

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

WILLIAM F. BARTZ
D/B/A BILL'S GARAGE

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 June 1, 1980
through August 31, 1982.

Petitioner, William Bartz d/b/a Bill's Garage, 317 Ontario Street, Wilson, New York 14172, 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, 1980 through August 31, 1982 (File No. 47658).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 11, 1985 at 1:15 P.M. Petitioner William Bartz appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioner's liability for additional sales tax for the period June 1, 1980 through August 31, 1982.

FINDINGS OF FACT

1. On July 15, 1983, the Audit Division issued to Bill's Garage a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1980 through August 31, 1982 asserting additional tax of \$10,821.53 plus penalty and interest accrued to the date of the notice. An attachment to the notice provided the following explanations:

"Total tax due was determined from the following sources:

- A) New York State Sales and Use Tax Returns for period 6/1/80 - 8/31/82
- B) Completed Form AU264.3 'Filling Station Questionnaire'
- C) Distributor records indicating gallons and cost of product purchased for period 6/1/80 - 8/31/82

Tax due was computed by marking up purchases of gasoline, as reported by your distributor.

The statewide average selling price of gasoline was computed for each period, based on a comparison of your selling price from the completed questionnaire to the statewide average selling price.

The average selling price, less exempt taxes was then applied to gasoline purchases to determine taxable sales.

Added to these gasoline sales were sales of lubrication oil, as determined from the above listed sources and this department's auditing experience.

Sales tax at the rate of 4% and 7% was applied to total audited sales. Credit was given for sales and use taxes paid, penalty and interest was computed to July 15, 1983."

2. Petitioner William Bartz operated a retail service station doing business as Bill's Garage in Java Village, New York. The service station had two service bays and three gasoline pumps.

3. The taxes asserted due from petitioner were determined by means of "third party verification". A schedule of the costs and gallons of motor fuel and "lube oil" purchased by petitioner from his motor fuel distributor was obtained by the Audit Division. The number of gallons of motor fuel purchased quarterly by petitioner (per his supplier's records) were marked up pursuant to the quarterly average (prevailing) retail sales prices for gasoline, as such figures are determined by the Audit Division for purposes of the sales tax component of the Highway Use Tax pursuant to section 503-a(2) of the Tax Law, resulting in audited gasoline sales. In computing the sales price and tax due

thereon, proper accounting was made with respect to federal and state excise taxes on motor fuel. "Lube oil" purchases for the period February 28, 1981 through November 30, 1981 were marked up 100 percent per audit experience and applied to gasoline sales for such period to determine the ratio of sales of lube oil to sales of gasoline. Said percentage was then applied to quarterly audited gasoline sales to determine total quarterly audited sales. The asserted tax due was then computed by applying the applicable sales tax rate to quarterly audited sales with credit for sales tax previously paid having been given. Contrary to the explanation in the attachment to the notice of determination and demand (Finding of Fact "1"), no adjustment was made based upon comparison of petitioner's claimed selling price and the average prices, there being (according to the Audit Division) no verification of petitioner's claimed selling prices.

4. Petitioner William Bartz was the sole owner of Bill's Garage. He had no employees. Petitioner personally prepared the sales and use tax returns and such other financial records as were maintained by the business.

5. Petitioner William Bartz suffered a heart attack in November of 1980 which severely restricted his business activities from said date through the end of the audit period (August, 1982).

6. Subsequent to the audit period, petitioner sold the business. On or about February 9, 1985, a fire destroyed petitioner's personal residence. Such records of the business that petitioner had retained were destroyed in that fire.

7. In general, for the audit period, petitioner's supplier showed monthly purchases by petitioner in amounts exceeding petitioner's quarterly reported sales. Petitioner's supplier reported purchases by petitioner of approximately

\$229,000.00, whereas petitioner reported sales of approximately \$78,658.00 for the audit period.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law, in pertinent part, provides:

"...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. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That where, as here, adequate records are not maintained, the Audit Division is authorized to resort to external indices in determining tax liability [Tax Law §1138(a); Matter of George Korba v. New York State Tax Comm., et. al, 84 A.D.2d 655].

C. That petitioner has failed to sustain his burden of showing that the Audit Division's determination is erroneous.

D. That section 1145(a)(1) of the Tax Law provides for the imposition of penalty for failure to file returns or pay tax as shown due thereon and subparagraph (ii) thereof provides:

"(ii) If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit all of such penalty and that portion of such interest that exceeds the interest that would be payable if such interest were computed at the rate set by the tax commission pursuant to section eleven hundred forty-two. The tax commission shall promulgate rules and regulations as to what constitutes reasonable cause."

E. That section 536.1(b) of the Commission regulations, in pertinent part, provides:

"(b) Reasonable cause. ...Grounds for reasonable cause, where clearly established, may include the following: (1) Death or serious illness of the taxpayer, a responsible officer or employee of the taxpayer or his unavoidable absence from his usual place of business."

F. That in accordance with Finding of Fact "5" and Conclusions of Law "D" and "E", penalty is cancelled.

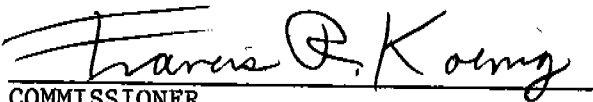
G. That the petition of William F. Bartz d/b/a Bill's Garage is granted to the extent noted in Conclusion of Law "F" and is in all other respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is otherwise sustained in full, together with such interest as by law allowed.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1986


PRESIDENT


COMMISSIONER


COMMISSIONER