

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

BAHRAM SADEGHI,
OFFICER OF MID PIC SERVICE, INC.
T/A TOWER SERVICE STATION :

AND :

MID PIC SERVICE, INC. T/A TOWER 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 June 1, 1979
through August 31, 1981. :

Petitioners, Bahram Sadeghi, Officer of MID PIC Service, Inc. T/A Tower Service Station and MID PIC Service, Inc. T/A Tower Service Station, 34 East Land Drive, Glen Cove, New York 11542, 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 June 1, 1979 through August 31, 1981 (File No. 46361).

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 July 24, 1985 at 1:15 P.M. and was continued to conclusion at the same location on May 2, 1986 at 9:00 A.M. Petitioners appeared by Robert L. Clarey, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq. [July 24, 1985] and Gary Palmer, Esq. [May 2, 1986], of counsel).

ISSUES

I. Whether the Audit Division properly determined the gasoline sales of MID PIC Service, Inc. on the basis of purchase records obtained from a third party.

II. Whether Bahram Sadeghi is personally liable for sales taxes due from MID PIC Service, Inc.

FINDINGS OF FACT

1. MID PIC Service, Inc. T/A Tower Service Station ("Mid Pic") operated a gasoline service station located at 433 Middle Neck Road, Great Neck, New York 11021. Mid Pic did not perform any repair services. The business was discontinued in July 1984.

2. On May 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 Mid Pic covering the period June 1, 1979 through August 31, 1981 for taxes due of \$47,872.39, plus penalty and interest of \$28,308.53, for a total of \$76,180.92. On the same date, a notice identical to the foregoing was issued against petitioner Bahram Sadeghi, as officer of Mid Pic.

3. Bahram Sadeghi, as president of Mid Pic, executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through May 31, 1982 to September 20, 1983.

4. On audit, the Audit Division found that Mid Pic maintained inadequate books and records for purposes of verifying reported gasoline sales. The Audit Division contacted Mid Pic's supplier of gasoline, Battery Oil Corp. ("Battery"), and obtained the total gallons of gasoline purchased by Mid Pic for the audit period. The only period for which Battery furnished the cost of the gasoline purchased was September 1980 through November 1980. For this period, Mid Pic purchased 133,000 gallons (38,600 - regular and 94,400 - unleaded) for \$153,401.00. Mid Pic's books and records for the same period showed purchases in the amount of \$47,634.40 and reported gasoline sales of \$75,358.00. Because of the significant discrepancies among the above figures, the Audit Division considered

Mid Pic's books and records unreliable and estimated gasoline sales for the audit period based on an analysis of the period ended November 30, 1980. An underreporting factor of 131.34 percent was computed for this period as follows:

gasoline purchased	\$153,401.00
x markup per corporation tax return	
for fiscal years ended 11/30/79 and 11/30/80	20.58%
gross profit	\$ 31,570.00
audited gross sales	\$184,971.00
less: state gasoline tax	10,640.00
taxable sales	\$174,331.00
tax due @ 7%	\$ 12,203.17
less: tax paid	5,275.00
balance due	\$ 6,928.00

balance due	6,928.00
tax paid	5,275.00

= 1.3134 = 131.34%

The error factor was applied to sales tax paid of \$36,449.20 for the audit period to arrive at additional taxes due of \$47,872.39.

5. On April 16, 1981, Larry E. Tyree Co., Inc. performed a Fire Marshall Test on one 3,000 gallon gasoline tank and four 1,000 gallon tanks. The 3,000 gallon tank passed, while the four 1,000 gallon tanks (two regular, two unleaded) failed. The latter tanks were then uncovered for repair. The tanks were tested and found to be not holding pressure. The repairs consisted of replacing a cracked bushing on one regular tank and repairing a leak in a three inch remote fill pipe. After the repairs were performed, the tanks were retested and all but one passed. The tank that failed was filled with sand and abandoned.

6. Petitioners' expert witness, Robert Liss, P.E., testified that a leak in a three inch diameter pipe with a hydrostatic head of 10 feet, with free flow in sandy and silty soil which was found on Mid Pic's premises, would cause a loss of between 9,000 and 18,000 gallons a year depending on how filled

the tanks were during the course of the year. A tank filled to capacity could lose up to 18,000 gallons.

7. Petitioners alleged that, in addition to the leak described above, the entire length of the tanks was corroded which caused further losses of gasoline. Petitioner took the position that the gasoline leaking from the tanks into the ground caused the difference between the gallons purchased from Battery and those actually sold.

8. Petitioner Bahram Sadeghi did not establish the extent of the corrosion of the tanks. Mr. Liss testified that there is no way to determine the quantity of gasoline lost through corroded tanks without the specific diameter of the hole and size of the hydrostatic head.

9. Bahram Sadeghi signed, as president, sales tax returns filed by Mid Pic for the period September 1, 1979 through May 31, 1981. Mr. Sadeghi offered no evidence to establish that he was not an officer of Mid Pic under a duty to act for said corporation in complying with the sales tax law.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) 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".

B. That section 1135(a) of the Tax Law 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 petitioners provided inadequate and incomplete books and records for purposes of verifying taxable sales. Moreover, the substantial discrepancy

between gasoline purchases and the sales shown in the books and records established the unreliability of Mid Pic's books and records. When books and records are incomplete and unreliable, the use of external indices is permissible (Matter of Korba v. NYS Tax Commission, 84 AD2d 655). Accordingly, the Audit Division's use of third party purchases and markup percentages as a basis for determining the tax liability was proper pursuant to section 1138(a) of the Tax Law.

D. That the estimate procedures adopted by the Audit Division reasonably calculated the gasoline sales made by Mid Pic. However, the audit did not give consideration to the gasoline lost through leakage. Based on the repairs to the gasoline tanks set forth in Finding of Fact "5", gasoline purchases shall be reduced by 18,000 gallons a year (4,500 gallons for test period computation) and the additional taxes due adjusted accordingly for periods prior to April 20, 1981 when the repairs were completed. Except for the leakage, petitioners failed to sustain their burden of showing that the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 AD2d 858).

E. That Bahram Sadeghi was a person required to collect tax pursuant to section 1131(1) of the Tax Law and, therefore, is personally liable for the taxes due from Mid Pic in accordance with section 1133(a) of the Tax Law.

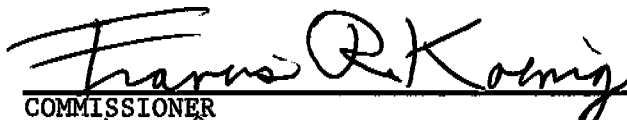
F. That the petition of MID PIC Service, Inc. T/A Tower Service Station and Bahram Sadeghi, as officer, is granted to the extent indicated in Conclusion of Law "D"; the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued May 20, 1983; and except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER