

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

NICOLA ALFIERI
D/B/A NICK'S SERVICE STATION

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 December 1, 1979 :
through November 30, 1982.

Petitioner, Nicola Alfieri d/b/a Nick's Service Station, 81-67 Liberty Avenue, Ozone Park, New York 11417, 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 December 1, 1979 through November 30, 1982 (File No. 45993).

A hearing was commenced before Frank Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 19, 1985 at 9:15 A.M., and continued to conclusion at the same location on March 3, 1986 at 1:15 P.M. Petitioner appeared by Nicholas Felella, P.A. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined the additional sales taxes due from petitioner, Nicola Alfieri d/b/a Nick's Service Station, for the period at issue.

11. Whether penalties and interest in excess of the minimum statutory rate should be waived.

FINDINGS OF FACT

1. On August 19, 1983, subsequent to the conduct of a field audit, the Audit Division issued to petitioner, Nicola Alfieri d/b/a Nick's Service Station, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1979 through November 30, 1982 in the amount of \$43,681.94, plus penalty of \$10,062.75 and interest of \$12,180.57, for a total of \$65,925.26. On March 4, 1983 and again on June 7, 1983, the petitioner had executed two consents extending the period of limitations for assessment of taxes for the taxable period December 1, 1979 through May 31, 1980 to June 20, 1983 and September 20, 1983, respectively.

2. On August 29, 1983, the Tax Appeals Bureau received a properly completed petition to review the aforementioned notice. Petitioner claims that the Audit Division's estimate of his repair sales was excessive and, further, that they improperly computed his markup on gasoline.

3. For approximately five years, the petitioner has operated an Amoco gasoline service station at 81-67 Liberty Avenue in Ozone Park, New York. The station contains five repair bays and is open daily from 7:30 A.M. to 6:00 P.M. Petitioner operates the station with the assistance **of** one part-time mechanic. In addition to gasoline and repairs, the petitioner's sales consisted of **oil**, grease, batteries, antifreeze and other automotive accessories.

4. **On** or about January 18, 1983, the auditor examined copies of petitioner's sales tax returns and Federal and State income tax returns and **a** sampling of gasoline purchase invoices for the period June, July and August of 1982. **The** auditor requested but was not provided with the following: general ledger, cash receipts journal, cash disbursements journal, purchase invoices (other

than gasoline), sales invoices, exemption certificates, bank statements and day sheets. The petitioner's accountant indicated that no books or records were maintained for the audit period. Presumably, sales as reported on sales tax returns were estimated by petitioner.

5. The auditor first obtained gasoline purchases for the audit period from Amoco Oil Company of \$419,557.85, excluding all taxes. A markup test was performed based on costs and selling prices as observed by the auditor on December 31, 1982, which resulted in an overall markup of 21.1 cents or 18.54 percent. The markup percentage was applied to the above gasoline purchases resulting in audited gasoline sales net of Federal excise tax of \$497,343.87. Federal excise tax of 4 cents per gallon was calculated on a total of 377,312 gallons purchased during the audit period resulting in \$15,092.48. The total audited taxable gasoline sales was determined to be \$512,436.35 (\$497,343.87 + \$15,092.48). Repair and other sales were estimated at \$1,000.00 per week, or \$156,000.00 for the audit period, based on the auditor's experience. Total audited taxable sales amounted to \$668,436.35 for a sales tax liability of \$51,121.98. After giving credit for total tax paid of \$7,440.04, additional sales tax liability was determined to be \$43,681.94.

6. At the hearing held herein, the petitioner presented evidence that his repair sales for the audit period were actually \$70,018.00. Petitioner did not indicate why this information was not made available to the auditor, nor did he present any evidence regarding his gasoline sales. It should be noted that the petitioner reported taxable sales of \$91,712.00 for the audit period.

7. Subsequent to the hearing, petitioner's representative requested that, due to the lengthy delay involved in an appeal, Mr. Alfieri should not be

charged penalties and interest during the time it took for his petition to be heard.

CONCLUSIONS OF LAW

A. That in light of petitioner's inability to produce complete and adequate books and records, the Audit Division was justified in employing external indices, in this instance, information from a third party and the auditor's experience, to determine petitioner's sales tax liability. Tax Law 111135 and 1138. The repair sales should be reduced to \$70,018.00 in accordance with Finding **of** Fact "6",

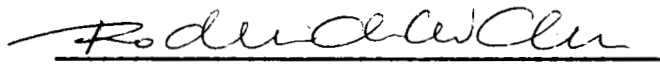
B. That since the petitioner did not explain or show that reasonable cause existed for the understatement of his tax liability, penalty and maximum interest are due on the additional sales tax determined. Petitioner's basis for waiving penalty and interest, as specified in Finding **of** Fact "7", does not constitute reasonable cause. See 20 NYCRR 536.1(b).

C. That the petition of Nicola Alfieri d/b/a Nick's Service Station is granted to the extent indicated in Conclusion of Law "A"; the Audit Division is hereby directed to accordingly modify the Notice **of** Determination and Demand for Payment **of** Sales and Use Taxes Due issued August 19, 1983; and that, except as **so** granted, the petition is denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER