

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
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EARLWOOD SERVICE STATION, INC.	:	DECISION
	:	
for Revision of a Determination or for Refund	:	
of Sales & Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1979	:	
through May 31, 1982.	:	

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Petitioner, Earlwood Service Station, Inc., 50-92 Northern Boulevard, Long Island City, New York 11101, 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 May 31, 1982 (File No. 45517).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 14, 1984 at 9:00 A.M. Petitioner appeared by William R. Brown, CPA. The Audit Division appeared John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division properly employed purchase markup procedures to calculate tax due on petitioner's sales of gasoline; tires, batteries and accessories; repair services; and motor oil.

FINDINGS OF FACT

1. On June 9, 1983, subsequent to the conduct of a field audit, the Audit Division issued to petitioner, Earlwood Service Station, Inc. ("Earlwood"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the

period June 1, 1979 through May 31, 1982 in the amount of \$31,004.24, plus penalties and interest. On September 14, 1982 and again on March 14, 1983, Fred Earl, as president of Earlwood, had executed on the corporation's behalf two consents extending the period of limitations for assessment of taxes for the taxable period June 1, 1979 through February 28, 1980 to March 20, 1983 and to June 20, 1983, respectively.

2. For approximately twenty-six years, Earlwood has operated a Mobil gasoline service station at 50-92 Northern Boulevard in Long Island City, New York. The station building contains three repair bays but only two are used. Earlwood is open for business eighteen hours daily, engaging two employees to pump gasoline and one mechanic's assistant during the day shift and one employee to pump gasoline during the night shift. Mr. Earl is a mechanic and is present at the station during the entire day shift.

3. Earlwood's business activities are reflected in daily reports, large printed forms (11" X 16"), on which are entered, inter alia, fuel meter readings; motor oil inventory; sales of tires, batteries and accessories; service income; and accounts receivable. At the far right of each form is a "summary column", recapitulating sales by category and the sales tax due. With the exception of the fuel meter readings for the night shift, all entries are made by Mr. Earl. Mr. Earl enters the sales amounts when customers remit payment and pick up their cars; thus, repair services may be performed on a particular day but the receipts therefrom not recorded until several days later if the customer delays in picking up his/her vehicle. With respect to petitioner's purchases, Mr. Earl staples the purchase invoices (e.g., an invoice from McCord Radiator Service for the repair of a radiator) to the daily report maintained on the date of the purchase; because petitioner may purchase tires or accessories but

not re-sell them on the same date, a purchase and its corresponding sale may not appear on the same daily report. Petitioner had available at the hearing approximately one hundred daily reports as above-described. Mr. Earl admits that not all sales invoices, purchase invoices and daily reports for the audit period were available to the sales tax examiner: the service station has been burglarized on several occasions; while cleaning up after the burglaries, it is possible that Earlwood employees mistakenly discarded some records.

4. Commencing sometime in 1980, the City of New York made certain excavations and sank observation wells on the service station premises in an effort to discover the source of gasoline leaking into the subway below Northern Boulevard. These activities, along with the City's surveillance of the observation wells, limited to some extent customer accessibility to the service station and therefore had some negative effect on the volume of business.

5. In calculating the assessment under consideration, the sales tax examiner employed markup tests of gasoline purchases and of tires, batteries, and accessories, labor and oil. He deemed petitioner's records inadequate to verify taxable sales because complete purchase invoices and sales invoices (for tires, batteries and accessories and repair services) were not available.

(a) The examiner compared petitioner's gasoline purchases per its books with purchases as reflected in the records of its supplier and found the amounts in close agreement. He then applied a weighted average markup of 7.3557 percent to gasoline purchases per petitioner's cash disbursements journal to arrive at audited gasoline sales of \$1,389,579.00. He eliminated from such amount the excise tax included therein. Net audited gasoline sales thus totaled \$1,295,844.32.

(b) The examiner subtracted net audited gasoline sales (\$1,295,844.32) from total reported taxable sales for the audit period (\$1,755,920.00) to calculate audited taxable sales of tires, batteries and accessories, repair services and motor oil (for simplicity, hereafter referred to as "TBA") of \$460,075.68. The excess of audited TBA sales over TBA purchases per petitioner's books yielded a gross profit of \$178,562.68, which when divided by TBA purchases in turn yielded a markup percentage of 63.43. Based on his experience, the examiner believed this markup percentage was too low and when petitioner was unable to substantiate it, the examiner decided to apply an "acceptable" markup of 200 percent.

(c) The examiner marked up petitioner's TBA purchases by 200 percent, which calculation resulted in audited TBA sales of \$844,539.00. The excess of this amount over reported TBA sales (\$460,075.68) represented additional audited TBA sales in the amount of \$384,463.32.

(d) Finally, the examiner calculated an error rate of 21.8953 percent by dividing additional audited TBA sales (\$384,463.32) by total taxable sales reported (\$1,755,920.00). He then increased taxable sales reported by petitioner for each quarterly period under consideration by this error rate. Taxable sales as so increased less taxable sales reported resulted in audited (unreported) taxable sales on which sales tax of \$31,004.24 was due.

6. At a pre-hearing conference, the examiner consented to return to petitioner's business premises where Mr. Earl and his new accountant agreed to have assembled and available for his review purchase invoices and the corresponding sales invoices for the quarterly period June through August, 1981. Upon the examiner's return, all these records were not furnished. Petitioner maintains that some matching purchase and sales invoices were provided to the

examiner and that nearly complete, if not complete, documents were available for the then current period. The examiner made no adjustments to the assessment.

7. Based on certain documentation for purchases made within the audit period, the markup on tires, batteries and accessories, repair services and oil was approximately 150 percent.

8. Petitioner has no prior audit history.

CONCLUSIONS OF LAW

A. That in light of petitioner's inability to produce sufficiently complete documentation, the Audit Division was justified in employing external indexes, in this instance purchase markup procedures, to verify petitioner's taxable sales. The markup percentage chosen by the auditor for tires, batteries and accessories, repair services and oil appears excessive, however, and should be reduced to 150 percent in accordance with Finding of Fact "7".

B. That inasmuch as the incompleteness of petitioner's records is attributable at least in part to burglaries of the business, and the assessment at issue in this proceeding is the first ever issued against Earlwood, all penalties and interest in excess of the minimum rate prescribed by statute are remitted (Tax Law section 1145[a][1][ii]).

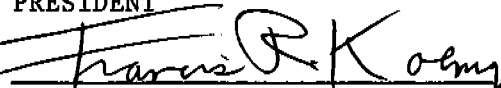
C. That the petition of Earlwood Service Station, Inc. is granted to the extent indicated in Conclusions of Law "A" and "B"; the assessment issued on June 9, 1983 is to be modified accordingly; and the petition is in all other respects denied.


DATED: Albany, New York

MAY 23 1985

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER