

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ROBERT COSTANZA AND EILEEN COSTANZA	:	DECISION
D/B/A COSTANZA 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 December 1, 1978	:	
through August 31, 1982.	:	

Petitioners, Robert Costanza and Eileen Costanza d/b/a Costanza Service Station, 2755 Long Beach Road, Oceanside, New York 11572, 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, 1978 through August 31, 1982 (File No. 46835).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 12, 1985 at 10:45 A.M. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales tax due from petitioner based upon an examination of available books and records.

FINDINGS OF FACT

1. On May 27, 1983, the Audit Division issued two notices of determination and demand for payment of sales and use taxes due ("notices") to petitioners Robert Costanza and Eileen Costanza d/b/a Costanza Service Station. One notice encompassed the period December 1, 1978 through November 30, 1981 and assessed additional sales tax due of \$4,243.03, plus interest of \$1,365.38, for a total

due of \$5,608.41. The second notice included the period December 1, 1981 through August 31, 1982 and assessed additional sales tax due of \$1,031.03, plus interest of \$118.01, for a total due of \$1,149.04.

2. A consent extending the period of limitation for assessment of sales and use taxes due was executed by Robert Costanza. Said consent was for the period December 1, 1978 through February 28, 1980 and permitted the assessment of any sales and use taxes due for these periods to be made on or before June 20, 1983.

3. During the period at issue, petitioners owned and operated a service station and automotive repair shop. Petitioner's books and records were inadequate since there was no record of exempt sales, no breakdown of sales by category and purchases per books could not be reconciled with purchases reported on Federal income tax returns.

4. Since petitioner's books and records were inadequate, the Audit Division resorted to the use of a purchase markup test to verify the accuracy of reported taxable sales. Audited taxable sales totaling \$794,247.98 were comprised of the following items:

Audited taxable gas sales	\$598,517.43
Audited taxable parts sales	161,447.29
Audited taxable tire and battery sales	19,168.15
Audited taxable anti freeze sales	373.50
Audited taxable oil sales	14,741.61
Total audited taxable sales	<u>\$794,247.98</u>

Audited taxable sales of \$794,247.98 were compared to reported taxable sales of \$719,510.00 to arrive at additional taxable sales of \$74,737.98.

5. From the beginning of the audit period until July 31, 1981, petitioner sold gasoline by the gallon. Effective August 1, 1981, petitioner converted from gallons to liters. In computing audited taxable gas sales, the Audit Division determined an average gross profit of 5.9505 cents per gallon for the

period December 1, 1978 through July 31, 1981. For the period August 1, 1981 through August 31, 1982, the Audit Division computed an average gross profit of only .4651 cents per gallon. The extremely low average gross profit for the period subsequent to July 31, 1981 was caused by Mr. Costanza's failure to fully comprehend the conversion from gallons to liters. Purchase markup tests for parts and tires and batteries revealed markups of 151 percent and 35 percent, respectively. Anti freeze purchases were marked up an estimated 66 percent, while oil purchases were marked up an estimated 90 percent.

6. At the hearing held herein, petitioners adduced no documentary or other credible evidence to show wherein the results of the audit were incorrect or erroneous.

CONCLUSIONS OF LAW

A. That section 1135 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.

B. 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". Petitioners maintained inadequate and incomplete books and records; thus, the use of external indices is permissible (See: Matter of Korba v. New York State Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division properly determined petitioners' tax liability pursuant to the provisions of section 1138(a) of the Tax Law.

C. That the audit method utilized herein was reasonable and the burden therefore rests upon the taxpayer to demonstrate by clear and convincing

evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization v. Tully, 85 A.D.2d 858). Petitioner has failed to overcome this burden of showing error.


D. That the petition of Robert Costanza and Eileen Costanza d/b/a Costanza Service Station is denied and the two notices dated May 27, 1983 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1986


PRESIDENT


COMMISSIONER


COMMISSIONER