

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

CROW ENTERPRISES CORP.
AND RICHARD D. DELIA, 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 December 1, 1978
through May 31, 1982.

Petitioners, Crow Enterprises Corp. and Richard D. Delia, as Officer, 50 Salem Road, Hicksville, New York 11801, 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 May 31, 1982 (File No. 47575).

A formal hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 8, 1985 at 1:30 P.M. with all briefs to be filed by November 6, 1985. Petitioner appeared by Theodore Mirkin, Esq. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined that the books and records of Crow Enterprises Corp. were insufficient and/or inadequate for purposes of determining sales tax liability.

II. If so, whether the Audit Division, based on a test period audit method, properly determined the additional sales tax due from Crow Enterprises Corp. and Richard D. Delia for the period December 1, 1978 through May 31, 1982.

FINDINGS OF FACT

1. On September 20, 1983, the Audit Division, as a result of a field audit of the books and records of Crow Enterprises Corp. ("Crow") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes due against Crow for taxes due of \$9,669.58, plus penalty of \$2,368.74 and interest of \$3,726.31, for a total amount due of \$15,764.63 for the period December 1, 1978 through May 31, 1982.

2. Also, on September 20, 1983, the Audit Division issued a Notice of Determination against petitioner Richard D. Delia, as officer, identical as to amounts and as to periods ended as the notice issued against Crow. At all times during the period at issue, Mr. Delia was the president of Crow and does not contest that he was a person required to collect tax on behalf of Crow. Mr. Delia had executed consents on behalf of Crow extending the statute of limitations for issuing an assessment for sales and use taxes for the period at issue to September 20, 1983.

3. On October 21, 1983, the petitioners timely filed an application for a hearing to review the notices of determination. The petitioners claim that the markup percentages determined by the examiner for the Audit Division were incorrect. Moreover, the petitioners primarily contend that the examiner misplaced and/or lost Crow's books and records and that the petitioners are at a disadvantage in refuting the findings of the examiner.

4. During the period at issue, Crow operated an Exxon gasoline station at 928 Jericho Turnpike in Westbury, New York. In addition to selling regular and unleaded gasoline, Crow performed automotive repairs in its two bays. Crow also sold tires, batteries, automotive accessories and soda. In May 1982 the station was closed for lack of business.

5. Anne Murphy, an examiner for the Audit Division, initiated the audit of Crow's books and records. Miss Murphy did some preliminary work and then left state employment. Another examiner, John Mandia, completed the audit. When Mr. Mandia resumed the audit, Crow's books and records consisted of the day book for part of the audit period, some check stubs and sales tax returns with related worksheets and Federal income tax returns. After concluding that these records were insufficient and/or inadequate to determine Crow's sales tax liability, Mr. Mandia resorted to the use of a test period audit method as well as his own observations and the preliminary work done by Miss Murphy to determine Crow's liability.

6. a) **On** audit, Mr. Mandia found that the total gallons of gasoline purchased, as shown on Crow's check stubs for the test period March 1, 1981 through November 30, 1981, agreed substantially with third party verification. Therefore, to determine the audited taxable gasoline sales, the total gallons purchased for each grade for the quarter ending November 30, 1981 (from Crow's check stubs) were segregated into gallons sold as full service and those sold as self-service. Next, the total gallons purchased in each grade and category were multiplied by the net profit per gallon found to exist on October 29, 1981 (the net profit excluded the New York State and Federal gas taxes and the sales tax). The resulting net profit of \$15,061.00 was added to gasoline cost of \$222,210, including New York State and Federal gas taxes, for the same period to compute total gasoline sales of \$237,271. Lastly, the 8¢ per gallon New York State gas tax of \$14,392 was deducted resulting in audited taxable gasoline sales **of** \$222,879 for the period March 1, 1981 through November 30, 1981.

b) Mr. Mandia then computed taxable sales of items other than gasoline. Purchases per check stubs for the period March 1, 1981 through November 30, 1981 were broken down into TBA (tires, batteries and accessories), subcontractor, repair parts and oil. The totals of said categories were marked up 35%, 0% (no profit on subcontractors), 150% and 80% respectively, yielding audited taxable sales of \$5,023. Next, purchases from the day book were tested for the quarter ended August 31, 1981. Said purchases were categorized as repair parts, TBA, soda, third party, towing and tools. Markups of 150%, 35%, 50% and 25% respectively (towing and tools were not marked up; additionally, tools were not considered to be sold) were applied to totals of the categories yielding taxable sales of \$12,204. Said sales were applied to the quarters ended May 31, 1981 and November 30, 1981 based on the ratio of gross sales in said quarters to gross sales for the quarter ended August 31, 1981 to determine taxable sales of \$35,508 for the period March 1, 1981 through November 30, 1981.

c) Based upon the above, total audited taxable sales for the test period March 1, 1981 through November 30, 1981 amounted to \$263,410. Crow's reported taxable sales for said period were \$235,875, resulting in additional taxable sales of \$27,535 or a margin of error of 11.67. The percentage of error was applied to taxable sales reported for the audit period to compute additional taxable sales of \$136,911 and additional sales taxes due of \$9,669.58.

7. Theodore Mirkin, petitioners' representative, also a public accountant, maintained the following records of Crow during the period at issue: cash receipts book, cash disbursements book and work papers which he described as Crow's daily business record book. Petitioner Delia maintained at

the station the purchases and sales invoices, the checkbook with related stubs and the day books. The records maintained by Mr. Mirkin and Mr. Delia when combined were adequate to determine Crow's sales tax liability.

8. After their initial meeting (an observation visit), Mr. Mirkin made the above records available to Miss Murphy and provided an office for her to work in. On a subsequent visit, Miss Murphy indicated that she would be taking certain books and records back to her own office. Miss Murphy took everything with the exception of check stubs for part of the audit period and day books, also for part of the audit period. The records which were removed were never returned. Mr. Mandia testified that subsequent to a pre-hearing conference wherein Mr. Delia inquired of the missing records, he contacted Miss Murphy and was advised by her that she returned the records. By itself, Mr. Mandia's testimony is insufficient to show that the records were returned to Mr. Delia or Mr. Mirkin.

9. At the hearing, Mr. Delia agreed that he underreported Crow's sales tax liability by 2% for the audit period.

CONCLUSIONS OF LAW

A. That although there is statutory authority for the use of a "test period" to determine the amount of tax due when a filed return is incorrect or insufficient (Tax Law, §1138, subd. [a]), resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit (Matter of Grant Co. v. Joseph, 2 N.Y.2d 196; Matter of Meyer v. State Tax Comm., 61 A.D.2d 223, mot. for lv. to app. den. 44 N.Y.2d 645; Matter of Markowitz v. State Tax Comm., 54 A.D.2d 1023, affd. 44 N.Y.2d 684). However, if records are available from which the exact amount of tax can be

determined, the estimate procedures adopted by the respondent become arbitrary and capricious and lack a rational basis (see Matter of Babylon Milk & Cream Co. v. Bragalini, 5 A.D. 2d 712, affd. 5 N.Y. 2d 736).

B. That in this case the petitioners maintained adequate books and records from which Crow's sales tax liability could have been determined. Therefore, the Audit Division's use of a test period audit method to determine Crow's sales tax liability was not proper. However, Mr. Delia agreed that he underreported Crow's sales tax liability by 2% and petitioners are hereby determined to be liable for said amount.

C. That the petition of Crow Enterprises Corp. and Richard D. Delia, as officer, is granted to the extent indicated in Conclusion of Law "B"; the Audit Division is hereby directed to modify the notices of determination issued on September 20, 1983; and except as **so** granted, the petition is denied.

DATED: Albany, New York


STATE **TAX** COMMISSION

JAN 09 1987

PRESIDENT



COMMISSIONER



COMMISSIONER

I dissent. The majority finds that the petitioners maintained adequate books and records and consequently, the Audit Division's use of external indices was improper. The record does not support this conclusion.

The Audit Division demonstrated that the records petitioners presented for examination were inadequate, and petitioners have not refuted this showing. For example, the purchase and sales invoices for repairs were incomplete and irreconcilable. Petitioners offered the testimony of Mr. Delia and Mr. Mirkin, the public accountant retained by petitioners, regarding the record-keeping procedures but introduced no source documents, relating to the audit period or any other period, to buttress the testimony.

Petitioners claimed first, that records were destroyed during a burglary of the business premises, and later, that records were provided to the original auditor but never returned. No evidence was presented to support the first claim, and an entry in the auditor's log contradicts the second claim.

Petitioners cannot satisfy their burden to show the sufficiency of their record keeping by unsupported and inconsistent testimony.


PRESIDENT