

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

S. A. SERVICE STATION, INC.

:

DECISION

for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 & 29  
of the Tax Law for the Period March 1, 1979  
through May 31, 1982.

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Petitioner, S. A. Service Station, Inc., 59-36 Maurice Avenue, Maspeth, New York 11378, 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 May 31, 1982 (File No. 42578).

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 December 8, 1986 at 1:15 P.M., with all briefs to be submitted by February 16, 1987. Petitioner appeared by Leonard Klinghoffer, P.M. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly determined sales and use taxes due from S. A. Service Station, Inc.

#### FINDINGS OF FACT

1. During the period at issue. petitioner, S. A. Service Station, Inc., operated a Gulf service station at 59-36 Maurice Avenue, Maspeth, New York.

2. A field audit of petitioner was conducted by the Queens District Office:

(a) The only records made available to the auditor were petitioner's 1979 and 1980 Federal income tax returns and its purchase invoices for the

(b) Since the records were incomplete, the auditor performed a test period audit utilizing said quarter as a test period.

(c) Gallons of gas purchased as per petitioner's records were multiplied by statewide average selling prices per grade as determined by the Audit Division (less state gasoline tax of 8¢ per gallon, Federal gasoline tax of 4¢ per gallon and sales tax). The calculation is as follows:

<u>Type of Gasoline</u>	<u>Gallons Purchased 9/1/80 - 11/30/80</u>	<u>Average Selling Price</u>	<u>Taxable Receipts</u>
Regular	91,033	\$1.094	\$ 99,590.00
Unleaded	71,530	1.138	81,401.00
Super Unleaded	<u>40,519</u>	<u>1,182</u>	<u>47,893.00</u>
TOTAL	203,082		\$228,885.00

(d) Repairs and accessory sales were estimated at \$5,000.00 per month for the station's one service bay, or \$15,000.00 for the test period.

(e) Total taxable sales of gasoline, repairs and accessories were calculated at \$243,885.00 for the test period, resulting in \$19,510.00 in sales tax due.

(f) Sales tax reported for the test period was \$2,933.20, resulting in a percentage of underreporting of 565.17%.

(8) The underreporting percentage of 565.17% was applied to sales tax reported for the entire audit period of \$42,724.85, resulting in additional sales tax due of \$241,468.62.

4. Third party verification was obtained from petitioner's supplier, Gulf Oil Corporation, showing a total of 850,492 gallons delivered in 1980, resulting in an average of 212,623 gallons per quarter, or 9,541 gallons more than shown by petitioner's purchase records for the test quarter.

5. Petitioner's United States Corporation Income Tax Return for 1979

shows sales of \$524,627.03 and cost of goods sold of \$416,111.01 (21.11%)

showing purchases for 1979 **is** not in the record). Petitioner's United States Corporation Income Tax Return for 1980 shows sales of \$930,866.91 and cost of goods sold of \$855,992.74, with purchases (excluding parts) of \$838,463.25 (including .025¢per gallon "rent") and \$14,929.49 in "parts". Beginning 1980 inventory was \$3,200.00 and ending 1980 inventory was \$7,500.00.

6. **On** December 13, 1982, the Audit Division issued a Notice of Determination **and** Demand for Payment of Sales and Use Taxes Due to petitioner for \$241,468.62 in tax, \$49,884.09 **in** penalty and \$57,425.05 in interest, for a total amount due of \$348,777.76. On the same date a similar Notice of Determination and Demand for Payment **of** Sales and Use Taxes Due was issued to Steve Aprigliano, President of S. A. Service Station, Inc., under Tax Law §§ 1131(1) and 1133(a). Mr. Aprigliano's liability as a person required to collect tax on behalf **of** the petitioner **is** not at issue herein.

7. Petitioner offered no testimony **or** documentary evidence **to** challenge the audit findings.

#### CONCLUSIONS OF LAW

A. That section 1138(a)(1) **of** the Tax Law provides, **in** pertinent: part, as follows:

"If a return required by this article **is** not filed, **or** if a return when filed **is** incorrect **or** insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That where a taxpayer's records are incomplete **or** insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate

by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous. (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858.)


C. That in this case, petitioner's records were incomplete, since the only information furnished by petitioner was the 1979 and 1980 Federal income tax returns and the purchase invoices for one quarter. Accordingly, it was proper for the Audit Division to perform a test period audit resulting in the assessments which were issued on December 13, 1982. Petitioner did not sustain its burden of proof to show that either the method of audit or the amount of tax assessed was erroneous. It is noted that the third party verification from Gulf Oil Corporation, while not used directly in computing the assessment, confirms the auditor's determination and, in fact, indicates that the amount of the assessment could have been higher. It is also noted that the sales shown on petitioner's own Federal income tax returns confirm that petitioner seriously underreported sales on its sales tax returns.

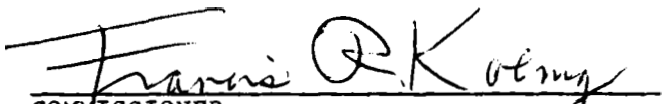
D. That the petition of S. A. Service Station, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 13, 1982, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 14 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER