

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

PERSONAL AUTO CENTER, INC. :

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 June 1, 1979
through November 30, 1983. :

Petitioner, Personal Auto Center, Inc., 2660 Jerusalem Avenue, North Bellmore, New York 11756, 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 June 1, 1979 through November 30, 1983 (File Nos. 44783, 50372, and 53295).

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 29, 1986 at 2:30 P.M. and was continued to conclusion at the same location on June 19, 1986 at 1:30 P.M. with all briefs to be submitted by July 28, 1986. Petitioner appeared by Jerome Feldman, CPA. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly estimated petitioner's gasoline and repair sales on the basis of external indices.

II. Whether the Audit Division properly imposed fraud penalty.

FINDINGS OF FACT

1. Petitioner, Personal Auto Center, Inc., operated a Chevron gasoline service station located at 2660 Jerusalem Avenue, North Bellmore, New York.

Petitioner had three service bays to perform repair work. Joseph Botwinick was the president of the corporation.

2. On March 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period June 1, 1979 through August 31, 1980 for taxes due of \$53,150.47, plus fraud penalty of \$26,319.14 and interest of \$20,214.38, for a total of \$99,683.99. On December 20, 1983, a second notice was issued to petitioner for the period September 1, 1980 through February 28, 1981 in the amount of \$20,811.46, plus penalty of \$9,600.74 and interest of \$8,085.06, for a total of \$38,497.26. A third notice was issued against petitioner on May 21, 1984 which assessed tax due of \$97,919.05, plus fraud penalty of \$48,959.49 and interest of \$24,798.49, for a total of \$171,677.03. This notice was for the period March 1, 1981 through November 30, 1983.

3. On May 21, 1984, the Audit Division issued notices of assessment review which reduced the tax due on the above notices issued March 20, 1983 and December 20, 1983 to \$30,400.20 and \$16,182.30, respectively.

4. The auditor went to the business premises on March 19, 1982 and obtained the selling prices of each grade of gasoline. The auditor also listed information from 20 repair sales invoices and requested that petitioner provide certain additional books and records for audit. Petitioner did not furnish any records of daily receipts, gasoline pump meter readings or purchase invoices for parts. The purchase invoices for gasoline were incomplete. The Audit Division contacted California Petroleum Corp. (Chevron) to ascertain the quantity and the cost of the gasoline purchased by petitioner. The supplier's records showed that petitioner purchased 1,512,488 gallons of gasoline for the period June 1, 1979 through May 31, 1982 at a total cost of \$1,638,028.00.

Petitioner reported sales of \$695,775.00 on sales tax returns filed for the same period. A comparison of gross sales reported on Federal income tax returns for fiscal years ended April 30, 1980 and April 30, 1981 revealed that such sales exceeded sales reported on sales tax returns by \$547,451.00. Based on the foregoing comparisons, the Audit Division concluded that taxable sales were substantially underreported and that the books and records were unreliable for audit purposes. In order to determine gasoline sales, the auditor excluded the state gasoline tax (.08 per gallon) from the above gasoline purchases furnished by Chevron to arrive at a cost of \$1,517,029.00. The following markups per gallon were computed based on the selling prices obtained on March 19, 1982: regular - .021; unleaded - .083 and super - (.004).¹ The markups were applied to the applicable gallons of gasoline purchased by grade to determine taxable gasoline sales of \$1,585,842.00 for the period June 1, 1979 through May 31, 1982. The quarterly average (\$132,153.51) was used to estimate sales for the period June 1, 1982 through August 31, 1982.² Total gasoline sales amounted to \$1,717,995.63. Repair sales were also estimated due to petitioner's unreliable recordkeeping. Petitioner had a posted labor rate of \$30.00 per hour. Labor sales were estimated at \$18,720.00 per quarter (\$30.00 per hour x one mechanic x 8 hours per day x 6 days per week x 13 weeks per quarter). An analysis of the sales invoices listed on March 19, 1982 showed that parts represented 148.2 percent of the labor charge. This percentage was applied to the estimated labor sales to estimate the cost of repair parts of

1 Super Unleaded Gasoline was sold at below cost.

2 Effective September 1, 1982 the retailer of gasoline no longer collected the sales tax.

\$27,743.00. A 40 percent markup (based on prior audit experience) was applied to the cost and was combined with the labor charges to arrive at estimated repair sales of \$57,560.00 per quarter and \$748,280.00 for the period June 1, 1979 through August 31, 1982. The auditor observed a soda machine on the premises; however, the books and records did not reflect any soda sales. The auditor, therefore, estimated soda sales of \$200.00 a week or \$33,800 for the period June 1, 1979 through August 31, 1982. The combined taxable sales for said period amounted to \$2,500,075.63. Petitioner reported taxable sales of \$763,178.00 for the same period, leaving additional taxable sales of \$1,736,897.63 or an underreporting factor of 227.59 percent. The error factor was applied to taxable sales reported by petitioner on sales tax returns for each quarter in order to distribute the unreported sales throughout the audit period. Estimated sales for periods after August 31, 1982 were \$60,160.00 (repairs - \$57,560.00 and soda - \$2,600.00). The total sales tax liability for the audit period amounted to \$142,095.60. Sales tax of \$2,405.95 was also assessed on the acquisition of fixed assets on which tax was not paid when purchased.

5. On March 6, 1984, Joseph Botwinick entered a guilty plea in the District Court of Nassau County to violation of section 1145(b) of the Tax Law for knowingly and willfully filing false sales tax returns for the period December 1, 1979 through February 28, 1982 and underreporting sales tax due in the amount of \$132,107.02. Joseph Botwinick executed an Affidavit for Judgement by Confession on May 24, 1984 for the sum of \$132,107.02, exclusive of interest and penalty due thereon, pursuant to section 1145(b)(2) of the Tax Law. Said affidavit stated that Joseph Botwinick operated Personal Auto Center, Inc.

6. Petitioner did not dispute the amount of gasoline sales determined by the Audit Division except for the periods ending May 31, 1982 and August 31,

1982. For these periods petitioner argued the taxable sales reported on the returns filed were correct since the sales were approximately three times the amounts reported in prior periods. Petitioner's position was that the error rate was not applicable to those periods. The application of the error factor to the foregoing periods did not increase the unreported gasoline sales found on audit. It merely distributed a greater proportion of such sales to said periods.

7. With respect to the repair sales, petitioner took the position that the Audit Division's estimate was excessive on the basis that a 40 percent markup was erroneous and a mechanic was not working for a full eight hours each day. Petitioner estimated that repair sales were \$7,000.00 a month. This estimate was predicated on petitioner's sales records for July 1982 through October 1982.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) 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 petitioner 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 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

AD2d 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 estimate procedures adopted by the Audit Division for repair sales were reasonable under the circumstances. When a taxpayers's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223). Petitioner failed to sustain its 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).

D. 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 (1) of the 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 representa-

tions, resulting in deliberate nonpayment or underpayment of taxes due and owing" (Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982).

E. That a plea of guilty to tax evasion collaterally estops a taxpayer from contesting a civil fraud penalty for the same period (see Plunkett v. Commissioner, 465 F2d 299 [7th Cir. 1972]). Accordingly, petitioner is liable for the fraud penalty for the period December 1, 1979 through February 28, 1982. Moreover, the Audit Division has sustained its burden of proof that the fraud penalty was properly imposed for the period June 1, 1979 through November 30, 1979.

F. That the Audit Division has not sustained its burden of proving that the fraud penalty is warranted for the period June 1, 1982 through November 30, 1983. Accordingly, the fraud penalty is cancelled for said period and penalty and interest shall be imposed under the provisions of section 1145(a)(1) of the Tax Law.

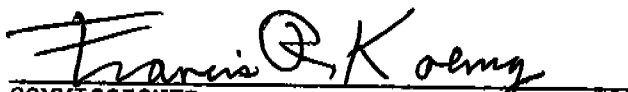
G. That the petition of Personal Auto Center, Inc. is granted to the extent indicated in Conclusion of Law "F". The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 21, 1984; and that, except as so granted, the petition is in all other respects denied and the notices issued March 20, 1983 and December 30, 1983, as revised by the notices of assessment review dated May 21, 1984, are sustained.

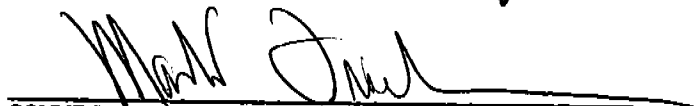
DATED: Albany, New York

STATE TAX COMMISSION

DEC 23 1986


PRESIDENT


COMMISSIONER


COMMISSIONER