

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

OLD COUNTRY CAR WASH, 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 December 1, 1979
through August 31, 1982. :

Petitioner, Old Country Car Wash, Inc., 39 Old Country Road, Westbury, New York 11590, 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 December 1, 1979 through August 31, 1982 (File No. 42846).

On September 9, 1985, petitioner, by its president, Vincent Cacaro, waived its right to a hearing and requested that a decision be rendered based on the entire record contained in its file. After due consideration, the State Tax Commission renders the following decision.

ISSUE

Whether penalty and interest in excess of the statutory minimum should be abated.

FINDINGS OF FACT

1. On December 31, 1982, the Audit Division issued to petitioner, Old Country Car Wash, Inc. (the "corporation"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1979 through August 31, 1982 assessing a tax of \$31,386.15, plus penalty and interest, as follows:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
02/28/80 - 380	\$5,349.24	\$1,337.31	\$1,908.72
05/31/80 - 480	2,472.01	618.01	807.29
08/31/80 - 181	1,275.63	318.91	378.01
11/30/80 - 281	1,287.94	321.99	343.12
02/28/81 - 381	4,108.96	1,027.24	973.09
05/31/81 - 481	3,294.02	757.63	680.45
08/31/81 - 182	2,228.77	445.76	388.23
11/30/81 - 282	4,386.25	745.67	610.96
02/28/82 - 382	786.00	110.04	82.57
05/31/82 - 482	941.08	103.52	66.83
08/31/82 - 183	5,256.25	420.50	194.43
TOTALS	\$31,386.15	\$6,206.58	\$6,433.70

2. Attached to the notice was an explanation of the basis for the above assessment. The Audit Division computed the tax due by marking up purchases of gasoline as reported by the corporation's gasoline distributors. The average selling price applied to purchases was computed by comparing selling prices supplied by the corporation to statewide average selling prices. The average selling price, less exempt taxes, was then applied to gasoline purchases to determine taxable gasoline sales. Based on the Division's auditing experience, sales attributable to the sale of motor oil, repair parts, tires, batteries and accessories were added to gasoline sales. Applicable sales tax rates were then applied to total audited sales and credit was given for taxes paid to determine total sales taxes due.

3. At no time during the audit were the books and records of the corporation requested, and the premises of Old Country Car Wash were not viewed by the auditor.

4. At a tax conference, the corporation submitted evidence that the gas station and car wash were closed from August 1981 through December 1981; furthermore, the Audit Division conceded that credit should be given for a payment of \$2,122.02 made for the period ending August 31, 1982. Following the conference, the corporation submitted additional information to the Audit

Division which led to further adjustments. As a result, the Audit Division reduced the tax due to \$19,787.13 plus penalty and interest. The corporation has agreed to the additional tax but seeks abatement of penalties and interest in excess of the minimum statutory rate.

5. From February 29, 1980 through December 23, 1980, the corporation was owned entirely by its current president, Vincent Cacaro. Tax returns for this period were prepared by a private accounting firm engaged by Mr. Cacaro for that purpose. In a letter, these accountants took responsibility for any errors in reporting made in this period. During the first four quarters in issue, the corporation's accountants verified sales on the basis of deposits made to the corporation's bank account. However, an accountant failed to make appropriate adjustments for credit card sales which resulted in an underreporting of sales tax due for those quarters.

6. On December 23, 1980, one hundred percent of the corporation's stock was purchased by a third party. All books and records maintained by Mr. Cacaro's accountants were turned over to the purchasers who filed the corporation's sales tax returns for the periods December 1, 1980 through November 30, 1981. In August of 1981, the building in which the car wash operations were located caved in under the pressure of water on its roof. The damage was uninsured and the new owners were financially unable to make the needed repairs. As a result, the car wash and gasoline station were closed. The new owners stopped making mortgage payments to Mr. Cacaro, who remained personally liable on certain obligations incurred by the corporation. Consequently, in December of 1981, Mr. Cacaro repurchased the stock of the corporation. He was unable to recover any of the corporation's books and records.

7. Mr. Cacero maintains that he accurately reported sales and use taxes due for those periods during which he owned and was in control of the corporation, excluding those amounts attributable to errors made by his accountant. He agreed to the tax asserted because he was unable to obtain any records kept before his repurchase of the corporation in December 1981.

8. During the period in which Mr. Cacero owned the corporation, sales tax returns were filed timely and sales taxes reported were paid in a timely fashion. Mr. Cacero is the owner of a second corporation which operates a restaurant. Following an audit of that corporation, the Audit Division concluded, on September 18, 1985, that no additional tax was due.

CONCLUSIONS OF LAW

A. That the Tax Commission may remit penalties and that portion of the interest in excess of the statutory minimum where the taxpayer establishes that failure to comply with the law was due to reasonable cause which may include, inter alia, destruction of the taxpayer's place of business or business records by fire or other casualty or "any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes..." (20 NYCRR 536.1).

B. That there has been no gross negligence or willful intent to disobey the Tax Law on Mr. Cacero's part. For one of the three years covered by the audit, the corporation was owned by third parties, and the unavailability of books and records is attributable to their stewardship of the corporation. Furthermore, at least a portion of whatever underreporting occurred while Mr. Cacero owned the corporation was the fault of his accounting firm. It is also noted that Mr. Cacero is the owner of a second corporation which, after

audit, was determined to have kept good records and to have paid all taxes due. On the basis of all of these factors, penalties and interest in excess of that amount prescribed by statute are abated.

C. That taxes due are reduced to \$19,787.13 to reflect the determination of the Audit Division (Finding of Fact "4").

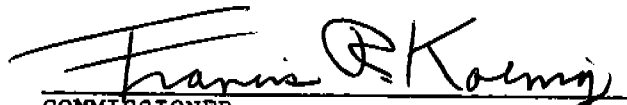
D. That the petition of Old Country Car Wash, Inc. is granted to the extent indicated in Conclusions of Law "B" and "C"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on December 31, 1982 is modified accordingly; and that except as so granted, the petition is in all other respects denied.

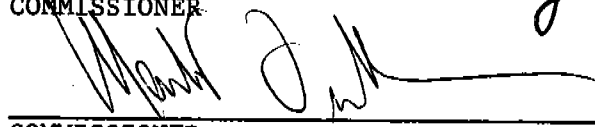
DATED: Albany, New York

STATE TAX COMMISSION

MAR 06 1986


PRESIDENT


COMMISSIONER


COMMISSIONER