

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

JOSEPH S. CALABRO :

D/B/A JOE'S SERVICE STATION AND J C AUTO SALES :

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 March 1, 1980 :
through August 31, 1982. :

Petitioner, Joseph S. Calabro d/b/a Joe's Service Station and J C Auto Sales, RD #3, Altamont, New York 12009, 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 March 1, 1980 through August 31, 1982 (File Nos. 45905 and 47973).

A formal hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, W. A. Harriman Campus, Albany, New York, on September 11, 1985 at 9:15 A.M., with all briefs to be filed by November 8, 1985. Petitioner appeared by Hershkowitz, Rodriguez & Stillman, P.C. (Phil A. Rodriguez, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether a desk audit of petitioner's business wherein the Audit Division primarily used external indices to determine petitioner's sales tax liability was warranted.

II. If so, whether the assessment resulting from such audit was proper.

FINDINGS OF FACT

1. Petitioner, Joseph S. Calabro d/b/a Joe's Service Station and J C Auto Sales, operates two Sunoco gasoline service stations in Altamont, New York. One station, known as Joe's Service Station, is located at the corner of Routes 20 and 146 and the other, known as Ma's Service Station, is located at the corner of Routes 20 and 158. In addition to selling gasoline and diesel motor fuel, the petitioner performs repair work on automobiles and sells parts, tires, batteries and accessories. The stations business hours are 8:00 A.M. to 11:00 P.M. daily including Saturday and Sunday. Each station has two service bays and two employees on duty at all times. The petitioner also has three trucks and/or service vehicles which are used in conjunction with the stations.

2. By a letter dated April 29, 1983, an examiner for the Audit Division's Central Sales Tax Section advised petitioner that his tax returns were being audited and requested petitioner to complete and return within twenty days an attached Filling Station Questionnaire, together with copies of either Federal Schedule C or Form 1120 for the years 1980 and 1981.

3. On or about May 12, 1983, petitioner returned the aforementioned questionnaire along with Schedule C, Form 1040 for the years 1980 and 1981. In addition to the current selling price of gasoline, the questionnaire also contained information relative to petitioner's purchases and sales for the test period September through November, 1981 as taken from petitioner's books and records. The examiner noted the following regarding the information on the questionnaire:

a) gallons sold (63,858) exceeded gallons purchased (54,007) by
9,851;

b) the purchase price of gasoline (\$68,425.00) which included Federal and State gasoline taxes, exceeded gasoline sales (\$51,300.00) by \$17,125.00;

c) total purchases (\$69,399.00) exceeded total sales (\$56,549.00) by \$16,850.00.

4. The examiner originally thought that the questionnaire contained figures only for petitioner's station at the corner of Routes 20 and 146, Joe's. The examiner therefore compared gasoline purchases for Joe's as indicated on a computer printout supplied to the Audit Division by Sun Oil Company ("Sun") to the questionnaire. The questionnaire indicated purchases of 54,007 gallons for the test period September through November, 1981, whereas the printout indicated purchases of 45,008 gallons for the same period. In view of this discrepancy, the examiner decided to compute petitioner's sales tax liability based on external indices. The examiner first computed the selling price of gasoline by averaging the selling price per the questionnaire to the retail selling price as determined by the Audit Division from a review of stations in petitioner's area. The selling price, which varied each quarter of the audit period, less the New York State gasoline tax and the sales tax, was multiplied by the number of gallons purchased per the printout to compute taxable gasoline sales. The examiner increased this amount by 109 percent to compute total audited taxable sales (the reason for or method of computing the 109 percent was not explained). The audited taxable sales were multiplied by the 7 percent sales tax rate to determine sales tax due which, when reduced by sales tax paid, resulted in additional sales tax due of \$39,895.07.

5. On May 27, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner for taxes due of \$39,895.07, plus penalty of \$8,471.18 and interest of \$8,312.75,

for a total amount due of \$56,679.00 for the period March 1, 1980 through August 31, 1982. On July 21, 1983, the petitioner timely filed a petition for a hearing to review the assessment.

6. Subsequently, the examiner noticed that the petitioner was filing a consolidated sales tax return (reporting sales and taxes for more than one business location) and that the questionnaire actually reported figures for both of petitioner's stations, Ma's and Joe's. The examiner therefore recomputed petitioner's sales tax liability. The examiner multiplied the selling price of gasoline, as computed above, less the New York State gasoline tax and sales tax, by the number of gallons purchased by both Ma's and Joe's per the printout of 892,969 gallons to compute taxable gasoline sales of \$1,055,942.11. This amount was increased by 37 percent (based on audit experience) to account for other taxable sales, i.e. repairs, tires, batteries, etc. This resulted in total audited taxable sales which, when multiplied by the 7 percent sales tax rate, resulted in sales tax due of \$101,264.72. The petitioner reported sales tax of \$30,912.00 which resulted in additional sales tax due of \$70,352.72.

7. On October 28, 1983, the Audit Division issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for taxes due of \$22,504.87, plus penalty of \$5,299.40 and interest of \$5,351.10, for a total due of \$33,155.37 for the period September 1, 1980 through August 31, 1982. It should be noted that no tax was assessed the period March 1, 1980 through August 31, 1980 due to the expiration of the statute of limitations. This second assessment was in addition to the assessment issued on May 27, 1983. On October 31, 1983, the petitioner timely filed a petition for a hearing to review this second assessment. The petitioner primarily contends that the figures reported by Sun do not accurately reflect his actual gasoline purchases.

Additionally, petitioner claims that he lost gasoline through theft, leakage and overfilling.

8. In or about November, 1982, the petitioner replaced two gasoline storage tanks with two new fiberglass tanks. The old tanks were badly rusted and full of pit holes. The earth and water around the old tank was contaminated with gasoline to such an extent that the new tanks had to be put in a different location at the rear of the premises. Mr. James Benton, Executive Director of the Gasoline Retailers Association of Northeastern New York and petitioner's expert witness, testified that the pit holes were large enough as to cause the loss of 300 gallons per day. Mr. Benton also testified that dealers experience a loss of at least 1½ percent of gasoline purchases due to evaporation and spillage during deliveries.

9. Mr. Lorenzo E. Claus, an ex-employee of petitioner and driver for Sun, testified that, during the period at issue, Sun had received numerous complaints from dealers regarding the theft of gasoline by drivers. Petitioner and other dealers received their deliveries after station hours when no one was present to verify the delivery. This resulted in Sun firing many of its drivers and utilizing independent truckers to deliver its gasoline. Petitioner's gasoline was subsequently delivered by independent truckers.

10. At the hearing, petitioner offered his ledger sheets showing, among other things, the following:

<u>Period Ended</u>	<u>Cash Receipts</u>	<u>Gallons Purchased</u>
9/30/80	\$53,982.44	86,421.6
2/28/81	53,040.96	75,500.0
5/31/81	50,223.94	58,290.5
8/31/81	65,417.18	75,504.7
11/30/81	52,549.23	63,858.2
2/28/82	40,506.99	54,257.0
5/31/82	36,832.32	55,819.8
8/31/82	44,040.90	63,402.4

The above was intended to show that, pursuant to petitioner's own records, he did not sell all the gasoline that he had purchased.

11. The examiner did not visit petitioner's business premises or review his books and records. Additionally, the examiner, when asked by petitioner's representative, testified that he did not verify the printout. The Audit Division presumed that the printout was correct. The assessments at issue herein were based primarily on the use of external indices.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, in part, that if a return required to be filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices.

B. That resort to the use of external indices to determine the amount of tax due must be based upon an insufficiency of record keeping which makes it virtually impossible to determine such liability and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44). Our review of the records reveals that there has been no showing of an inadequacy or insufficiency of record keeping on the part of petitioner. Therefore, the Audit Division's use of external indices to determine petitioner's tax liability was not proper.

C. That the petition of Joseph S. Calabro d/b/a Joe's Sunoco Station and J C Auto Sales is granted and the notices of determination and demand for

payment of sales and use taxes due issued May 27 and October 28, 1983 are hereby cancelled.

DATED: Albany, New York

MAR 27 1986

STATE TAX COMMISSION

Rodwin W. Clu
PRESIDENT

Francis R. K. King
COMMISSIONER

Mark J. Smith
COMMISSIONER