

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

KEVIN SCHAEFFER  
D/B/A NORTH SHORE SERVICE STATION

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, 1979  
through May 31, 1982.

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Petitioner, Kevin Schaeffer d/b/a North Shore Service Station, High Street and New York Avenue, Huntington, New York 11743, 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 May **31**, 1982 (File No. 47963).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on October 29, 1986 at 1:15 P.M. Petitioner appeared by Jeffrey W. Waller, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

#### ISSUE

Whether petitioner established reasonable cause for waiver of penalty and reduction of statutory interest.

#### FINDINGS OF FACT

1. Petitioner, Kevin Schaeffer d/b/a North Shore Service Station, operates an Exxon gasoline station at High Street and New York Avenue, Huntington, New York.

2. The Audit Division conducted a sales tax field audit of petitioner's business covering the period June 1, 1979 through May 31, 1982:

- (a) Petitioner's books and records were found to be accurate with respect to purchases of gasoline. (The purchases were verified by the supplier, Exxon.) Gross sales per books agreed with gross sales per Federal income tax returns. Gross sales per books, however, did not agree with gross sales per sales tax returns filed. Bank deposits (less returned checks) for the audit period totalled \$1,328,766.00, while gross sales reported were \$500,700.00, resulting in a discrepancy of \$828,066.00. This discrepancy could not be explained by petitioner or his former accountant.
- (b) Audited taxable sales of \$1,227,966.00 were determined from three sources: gasoline, oil and tires, batteries and accessories ("TBA"), including repairs.
  - (i) Gasoline purchases of \$1,073,006.41 were marked up 6.965% (this percentage was used based on the markup of another Exxon station because petitioner's selling prices for most of the audit period were not available). After deducting 8 cents per gallon gasoline tax, audited taxable gasoline sales were determined to be \$1,065,839.31.
  - (ii) Oil purchases of \$7,977.86 were marked up 63.99% based on a markup test, resulting in audited oil sales of \$12,252.46.
  - (iii) Audited TBA sales were found to be \$149,875.40. This amount was projected using one mechanic working 40 hours per week and charging \$30.00 per hour for labor. This method was used because petitioner's books showed only \$15,666.00 in TBA purchases. Based on a markup test, this would have produced \$34,523.00 in TBA sales, which the auditor found unacceptable considering the fact that petitioner had a contract with the Post Office that produced \$21,724.00 in nontaxable TBA sales for 19 months.
- (c) Taxable sales reported for the period June 1, 1979 through February 28, 1982 were \$458,474.00. Additional taxable sales for this period were \$769,627.00. The audit was updated to include the period ending May 31, 1982, resulting in total additional taxable sales for the audit period of \$831,372.00 and tax due thereon of \$58,631.00. (The audit period excludes the quarter ending August 31, 1982, as petitioner reported taxable

sales of \$92,856.00 for that quarter, which the auditor determined to be in line with audit findings.)

3. On August 11, 1983 a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner for \$58,631.00 in tax, \$14,142.15 as a penalty and \$19,753.17 in interest. The notice was subsequently amended on September 20, 1983 to increase the penalty to \$29,315.50 because of fraud. (Petitioner had signed consents extending the period of limitation for assessment to September 20, 1983).

4. Petitioner's former accountant visited the station once a month and made the entries in the ledger from bills retained by petitioner. The accountant prepared all tax returns and prepared all checks for taxes. The returns and checks were then signed by petitioner.

5. At a post assessment conference, the Audit Division agreed to reduce the additional tax to \$55,656.00. At a Tax Appeals Bureau conference, the Audit Division also agreed to reduce the 50% fraud penalty to the statutory penalty of 25%.

6. Petitioner concedes that the tax as reduced to \$55,656.00 is correct, but argues that the penalty should be cancelled because he retained all necessary documents and relied on his accountant to correctly determine the tax due.

#### CONCLUSIONS OF LAW

A. That during the period at issue, Tax Law § 1145(a)(1) provided a penalty of up to 25% and maximum statutory interest for failure to pay over sales tax on a timely basis. The law also provided that if the Tax Commission determined that the failure or delay was due to reasonable cause and not willful neglect, the penalty and all but minimum interest were to be remitted.

B. That petitioner has not established that his failure to pay over sales tax was due to reasonable cause. Even if it were to be assumed that petitioner's


former accountant was at fault for the underreporting, the discrepancies were of such magnitude that they should have been obvious to petitioner. (~~See~~ 20 NYCRR 536.5.) Accordingly, the 25% penalty and maximum statutory interest must stand.

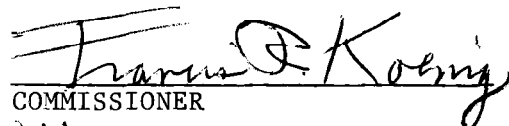
C. That the petition of Kevin Schaeffer d/b/a North Shore Service Station is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, as reduced to the sum of \$55,656.00 in tax with 25% penalty and statutory interest, is sustained.

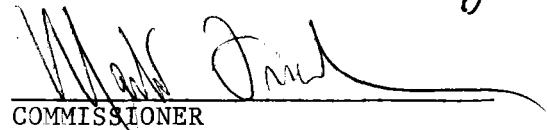
DATED: Albany, New York

STATE TAX COMMISSION

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