

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
PULASKI BRIDGE SERVICE STATION, 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 May 31, 1982.	:	

Petitioner, Pulaski Bridge Service Station, Inc., 321 McGuinness Boulevard, Brooklyn, New York 11222, 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 Nos. 45649 and 47853).

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 30, 1986 at 2:45 P.M. Petitioner appeared by Andy Fradelakis, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Laura Nath, Esq., of counsel).

ISSUE

Whether the Audit Division properly estimated petitioner's taxable sales on the basis of external indices.

FINDINGS OF FACT

1. Petitioner, Pulaski Bridge Service Station, Inc., operated a Mobil gasoline service station located at 321 McGuinness Boulevard, Brooklyn, New York. Petitioner had three service bays to perform repair work.

2. On August 20, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due covering the period June 1, 1979 through August 31, 1980 for taxes due of \$26,160.52, plus penalty and interest of \$21,049.69, for a total of \$47,210.21. On April 27, 1983, a second notice was issued for the period September 1, 1980 through May 31, 1982 which assessed additional taxes due of \$38,086.78 plus penalty and interest. On April 7, 1983, the Audit Division issued a Notice of Assessment Review that revised the tax due on the notice issued August 20, 1982 to \$19,979.64 plus penalty and interest.

3. On July 16, 1982, George Papadopoulos, president of petitioner, executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through May 31, 1980 to July 20, 1983.

4. On audit, the Audit Division found that petitioner maintained incomplete and inadequate books and records. Petitioner did not have any record of daily gasoline sales or repair sales to verify sales shown on worksheets prepared by petitioner's accountant. In addition, purchase invoices were not available. In order to verify taxable sales reported, the Audit Division contacted Mobil Oil Corporation to obtain the quantity of gasoline purchased by petitioner during the audit period. The total gallons provided by Mobil (531,465) agreed with the amount shown on the accountant's worksheet. The gallons, by grade of gasoline, were multiplied by the statewide average selling price (excluding the state gasoline tax and sales tax) to arrive at total gasoline sales of \$605,944.00. The Audit Division also estimated repair sales of \$257,400.00 due to the lack of sales and purchase invoices. This amount was determined based on two mechanics working 6 hours a day, 5½ days a week and using an hourly rate of \$25.00, including parts. The combined audited sales amounted to \$863,344.00. The Audit Division reduced this to \$858,337.00 to account for New York State

inspections. Petitioner reported taxable sales of \$139,571.00 for the same period, leaving additional taxable sales of \$718,766.00 with tax due thereon of \$57,866.42. Use tax of \$200.00 was also assessed on fixed asset acquisitions of \$2,500.00 in June 1979.

5. Following a pre-hearing conference with the Tax Appeals Bureau, the Audit Division agreed that petitioner's liability should be reduced to \$50,783.50 (\$17,504.36 on notice issued August 20, 1982 and \$33,279.14 on notice issued April 27, 1983). Gasoline sales were adjusted to allow for leakage of 3 percent and repair sales were revised to \$185,625.00.

6. At the hearing, counsel for the Audit Division conceded that the use tax of \$200.00 should be cancelled.

7. Petitioner does not dispute the gasoline sales determined by the Audit Division. Petitioner argued, however, that the allowance for leakage was insufficient and the estimate for repair sales was overstated. No evidence was produced by petitioner to establish the extent of its gasoline losses during the audit period, nor did petitioner show that the repair sales were erroneous.

CONCLUSIONS OF LAW

A. That section 1138(a) 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".

B. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

C. That petitioner provided inadequate and incomplete books and records for purposes of verifying taxable sales. Accordingly, the Audit Division's use of third party purchases and statewide average selling prices as a basis for determining petitioner's liability was proper pursuant to section 1138(a) of the Tax Law.


D. 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). 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).

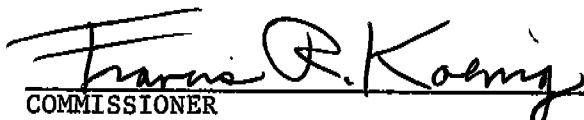
E. That the petition of Pulaski Bridge Service Station, Inc. is granted to the extent that the additional taxes due are reduced to \$50,583.50 (Findings of Fact "5" and "6"); the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued August 20, 1982 and April 27, 1983; and that, except as so granted, the petition is in all other respects denied.

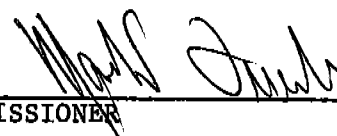
DATED: Albany, New York

STATE TAX COMMISSION

OCT 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER