

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JOSEPH A. CIATTO :
D/B/A PATTERSON POWER TEST : 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, 1979 :
through August 31, 1982. :
:

Petitioner, Joseph A. Ciatto d/b/a Patterson Power Test, Routes 22 and 311, Patterson, New York 12563, 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, 1979 through August 31, 1982 (File Nos. 44506 and 49871).

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 November 20, 1985 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner based on examination of available books and records.

FINDINGS OF FACT

1. Petitioner, Joseph A. Ciatto d/b/a Patterson Power Test, operated a gasoline service station located at Routes 22 and 311, Patterson, New York. Petitioner did not perform any repairs.

2. On October 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 petitioner covering the period March 1, 1979 through August 31,

1980 for taxes due of \$34,102.04, plus penalty and interest of \$20,083.89, for a total due of \$54,185.93. On December 20, 1983, a second notice was issued covering the period September 1, 1980 through August 31, 1982 in the amount of \$33,564.63, plus penalty and interest of \$17,009.25, for a total due of \$50,573.88. Also on December 20, 1983, a Notice of Assessment Review was issued which revised the tax due on the first notice to \$17,720.59.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1979 through February 28, 1982 to November 30, 1982.

4. Petitioner provided the Audit Division with the following books and records for audit: sales tax returns, federal and state income tax returns, bank deposit records, purchases journal and daily sales sheets which showed the gallons of gasoline pumped, selling prices and total receipts. The Audit Division reconciled bank deposits with sales tax returns and found that the deposits for the audit period exceeded gross sales reported on the sales tax returns by \$937,218.00 (loans and taxes paid were deducted from deposits). Because of the substantial discrepancy in receipts, the Audit Division determined that the books and records were unreliable and it was necessary to reconstruct sales based on purchases of gasoline. The Audit Division obtained the quantity of gasoline purchased by petitioner for the period March, 1980 through October, 1981 from Power Test, petitioner's supplier. These purchases were used to estimate the taxes due on the notice issued October 20, 1982. Following the issuance of the notice, a conference was held at the White Plains District Office at which time petitioner produced purchase invoices for the period March 1, 1979 through August 31, 1982, as well as daily sales sheets which had the selling price for each grade of gasoline. The purchase invoices were verified against the Power

Test purchase records and were found to be complete. From the purchase invoices, the Audit Division listed the total gallons of gasoline purchased by grade for each month in the audit period. The gallons were multiplied by the selling price on the 15th day of the month to arrive at gasoline sales of \$3,011,929.00. The taxable sales after deducting the state gasoline tax were \$2,813,972.00. The Audit Division then allowed for personal use of the gasoline and excluded the sales tax which reduced the taxable sales to \$2,658,282.00. Petitioner reported taxable sales of \$1,746,680.00 for the same period, leaving additional taxable sales of \$911,602.00 and tax due thereon of \$50,790.74. Petitioner was also assessed use tax of \$494.48 on the personal consumption of gasoline for a total deficiency of \$51,285.22.

5. Petitioner took the position that the gasoline sales determined by the Audit Division were excessive for the following reasons:

a) the gasoline delivered by Power Test was not metered and, therefore, there was no way to determine whether the quantity of gasoline shown on the invoices was actually received;

b) the Audit Division's estimate of sales was based on selling prices effective on the 15th of the month while prices varied every few days;

c) Power Test set the selling price of gasoline and occasionally such price was less than cost.

6. An analysis of petitioner's selling prices of gasoline over the entire audit period showed that selling prices on the 15th of any particular month represented the average selling price for that month.

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. That the discrepancy between the bank deposits and the sales shown on sales tax returns, as well as the substantial underreporting of taxable sales disclosed by the audit, established the unreliability of petitioner's 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 petitioner's tax liability pursuant to the provisions of section 1138(a) of the Tax Law.

C. That the Audit Division reasonably calculated petitioner's tax liability and, therefore, petitioner had the burden of showing 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). Petitioner failed to sustain this burden.

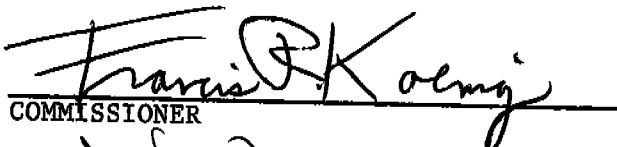
D. That the petition of Joseph A. Ciatto d/b/a Patterson Power Test is denied and the notices of determination and demand for payment of sales and use taxes due issued October 20, 1982, as revised, and December 20, 1983 are sustained.

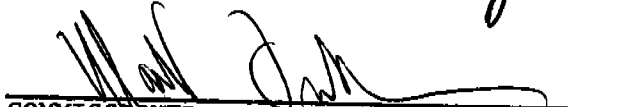
DATED: Albany, New York

STATE TAX COMMISSION

APR 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER