

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
KELLY TIRE SERVICE CENTER, 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 March 1, 1980	:	
through February 28, 1983.	:	

Petitioner, Kelly Tire Service Center, Inc., 2701 Knapp Street, Brooklyn, New York 11235, 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 February 28, 1983 (File No. 45916).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 17, 1986 at 1:15 P.M. Petitioner appeared by William T. Barbera, Esq. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined sales and use taxes due from petitioner.

II. Whether the Audit Division properly asserted a penalty based upon fraud.

FINDINGS OF FACT

1. During the period at issue, petitioner, Kelly Tire Service Center, Inc., operated a Sunoco gas station at 2701 Knapp Street, Brooklyn, New York. On two separate occasions the auditor visited the business premises and observed that,

in addition to six pumps for dispensing gas, petitioner had three bays and employed two mechanics for maintaining and repairing cars.

2. After each of his four attempts to review petitioner's books and records proved fruitless because petitioner failed to present any records for audit, the auditor decided to use external indices to determine petitioner's sales and use tax liability. He first contacted petitioner's gasoline distributor, Sun Refining and Marketing Company in Melville, New York, and was advised that for the audit period petitioner purchased 1,103,714 gallons. The Audit Division determined petitioner's selling price per gallon to be \$1.25, exclusive of sales tax, State tax on gasoline and the tax of the City of New York on leaded gasoline, based on its experience in auditing similar businesses. The auditor multiplied the number of gallons purchased by \$1.25 to compute audited taxable sales of \$1,379,643.00 which when reduced by taxable sales reported of \$242,656.00 resulted in additional taxable gasoline sales of \$1,136,987.00 with a tax due thereon of \$92,179.56. The auditor then computed taxable repair sales for the audit period of \$449,280.00 with a tax due thereon of \$36,504.00 based on two mechanics working eight hours per day, six days per week with an hourly rate of \$30.00. The \$30.00 amount was also based on the Audit Division's experience in auditing similar businesses. The auditor next computed unpaid sales taxes on purchases due of \$1,600.00 based on the following fixed assets and estimated costs which he observed at the premises: tow truck, \$5,000.00; inspection machine, \$7,000.00; compressor, \$2,000.00; and lift equipment, \$6,000.00. As a result of the above, the auditor computed additional taxes due of \$130,283.56 ($\$92,179.56 + \$36,504.00 + \$1,600.00$).

3. On June 20, 1983, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a tax

due of \$130,283.56, plus a 50 percent fraud penalty of \$65,141.79 and interest of \$29,768.89, for a total amount due of \$225,194.24 for the period March 1, 1980 through February 28, 1983.

4. The Audit Division offered no evidence to support its assertion of fraud penalty.

5. Petitioner, in its perfected petition, claimed that the sales taxes which it reported were correct and that the assessment by the Audit Division was arbitrary and capricious. No evidence was presented in support of these contentions.

6. Petitioner also failed to present any evidence that the failure to remit the taxes at issue was due to reasonable cause and not due to willful neglect.

CONCLUSIONS OF LAW

A. That in view of petitioner's failure to present books and records for audit as required, the Audit Division was justified in utilizing external indices to determine petitioner's sales and use tax liability (Tax Law §§ 1135, 1138). Because the petitioner has failed to demonstrate that either the audit method or the result arrived at were erroneous, the additional sales and use taxes are sustained in full.


B. That based on the evidence presented, the Audit Division has not sustained the burden of proving that the imposition of a fraud penalty is warranted. However, since petitioner has failed to show that the failure to pay the taxes at issue was due to reasonable cause and not due to willful neglect, the petitioner is liable for the penalty imposed by Tax Law § 1145(a)(1)(i).

C. That the petition of Kelly Tire Service Center, Inc. is granted to the extent indicated in Conclusion of Law "B". The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1983; and that except as so granted, the petition is denied.


DATED: Albany, New York

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STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER