

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

S & J ECONOMIC SERVICE CENTER, INC.

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 August 31, 1981

In the Matter of the Petition

of

S & J ECONOMIC SERVICE CENTER, INC.

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Fiscal Years
Ending September 30, 1979 through September 30,
1981.

DECISION

In the Matter of the Petition

of

JOHN CANONICO,
OFFICER OF S & J ECONOMIC SERVICE CENTER, INC.

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 August 31, 1981.

In the Matter of the Petition

of

SALVATORE RUSSO,
OFFICER OF S & J ECONOMIC SERVICE CENTER, INC.

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 August 31, 1981.

In the Matter of the Petition
of
SALVATORE AND SHEILA RUSSO
for Redetermination of a Deficiency or for
Refund of New York State and New York City
Personal Income Tax under Article 22 of the
Tax Law and Chapter 46, Title T of the
Administrative Code of the City of New York
for the Years 1979 through 1981.

In the Matter of the Petition
of
JOHN AND BARBARA CANONICO
for Redetermination of a Deficiency or for
Refund of New York State and New York City
Personal Income Tax under Article 22 of the
Tax Law and Chapter 46, Title T of the
Administrative Code of the City of New York
for the Years 1979 through 1981.

Petitioner, S & J Economic Service Center, Inc., 3768 Nostrand Avenue,
Brooklyn, New York 11235, 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 August 31, 1981 (File No. 45522).

Petitioner, S & J Economic Service Center, Inc., 3768 Nostrand Avenue,
Brooklyn, New York 11235, filed a petition for redetermination of a deficiency
or for refund of corporation franchise tax under Article 9-A of the Tax Law for
the fiscal years ending September 30, 1979 through September 30, 1981 (File No.
45396).

Petitioner, John Canonico, Officer of S & J Economic Service Center, Inc.,
c/o Berman, Koerner & Silberberg, 33 Irving Place, 11th Floor, New York, New

York 10003 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 August 31, 1981 (File No. 58340).

Petitioner, Salvatore Russo, Officer of S & J Economic Service Center, Inc., 2424 Natimal Drive, Brooklyn, New York 11235, 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 August 31, 1981 (File No. 58341).

Petitioners, Salvatore and Sheila Russo, 2424 Natimal Drive, Brooklyn, New York 11234, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1979 through 1981 (File No. 45372).

Petitioners, John and Barbara Canonico, c/o Berman, Koerner & Silberberg, 33 Irving Place, 11th Floor, New York, New York 10003, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1979 through 1981 (File No. 44683).

A consolidated hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 6, 1986 at 9:45 A.M. Petitioners appeared by Berman, Koerner & Silberberg, P.C. (Carl S. Koerner, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether sales tax assessments and deficiencies in corporate franchise tax and personal income tax were proper, where the multi-audit was based primarily on increased purchases reported by a gasoline supplier.

FINDINGS OF FACT

1. The Audit Division conducted a multi-audit of petitioners for the following taxes and periods:

<u>Petitioner</u>	<u>Tax</u>	<u>Period</u>
S & J Economic Service Center, Inc.	Sales & Use Tax	6/1/79-8/31/81
S & J Economic Service Center, Inc.	Corporation Franchise Tax F.Y.E.	9/30/79, 80, 81
John & Barbara Canonico	Personal Income Tax	1979-1981
Salvatore & Sheila Russo	Personal Income Tax	1979-1981

The Sales Tax Audit

2. The auditor examined the books and records of petitioner S & J Economic Service Center, Inc. ("S & J"). The purchases per books and records agreed with reported sales. The auditor was not shown shift sheets or daily reports.

3. The Audit Division contacted Amoco Oil Company ("Amoco"), S & J's supplier of gasoline, to verify purchases. Information supplied by Amoco basically confirmed purchases per records for the periods ending November 30, 1979 and February 28, 1980. For subsequent periods, however, Amoco reported substantial purchases not included in petitioner's books and records. The following table compares purchases per Amoco and purchases per records:

<u>Period Ending</u>	<u>Per Amoco</u>	<u>Per Records</u>	<u>Additional Purchases</u>
11/30/79	99,674	100,309	(635)
2/28/80	98,823	99,354	(531)
5/31/80	164,376	121,217	43,159
8/31/80	177,592	122,252	55,340
11/30/80	181,741	114,445	67,296
2/28/81	193,036	128,478	64,558
5/31/81	201,188	122,417	78,771

4. Based on the audit, on April 27, 1983 the Audit Division issued notices of determination and demands for payment of sales and use taxes due to S & J and to Salvatore Russo and John Canonico, as officers, each in the amount of \$33,873.00 in tax and \$8,371.75 in penalty. Interest was also asserted. The assessments were for the period March 1, 1980 through August 31, 1981.

The Income Tax Audits

Salvatore and Sheila Russo

5. The auditor performed a cash availability audit of petitioners Salvatore and Sheila Russo. After calculating Salvatore Russo's share of the additional income of S & J based on increased sales as per the sales tax audit, the auditor made the following adjustments:

1979 - \$4,370.00 additional income from S & J; 3% medical adjustment of \$131.00; total \$4,501.00.

1980 - \$9,151.00 additional income from S & J; 3% medical adjustment of \$275.00; total \$9,426.00.

1981 - \$8,447.00 additional income from S & J; 3% medical adjustment of \$253.00; total \$8,700.00.

6. On April 14, 1983, the Audit Division issued notices of deficiency to petitioner Salvatore Russo as follows: 1979/1980 - \$1,893.00 tax, \$132.94 penalty; 1981 - \$1,735.00 tax, \$104.36 penalty. Interest was also asserted. (Petitioner Sheila Russo was not named in the notices of deficiency.)

John and Barbara Canonico

7. No income reconstruction audit was performed with respect to petitioners John and Barbara Canonico. The auditor calculated John Canonico's distributive share of the additional income of S & J and made the following adjustments:

1979 - \$12,507.00 additional income from S & J; 3% medical adjustment of \$375.00; total \$12,882.00.

1980 - \$11,911.00 additional income from S & J; 3% medical adjustment of \$357.00; total \$12,268.00.

1981 - \$8,447.00 additional income from S & J; 3% medical adjustment of \$253.00; total \$8,700.00.

8. On April 14, 1983, the Audit Division issued the following notices of deficiency to John and Barbara Canonico: 1979/1980 - \$3,769.00 tax, \$252.72 penalty; 1981 - \$1,777.00 tax, \$106.78 penalty. The notices also asserted interest.

The Corporation Franchise Tax Audit

9. S & J's records were deemed to be inadequate for purposes of corporation franchise tax based on the additional purchases determined in the sales tax portion of the audit. Accordingly, the auditor made the following adjustments:

	9/30/79	Fiscal Years Ending 9/30/80	9/30/81
Additional income derived from additional purchases	\$ -0-	\$ 4,993.00	\$16,894.00
Additional funds from shareholders:			
Salvatore Russo	4,370.00	6,655.00	-0-
John Canonico	12,507.00	9,415.00	-0-
Net Adjustment	\$16,877.00	\$21,063.00	\$16,894.00

10. On April 18, 1983, the Audit Division issued three notices of deficiency for corporation franchise tax to petitioner S & J. The Notice of Deficiency for the fiscal year ending September 30, 1979 was for \$855.00 in tax plus interest and an additional charge of \$88.00. The Notice of Deficiency for the fiscal year ending September 30, 1980 was for \$1,581.00 in tax plus interest and an additional charge of \$79.00. The Notice of Deficiency for the fiscal year ending September 30, 1981 was for \$1,492.00 in tax plus interest and an additional charge of \$75.00.

Business Operations

11. S & J operated an Amoco gasoline station at 3768 Nostrand Avenue, Brooklyn, New York.

12. Salvatore Russo was president of S & J and John Canonico, the vice president. Each owned 50 percent of the stock of the corporation.

13. During the periods at issue, the station had one service island with four gasoline pumps and eight hoses. The station's twelve tanks each had a capacity of 550 gallons.

14. The station was open from 7:00 A.M. to 10:00 P.M., six days per week. It was closed on Sunday. S & J employed three or four persons in addition to petitioners Russo and Canonico.

15. Charge purchases of gasoline made by customers on Amoco credit cards were credited against purchases of gasoline by petitioners.

16. When gasoline was delivered by Amoco, its driver could not accept cash. S & J paid the Amoco driver by means of Amoco credit card slips and a check for the balance.

17. S & J's checking account records reconcile with its other books and records.

18. At the hearing, petitioners offered into evidence S & J's daily reports for the periods at issue. These records were not seen by the auditor.

19. Petitioner John Canonico testified that a shift sheet would be prepared for each of the two shifts at the station and that he or Mr. Russo would put information from the shift sheets onto the daily reports. This information included gallons of each type of gasoline sold.

20. Detailed examination of the daily reports submitted by petitioners at the hearing (Petitioner's Exhibit "1") discloses that in many instances the

gallonge of regular gasoline was exactly twice the gallonge of high test. In August, 1980, for example, this was the case on 12 of the 26 business days. (One of such days recorded one gallon more than half; one other day recorded one gallon less than half.)

CONCLUSIONS OF LAW

A. That the assessments and deficiencies in each tax issued to petitioners all have a common basis: a determination that S & J's books and records were inadequate and incomplete in view of the gallonge reported by Amoco.

B. The Audit Division may resort to estimated assessments and deficiencies where petitioner's books and records are unreliable.

C. That while S & J's records for the most part appear to reconcile, petitioner John Canonico's testimony that gallons were recorded on the daily reports directly from the shift sheets each day is clearly contradicted by the fact that a very substantial percentage of such entries were obviously incorrect; someone had simply allocated two-thirds of a certain gallonge figure to regular and one-third to high test. Obviously, these figures did not come from the respective pump readings, as claimed by petitioners, and thus petitioners' records were inadequate.

D. That while there may well be an innocent explanation for recording gasoline sold in the above-described manner, the fact remains that it was not adduced at the hearing. Accordingly, petitioners did not sustain their burden of proof to show that the books and records were complete and accurate or that the gallonge reported by Amoco was incorrect. It is noted that petitioners did not subpoena Amoco's records.


E. That the petition of S & J Economic Service Center, Inc., John Canonico and Salvatore Russo, as officers, and Salvatore and Sheila Russo and John and

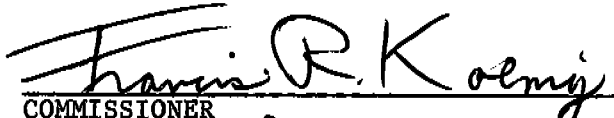
Barbara Canonico are denied and the notices of determination and demands for payment of sales and use taxes due and the notices of deficiency are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 05 1986


PRESIDENT


COMMISSIONER


COMMISSIONER