

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ARTHUR'S SERVICE STATION, 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 March 1, 1977
through November 30, 1981.

Petitioner, Arthur's Service Station, Inc., 3740 Broadway, New York, New York 10032, 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, 1977 through November 30, 1981 (File No. 42558).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 24, 1985 at 9:15 A.M. Petitioner appeared by Russo, Silverman & Vitaliano, Esqs. (Darrell L. Paster, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Joseph Pinto, Esq., of counsel).

ISSUE

Whether the results of a field audit of petitioner, Arthur's Service Station, Inc., properly reflect additional sales and use taxes due from said petitioner.

FINDINGS OF FACT

1. On January 27, 1983, following a field audit, the Audit Division issued to petitioner, Arthur's Service Station, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1979 through November 30, 1981 in the amount of \$184,792.54, plus interest. Petitioner,

by its president, Abder Isa, had previously executed a validated consent allowing assessment for the noted period to be made at any time on or before March 20, 1983.

2. By a Notice of Assessment Review, hand dated April 25, 1983, the Audit Division advised petitioner that the above-noted assessment was being modified to include assessment of a penalty as well as interest, rather than simply minimum interest.

3. Petitioner operates a gasoline service station and automobile repair shop located in New York City. On or about December 11, 1981, the Audit Division commenced a field audit of petitioner's business operation. Initial records given to the auditor, which were not complete records, revealed that both purchases and sales, per such records, exceeded sales reported per sales tax returns by over one million dollars. No sales invoices were kept by petitioner.

4. The Audit Division obtained verification of petitioner's purchases of gasoline and oil from Mobil Oil Company as petitioner's product supplier. The auditor originally determined the following average gasoline markup percentages from petitioner's posted pump prices for January 5, 1982 and from a January 2, 1982 Mobil credit card bill:

<u>Type of Gasoline</u>	<u>Mark-up</u>
Super Unleaded	13.145%
Unleaded Regular	14.790%
Regular	13.217%

These markups were revised downward following a post-audit conference based on gas costs, gross profits and taxable selling prices on January 3, 1979, July 2, 1980, August 31, 1981 and January 5, 1982, with such revised markups being as follows:

<u>Type of Gasoline</u>	<u>Mark-up</u>
Super Unleaded	9.61%
Unleaded Regular	8.91%
Regular	7.17%

5. Purchases of tires, batteries and accessories ("T.B.A.") and parts, as listed in worksheets provided to the auditor, totalled \$41,619.00 and were allocated fifty percent to T.B.A. and fifty percent to parts. Based on the absence of documentation or other evidence of petitioner's markup percentages on these items, the auditor, on the basis of experience in audits of similar gasoline stations, marked up T.B.A. by 100 percent and parts by 200 percent.

6. Mobil's verification report reflected oil purchases in the amount of \$41,652.00. Again, in the absence of records or other evidence from petitioner regarding the markup amount on oil, and relying upon past audit experience, the auditor used a 60 percent markup on oil.

7. By applying the various noted markup percentages to the dollar amounts of the different items purchased, the auditor arrived at audited taxable sales of \$3,413,480.00, which amount exceeded reported taxable sales per returns by \$2,291,471.00, thus resulting in additional sales tax due in the amount of \$183,838.43.

8. In addition to the foregoing the auditor noted, in reviewing fixed asset purchases for the audit period, the purchase of a tow truck and emission equipment at a dollar amount of \$11,923.00 upon which no tax had been paid. Accordingly, the auditor calculated use tax due thereon in the amount of \$954.11.

9. Petitioner appeared by its representative but did not offer records or other evidence to refute the methodology utilized or results of the instant audit. Petitioner's representative requested and received a period of thirty

days from the hearing date within which to file a brief or, alternatively, to notify the hearing officer if this matter had been resolved in conjunction with a related court proceeding, thus obviating the need for a Commission decision. Neither such notice of resolution nor a brief have been received.

CONCLUSIONS OF LAW

A. That where, as here, complete, adequate and accurate records are neither maintained nor presented upon request for audit, **as** required, it is well settled that the Audit Division may resort to such information as is available, including external indices, In arriving at a reasonably calculated determination of tax liability (Tax Law sections 1135, 1142.5 and **1138**).


B. That there has been no showing by petitioner that the results of the audit conducted were erroneous, nor has petitioner provided any facts or circumstances warranting reduction or abatement of the penalty imposed.

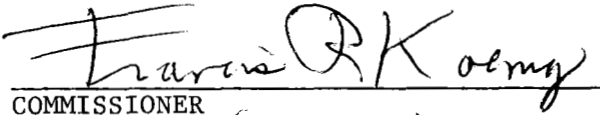
C. That the petition of Arthur's Service Station, Inc. is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated January 27, 1983, together with penalty (~~see~~ Finding of Fact "2") and interest, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

Sent to	<i>Arthur J. Stata, Jr.</i>
Street and No.	<i>3740 Broadway</i>
P.O., State and ZIP Code	<i>New York, NY 10032</i>
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 380, Feb. 1982

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

Sent to	<i>David J. Stata</i>
Street and No.	<i>3740 Broadway</i>
P.O., State and ZIP Code	<i>New York, NY 10032</i>
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 380, Feb. 1982