

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

PETER GIORDANO

D/B/A B & G GULF SERVICE STATION

:

:

DECISION

for Revision of Determinations or for Refund
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period September 1, 1979 :
through August 31, 1982.

Petitioner, Peter Giordano d/b/a B & G Gulf Service Station, 310 Main Street, Hempstead, New York 11550, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1979 through August 31, 1982 (File Nos. 42892 and 45778).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 8, 1986 at 1:15 P.M. Petitioner appeared by Stephen Hochberg, Esq. and Dean Chryssos, CPA. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether the Audit Division is barred by the statute of limitations from assessing petitioner for the periods ending November 30, 1979 and May 31, 1980.

II. Whether the Audit Division properly determined additional sales taxes due from petitioner based upon an examination of petitioner's available books and records.

FINDINGS OF FACT

1. The Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Peter Giordano d/b/a B & G Gulf Service Station, dated December 20, 1982, in the amount of \$26,503.53, with a penalty of \$4,398.08 and interest of \$4,241.97, for a total amount due of \$35,143.58 for the period September 1, 1979 through August 31, 1982. After a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, dated May 27, 1983, in the amount of \$14,703.74, plus penalty of \$3,109.59 and interest of \$3,038.65, for a total amount due of \$20,851.98 for the period March 1, 1980 through August 31, 1982. Petitioner protested each of these notices in a timely fashion on March 7, 1983 and July 25, 1983, respectively.

2. The Audit Division had until December 20, 1982 to issue a notice of determination and demand for the period ending November 30, 1979. However, books and records were not forthcoming from petitioner or his representative despite numerous requests made over a ten month period. In order to afford more time for a proper audit, the Audit Division attempted to have petitioner execute a consent extending the period of limitation for assessment of sales and use taxes. However, despite several attempts to procure said consent, including hand-delivering a consent to petitioner at his place of business on November 18, 1982, no executed consent was ever received by the Audit Division.

3. Petitioner operated a service station in Hempstead, New York which made retail sales, inter alia, of gasoline, repairs and undercoating and rustproofing. Petitioner operated the service station alone until August of 1981 when he was joined by his son, Peter Giordano, Jr.

4. The Audit Division began its field audit of petitioner on February 24, 1982 and followed up with an appointment letter sent to both petitioner and his accountant on February 26, 1982, wherein petitioner and his accountant were requested to produce the books and records of the business for the audit period, September 1, 1979 through August 31, 1982.

5. The first meeting the Audit Division had with petitioner's accountant took place on July 19, 1982. Petitioner's accountant produced some invoices, bank statements and check stubs. The Audit Division also reviewed petitioner's sales tax returns filed during the audit period and requested verification of petitioner's purchases from two suppliers, Gulf Oil and Nobek. Even though subsequent meetings were held between the Audit Division and petitioner's accountant over the following eight months, no further records were produced by petitioner. Additionally, despite efforts to procure a consent to extend the period of limitation for assessment of sales and use taxes, none was ever received by the Audit Division.

6. Since the Audit Division was already precluded from assessing two quarters due to the statute of limitations, it notified petitioner that it was imperative for him to execute a consent extending the period of limitation for assessment of sales and use taxes or face the alternative of having a notice of determination and demand issued based upon external indices, since the information produced by petitioner and petitioner's accountant was deemed insufficient by the Audit Division to determine petitioner's sales tax liability for the audit period.

7. The first notice of determination and demand, which was dated December 20, 1982, stated additional tax due for the period September 1, 1979 through August 31, 1982 of \$26,503.53. This figure was calculated by the Audit Division

by doubling the gross sales reported on the sales tax returns filed by petitioner. This method was chosen to prevent the forfeiture of further quarters due to the statute of limitations, and was based upon the Audit Division's examination of available purchase invoices, bank statements and check stubs which indicated that petitioner was reporting gross sales which were substantially less than purchases.

8. The Audit Division issued a second notice of determination and demand dated May 27, 1983, stating additional taxes due for the period March 1, 1980 through August 31, 1982 in the sum of \$14,703.74, plus penalty and interest. The decision to issue this second assessment for periods covered under the first assessment was made after a supervisor's review of the field auditor's notes and workpapers. The second assessment was based upon a test of petitioner's available books and records for the period December 1, 1980 through May 31, 1981. It was noted after a comparison of third party verification records from Gulf Oil and Nobek, petitioner's suppliers, and petitioner's **own** purchase records, that petitioner purchased substantially more gasoline than reported by the third parties. Further, the Audit Division transcribed the bank deposits for the period June 1, 1979 through May 31, 1982 and compared them to the gross sales reported on petitioner's sales tax returns, revealing \$19,683.00 more in deposits than gross sales reported. However, since the Audit Division decided to use a markup audit method, this additional amount was never directly assessed.

9. The Audit Division, using petitioner's **own** records for the period December 1, 1980 through May 31, 1981, determined the total number of gallons of regular and unleaded gasoline purchased and then marked up each by the amounts determined from a physical observation of the prices being charged by petitioner, resulting in a combined profit for the test period of \$5,232.04.

The combined cost of both types of gasolines as recorded on petitioner's invoices was \$67,104.21. The Audit Division added petitioner's profit to his combined cost and subtracted the 8 cents per gallon gasoline tax, which totalled \$1,440.40 for regular gas and \$2,974.96 for unleaded, to arrive at total adjusted taxable gasoline sales for the test period of \$67,921.00. The Audit Division, based upon its experience in similar audits, estimated repair sales to be \$1,500.00 a week. However, since petitioner's station was manned by only one person, who divided his time equally between repairs and pumping gas, repair sales were calculated at a rate of \$750.00 per week. For the 26 weeks in the test period, this yielded \$19,500.00 in total repair sales, and when added to the total adjusted taxable gas sales yielded total taxable sales of \$87,421.00. Petitioner reported taxable sales of \$23,597.00 on his returns, leaving additional taxable sales for the test period of \$63,824.00, or a 270.48 percentage of error.

10. The Audit Division applied this margin of error to the taxable sales reported for the period March 1, 1980 through August 31, 1982 and found adjusted taxable sales of \$728,697.00, resulting in additional tax due of \$52,163.70. Since petitioner had reported and paid sales tax of \$14,080.12 per its sales tax returns and had previously been assessed \$23,379.84 on the notice of determination and demand dated December 20, 1982, the additional tax due for the period March 1, 1980 through August 31, 1982 was determined to be \$14,703.74.

11. The Audit Division assessed full penalty and interest due to its determination that there had been a gross understatement of sales as revealed by the sales tax returns filed by petitioner for the audit period September 1, 1979 through August 31, 1982.

12. Petitioner conceded that its books and records for all periods prior to late August or early September of 1981 were lost by its previous accountant, who died during 1981, leaving no clue as to the whereabouts of petitioner's books and records. Despite attempts by petitioner and petitioner's new accountant, none of the books and records could be located nor could a reconstruction of the books and records be made. Petitioner's new accountant, Mr. Dean Chryssos, installed a new bookkeeping policy on behalf of petitioner which required careful journal entries of gasoline, repair and undercoating sales.

13. Petitioner submitted numerous repair sales receipts for the period January 20, 1982 through August 31, 1982 and sales receipts, for various periods, which petitioner claims are tax exempt. Petitioner also submitted a cash receipts journal for the months of January through August of 1982 and ten blanket resale certificates from the following purchasers:

Mack Markowitz, Inc.	Hempstead Auto Co.
Bridge Chrysler-Plymouth, Inc.	Manhattan Imported Cars, Inc.
Curry Chevrolet, Inc.	Moro Motors Limited
Art Pell Dodge	Hempstead Renting & Leasing, Inc.
Hertz Corporation	Philbor Motors, Inc.

Petitioner did not submit any substantiating documentation with regard to gasoline sales other than handwritten sheets which were allegedly acquired by petitioner's accountant through telephone contact with petitioner.

14. Petitioner also submitted sales tax computations for the quarters ended November 30, 1981, February 28, 1982, May 31, 1982 and August 31, 1982 which substantiated the amounts reported on petitioner's ST-100's for those respective periods.

15. Petitioner contends that the Audit Division is time barred by the statute of limitations with regard to the quarters ended November 30, 1979 and May 31, 1980 because the notices were not issued in a timely fashion. However,

petitioner did not deny receipt of either notice or contend that the notices were not timely for all other quarters in the audit period.

16. Although the Audit Division was asked to produce proof of mailing of the Notices of Determination and Demands and was allotted ample time to do so after the hearing, it failed to submit evidence of mailing.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a) provides that:

"[I]f 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 Tax Law § 1135(a) 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 did not have books and records available for audit nor did it produce books and records sufficient to determine petitioner's tax liability. When records are not provided or are incomplete and insufficient, it **is** the duty of the Audit Division to select a method of audit reasonably calculated to reflect taxes due (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576). The Audit Division properly determined petitioner's sales on the basis of purchases and the auditor's past experience with audits of similar businesses in accordance with Tax Law § 1138(a). The notice of determination dated December 20, 1982, which was based upon a doubling of petitioner's reported taxable sales, was based upon the auditor's review **of** petitioner's purchases and reported

gross sales which indicated the petitioner's faulty recordkeeping. Once a taxpayer's recordkeeping is determined to be faulty, exactness is not required of the examiner's audit. (Meyer v. State Tax Commission, 61 AD2d 223.)

D. That petitioner has the burden of demonstrating by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization v. Tully, 85 AD2d 858, 859). Petitioner has suggested several possible inaccuracies in the audit method chosen by the Audit Division, but he has failed to show that the audit method was erroneous (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576, 577).

E. That Tax Law § 1145(a)(1), in effect during the period in issue states, in pertinent part, as follows:

"(a) (1) (i) Any person failing to file a return or to pay or pay over any tax to the tax commission within the time required by this article shall be subject to a penalty of five percent of the amount of tax due if such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate; plus interest at the rate of one percent of such tax or one-twelfth of the annual rate of interest set by the tax commission pursuant to section eleven hundred forty-two, whichever is greater, for each month of delay after such return was required to be filed or such tax became due.

(ii) If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit all of such penalty and that portion of such interest that exceeds the interest that would be payable if such interest were computed at the rate set by the tax commission pursuant to section eleven hundred forty-two. The tax commission shall promulgate rules and regulations as to what constitutes reasonable cause."

F. That 20 NYCRR 536.5(a) (formerly 20 NYCRR 536.1[a]) provides that the Tax Commission may remit interest or penalties assessed under Tax Law § 1145 if petitioner's failure to comply with the law was due to reasonable

cause. Subsection (b) of 20 NYCRR 536.5 states that grounds for reasonable cause may include the inability to obtain and assemble essential information required for the preparation of a complete return despite reasonable efforts. Since petitioner's accountant died in 1981 and all of petitioner's and petitioner's accountant's efforts to retrieve petitioner's records were fruitless, there is reasonable cause to remit the penalties for all periods prior to September, 1981.

G. That Tax Law § 1101(b) defines "retail sale" in pertinent part, as follows:

"(b)(4)Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property,...."

The regulations promulgated pursuant to Tax Law § 1101(b)(4) provide that where a person in the course of his business operations purchases tangible personal property which he intends to sell either in the form in which purchased or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale and, therefore, not subject to tax until he has transferred the property to his customer. (20 NYCRR 526.6[c].)

H. That the regulations further state that a resale certificate is one used to claim exemption from tax on purchases of tangible personal property or services which will be resold or transferred to a customer when said personal property or services is for resale. (20 NYCRR 532.4[d][1].) Further, the regulations require that each vendor accepting a resale certificate must, for verification purposes, maintain a method of associating a sale made for resale with the resale certificate on file. (20 NYCRR 532.4[d][4].)

I. That petitioner has produced ten blanket resale certificates and, to the extent that it has also produced receipts which are subject to said certificates, petitioner **is** entitled to a credit. The blanket resale certificates and receipts submitted by petitioner at hearing should be remitted to the Audit Division for adjustment of estimated taxable sales.

J. That Tax Law § 1147(a) provides that the mailing of a notice **is** presumptive evidence of the receipt of same by the person to whom it **is** addressed. Since petitioner claimed the notices were untimely with regard to the first period on each of the notices issued against petitioner, it was incumbent upon the Audit Division to establish the mailing of the notice in a timely manner. The presumption of receipt arises upon the presentation of proof by the sender that it has a routine office practice and procedure for mailing the notices which demonstrate that the notices were in fact properly addressed and mailed. (T.J. Gulf, Inc. v. New York State Tax Commission, 124 AD2d 314.)

K. That the Audit Division did not submit proof sufficient to establish the timely mailing of the notices of determination and demands even though given ample opportunity to do **so** at and subsequent to hearing. Therefore, the tax due for the first period on notice number 5821202003N, period ended November 30, 1979, and the first period on notice number 5830527147C, period ended May 31, 1980, **is** cancelled.

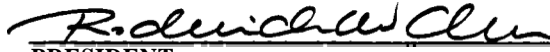
L. That the petition of Peter Giordano d/b/a **B & G** Gulf Service Station **is** granted to the extent set forth in Conclusions of Law "**F**", "**I**" and "**K**"; that the Audit Division **is** directed to modify the notices of determination and demands for payment of sales and use taxes due dated

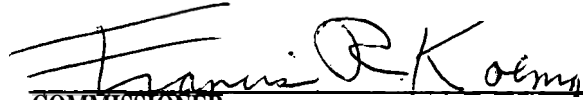
December 20, 1982 and ~~May~~ 27, 1983, accordingly; and that except as so granted the petition is in all other respects denied.

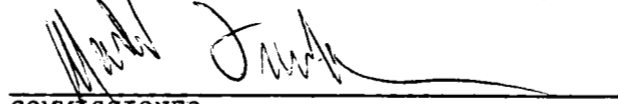
DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1987


PRESIDENT


COMMISSIONER


COMMISSIONER