

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

A & C POWER TEST, INC. and  
ABDUL JALIL KHAN, 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 March 1, 1980  
through February 28, 1981.

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Petitioners A & C Power Test, Inc. and Abdul Jalil Khan, 60 Turner Place, Brooklyn, New York 11218 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, 1980 through February 28, 1981 (File No. 43992).

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 June 18, 1986 at 1:15 P.M., with all briefs to be submitted by October 15, 1986. Petitioner appeared by Gerald I. Steinhaus, **Esq.** The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly estimated additional sales taxes due from A & C Power Test, Inc. on the basis of purchase information obtained from a third party.

II. Whether Abdul Jalil Khan is personally liable for the taxes determined due from A & C Power Test, Inc.

FINDINGS OF FACT

1. A & C Power Test, Inc. ("A & C") operated a gasoline service station located at 312 Clarkson Street, Brooklyn, New York. A & C did not perform any repair work.

2. On February 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against A & C covering the period March 1, 1980 through February 28, 1981<sup>1</sup> for taxes due of \$25,350.32, plus fraud penalty of \$12,675.16 and interest of \$8,266.10, for a total of \$46,291.58. On the same date, an identical notice was issued against Abdul Jelet Khan [sic] as officer.

3. By letter dated January 28, 1982, the Audit Division advised A & C that a field audit of its books and records was scheduled for February 17, 1982 and requested that certain books and records be made available at that time. The Audit Division was informed by Mr. Alan Stewart, accountant for A & C, that there were no books and records. Consequently, the Audit Division contacted A & C's supplier of gasoline (Power Test Corporation) to obtain the quantity of gasoline purchased by A & C during the audit period. The supplier's records showed that A & C purchased 294,503 gallons for the period March 1, 1980 through December 31, 1980. Gasoline sales of \$368,129.00 were estimated by applying an average retail selling price of \$1.25 (excluding state gasoline tax and sales tax) to the purchases as furnished by Power Test Corp. A & C reported sales of \$51,250.00 for the same period, leaving additional taxable sales of \$316,879.00 and tax due thereon of \$25,350.32.

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<sup>1</sup> The notice shows the quarterly period ending February 28, 1981; however, the tax assessed is only for the month of December 1980.

4. Power Test Corporation provided the Department of Taxation and Finance with the amount of gasoline sold to each of its customers. The information was submitted on computer records (floppy disc storage medium). The data was converted to magnetic tape storage medium by the EDP Systems Audit Bureau so that it could be used by the Department's computers. The EDP Systems Audit Bureau created a computer printout of gasoline purchases made by A & C on a monthly basis. This was the data used by the Audit Division to estimate gasoline sales. Petitioner objected to the use of the data on the basis that no independent verification of Power Test's records was made by the EDP Systems Audit Bureau or the Audit Division.

5. The District Office Audit Bureau issued a memorandum dated April 5, 1982 which listed statewide average retail selling prices of regular gasoline for quarterly periods beginning March 1, 1979 through February 28, 1982. For the periods at issue herein, the selling prices were March 31, 1980 - \$1.27.6; August 31, 1980 - \$1.28.9; November 30, 1980 - \$1.27.2 and February 28, 1981 - \$1.42.9. The prices included all taxes. Petitioner argued that Audit Division's use of \$1.25 as the average selling price was incorrect since the state gasoline tax and the sales tax have to be deducted from the above selling prices. The position of the Audit Division was that the gasoline purchases obtained from Power Test Corp. included both regular and unleaded gasoline and since the above selling prices were for regular gasoline only, the \$1.25 a gallon was a reasonable average considering A & C sold both grades of gasoline.

6. One Aziz Okbinoglu was the principal owner of A & C. He also operated several other Power Test gasoline stations, one of which was Murat Service Station located on Coney Island Avenue in Brooklyn. Petitioner Abdul Jalil Khan managed this station as well as the station on Clarkson Avenue operated by

A & C. Mr. Khan purchased gasoline and signed checks in payment thereof. He took daily meter readings from the pumps which were turned over to Mr. Okbinoglu. Mr. Khan did not sign checks other than for the gasoline purchases nor did he determine what creditors were paid. He was not involved with maintaining the books and records or preparing tax returns. He did however, sign sales tax returns filed for the periods ended May 31, 1980 and August 31, 1980. Mr. Khan supervised the employees and had the authority to hire and fire them. He worked full time at the stations and was paid a weekly salary. Mr. Khan was listed as the secretary-treasurer on the Certificate of Registration filed with the Department of Taxation and Finance; however, he was not an officer or stockholder of A & C.

7. The Audit Division conceded that it cannot sustain its burden of proving that the imposition of fraud penalty was warranted.

#### 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".

B. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and **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.

C. That petitioners did not have books and records available for audit. When records are not provided or are incomplete and insufficient, it is the duty of the Audit Division to select a method of audit reasonably calculated to reflect taxes due (Matter of Urban Liquors, Inc. v. State Tax Commission, 90

AD2d 576). The Audit Division's use of third party purchase information and application of estimated selling prices to such gasoline purchases was a proper basis for determining the gasoline sales of A & C in accordance with the provisions of section 1138(a) of the Tax Law. When a taxpayer's recordkeeping is faulty exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223).

D. That it was A & C's own failure to provide books and records that necessitated the use of third party verification. Petitioners have the burden of showing that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 AD2d 858; Matter of Urban Liquors v. State Tax Commn., supra). The Audit Division did not have the burden of establishing that the data furnished by Power Test Corp. was correct. Petitioners failed to sustain their burden of showing that the assessment was erroneous.

E. That section 1133(a) of the Tax Law places personal liability for the taxes imposed, collected or required to be collected under Article 28 upon "every person required to collect any tax" imposed by said article. Section 1131, subdivision (1) furnishes the following definition for the term "person required to collect tax":

"'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of partnership." (Emphasis supplied.)

F. That resolution of the issue of personal liability for sales tax due turns upon a factual determination in each case (Vogel v. New York State Dept. of Taxation and Finance, 98 Misc2d 222; Chevlowe v. Koerner, 95 Misc2d 388). Relevant factors in making such determination include, inter alia, day-to-day responsibilities in the corporation, involvement in and knowledge of the corporation's financial affairs and its management, the identity of who prepared and signed tax returns and the authority to sign checks (Vogel, supra. See also 20 NYCRR 526.11[b]).

G. That petitioner had limited involvement with and knowledge of the financial affairs and management of A & C. Accordingly, he was not a person under a duty to collect, truthfully account for and pay over sales and use taxes within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law and thus bears no personal liability for the taxes due from A & C.

H. That in accordance with Finding of Fact "7", the fraud penalty **is** cancelled. A & C failed to establish that the underreporting of taxable sales was due to reasonable cause and not willful neglect; therefore, penalty and interest shall be imposed under the provisions of section 1145(a)(1) of the Tax Law.

I. That the petition of A & C Power Test, Inc. **is** granted to the extent indicated in Conclusion of Law "8"; the Audit Division **is** hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 20, 1983; and that, except as **so** granted, the petition **is** in all other respects denied.

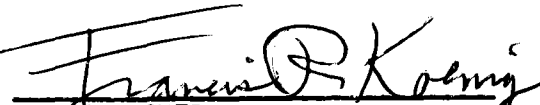
J. That the petition of Abdul Jalil Khan is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 20, 1983 is cancelled.

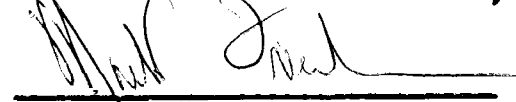
DATED: Albany, New York

STATE TAX COMMISSION

FEB 24 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER