

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

ADAMIDES SERVICE STATION, INC.

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, 1978  
through May 31, 1982.

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DECISION

In the Matter of the Petition

of

EFSTATHIOS ADAMIDES  
OFFICER OF ADAMIDES SERVICE STATION, INC.

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, 1978 :  
through May 31, 1982.

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Petitioners, Adamides Service Station, Inc., 375 Plandome Road, Manhasset, New York 11030 and Efsthathios Adamides, Officer of Adamides Service Station, Inc., 32 Highfield Avenue, Port Washington, New York 11050, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1978 through May 31, 1982 (File Nos. 43046 and 43047).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 2, 1985 at 9:15 A.M., with all briefs to be submitted by July 22, 1985. Petitioners appeared by John G. Dalton, Jr., Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales taxes due from Adamides Service Station, Inc. on the basis of purchases obtained from a third party.

11. Whether the Audit Division properly imposed a fraud penalty based on the above determination.

111. Whether a consent extending the period of limitation for assessment of sales and use taxes was invalid because it was executed by a representative whose power of attorney was incomplete.

IV. Whether Efstathios Adamides **is** personally liable for the sales taxes due from Adamides Service Station, Inc.

V. Whether petitioners' constitutional rights to due process were violated by documents constituting material evidence being made part of the record without the preparer **of** such documents being present for confrontation and cross-examination.

FINDINGS OF FACT

1. Petitioner Adamides Service Station, Inc. ("Adamides") operated a Gulf gasoline service station located at 375 Plandome Road, Manhasset, New York.

2. **On** December 20, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Adamides covering the period December 1, 1978 through May 31, 1982 for taxes due of \$50,315.15, plus fraud penalty of \$25,157.58 and interest of \$12,240.41, for a total **of** \$87,713.14. **On** the same date, a notice for the same amount was issued against petitioner Efstathios Adamides as officer of Adamides.

3. A consent extending the period of limitation for assessment of sales and use taxes was executed by George Dounias, accountant, **on** November 16, 1981.

Said consent extended the time for issuing an assessment for the taxable periods December 1, 1978 through August 31, 1981 to December 20, 1982. Adamides, by power of attorney also dated November 16, 1981, had appointed George Dounias as its representative before the Department of Taxation and Finance. The power was signed by two witnesses and the appointed representative. It indicated that the type of tax involved was sales tax; however, the periods or years were not listed on the power.

4. The Audit Division requested that Adamides provide certain books and records for audit. Adamides did not furnish the general ledger, records of daily receipts, or the worksheets used in computing the sales reported on sales tax returns. In addition, purchase invoices and sales invoices were incomplete. In order to verify gasoline purchases, the Audit Division contacted Adamides' suppliers of gasoline (Gulf Oil Corporation ["Gulf"] and Nobek). The suppliers' records showed that Adamides made purchases of \$374,451.00 from Gulf and \$18,670.65 from Nobek for the period December 1, 1978 through November 30, 1981. Federal and state gasoline taxes were added to these amounts to determine total purchases of \$446,339.43. The cash disbursements journal showed gas purchases of \$171,317.70 for the period December 1, 1978 through August 31, 1981. Total sales recorded in the cash receipts journal for the same period were \$111,600.00. Gross sales reported on federal income tax returns exceeded the gross sales on the sales tax returns for the period December 1, 1978 through October 31, 1980 by \$106,530.00. Bank deposits were \$172,582.00 higher than sales. Based on the foregoing comparisons, the Audit Division concluded that taxable sales were grossly underreported and that the books and records were unreliable for audit purposes. The auditor went to the business premises on October 27, 1981 and obtained the selling prices for each grade of gasoline. The auditor then

computed gross profits of 9.45¢, 11.05¢ and 10.71¢ per gallon respectively for regular, unleaded and super unleaded gasoline using these selling prices and applicable costs received from Gulf and Nobek. The gross profits were applied to total gallons purchased as per the third party verification by grade of gasoline to arrive at total gross profit of \$46,141.00 which, when added to the purchases (excluding the state gasoline tax), resulted in taxable gasoline sales of \$457,001.00. The Audit Division estimated oil sales of \$11,425.05. Prior audit experience showed that oil sales represented 2½ percent of gasoline sales. Repair sales were also estimated due to incomplete sales invoices. The Audit Division had all the sales invoices for repairs for the period April 1, 1981 through April 15, 1981. These invoices amounted to \$2,415.20. This figure was used to estimate repair sales of \$188,385.60 for the period December 1, 1978 through November 30, 1981 (\$1,207.60 per week x 156 weeks). The combined audited taxable sales totalled \$656,812.53 as compared to taxable sales reported of \$123,116.00, leaving a difference of \$533,696.53 or an underreporting factor of 433.49 percent. The audit was updated to include the period December 1, 1981 through May 31, 1982. The error rate was applied to reported sales of \$40,831.00 for this period which increased the unreported taxable sales to \$710,693.79 with tax due thereon of \$50,315.15. The Audit Division did not request or review any further books and records for the updated period. The Audit Division asserted the fraud penalty because the purchases of gasoline were substantially greater than the taxable sales reported.

5. Petitioner Efstathios Adamides immigrated to the United States from Greece in 1972. He worked as a mechanic until 1976 when he opened his own gasoline station. Mr. Adamides' fluency in the English language was minimal. His education in Greece was equivalent to a high school education in the United

States. He had no education pertaining to bookkeeping or tax matters of any nature. Mr. Adamides hired George Dounias, a public accountant, to keep his books and records and to prepare all necessary federal and state tax returns for the business. He chose Mr. Dounias because he spoke Greek. The sales tax returns were prepared by Mr. Dounias.

6. Efstathios Adamides was the president of and a director of Adamides. He was the sole person responsible for the day-to-day management and financial affairs of the business.

7. Petitioners contend that the admission into evidence of information obtained from Adamides' suppliers violated petitioners' constitutional rights of confrontation and cross-examination.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that "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" and authorizes, where necessary, an estimate of tax due "on the basis of external indices" including purchases.

B. Petitioners maintained inadequate and incomplete books and records. Moreover, the inconsistencies between the books and records and the tax returns, as well as the substantial underreporting of taxable sales disclosed by the audit, further established the unreliability of petitioners' books and records. When books and records are incomplete and unreliable, the use of external indices is permissible (Matter of Korba v. New York State Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division properly determined petitioners' tax liability pursuant to the provisions of section 1138(a) of the Tax Law. It was normal audit procedure to update the audit to include the most current reporting period. The estimation procedure used to determine the taxes due

for the period December 1, 1981 through May 31, 1982 was reasonable due to the incomplete and unreliable records made available for the other periods under audit. The burden was upon the taxpayer to demonstrate that the audit method or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization v. Tully, 85 A.D.2d 858). Petitioners failed to sustain their burden of proof.

C. 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 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...".

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 (N.Y. Legis. Ann., 1975, p. 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 and Gertrude Shutt, State Tax Commission, June 4, 1982).

D. That the Audit Division has not sustained its burden of proving that the imposition of a fraud penalty is warranted. The evidence presented did not clearly establish whether petitioner Adamides' sales tax returns for the period in issue were knowingly and deliberately filed in a manner which reflected

false information and underreporting of tax collected and due. Accordingly, the fraud penalty is cancelled.

E. That the omittance of the sales tax periods on the power of attorney was not a material defect and thus the consent referred to in Finding of Fact "3" was valid.

F. That petitioner Efstathios Adamides was a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law and, therefore, is personally liable for the taxes due from Adamides in accordance with section 1133(a) of the Tax Law.


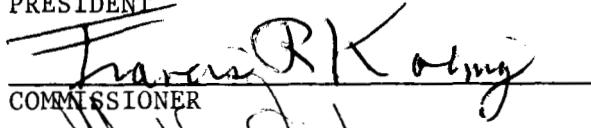
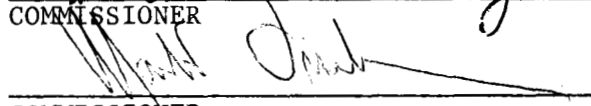
G. That the contentions **of** petitioners with respect to Issue V are without merit. It was Adamides' own failure to maintain adequate books and records that necessitated the use of third party verification. As indicated in Conclusion **of** Law "B", the audit procedures were proper and the burden **was** upon the petitioners to show that the assessment was erroneous. Petitioners had the opportunity to subpoena the individual from Gulf Oil Corporation responsible for furnishing the gasoline purchases to the Audit Division or to subpoena the books and records of Gulf Oil Corporation **to** challenge the accuracy of such information provided.

G. That the petitions of Adamides Service Station, Inc. and Efstathios Adamides, as officer, are granted to the extent indicated in Conclusion **of** Law "D"; the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued December 20, 1982; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

**MAR 27 1986**

  
PRESIDENT  
  
COMMISSIONER  
  
COMMISSIONER