

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
	:	
of	:	
	:	
MARK BARBATO	:	DECISION
D/B/A MARK'S SUNOCO CENTER	:	
	:	
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, 1981	:	
through August 31, 1982.	:	

---

Petitioner, Mark Barbato d/b/a Mark's Sunoco Center, 1425 Culver Road, Rochester, New York 14609, 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, 1981 through August 31, 1982 (File No. 45777).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on June 5, 1986 at 9:15 A.M., with all briefs to be submitted by September 2, 1986. Petitioner appeared by Carl A. Nanni, P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUE

Whether a desk audit of petitioner's business utilizing third party information and industry standard markups was justified and, if so, whether petitioner has provided sufficient evidence to warrant reduction or cancellation of the assessment resulting from such audit.

#### FINDINGS OF FACT

1. On July 15, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Mark's Sunoco Center

asserting additional sales tax due in the amount of \$26,135.83 plus penalty and interest for the period June 1, 1981 through August 31, 1982.

2. At all times during the period at issue herein, Mark's Sunoco Center was a proprietary entity owned and operated by petitioner, Mark Barbato. Mark's Sunoco Center sold gasoline, repair service, and tires, batteries and accessories ("TBA").

3. On May 5, 1983 the Central Office Audit Bureau of the Audit Division ("COAB") mailed a written inquiry to petitioner advising petitioner that his sales tax returns were being audited and requesting that he complete and return to the Audit Division a "Filling Station Questionnaire" which was enclosed with the inquiry. Said questionnaire requested information regarding the operation of petitioner's gas station, including petitioner's selling prices and gasoline purchase information. The inquiry also requested certain tax return information from petitioner.

4. Having received no reply to the May 5 inquiry, COAB sent a follow-up inquiry to petitioner on June 14, 1983, requesting a response to COAB's prior request within ten days. COAB made no further effort to contact petitioner prior to the issuance of the notice of determination referred to in Finding of Fact "1".

5. Petitioner received both inquiries from COAB, but did not respond.

6. Having received no response from its inquiries, COAB commenced an audit of petitioner. COAB obtained the gasoline gallonage sold to petitioner during the audit period from petitioner's distributor, Sun Oil Company. COAB assumed that gasoline purchased by petitioner during the audit period was also sold by petitioner. The gallonage of gasoline purchased by petitioner was determined to have been sold by petitioner at the average statewide prices.

COAB therefore multiplied gallons purchased by the average selling price to determine petitioner's audited taxable sales of gasoline during the audit period. It was the experience of COAB personnel in auditing gas stations that the ratio of sales of TBA and repair services to gasoline sales in New York was 38%. Accordingly, COAB computed petitioner's sales of TBA and repair services ("other sales") by multiplying petitioner's audited gasoline sales by 38%.

7. The foregoing calculations formed the basis of the notice of determination referred to in Finding of Fact "1".

8. At a pre-hearing conference in this matter petitioner produced certain records including gasoline purchase invoices, repair service invoices, bi-weekly inventory worksheets, and workpapers summarizing petitioner's pump readings and prices at two-week intervals throughout the audit period.

9. The Audit Division determined that the records supplied by petitioner at the pre-hearing conference were incomplete, but accepted the selling prices for gasoline as set forth by petitioner in his workpapers and utilized said selling prices to recalculate petitioner's audited gasoline sales. With respect to the repair invoices submitted, the Audit Division determined that the invoices submitted for the month of July 1982 were complete and therefore recalculated petitioner's audited other sales by adding the sales tax charged on the invoices for July 1982 and multiplying that total by three to reach quarterly TBA and repair service sales. The quarterly figure was multiplied by the five quarters comprising the audit period to reach audited other sales. Based upon the foregoing calculations, the additional tax asserted due herein by the Audit Division was adjusted to \$23,847.80, plus penalty and interest.

10. At hearing, petitioner introduced gasoline purchase invoices from Sun Oil Company representing its purchases of gasoline during the audit period. The gallonage listed on the invoices submitted was identical to the information

provided to the Audit Division by the supplier for 11 of the months at issue. Petitioner also introduced invoices for TBA and repair service. No invoices were introduced for the month of December 1981 through June 1982. Additionally, petitioner introduced bi-weekly "Inventory Work Sheets" detailing selling prices and gasoline gallonage information.

11. Petitioner did not personally appear at the hearing and no evidence was received attesting to the completeness or accuracy of the records which were introduced.

12. Petitioner contended that, inasmuch as the initial notice of determination was based upon assumptions of the Audit Division, said notice was improper. Petitioner further contended that the records submitted were complete and accurate and therefore the adjustments made at the pre-hearing conference were improper.

#### CONCLUSIONS OF LAW

A. That every person required to collect tax is under a duty to keep adequate records pertaining thereto and to make such records available for examination by the Audit Division (Tax Law §§ 1135, 1142.5). In turn, where, as here, adequate records and information are either not maintained or are not made available upon request, the Audit Division may estimate the amount of tax due from such information as is available and may resort to the use of external indices reasonably calculated to arrive at a determination of tax liability (Tax Law § 1138[a]).

B. That given petitioner's failure to respond to the two written inquiries made by COAB, the use of estimation procedures and external indices as described in Finding of Fact "6" was appropriate (see Matter of Edward Perretta, State Tax Commission, February 18, 1986). The Audit Division thus had a factual basis

for the issuance of the notice of determination herein (see Matter of A & Victor Manufacturing Co., Inc., State Tax Commission, July 18, 1984).

C. That petitioner has failed to show wherein the assessment and adjustments made with respect thereto as a result of the pre-hearing conference were improper. There has been no showing that the distributor's records of petitioner's purchases as relied upon by the Audit Division were inaccurate. In fact, the gasoline purchase invoices, submitted by petitioner at hearing substantially support the accuracy of the distributor's records. Additionally, the repair service invoices submitted by petitioner were clearly incomplete, inasmuch as no invoices for several months of the audit period were submitted. The Audit Division's adjustment to this portion of the assessment based upon invoices submitted for July 1982 was therefore reasonable. Finally, in view of Finding of Fact "11", the bi-weekly worksheets submitted at hearing were not reliable records to satisfy the statutory requirements.


D. That the petition of Mark Barbato d/b/a Mark's Sunoco Center is in all respects denied, and the notice of determination dated July 15, 1983, as adjusted (Finding of Fact "9"), is in all respects sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER