

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HILLPIKE SERVICE STATION, INC.	:	
AND BEN SIGNORELLI, AS OFFICER	:	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 November 1, 1977	:	
through April 30, 1982.	:	

Petitioners, Hillpike Service Station, Inc. and Ben Signorelli, as officer, 11 Sansun Lane, St. James, New York 11780, 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 November 1, 1977 through April 30, 1982 (File Nos. 43222 and 43223).

A hearing was held before Frank A. Landers, 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., with all briefs to be submitted by October 10, 1985. Petitioners appeared by Ben Signorelli. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined the additional sales taxes due from petitioner Hillpike Service Station, Inc. for the period at issue.

FINDINGS OF FACT

1. On March 2, 1983, the Audit Division issued to each of the petitioners herein, Hillpike Service Station, Inc. ("Hillpike") and Ben Signorelli, two notices of determination and demand for payment of sales and use taxes due; the first notices assessed a sales tax due of \$82,283.82, plus penalty of \$20,546.24

and interest of \$38,311.37, for a total due of \$141,141.43 for the period November 1, 1977 through February 28, 1981; the second notices assessed a sales tax due of \$25,517.35, plus penalty of \$4,536.85 and interest of \$4,937.66, for a total due of \$34,991.86 for the period March 1, 1981 through November 30, 1981. On June 22, 1984, the Audit Division issued an additional Notice of Determination and Demand for Payment of Sales and Use Taxes Due to each of the petitioners assessing sales taxes due of \$8,483.59, plus penalty of \$2,120.90 and interest of \$2,505.44, for a total due of \$13,109.93 for the period December 1, 1981 through April 30, 1982. The notices were issued as the result of a field audit of Hillpike's books and records.

2. Petitioners timely filed an application for a hearing to review the above notices. Petitioners claim that they operated the business only for "a couple of months" in 1980 and, further, that the Audit Division's estimate of Hillpike's repair sales was excessive.

3. From 1977 through June 23, 1980, petitioner Ben Signorelli operated, as a sole proprietorship, B & A Sunoco at the corner of Hillside Avenue and Jericho Turnpike in St. James, New York. On June 23, 1980, Hillpike was formed with petitioner Signorelli as president and a one Al Miller as vice-president.

4. On audit, the petitioners presented copies of Hillpike's U.S. corporation income tax returns for the fiscal years ended March 31, 1981 and 1982. No other books or records were made available for audit; therefore, the examiner used external indices to determine taxable sales and sales tax liability. The examiner obtained gasoline purchases for the audit period of 1,514,548 gallons from Hillpike's supplier, Sun Oil Company. This amount was multiplied by the average retail selling price of regular gasoline (based on an Audit Division quarterly survey of ten selected truck-stops widely scattered throughout the

State) to compute gross gasoline sales of \$1,648,535.53. This amount was reduced by the 8 cents per gallon State gasoline tax and the State and local sales tax to compute audited taxable gasoline sales of \$1,422,191.73. The auditor next computed repair sales, based on office experience, of \$24,000.00 per quarter, or \$432,000.00 for the audit period (\$200.00 per day x 2 bays x 5 days per week x 12 weeks per quarter). Total taxable sales for the audit period of \$1,854,191.73 (\$1,422,191.73 + \$432,000.00) were reduced by taxable sales reported of \$201,491.00 to determine additional taxable sales of \$1,652,700.73 and additional sales tax due of \$116,284.76.

5. At the hearing, petitioner Signorelli introduced an agreement for the lease of the station with himself, as landlord, and Shelly Levine d/b/a MDK, as tenant, beginning August 1, 1980 and ending August 31, 1982. Mr. Signorelli testified that MDK operated the business for about a year and then vacated the premises. The lease agreement and Mr. Signorelli's testimony, absent any corroboration, are insufficient to show that the premises were actually leased to MDK. Petitioner also failed to present any evidence to show that the Audit Division's estimate of repair sales was excessive.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

B. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that if a sales and use tax return is not filed, or if filed is incorrect or insufficient, the amount of tax due shall be determined from such information as

may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices.

C. That the books and records of Hillpike Service Station, Inc. were inadequate and incomplete for purposes of determining taxable sales or sales tax due. Therefore, the use of external indices is permissible (Matter of Korba v. N.Y.S. Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division's determination of additional tax due was proper pursuant to section 1138(a)(1) of the Tax Law. Exactness is not required where it is the taxpayer's own failure to maintain proper records which prevents exactness in the determination of sales tax liability (Matter of Markowitz v. State Tax Commission, 54 A.D.2d 1023).

D. That Hillpike Service Station, Inc. was not formed until June 23, 1980; therefore, the additional taxes determined to be due for periods prior thereto are hereby cancelled.

E. That the petition of Hillpike Service Station, Inc. and Ben Signorelli is granted to the extent indicated in Conclusion of Law "D"; the Audit Division is hereby directed to accordingly modify the notices of determination and demand for payment of sales and use taxes due issued March 2, 1983; and that except as so granted, the petition is otherwise denied.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER