

STATE OF NEW YORK

DIVISION OF TAX APPEALS

x

In the Matter of the Petition

of

2317 CONEY ISLAND AVENUE CORPORATION

DETERMINATION

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, 1979 :
through August 31, 1980.

Petitioner, 2317 Coney Island Avenue Corporation, c/o Jean Ficco, 2207 E. 5th Street, Brooklyn, New York 11223, 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, 1979 through August 31, 1980 (File No. 42901).

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 October 23, 1986 at 1:15 P.M., with all briefs to be submitted by June 15, 1987. Petitioner appeared by Edmund P. D'Elia, P.C. (Edmund P. D'Elia, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined that additional sales tax was due and owing by petitioner.

11. Whether the imposition of a fraud penalty pursuant to Tax Law § 1145(a)(2) is warranted and should be upheld.

FINDINGS OF FACT

1. On December 20, 1982 the Audit Division issued to petitioner, 2317 Coney Island Avenue Corporation c/o Jean Ficco, a Notice of Determination and

Demand for Payment of Sales and Use Taxes Due for the period September 1, 1979 through August 31, 1980 in the amount of \$150,475.60, plus interest, plus a fraud penalty (Tax Law § 1145[a][2]) equal to fifty percent of the tax assessed.

2. The above-noted assessment results from an audit of petitioner's business operations, which audit commenced in or about July 1981. Records made available to the auditor included petitioner's sales tax returns with related worksheets, Federal and New York State income tax returns and cancelled checks. Cash register tapes and daily summaries of business activities were not maintained or made available, nor was a complete set of purchase invoices available.

3. Petitioner's sales tax returns agreed numerically with the related worksheets upon which the returns were calculated. However, the auditor determined that the absence of source documents, including complete invoices, detailed records and cash register tapes, rendered petitioner's records inadequate for audit purposes in terms of determining and verifying taxable sales and tax imposed and collected per the returns. Accordingly, the auditor resorted to third party information in determining petitioner's volume of business.

4. Petitioner operated at a leased Amoco Oil Company service station located at 2317 Coney Island Avenue in Brooklyn, New York. Petitioner sold gas, oil and accessories, but performed no repair services, and there were no repair bays or lifts at the station location. The station was open 24 hours per day and 7 days per week.

5. In calculating the assessment at issue, the auditor requested of Amoco Oil Company, on August 26, 1982, records in verification of petitioner's purchases from Amoco. More specifically, the request was made for records pertaining to customer number 0000967-13-9 in the business name **of** "Gas Depot

#1", with an owner listed as Pasquale Ficco. Mr. Ficco was the sole shareholder and officer of petitioner. Mr. Ficco died on July 6, 1980 which was prior to the commencement of the audit herein.

6. In response to the request for information, Amoco supplied computer printout sheets showing the volume of gasoline and other purchases by Gas Depot #1. The auditor compared gallonage reported as sold by petitioner with the third party information regarding gallons purchased and delivered with respect to Gas Depot #1, and found the third party (Amoco) information revealed much greater gallonage purchased than was reported as sold. Accordingly, the auditor computed the instant assessment by multiplying total gallons purchased, per third party information, by quarterly average selling prices for gasoline as determined by Audit Division studies, to arrive at taxable gasoline sales. In addition, petitioner's oil purchases were marked up at \$1.50 per quart, accessories were marked up using a selling price of \$5.00 per item, and anti-freeze was marked up using a \$7.50 per gallon selling price. Each of these markups reflect standard Audit Division markups as determined based upon office experience, and upon information available based upon Audit Division studies.

8. In response to the aforementioned assessment, petitioner asserts that petitioner's sole shareholder and operator died before commencement of the audit, and that petitioner's representative was never informed that the records were being considered inadequate until the time of the hearing held herein. In this regard petitioner asserts prejudice to the extent that the records of the petitioner corporation cannot be found. More specifically, petitioner's representative asserted at hearing, in response to a question as to whether there is an allegation by petitioner that complete and adequate records exist, as follows:

"At the time of the audit or sometime thereafter, there were records."

9. Petitioner further asserts that the third party information from Amoco regarding purchases of gasoline shows a much larger volume of gallonage purchased than is shown on petitioner's returns due to the fact that all purchases as provided by Amoco relate to deliveries of gasoline to Gas Depot #1. Petitioner's representative asserted that there were four corporations, all with their principal place of business at 2317 Coney Island Avenue in Brooklyn and that the deliveries to "Gas Depot #1" represented purchases made by all four of such entities. Hence, petitioner's representative asserts that the gallonage should be apportioned to the four corporations and, in essence, asserts that petitioner correctly reported all of its gallonage and correctly paid all of its sales taxes.¹

10. Petitioner offered some evidence to establish the existence of the additional corporations, including checks drawn on accounts in the names of such corporations indicating payments made to Amoco. All delivery tickets offered in evidence indicated deliveries to Gas Depot #1, with the identification number specified as 0000967. Petitioner's representative made efforts but was unable to obtain records, either from Amoco or elsewhere, in segregation of the purchases and payments attributable to each of the four individual corporations operating out of the same location at 2317 Coney Island Avenue. It is noted that the address was also the delivery location for Amoco products delivered to Gas Depot #1.

1 The four corporations are 2317 Coney Island Avenue Corporation, 2317 Coney Island Avenue Operating Corporation, Avenue T Operating Corporation and Avenue T Gas Operating Corporation. While unspecified, it appears that Mr. Ficco was the sole owner of each of these four corporations.

11. In sum, petitioner asserts that the auditor's resort to third party information as a means of determining and calculating the assessment herein was improper in that adequate records were maintained and were available for audit, and that by the passage of time petitioner has been prejudiced to the extent that its records as well as those of the three other corporations cannot now be located.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, in part, that if a return required to be filed is incorrect or insufficient, the tax commission shall determine the amount of tax due on the basis of such information as may be available. This section further provides that if necessary the tax may be estimated on the basis of external indices.

B. That it is well settled that where a taxpayer does not maintain and/or make available such records, including source documents, as will allow the establishment of an audit trail and enable verification of the accuracy of returns filed, the Audit Division may resort to indirect audit methodology in carrying out its audit function. In determining the amount of a sales tax assessment, it is the duty of the Audit Division to select a method "reasonably calculated to reflect the taxes due" (Matter Grant Co. v. Joseph, 2 NY2d 196,206; Matter of Meyer v. State Tax Commn., 61 AD2d 223, 227, lv. denied 44 NY2d 645). In turn, when the Audit Division employs such a method, it becomes incumbent upon the petitioner to establish error (Matter of Meyer v. State Tax Commn., supra).

C. That the evidence does not support the assertion that complete, adequate and accurate books and records were maintained. Accordingly, the Audit Division was entitled to resort to indirect auditing techniques, including

the use of third party information, in an effort to determine and estimate whether the amount of tax reported and paid by petitioner was correct.

D. That it is possible that the gallonage reported to the Audit Division by Amoco in fact represented purchases by petitioner and by other entities (to wit by four corporations all operating out of the one location at 2317 Coney Island Avenue). However, petitioner has failed to prove, by adequate records of its own and/or by adequate records of the other corporations, the means or method whereby the gallonage was purchased or allocated among the various entities, that petitioner's returns accurately reflect only its purchases and sales, or that all sales tax due on the sale of gasoline, parts and accessories was collected and remitted. Petitioner's sole shareholder chose the method of operation employed, specifically utilizing more than one corporation operating out of the same location, and must bear the results flowing therefrom. In sum, petitioner has failed to provide such evidence as would refute or warrant reduction of the assessment as issued herein.

E. That section 1145(a)(2) of the Tax Law was added by section 2 of Chapter 287 of the Laws of 1975. During the period in issue this paragraph provided:

"If the failure to file a return or to pay over any tax to the tax commission within the time required by this article is due to fraud, there shall be added to the tax a penalty of fifty percent of the amount of the tax due (in lieu of the penalty provided for in subparagraph (i) of paragraph one, plus interest...".

F. That section 1145(a)(2) of the Tax Law was enacted by the legislature with the intention of having a penalty provision in the Sales and Use Tax Law which was similar to that which already existed in the Tax Law with respect to deficiencies of ~~inter alia~~, personal income tax (1975 NY Legis Ann, at 350). Thus, the burden placed upon the Audit Division to establish fraud at a hearing

involving a deficiency of sales and use tax is the same as the burden placed upon the Audit Division in a hearing involving a deficiency of personal income tax. A finding of fraud at such a hearing "requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing."


(Matter of Walter Shutt & Gertrude Shutt, State Tax Commission, June 4, 1982.)

G. That based upon the evidence presented, the Audit Division has not sustained its burden of proving that the imposition of a fraud penalty is warranted. Accordingly, said penalty as imposed is cancelled.

H. That the petition of 2317 Coney Island Avenue Corporation is granted to the extent indicated in Conclusion of Law "G", but is in all other respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 20, 1982, as modified in accordance herewith, is sustained.

DATED: Albany, New York

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ADMINISTRATIVE LAW JUDGE