

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter **of** the Petition

of :

MY PLACE AUTO CENTER, INC.
and SAMUEL IZSAK, OFFICER

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, 1980
through December 31, 1981.

Petitioners, My Place Auto Center, Inc. and Samuel Izsak, 141-05 Northern Blvd., Flushing, New York 11354, 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, 1980 through December 31, 1981 (File No. 42541).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices **of** the State Tax Commission, Two World Trade Center, New York, New York on September 10, 1986 at 1:45 P.M. Petitioners appeared by Samuel Izsak. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., **of** counsel).

ISSUES

I. Whether the Audit Division properly determined sales and use taxes due from My Place Auto Center, Inc.

II. **Whether Samuel Izsak was a person required to collect tax on behalf of My Place Auto Center, Inc.**

FINDINGS OF FACT

1. Petitioner My Place Auto Center, Inc. ("the corporation") operated a gasoline service station business at 175-14 Horace Harding Boulevard, Queens, New York.

2. Petitioner Samuel Izsak was hired by one Ralph Benaim to manage the station as of March 17, 1980. At that time the business was known as Tel Aviv Service Station and was operated by Mr. Benaim.

3. On or about June 1, 1980, Mr. Benaim caused the corporation to be formed. Mr. Izsak was named secretary and 25 percent of the corporation's stock was issued in his name. Mr. Benaim's nephew, Hasiba Galai, was named president and held 75 percent of the stock.

4. Mr. Izsak and a mechanic's helper actually operated the business for the corporation.

5. Mr. Izsak had the authority to, and in fact did, sign checks on behalf of the corporation.

6. When Mr. Izsak came to the station on the morning of June 1, 1981, he found that the station was already open and that the safe was open and everything in it had been removed. Mr. Benaim had keys to the station and had evidently opened the station and the safe. On that same morning, Mr. Izsak was "thrown out" of the business by Mr. Benaim and was permitted to take only his personal tools.

7. Mr. Izsak testified that during the period June 1, 1980 through May 31, 1981 Mr. Benaim took \$38,142.00 in cash and gasoline out of the business and that the station was operated by another corporate entity after said period.

8(a). No records were available at the time of the audit. Mr. Izsak told the auditor that Mr. Galai had the records and had evidently left the country, returning to his native Turkey.

(b). Gasoline sales were estimated by a third party verification from EFCO Oil Corp. ("EFCO"), which showed the following:

<u>Month</u>	<u>Gallons</u>
June 1981	12,000
July 1981	48,055
August 1981	<u>78,002</u>
TOTAL	138,057

Total gallons for the three months, 138,057, multiplied by an average selling price of \$1.25 per gallon resulted in audited gasoline sales of \$172,571.25 per quarter.

(c). Repair sales were estimated by assuming that each of the two bays of the gas station had \$10,000.00 per month in repairs. This amounted to \$60,000.00 in repair sales per quarter.

(d). Tires, batteries and accessories ("TBA") sales were estimated at \$5,000.00 per month or \$15,000.00 per quarter.

(e). Estimated gasoline, repair and TBA sales amounted to \$247,571.25 which amount was rounded to \$250,000.00 per quarter for assessment purposes.

(f). Additional taxable sales were computed as follows:

<u>Quarter</u> <u>Ending</u>	<u>Estimated</u> <u>Taxable Sales</u>	<u>Taxable</u> <u>Sales Reported</u>	<u>Additional</u> <u>Taxable Sales</u>
8/31/80	\$250,000.00	\$23,105.00	\$226,895.00
11/30/80	250,000.00	25,186.00	224,814.00
2/28/81	250,000.00	19,461.00	230,539.00
5/31/81	250,000.00	-0-	250,000.00
8/31/81	250,000.00	-0-	250,000.00
11/30/81	250,000.00	-0-	250,000.00
12/31/81	83,333.00	-0-	83,333.00

9. On January 11, 1983 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner My Place Auto Center, Inc. in the amount of \$122,079.81 in tax, and \$28,063.71 in penalty, plus interest. Similar notices were issued to Hasiba Galai, as president, and Mr. Izsak, as secretary.

10(a). After the assessment, the Audit Division issued subpoenas to Chevron USA, Inc. ("Chevron"), seeking petroleum sales information with respect to the corporation, Ralph Benaim and 175 Horace Service Station, Inc., all regarding the 174-14 Horace Harding Boulevard location.

(b). Chevron's records show the station's account to be in the name of Ralph Benaim/Tel Aviv Chevron through June 30, 1981 with a change to 175 Horace Service Station, Inc. as of July 1, 1981.

(c). Total Chevron gasoline sales to the station for 1980 were 218,992 gallons. Sales from June 1, 1980 through December 31, 1980 were 110,977 gallons. There were no Chevron TBA sales to the station for 1980 (in fact it appears that no TBA purchases had been made from Chevron since February 1979).

(d). Chevron gasoline sales to the station for 1981 were 112,790 gallons which, Chevron reported, was 48 percent lower than the prior year. No TBA was shown as having been sold to the station by Chevron for 1981.

11. During the period June 1, 1980 through May 31, 1981 the station was open six days a week for approximately 12 hours per day. The labor rate for repairs was \$25.00 per hour.

12. The petition filed by Mr. Izsak on behalf of the corporation was clearly intended to protest his own liability as officer, as well as that of the corporation. Accordingly, the petition and perfected petition are deemed amended to include Mr. Izsak as a petitioner.

CONCLUSIONS OF LAW

A. That since no books or records were available, it was permissible for the Audit Division to estimate the amount of tax due by external indices (Tax Law § 1138[a]). The tax estimated by the auditor must, however, be revised in view of evidence adduced at the hearing.

B. That it was improper to project the EFCO purchases over the entire audit period. It appears that the **EFCO** purchases commenced with the new management effective June 1981, starting with only 12,000 gallons during that month, increasing to 48,055 gallons in July and 78,002 gallons in August. Moreover, Chevron sales for 1981 were only about one-half of the 1980 sales, which shows a lessened dependence on Chevron. Accordingly, gasoline sales are hereby determined to be as follows:

- (1) June 1, 1980 - May 31, 1981: 15,853 gallons per month on average (based on Chevron records for the seven month period June 1, through December 31, 1980) times \$1.25 per gallon for \$19,816.25 per month or \$59,448.75 per quarter.
- (2) June 1, 1981 - December 31, 1981: As per audit.

C. Sales of tires, batteries and accessories are hereby deemed to be as follows:

- (1) June 1, 1980 - May 31, 1981: Sales are reduced to 8.7 percent of gasoline sales or \$5,172.00 per quarter (using the same ratio of gasoline to TBA as used in the audit).
- (2) June 1, 1981 - December 31, 1981: As per audit.

D. Repair sales are hereby determined to be as follows:

- (1) June 1, 1980 - May 31, 1981: Sales for this period are reduced to \$29,250.00 per quarter, on the basis that the mechanic and one mechanic's helper would bill 10 hours per day at \$25.00 per hour for six days per week (as they also had to pump gas) and that sales of parts were equal to one-half of labor sales.
- (2) June 1, 1981 - December 31, 1981: As per audit.

E. That in view of the above, the assessment *is* to be reduced based on the following:

<u>Quarter Ending</u>	<u>Estimated Taxable Sales</u>	<u>Taxable Sales Reported</u>	<u>Additional Taxable Sales</u>
8/31/80	\$ 93,871.00	\$23,105.00	\$ 70,766.00
11/30/80	93,871.00	25,186.00	68,685.00
2/28/81	93,871.00	19,461.00	74,410.00
5/31/81	93,871.00	-0-	93,871.00
8/31/81	250,000.00	-0-	250,000.00
11/30/81	250,000.00	-0-	250,000.00
12/31/82	83,333.00	-0-	83,333.00


F. That petitioner Samuel Izsak was not a person required to collect sales and use taxes on behalf of petitioner after May 31, 1981 and in fact is not liable for tax after the quarter ending February 28, 1981. Mr. Izsak was literally thrown out of the business on June 1, 1981 and was not in the position to remit tax on behalf of the corporation for the immediately preceding quarter. Mr. Izsak is liable, however, under sections 1133(a) and 1131(1) of the Tax Law for the period June 1, 1980 through February 28, 1981.

G. That the petition of My Place Auto Center, Inc. and Samuel Izsak is granted to the extent provided for in Conclusions of Law "E" and "F", and, except as so granted, the petition is otherwise denied.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 16 1987


PRESIDENT


COMMISSIONER


COMMISSIONER