. Furthermore, the cash register tapes and ledgers introduced at hearing were not reliable records satisfying the statutory requirement that records of individual sales be retained (see, Matter of Skiadas v. State Tax Comm., 95 A.D.2d 971). The tapes were not dated, they did not show each individual gasoline sale and the ledgers derived from the tapes did not include an entry for each sale. Moreover, petitioner did not use these records as the basis for determining its taxable gasoline sales and reporting sales tax due.

B. That petitioner's failure to keep adequate records made it virtually impossible to verify taxable sales receipts and conduct a complete audit. Under such circumstances, Section 1138(subd. [a]) of the Tax Law requires the Audit Division to determine the amount of tax due from such information as may be available and, if necessary, to estimate the tax on the basis of external indices. In light of petitioner's faulty record keeping, the test period and markup audit utilized by the Audit Division was a reasonable method for determining petitioner's tax liability (Matter of Sakran v. State Tax Comm., 73 A.D.2d 989).

C. That although the audit techniques employed were reasonable, petitioner has established that during the test period its average selling price per gallon of gasoline was \$1.256. Furthermore, documents provided by petitioner show that it utilized a markup of 130 percent on non-gasoline sales. Petitioner's taxable sales shall be recomputed accordingly.

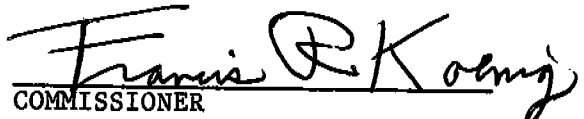
D. That the petition of E & M Witkowski, Inc. is granted to the extent indicated in Conclusion of Law "C"; that the notices of determination and demands for payment of sales and use taxes due issued on December 13, 1982 and December 20, 1982 shall be modified accordingly; and that in all other respects the petition is denied.

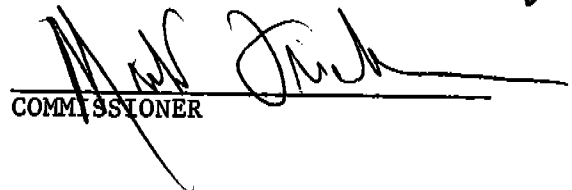
DATED: Albany, New York

STATE TAX COMMISSION

JUN 19 1986


PRESIDENT


COMMISSIONER


COMMISSIONER