

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JODI SERVICE STATION, INC.	:	DECISION
T/A PREMIER SERVICE STATION -	:	
JODI SERVICE STATION	:	
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 November 30, 1982.	:	

Petitioner, Jodi Service Station, Inc. t/a Premier Service Station, - Jodi Service Station, c/o Joseph Lentini, 1230 Avenue X, Brooklyn, New York 11232, 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 November 30, 1982 (File No. 45926).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 30, 1986 at 10:45 A.M., with all briefs to be submitted by March 1, 1986. Petitioner appeared by its President, Joseph Lentini. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales taxes due from petitioner on the basis of purchases obtained from a third party.

II. Whether the Audit Division properly imposed a fraud penalty based on the above determination.

FINDINGS OF FACT

1. Petitioner, Jodi Service Station, Inc. t/a Premier Service Station - Jodi Service Station, operated a Mobil gasoline service station located at 987

4th Avenue, Brooklyn, New York. Petitioner had three service bays to perform repair work.

2. On June 20, 1983, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1980 through November 30, 1982 for taxes due of \$91,052.30, plus fraud penalty of \$45,526.13 and interest of \$23,098.73, for a total of \$159,677.16.

3. On audit, the Audit Division found that petitioner maintained incomplete and inadequate books and records. Petitioner did not have any record of daily gasoline sales or repair sales to verify against the sales shown in the cash receipts journal. In order to verify taxable sales reported, the Audit Division contacted petitioner's supplier of gasoline to obtain the gallons of gasoline purchased during the period under audit. The supplier's records showed that petitioner purchased 476,370 gallons in 1981 and 494,724 gallons in 1982. Petitioner's records for the same years indicated purchases of 177,850 gallons and 118,500 gallons, respectively. Because of this discrepancy, the Audit Division concluded that taxable sales were grossly underreported. The Audit Division estimated gasoline sales of \$1,517,299.00 by applying \$1.25 (average selling price of regular and unleaded gasoline over the audit period excluding state gasoline tax and sales tax) to gasoline purchases as furnished by Mobil Oil Corp.¹ Repair sales were also estimated due to the lack of sales invoices and incomplete purchases. Prior audit experience with similar business showed that repair sales were \$30.00 per hour (\$20.00 - labor and \$10.00 - parts) for one

¹ The Audit Division did not use purchases after August 31, 1982, since effective September 1, 1982 the retailer no longer collected the sales tax.

mechanic. Repair sales for the audit period amounted to \$187,200.00 (\$30.00 per hr. x 8 hrs. per day x 5 days per week x 13 weeks per quarter = \$15,600). The combined audited taxable sales were \$1,704,499.00 with tax due thereon of \$137,860.88. Petitioner paid tax of \$46,808.38 for the same period, leaving a deficiency of \$91,052.30. The Audit Division asserted the fraud penalty because of the substantial difference between the taxable sales it determined on audit and the taxable sales reported. At the hearing, the Audit Division alternatively argued that if the fraud penalty is not sustained the penalty authorized pursuant to section 1145(a)(1) should be imposed.

4. Petitioner argued that the gasoline purchases supplied by Mobil Oil Corp. were erroneous and that the estimated repair sales were excessive. However, no credible evidence was adduced by petitioner at the hearing to support its argument. Petitioner requested and was given until March 1, 1986 to submit documentation. No such documentation was submitted.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that "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" and authorizes, where necessary, an estimate of tax due "on the basis of external indices" including purchases.

B. That petitioner provided inadequate and incomplete books and records for purposes of verifying taxable sales. Accordingly, the Audit Division's use of third party purchases and statewide average selling prices as a basis for determining petitioner's liability was proper pursuant to section 1138(a) of the Tax Law.

C. That the estimate procedures adopted by the Audit Division were reasonable under the circumstances and petitioner failed to sustain its burden of showing that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 A.D.2d 858).

D. That section 1145(a)(2) of the Tax Law was added by section 2 of chapter 287 of the laws of 1975. During the period in issue, this paragraph provided:

"If the failure to file a return or pay over any tax to the tax commission within the time required by this Article is due to fraud, there shall be added to the tax a penalty of fifty percent of the amount of the tax due (in lieu of the penalty provided for in subparagraph (i) of paragraph one), plus interest..."

Section 1145(a)(2) of the Tax Law was enacted by the Legislature with the intention of having a penalty provision in the Sales and Use Tax Law which was similar to that which already existed in the Tax Law with respect to deficiencies of, inter alia, personal income tax (N.Y. Legis. Ann., 1975, p. 350). Thus, the burden placed upon the Audit Division to establish fraud at a hearing involving a deficiency of sales and use tax is the same as the burden placed upon the Audit Division in a hearing involving a deficiency of personal income tax. A finding of fraud at such a hearing "...requires, clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing." (Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982).

E. That the Audit Division has not sustained its burden of proving that the imposition of fraud penalty is warranted. The evidence presented did not

clearly establish all elements of fraud as set forth above. Accordingly, the fraud penalty is cancelled.


F. That petitioner failed to establish that the underreporting of taxable sales was due to reasonable cause and not willful neglect. Therefore, penalty and interest shall be imposed under the provisions of section 1145(a)(1) of the Tax Law.


G. That the petition of Jodi Service Station, Inc. t/a Premier Service Station - Jodi Service Station is granted to the extent indicated in Conclusion of Law "E"; 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 to the extent indicated in Conclusions of Law "E" and "F"; and that except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 19 1986


PRESIDENT


COMMISSIONER


COMMISSIONER