

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

R & R AUTO & TRUCK REPAIR, INC.

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 August 31, 1982.

Petitioner, R & R Auto & Truck Repair, Inc., 1560 Brentwood Road, Bayshore, New York 11706, 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 September 1, 1980 through August 31, 1982 (File No. 47208).

A hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 17, 1986 at 1:15 P.M., with all briefs to be submitted by November 24, 1986. Petitioner appeared by Andrew L. Sokol, CPA. The Audit Division appeared by John P. Dugan, Esq. (Michael Infantino, Esq., of counsel).

ISSUE

Whether the audit procedures used by the Audit Division in an examination of petitioner's books and records were proper and whether the additional taxable sales determined as a result thereof were correct.

FINDINGS OF FACT

1. Petitioner, R & R Auto & Truck Repair, Inc., operated a gasoline service station located at 1560 Brentwood Road, Bayshore, New York. Petitioner also had two service bays and employed two mechanics to perform repair work.

2. On July 6, 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 petitioner covering the period September 1, 1980 through August 31, 1982 for taxes due of \$114,585.00, plus penalty and interest of \$52,663.94, for a total of \$167,248.94.

3. The Audit Division requested that petitioner provide certain books and records for audit. Petitioner did not furnish Federal income tax returns, general ledger, cash receipts journal or other records of daily receipts. In addition, purchase invoices for gasoline and repair parts were incomplete. The Audit Division had previously contacted petitioner's supplier of gasoline, Pilot Petroleum Corp., and obtained the quantity of gasoline purchased by petitioner for the months of September, October and November 1980. The total gallons provided by the supplier (188,415 gallons) exceeded the amount recorded in petitioner's books and records. These gallons were multiplied by the statewide average selling price of gasoline (\$1.25 excluding the state gasoline tax and sales tax) to arrive at gasoline sales of \$235,518.00 for the quarterly period ending November 30, 1980. Sales of oil for this period were estimated to be 1.35 percent of gasoline sales, or \$3,179.00. The percentage was derived from completed audits of other gasoline stations in the area. Sales of other items were categorized as follows: repair parts, tires, batteries, outside labor and cigarettes. A markup percentage was computed for each of the foregoing categories based on the available selling prices, sales invoices and purchase invoices for the period September 1, 1980 through November 30, 1980. The markup percentages determined were: repair parts - 172.57 percent; tires - 11.99 percent; batteries - 38.86 percent; outside labor - 2.9 percent and cigarettes - 8.404 percent. The markups were applied to the applicable purchases

for the same period to determine sales of \$35,859.27. The total sales estimated for the test period were \$274,556.27. This amount was divided by total purchases for the period of \$142,820.36 to arrive at a factor of 192.23889 percent which was multiplied times purchases for the remaining periods under audit to determine total sales. This resulted in total taxable sales of \$1,854,777.07 for the period September 1, 1980 through August 31, 1982, with tax due thereon of \$131,675.00. Petitioner had paid sales tax of \$17,091.00 for the same period, leaving additional tax due of \$114,585.00.

4. Subsequent to the issuance of the assessment, the Audit Division learned that the purchase information furnished by Pilot Petroleum Corp. was not reliable. Consequently, the amount of tax due was revised. Gasoline and oil purchases from petitioner's books and records of \$753,037.62 for the period September 1, 1980 through May 31, 1982 were marked up 6 percent.¹ Purchases for the period June 1, 1982 through August 31, 1982 were computed by averaging the three preceding quarters. The adjusted taxable sales of gasoline and oil amounted to \$826,369.00. Sales of repair parts, tires, batteries and outside labor were adjusted to \$95,574.00 for the audit period based on total purchases of such items as recorded in the books and records and using a weighted average markup of 98.03 percent computed from the markup test referred to above in Finding of Fact "3". Cigarette purchases from the books and records were marked up 8.4 percent to arrive at cigarette sales for the audit period of \$64,804.00. The revised tax due was \$52,989.00.

1 The markup was based on office experience with completed audits of similar gasoline stations. The Audit Division deducted the state gasoline tax before applying the markup percentage.

5. Petitioner recorded beginning and ending meter readings from the gasoline pumps for each work shift, or three times a day. Petitioner also took a stick reading of the underground storage tanks of gasoline twice a day. A stick reading is a method of determining the gallons in the tank from the inches indicated on the stick.

6. Petitioner had a procedure to control the gallons of gasoline delivered by Pilot Petroleum Corp. Petitioner compared the loading ticket from the delivery truck with the stick reading. The loading ticket was verified against the billing invoice issued by Pilot. This procedure disclosed that, occasionally, Pilot invoiced petitioner for more gallons than were actually delivered. In these instances, petitioner corrected the invoice and only paid for the gallons received.

7. Richard Barrette, president of petitioner, testified that petitioner sold an average of 12,000 gallons a month during the audit period which equals a total of 288,000 gallons for the period. Petitioner's books and records showed that it paid \$753,038.00 for the gasoline. If Mr. Barrette's estimate was accurate, petitioner paid \$2.00 a gallon while the average selling price during the audit period was \$1.25 as set forth in Finding of Fact "3".

8. Petitioner did not produce any of the daily records of meter readings at the hearing to show that purchases of gasoline recorded in its books and records were inaccurate. Moreover, no evidence was presented to establish that a 6 percent markup on gasoline as well as the markups computed for repair parts, tires, batteries, outside labor and cigarettes were excessive.

9. Petitioner's position was that its recordkeeping system, although not sophisticated, was nonetheless accurate and reliable and as such the audit methodology was improper and the results determined therefrom were erroneous.

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" including purchases.

B. That petitioner provided inadequate and incomplete books and records for purposes of verifying taxable sales. Moreover, the inconsistencies between the books and records, which showed merchandise purchases of \$753,037.62, and the sales tax returns that reported taxable sales of \$239,960.00 for the same period further established the unreliability of petitioner's books and records. When books and records are incomplete and unreliable, the use of external indices is permissible (Yatter of Korba v. State Tax Commission, 84 AD2d 655). When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 233). Accordingly, the Audit Division's use of purchases recorded in petitioner's books and records and markup percentages as a basis for determining taxable sales was proper pursuant to the provisions of section 1138(a)(1) of the Tax Law.

C. That petitioner failed to sustain its burden of showing that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 AD2d 858).

D. That the petition of R & R Auto & Truck Repair, **Inc.** is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due

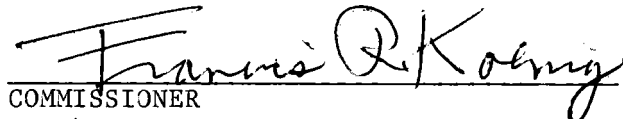
issued July 6, 1983, as revised to \$52,989.00, plus penalty and interest, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1987


PRESIDENT


COMMISSIONER


COMMISSIONER