

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ARVY'S SERVICE STATION, INC.
and ROBERT VIGORITO, as OFFICER

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 September 1, 1980
through May 31, 1983.

Petitioners, Arvy's Service Station, Inc. and Robert Vigorito, as Officer, 1956 Stuart Street, Brooklyn, New York 11229 filed petitions 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 September 1, 1980 through May 31, 1983 (File Nos. 46438 and 46439).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 6, 1986 at 9:15 A.M. with all briefs to be submitted by October 31, 1986. Petitioners appeared by John A. Pannone, Esq. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly resorted to external indices to determine petitioners' tax liability.

II. Whether, if the resort to external indices was warranted, the assessment resulting from the audit was correct.

III. Whether petitioner, Robert Vigorito, was a person required to collect and pay sales and use taxes on behalf of Arvy's Service Station, Inc.

IV. Whether the Audit Division's imposition of fraud penalty should be sustained.

FINDINGS OF FACT

1. On July 21, 1983, the Audit Division issued against petitioner, Arvy's Service Station, Inc. ("Arvy's"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1980 through May 31, 1983, asserting a tax due of \$136,350.04 plus interest of \$28,443.19 and a fraud penalty of \$68,175.00 for a total due of \$232,968.23. On the same date, an identical notice was issued against petitioner, Robert Vigorito, as officer of Arvy's.

2. In 1982 Getty Oil Company ("Getty") provided the Audit Division with verification of monthly gasoline purchases for a large number of vendors, including Arvy's. In order to utilize the information, the Audit Division segregated purchases by vendor and aggregated them for each sales tax quarter. This procedure revealed that Arvy's purchased 705,027 gallons of gasoline during the period September 1, 1980 through November 30, 1981 at a total cost of \$785,779.06. During the same period, Arvy's filed State sales tax returns reporting total taxable sales of \$142,927.00. After completing its analysis of Arvy's purchases, the Central Office Audit Bureau assigned the case to a regional office to perform a sales and use tax field audit.

3. The auditor did not contact Mr. Vigorito nor make a request for Arvy's books and records prior to calculating the assessment under consideration.

4. From a car parked across the street, an auditor observed the service station operated by Arvy's. He saw two mechanics working on cars. Based on this observation and office audit experience, the auditor calculated repair sales for the audit period of \$399,360.00. He employed a formula for this purpose of \$30.00 per hour per mechanic (\$20.00 for labor and \$10.00 for parts) applied to

an 8 hour work day and a six day work week. He then used Getty's third party verification to calculate audited gasoline sales. Because Getty's records did not cover the entire audit period, purchases for the sales tax quarter ended November 30, 1981 were used to estimate purchases for the next three sales tax quarters. No gasoline sales were estimated for the last three quarters of the audit period. A markup of 15 percent was applied to total estimated gasoline purchases, and the result was adjusted by adding federal excise taxes. This yielded audited taxable gasoline sales of \$1,510,649.00 and total audited taxable sales of \$1,910,009.00 with a tax due on that amount of \$155,354.04. Tax previously paid was deducted from this amount, producing a total tax liability of \$136,350.04.

5. Following a tax appeals conference, petitioners submitted books and records to the Audit Division, including a general ledger containing sales and purchases and other expenses, and a cash disbursements journal for the period January through June 1981. The Audit Division also had available in its files copies of Arvy's Federal income tax returns for the fiscal years ended August 31, 1981, August 31, 1982 and August 31, 1983, showing purchases for the three year period of \$949,804.61 and gross sales of \$1,143,385.30. Based on the inadequacy of Arvy's records and the substantial discrepancies between Arvy's Federal income tax returns and State tax returns, the Audit Division determined that the original assessment was proper.

6. Robert Vigorito was an officer of Arvy's during the period under consideration. He supervised the operation of the gas station, wrote checks on the corporation's account, and signed all tax returns. Arvy's books were kept by an accountant hired for that purpose, and its tax returns were prepared by the same accountant.

7. Petitioners offered no documentary evidence to challenge the results of the audit. However, they did offer the general ledger and cash disbursements journal to support their contention that books and records were available but had never been requested.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law gives the Audit Division statutory authority for the use of external indices to determine the amount of tax due when a filed return is incorrect or insufficient. Resort to external indices to compute tax liability must be founded on an insufficiency of record keeping that makes it virtually impossible to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44). Chartair requires that the Audit Division request books and records before resorting to external indices, for it is the lack of books and records that authorizes the use of external indices to estimate taxable sales (Matter of Christ Cella v. State Tax Commission, 102 A.D.2d 352).

B. That inasmuch as the Audit Division made no request for books and records prior to issuing the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, there was no statutory authority for estimating the tax due on the basis of external indices. Accordingly, the assessments under consideration are cancelled. It is noted that proof gathered after the assessment is issued, which indicates that the assessment is reasonable, does not eliminate the requirement that a request for books and records be made prior to resorting to external indices (Matter of Theresa Roncone d/b/a Roncone's Grill, State Tax Commission, March 11, 1986).


C. That in view of Conclusion of Law "B", all other issues raised are rendered moot.

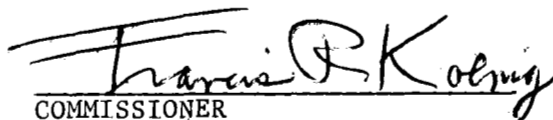
D. **That the** petitions of Arvy's Service Station, Inc. and Robert Vigorito are granted to the extent indicated **in** Conclusion of Law "B"; accordingly, **the** Audit Division is directed to cancel the notices of determination and demands **for** payment of sales and use taxes due.

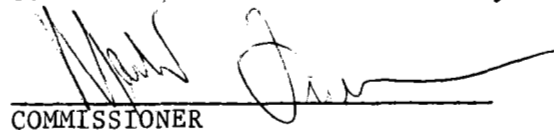
DATED: Albany, New **York**

STATE TAX COMMISSION

FEB 27 1987


PRESIDENT


COMMISSIONER


COMMISSIONER