

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

J. BOTWINICK & SONS, INC.  
T/A RITE SERVICE STATION  
AND JOSEPH BOTWINICK, 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 June 1, 1979 :  
through August 31, 1983. :

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Petitioners, J. Botwinick & Sons, Inc., t/a Rite Service Station and Joseph Botwinick, Officer, c/o Jerome J. Feldman, 249-12 Jericho Turnpike, Floral Park, New York 11001, 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 August 31, 1983 (File Nos. 45027, 50336 and 53294).

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 19, 1986 at 2:15 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 petitioners' gasoline and repair sales on the basis of external indices.
- II. Whether the Audit Division properly imposed fraud penalty.
- III. Whether Joseph Botwinick is personally liable for the taxes determined due from J. Botwinick & Sons, Inc.

FINDINGS OF FACT

1. Petitioner J. Botwinick & Sons, Inc. t/a Rite Service Station ("Botwinick") operated a Chevron gasoline service station located at 1555 Jerusalem Avenue, North Merrick, New York. Botwinick 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 Botwinick covering the period June 1, 1979 through August 31, 1980 for taxes due of \$68,442.33, plus penalty of \$33,591.94 and interest of \$26,166.64, for a total of \$128,200.91. On December 20, 1983, a second notice was issued to Botwinick for the period September 1, 1980 through February 28, 1981 in the amount of \$26,861.63, plus penalty of \$12,303.14 and interest of \$10,438.04, for a total of \$49,602.81. A third notice was issued against Botwinick on May 7, 1984 which assessed tax due of \$105,239.54, plus fraud penalty of \$52,619.74 and interest of \$28,700.00, for a total of \$186,559.28. This notice was for the period March 1, 1981 through August 31, 1983. Joseph Botwinick was assessed individually, as president, for the taxes determined due from Botwinick.

3. On May 7, 1984, the Audit Division issued notices of assessment review to Botwinick which reduced the tax due on the above notices issued March 20, 1983 and December 20, 1983 to \$46,138.29 and \$22,110.34, respectively, plus revised fraud penalty and interest. Petitioner Joseph Botwinick was also issued notices of assessment review which in addition to the foregoing reductions deleted use tax that was included in the assessments against the corporation.

4. Joseph Botwinick, on behalf of Botwinick, executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through February 29, 1980 to September 20, 1983.

5. The auditor went to the business premises on April 15, 1982 and obtained the selling prices of each grade of gasoline. The auditor also listed information from 26 repair sales invoices and requested that Botwinick provide additional books and records for audit. Botwinick did not furnish any records of daily receipts or gasoline pump meter readings. The purchase invoices maintained for parts and gasoline were incomplete. The Audit Division contacted California Petroleum Corp. (Chevron) to ascertain the quantity and the cost of the gasoline purchased by Botwinick. The supplier's records showed that Botwinick purchased 2,294,654 gallons of gasoline for the period June 1, 1979 through May 31, 1982 at a total cost of \$2,454,844.00. Botwinick reported gross sales of \$1,118,683.00 on sales tax returns filed for the same period. A comparison of gross sales reported on Federal income tax returns for fiscal years ended September 30, 1980 and September 30, 1981 revealed that such sales exceeded sales reported on sales tax returns by \$832,406.00. 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. 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 \$2,271,272.00. The average markup determined for the three grades of gasoline was 2.8515%. This markup was applied to the gallons of gasoline purchased to determine taxable gasoline sales of \$2,336,037.00 for the period June 1, 1979 through May 31, 1982. Repair sales were also estimated due to Botwinick's unreliable recordkeeping. Petitioner had a posted labor rate of \$30.00 per

hour. Labor sales were estimated at \$37,440.00 per quarter (\$30.00 per hour x two mechanics x 8 hours per day x 6 days per week x 13 weeks per quarter). Labor sales were increased by 25 percent to estimate the cost of repair parts of \$9,360.00. Total estimated repair sales per quarter amounted to \$46,800.00 and \$561,600.00 for the period June 1, 1979 through May 31, 1982. The auditor observed that Botwinick sold soda and candy; however, the books and records did not reflect any such sales. The auditor, therefore, estimated soda and candy sales of \$200.00 per week or \$31,200.00 for the period June 1, 1979 through May 31, 1982. The combined audited taxable sales for the period amounted to \$2,928,837.00 as opposed to reported taxable sales of \$1,015,584.00 for the same period, leaving additional taxable sales of \$1,913,253.00 or an underreporting factor of 188.3894 percent. The error factor was applied to taxable sales reported by Botwinick on sales tax returns filed for each quarter in order to distribute the unreported sales throughout the audit period. Estimated sales for periods after August 31, 1982<sup>1</sup> were \$49,400.00 (repairs - \$46,800.00 and soda - \$2,600.00). The total sales tax liability for the audit period amounted to \$170,631.03. Sales tax of \$4,028.83 was also assessed on the acquisition of fixed assets on which tax was not paid when purchased.

6. 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

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

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 J. Botwinick & Sons, Inc.

7. 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 on the basis that such sales were approximately three times the amounts reported in prior periods and were substantially the same as those estimated by the Audit Division. Botwinick's position was that the error rate was not applicable to those periods. The application of the error factor to the sales reported for the period ending May 31, 1982 did not increase the unreported gasoline sales found on audit. It merely distributed a greater proportion of such sales to this period. However, the Audit Division incorrectly applied the error rate to the period ending August 31, 1982. The gasoline sales reported by Botwinick were substantially correct for this period as evidenced by the audited sales determined in prior periods.

8. With respect to the repair sales, Botwinick took the position that the Audit Division's estimate was excessive. Botwinick 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.

9. At the hearing the Audit Division conceded that the fixed asset purchases subject to tax should be reduced to \$32,636.15.

10. Petitioner Joseph Botwinick was the sole officer and stockholder of the corporation. He was responsible for the day to day management and financial affairs of the business. Mr. Botwinick signed the sales tax returns filed for

the period June 1, 1980 through August 31, 1983, the New York State Corporation Franchise Tax Report and the Federal corporation income tax return for the fiscal year ended September 30, 1981, and the New York State Corporation Franchise Tax Report for the fiscal year ended September 30, 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 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 AD2d 655). Accordingly, the Audit Division properly determined petitioners' 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 taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223). However, in accordance with Finding of Fact "7" the unreported gasoline sales determined for the period ended August 31, 1982 are cancelled. The additional taxable sales for that period are reduced to repair sales of \$49,400.00. In addition, the purchases subject to sales tax are reduced to \$32,635.15 pursuant to Finding of Fact "9". Except for these

revisions Botwinick 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 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).

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 of Internal Revenue, 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 August 31, 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 Joseph Botwinick was a person required to collect tax pursuant to section 1131(1) of the Tax Law and therefore bears personal liability for the taxes determined due from J. Botwinick & Sons, Inc. in accordance with section 1133(a) of the Tax Law.

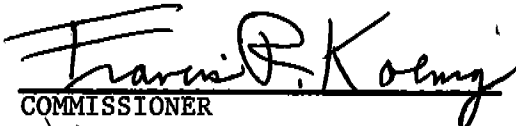
H. That the petition of J. Botwinick & Sons, Inc. t/a Rite Service Station and Joseph Botwinick, as officer, is granted to the extent indicated in Conclusions of Law "C" and "F". The Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued May 7, 1984, March 20, 1983 and December 20, 1983, as revised by the notices of assessment review dated May 7, 1984; and that, except as so granted the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 05 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER