

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

BRAD AUTO SERVICE CORP.

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 December 1, 1979
through August 31, 1984.

DECISION

In the **Matter** of the Petition

of

ROBERT DeNUNZIO,
OFFICER OF BRAD AUTO SERVICE CORP.

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 December 1, 1979 :
through August 31, 1984.

Petitioner Brad Auto Service Corp., 1120 North Broadway, North Massapequa,
New York 11758, 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
December 1, 1979 through August 31, 1984 (File Nos. 45730, 50879, 55600 and
58842).

Petitioner Robert DeNunzio, officer of Brad Auto Service Corp., 68
Beechwood Street, Farmingdale, New York 11735, 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 December 1, 1979 through August 31, 1984 (File
Nos. 45729, 50880 and 55601).

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 May 16, 1986 at 10:30 A.M., and continued on July 15, 1986 at 1:15 P.M. The matter was to be further continued on October 28, 1986 at 10:30 A.M.; however, by letter dated October 2, 1986, petitioners' representative waived said continued hearing date and asked that the decision be rendered based on the existing record. Petitioners appeared by Peter R. Newman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether a sales tax audit properly determined sales and use taxes due.

FINDINGS OF FACT

1. Petitioner Brade Auto Service Corp. operated a gasoline service station at 1120 North Broadway, North Massapequa, New York, during the periods at issue. Petitioner Robert DeNunzio was president of the corporation.

2. Pursuant to a field audit, the following notices of determination and demands for payment of sales and use taxes due were issued to petitioners (interest excluded):

<u>Date</u>	<u>Issued To</u>	<u>Tax</u>	<u>Penalty</u>	<u>Period</u>
3/20/83	Brade Auto Service Corp.	\$50,996.82	\$25,498.42	12/1/79-8/31/80
3/20/83	Robert DeNunzio, Pres.	50,996.82	25,498.42	12/1/79-8/31/80
12/20/83	Brade Auto Service Corp.	26,401.90	13,200.95	9/1/80-2/28/81
12/20/83	Robert DeNunzio, Pres.	26,401.90	13,200.95	9/1/80-2/28/81
6/20/84	Brade Auto Service Corp.	25,708.84	12,854.43	3/1/81-8/31/81
6/20/84	Robert DeNunzio, Pres.	25,708.84	12,854.43	3/1/81-8/31/81
12/7/84	Brade Auto Service Corp.	49,576.96	24,788.53	9/1/81-8/31/84
12/7/84	Robert DeNunzio, Pres.	49,576.96	24,788.53	9/1/81-8/31/84

3. The auditor made an unannounced observation test of the place of business on June 4, 1982. No records were made available and he was told by Mr. DeNunzio that the records had been stolen.

4. The audit was conducted in two stages:

a) The auditor first examined tax due for the period December 1, 1979 through August 31, 1980. Since no records were available, the auditor used third party verification information from Award Petroleum for the quarter September 1, 1980 through November 30, 1980. Information from Award indicated that 154,462 gallons were sold to the corporation during said period. This was multiplied by an Audit Division average selling price of \$1.25 per gallon for audited gasoline sales of \$193,078.00. Repair sales were estimated at \$1,500.00 per week for each of the three service bays, based on full-time mechanics and a labor rate of \$25.00 per hour. These sales were projected for the quarter ending November 30, 1980 resulting in audited taxable repair sales of \$58,500.00. This figure, when added to audited gasoline sales of \$193,078.00, resulted in total audited taxable sales of \$251,578.00 for the quarter ending November 30, 1980. Additional taxable sales of \$228,542.00 were compared to taxable sales of \$23,036.00 reported for that period, resulting in an error percentage of 992.11 percent. This percentage was applied to reported taxable sales for the period December 1, 1979 through August 31, 1981 and resulted in the additional audited taxable sales used in calculating the notices of determination and demands issued on March 20, 1983, December 20, 1983 and June 20, 1984.

b) Subsequent information as per Award Petroleum showed that the corporation made purchases of \$523,915.72 during the period December 1, 1979 through May 31, 1981. These figures were marked up 10 percent resulting in audited taxable gasoline sales of \$576,308.00. Repair sales were estimated at \$1,500.00 per week per bay for the three bays, based on full-time mechanics and a labor rate of \$25.00 per hour and projected for the period December 1, 1979 through May 31, 1981, resulting in audited taxable repair sales of \$351,000.00. Total audited taxable sales for said period were \$927,308.00. Additional

taxable sales of \$794,492.00 were compared to taxable sales of \$132,816.00 reported for the period, resulting in an error percentage of 598.19 percent. This percentage was applied to taxable sales reported for the period December 1, 1979 through August 31, 1980 resulting in additional taxable sales of \$439,263.00 and additional sales tax due of \$30,748.41. The field audit report stated that the assessments which had been issued on March 20, 1983 had been issued based on limited information and that, based on additional information, "adjustments are warranted and will be made at Tax Appeals". It is noted that the assessments which had been issued on December 20, 1983 and June 20, 1984 were also based on the 992.11 error percentage. It appears that although the auditor recognized that the error percentage should have been reduced to 598.19 percent from 992.11 percent, no notice of assessment review was issued. It also appears that the assessments issued on March 20, 1983, December 20, 1983 and June 20, 1984 were never adjusted at the Tax Appeals Bureau conference.

5. The assessments issued on December 7, 1984, with respect to the period September 1, 1981 through August 31, 1984, were issued based on the application of the error percentage of 598.19 percent.

6. The corporation's Federal income tax return for 1980 shows gross sales of \$320,574.49. This figure is approximately three times the gross sales reported on the sales tax returns for said year. (Sales tax returns were filed on a quarterly basis on a year running December 1 through November 30. Accordingly, direct calendar year comparison is impossible. However, sales reported for the period December 1, 1979 through November 30, 1980 were \$107,012.00 and sales reported for the period March 1, 1980 through February 28, 1981 were \$99,909.00.)

7. At the hearing on July 15, 1986, petitioner was granted additional time until the continued date of October 28, 1986 in which to enforce a subpoena ~~duces tecum~~ against Award Petroleum and to obtain other documentary information. As noted above, petitioner waived the further proceedings and requested that the decision be rendered based on the existing record.

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 reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous. (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858.)

C. That the corporation's records were incomplete or insufficient and, in fact, were never produced either for audit or at the hearing. Accordingly, the Audit Division properly estimated tax pursuant to Tax Law § 1138(a)(1). Petitioners did not sustain their burden of proof to show that either the method of audit or the amount of tax assessed was erroneous.

D. That the notices of determination and demands for payment of sales and use taxes due for the period December 1, 1979 through August 31, 1981 are to be reduced by adjusting the error percentage from 992.11 percent to 598.19 percent.

As noted in Finding of Fact "4(b)", the field audit report provided that adjustment was to be made; however, it appears that this was never done.

E. That the corporation's failure to pay the correct sales and use tax was due to fraud. This **is** evidenced by the fact that the corporation consistently reported only a fraction of its taxable sales (see Rogers v. Commissioner of Internal Revenue, 111 F2d 987 [6th Cir 1940]). Reported taxable sales were only 14.3 percent of audited taxable sales over a four year and nine month audit period (Finding of Fact "4[b]"). Moreover, the corporation's **own** Federal income tax return for 1980 shows gross sales of approximately three times the gross sales reported on its sales tax returns for 1980 (Finding of Fact "6"). Accordingly, the fraud penalty asserted under Tax Law § 1145(a)(2) is sustained.

F. That except as provided **in** Conclusion of Law "D", the petitions are denied and the notices of determination and demands for payment of sales and use taxes due issued to petitioners, Brade Auto Service Corp. and Robert DeNunzio, as officer **of** Brade Auto Service Corp., are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 27 1987


PRESIDENT


COMMISSIONER


COMMISSIONER