

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
4 STAR AUTO REPAIRS, INC.
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.

DECISION

Petitioner, 4 Star Auto Repairs, Inc., c/o Ota, 787 Kimball Avenue, Yonkers, New York 10704, 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. 47993).

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 March 3, 1986 at 1:15 P.M., with all briefs to be submitted by May 18, 1986. Petitioner appeared by John W. Graci, Enrolled Agent. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether it was proper for the Audit Division to compute petitioner's gross sales using estimated markups.

II. Whether the Audit Division properly disallowed a portion of petitioner's claimed exempt sales.

FINDINGS OF FACT

1. On December 20, 1982, the Audit Division, as the result of a field examination, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, 4 Star Auto Repairs, Inc. Said notice,

which encompassed the period December 1, 1978 through May 31, 1982, determined additional sales and use taxes due of \$12,832.43, plus penalty of \$2,784.76 and interest of \$3,555.69, for a total amount due of \$19,172.88.

2. Petitioner executed a series of three consents, dated March 2, 1982, July 6, 1982 and October 15, 1982, wherein it agreed that the assessment of any sales and use taxes due for the period December 1, 1978 through May 31, 1982 could be determined at any time on or before December 20, 1982.

3. During the period at issue, petitioner operated an automotive repair shop which employed two mechanics along with two active corporate officers. No gasoline was sold by petitioner.

4. At the beginning of the field examination, the auditor was not furnished with sales invoices and he therefore determined that petitioner's books and records were inadequate. To verify reported gross sales, the auditor requested that petitioner keep its sales invoices and purchase invoices for the then-current month, which was March of 1982. After reviewing said invoices, the auditor determined that the markup, as shown on these invoices, was too low to be accepted.

5. To compute audited gross sales, the auditor used an estimated markup of 250 percent for automotive repairs and an estimated markup of 100 percent for body, fender and towing repairs. The following table sets forth the computation of audited gross sales:

Purchases for automotive repairs	\$154,038.00	
Estimated markup (250%) plus cost (100%)	x 350%	
Sales for automotive repairs		\$539,133.00
Purchases for body, fender and towing	\$ 14,665.00	
Estimated markup (100%) plus cost (100%)	200%	
Sales for body, fender and towing		29,330.00
Audited gross sales		\$568,463.00
Less: reported gross sales		510,424.00
Additional gross sales		<u>\$ 58,039.00</u>

The Audit Division considered the additional gross sales of \$58,039.00 to be fully taxable and determined a tax due of \$4,680.47.

6. In addition to the \$4,680.47 of tax due on additional taxable sales, the Audit Division also disallowed \$93,958.00 of claimed nontaxable sales, producing a tax due of \$7,555.32. Finally, the Audit Division determined that \$596.64 of tax was due on purchases of machinery and equipment made during the audit period. Petitioner does not contest the \$596.64 of tax due on the purchases of machinery and equipment.

7. At the hearing held herein, the auditor testified that the unacceptably low markup determined per his review of invoices for March of 1982 was "118.82% including costs". The audit workpapers submitted in evidence contain a worksheet entitled "Computation of Parts to Labor Ratio". Said worksheet computed a percentage of 118.82 percent by dividing the retail sale of labor (\$1,962.00) by the retail sale of parts (\$1,651.17). There were no workpapers submitted in evidence which computed a markup percentage for the March 1982 invoices.

8. Petitioner's overall markup per its books and records was 202.5 percent (\$510,424.00 reported gross sales divided by \$168,703.00 of purchases subject to markup). The overall markup estimated by the Audit Division was 236.9 percent. Petitioner submitted a sampling of sales and purchase invoices for the first five months of 1981 which showed that the reported markup of 202.5 percent was an accurate markup.

9. The disallowed nontaxable sales of \$93,958.00 represented exempt sales allegedly made by petitioner to diplomatic personnel. Said claimed exempt sales were disallowed by the Audit Division because petitioner could not produce or obtain certificates of diplomatic and consular tax exemption. Petitioner maintained that it was unable to obtain the requested exemption certificates since the diplomatic personnel involved had completed their tours

of duty in the United States and had returned to their respective homelands. It is not known why petitioner did not obtain the required exemption certificates at the time these sales were allegedly made to said diplomatic personnel.

CONCLUSIONS OF LAW

A. That petitioner has submitted sufficient evidence to show that its overall markup per books of 202.5 percent was accurate and that it reported the correct amount of gross sales on its sales and use tax returns. Accordingly, the assessment of additional tax due of \$4,680.47, which amount is based upon an increase in gross sales determined through the use of estimated markups, is to be deleted from the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 20, 1982.

B. That section 1132(c) of the Tax Law provides, in pertinent part, as follows:

"[I]t shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five...are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer. Unless... the purchaser prior to taking delivery, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the tax commission may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. Where such a certificate or statement has been furnished to the vendor, the burden of proving that the receipt, amusement charge or rent is not taxable hereunder shall be solely upon the customer. The vendor shall not be required to collect tax from purchasers who furnish a certificate of resale or an exempt organization statement in proper form."


C. That petitioner has failed to present certificates of diplomatic and consular tax exemption or any other evidence demonstrating that the purchaser was exempt from tax for any of the \$93,958.00 of disallowed exempt sales. Accordingly, that portion of the notice dated December 20, 1982 which assessed tax due of \$7,555.32 on disallowed exempt sales of \$93,958.00 is sustained.

D. That the petition of 4 Star Auto Repairs, Inc. is granted to the extent indicated in Conclusion of Law "A", supra; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 20, 1982 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 12 1986


PRESIDENT


COMMISSIONER


COMMISSIONER