

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition

of

DECISION

FRANK SANDLER

D/B/A SANDY'S AMERICAN SERVICE CENTER

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, 1982.

---

Petitioner, Frank Sandler d/b/a Sandy's American Service Center, 68  
Caffrey Avenue, Bethpage, New York 11714 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, 1982 (File No.  
46821).

A hearing was commenced before Jean Corigliano, Hearing Officer, at the  
offices of the State Tax Commission, Two World Trade Center, New York, New York,  
on January 29, 1986 at 9:15 A.M., continued on May 14, 1986 at 10:00 A.M. and  
concluded on September 10, 1986 at 9:15 A.M., with all briefs to be submitted  
by December 12, 1986. Petitioner appeared by Peter R. Newman, Esq. The Audit  
Division appeared by John P. Dugan, Esq. (Joseph W. Pinto, Esq., and Michael  
Glannon, Esq. of counsel).

#### ISSUES

I. Whether any part of the assessment is barred by the statute of limita-  
tions found in section 1147(b) of the Tax Law.

11. **Whether** the Audit Division properly employed estimated purchase and  
purchase markup procedures to calculate tax due on petitioner's sales of  
gasoline and repair services.

FINDINGS OF FACT

1. On July 26, 1983, following a field audit, the Audit Division issued to petitioner, Frank Sandler d/b/a Sandy's American Service Center, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1979 through August 31, 1982 in the amount of \$49,843.41 plus penalties and interest.

2. On July 19, 1982, Mr. Sandler executed a consent extending the period of limitation for the assessment of sales and use taxes for the taxable period June 1, 1979 through May 31, 1980 to September 20, 1983.

3. An auditor visited the service station in Yay 1982 and had several contacts with Mr. Sandler and his accountant in an attempt to obtain books and records. The documents made available were deemed inadequate to verify taxable sales because no invoices were maintained for sales of repair services, purchase invoices were incomplete and petitioner's general ledger could not be reconciled with his Federal income tax returns.

4. In calculating the assessment under consideration, the auditor employed a markup test of gasoline purchases and an estimate of sales of repair services.

a. The auditor obtained petitioner's gasoline purchases from his suppliers. Using the supplier's cost figures and petitioner's posted pump prices, the auditor calculated an average weighted markup per gallon of 12.97 percent. This markup figure was applied to petitioner's gasoline purchases to determine total taxable gasoline sales. Appropriate adjustments were made to remove from the selling price of gasoline sales and excise taxes not taxable under Articles 28 & 29.

b. Utilizing petitioner's cash disbursements journal the auditor estimated that for the period June 1979 through November 1979 petitioner's

purchases of repair parts amounted to approximately nine percent of his gasoline purchases. The auditor then estimated petitioner's parts purchases for the audit period using the nine percent figure and applied a markup of 125 percent to parts purchases to determine audited repair sales. The markup figure was based on the auditor's personal experience of auditing gasoline stations in Nassau County.

c. Using the methodology described, the auditor calculated additional taxes due from petitioner as follows:

Taxable gasoline sales	\$1,567,953
Sales of repair services	103,139
Total taxable sales	1,671,092
Taxable sales reported	974,892
Additional taxable sales	710,584
Additional sales tax due	\$49,843.41

5. Mr. Sandler had an agreement with his supplier whereby he paid for the amount of gasoline he actually pumped, as shown on his meters, rather than the amount of gasoline delivered to his station. He took daily meter readings from each pump and reported the results to his supplier. Petitioner was given the opportunity to submit a summary of his daily meter readings after the close of the hearing, but he failed to do so.

#### CONCLUSIONS OF LAW

A. That petitioner's failure to provide verifiable records made it impossible to determine his tax liability without resort to external indices; therefore, the Audit Division was warranted in employing outside indices to estimate taxable sales (Tau Law §1138[a][1]).

B. That the audit methodology was reasonable, and petitioner has not shown that either the method or the results were erroneous (Surface Line Operators Fraternal Organization, v. Tully, 85 AD2d 858).

C. That the consent executed on July 19, 1982 was effective only for those periods which had not yet expired (Tax Law §1147[c]), The period of limitation for the assessment of sales and use taxes for the sales tax quarter ended August 31, 1979 expired on September 20, 1982. Accordingly, the consent was executed before the period for assessment had expired, and the notice was issued timely.


D. That the petition of Frank Sandler d/b/a Sandy's American Service Center **is** denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes due issued on July 26, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER