

STATE OF NEW YORK

DIVISION OF **TAX** APPEALS

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In the Matter of the Petition

of

GAS MASTERS, 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 August 1, 1981  
through August 31, 1982.

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In the Matter of the Petition

of

JOHN JAKOBSEN,  
OFFICER OF GAS MASTERS, INC.

DETERMINATION

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 August 1, 1981  
through August 31, 1982.

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In the Matter of the Petition

of

YAAKOV WICZYK,  
OFFICER **OF** GAS MASTERS, 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 August 1, 1981  
through August 31, 1982.

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Petitioner Gas Masters, Inc., 2317 Coney Island Avenue, Brooklyn, New York 11223, 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 August 1, 1981 through August 31, 1982 (File No. 45642).

Petitioner John Jakobsen, ~~1731 East 51st Street, Brooklyn, New York 11234,~~ 6 Boxwood Drive, Coltsneck, N.J. 07722

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 August 1, 1981 through August 31, 1982 (File No. 45641).

Petitioner Yaakov Wiczuk, 1064 Fordham Lane, Woodmere, New York 11598, 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 August 1, 1981 through August 31, 1982 (File No. 45643).

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 September 10, 1986 at 9:15 A.M., with all briefs to be submitted by February 7, 1987. Petitioners appeared by Hall, Dickler, Lawler, Kent & Howley (Steven D. Goldberg, Esq. and James J. Mahon, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

#### ISSUES

'I. Whether an assessment of sales and use taxes was properly determined on the basis of purchases by Gas Masters, Inc. of gasoline, oil and other items reported by Amoco Oil Corporation.

11. Whether petitioner Yaakov Wiczuk was a person required to collect sales and use taxes on behalf of Gas Masters, Inc.

#### FINDINGS OF FACT

1. Petitioner Gas Masters, Inc. ("Gas Masters") operates an Amoco service station at 2317 Coney Island Avenue, Brooklyn, New York, and did so during the period at issue. Petitioner John Jakobsen is, as he was during the audit period, president and sole officer and director of Gas Masters.

2. The audit was commenced by the Brooklyn District Office on January 19, 1983. The auditor basically compared sales records of Amoco Oil Corporation ("Amoco") with Gas Masters' sales tax returns and calculated that additional tax was due.

(a) The total number of gallons purchased by Gas Masters, according to the Amoco records, was multiplied by the average standard gasoline selling prices, as determined by the Miscellaneous Tax Bureau, less taxes, to find \$3,663,935.00 in total taxable gasoline sales. The calculations are as follows:

<u>Month</u>	<u>Monthly Gallons</u>	<u>Quarterly Gallons</u>	<u>Average Selling Price</u>	<u>Total Taxable Gasoline Sales</u>
8/81	254,000	254,000	1.242	\$ 315,468.00
9/81	255,000			
10/81	261,000			
11/81	93,113	609,113	1.235	752,255.00
12/81	299,269			
1/82	213,500			
2/82	222,000	734,769	1.201	886,866.00
3/82	251,500			
4/82	219,000			
5/82	228,706	699,206	1.207	843,942.00
6/82	--	--		
7/82	--	--		
8/82	--	--	1.207	865,404.00
	<u>2,297,088</u>	<u>2,297,088</u>		<u>\$3,663,935.00</u>

(b) Taxable oil sales were determined by using an average selling price of \$6.00 per gallon for 1,039 gallons of oil purchased, resulting in taxable oil sales of \$6,234.00 (oil purchases for the quarter ending August 31, 1982 appear to have been estimated).

\* Quarter ending 8/82 based on prior two quarters' gallonage:

734,769
699,206
<u>1,433,975</u>

$$\frac{1,433,975}{2} = 716,988 \times 1.207 = \$865,404.51$$

(c) Anti-freeze and tires, batteries and accessories ("TBA") sales were determined as follows:

(i) The total number of gallons of anti-freeze purchased, as per the Amoco reports for the audit period, i.e. 39 gallons, was multiplied by \$7.50 per gallon resulting in \$293.00 in anti-freeze sales.

(ii) TBA purchases were deemed to be units and were multiplied by \$5.00 selling price per item. Thus, 2,240 units for the audit period multiplied by \$5.00 resulted in \$11,200.00 total TBA sales.' This calculation was incorrect, as review of the Amoco report shows that the figure 2,240 represented dollars and not units.

It is noted that anti-freeze and TBA purchases for the last quarter also appear to have been estimated.

(d) Total adjusted taxable sales were as follows:

Gasoline	\$3,663,935.00
Oil	6,234.00
Anti-Freeze & TBA	11,493.00
Total	<u>\$3,681,662.00</u>

(e) As Gas Masters had reported taxable sales of \$1,352,177.00 for the audit period, additional taxable sales were found to be \$2,329,485.00, with tax due of \$191,677.38.

(f) The auditor did not contact the vendor prior to issuing a statement of proposed audit adjustment on February 3, 1983, claiming \$191,677.38 in tax due.

(g) The auditor visited the station on February 23, 1983 and was told by petitioner John Jakobsen that Gas Masters' accountant would produce books and records showing that the adjustments were in error.

(h) On March 2, 1983, the Audit Division received petitioners' notice of disagreement with the proposed audit adjustments.

(i) The auditor's testimony at the hearing was vague as to his requesting records from petitioner. It is not clear which records, if any, were requested. No letter requesting records was ever sent to petitioners or petitioners' accountant.

(j) The auditor closed the case on March 23, 1983.

3. On April 27, 1983, the Audit Division issued notices of determination and demands for payment of sales and use taxes due in the amount of \$191,677.38 in tax, \$31,842.41 in penalty and \$25,121.66 in interest, to Gas Masters and to John Jakobsen and Yaakov Wiczzyk, as officers.

4. Prior to the period at issue, petitioner Yaakov Wiczzyk was the owner of two Amoco service stations and petitioner John Jakobsen was one of his employees.

5. In July 1981, John Jakobsen learned that an Amoco station at 2317 Coney Island Avenue in Brooklyn had become available. However, since Amoco's policy was to lease stations only to established individuals and Jakobsen was unknown to Amoco, he asked Yaakov Wiczzyk to lease the station and in turn sublease it to him or a corporation owned by him (i.e., Gas Masters).

6. Petitioner Yaakov Wiczzyk leased the station from Amoco by a lease dated August 7, 1981 and sublet the station to Gas Masters, Inc. on the same date. The sublease provided, in pertinent part, as follows:

"29th. In the event that this franchise is sold, Landlord shall be entitled to 50% of any 'good will' payments received from purchaser."

7. Amoco management was aware of the sublease and appears to have acquiesced in it. Payments for gasoline, oil and accessories were made by Gas Masters and the credit card imprint plates were in Gas Masters' name.

8. When Gas Masters began operation, the gasoline pump totalizers were reset to zero and sealed.

9. The station was open 24 hours a day, 7 days a week. Shifts were 12 hours each. There were five to six persons employed by Gas Masters at any one time during the period in issue.

10. Gasoline was delivered to the station by an Amoco truck or a common carrier hired by Amoco. The driver was paid by credit card vouchers and checks. The drivers were not authorized to accept cash. Gas Masters was on a previous load payment plan, where it paid a driver not for the load he delivered but for the previous delivery.

11. At the hearing, petitioners submitted a voluminous amount of documentary evidence, including shift sheets showing pump readings, bank records and a computer-generated general ledger. Examination of these records shows that they are consistent and, with very minor deviations, support petitioners' reported taxable sales. The documents were corroborated by uncontroverted testimony.

12. Petitioner Yaakov Wiczyn was not an officer, director, shareholder or employee of Gas Masters and did not take part in the operation of its business.

#### CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides, in pertinent part, as follows:

"If a return required by this article is not filed, or 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. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That where a taxpayer's records are incomplete or insufficient, the Audit Division may select a method of audit reasonably calculated to reflect sales and use taxes due (Ristorante Puglia, Ltd. v. Chu, 102 AD2d 348).

However, if records are available from which the exact amount of tax can be

determined, estimation of tax lacks a rational basis (Chartair, Inc. v. State Tax Commission, 65 AD2d 44).

C. That, in this case, the auditor issued the proposed assessment based on information received from Amoco prior to contacting petitioner. No written request for records was ever made and the auditor's testimony as to orally requesting records was vague. Moreover, the auditor apparently did nothing to verify the Amoco information, even after visiting the station two weeks after issuing the proposed assessment. In summary, it appears that the Audit Division elected from the outset not to do a complete audit, but to rely on an estimated assessment and quickly close out the case. In view of this, the estimation of tax lacked a rational basis and the assessments were improperly issued.

D. That in view of the above, Issue II is moot.

E. That the petitions of Gas Masters, Inc., John Jakobsen and Yaakov Wiczyn are granted and the notices of determination and demands for payment of sales and use taxes due issued on April 27, 1983 are cancelled.

DATED: Albany, New York

OCT 0 8 1987

  
ADMINISTRATIVE LAW JUDGE