

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HAROLD LANGDON	:	DECISION
d/b/a LANGDON'S GROCERY	:	
	:	
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 March 1, 1979	:	
through February 28, 1982.	:	

Petitioner, Harold Langdon d/b/a Langdon's Grocery, Route 78, Bliss, New York 14024, 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 March 1, 1979 through February 28, 1982 (File No. 48333).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, Part V, State Office Building, 65 Court Street, Buffalo, New York on December 5, 1985 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether additional sales tax was properly assessed against petitioner pursuant to a sales tax markup audit.

FINDINGS OF FACT

1. Petitioner, Harold Langdon, operates a general store under the name "Landgon's Grocery" in Bliss, New York. He sells groceries, clothing, candy, cigarettes, books, beverages and other items in the store and sells gasoline from two self-service pumps located in front of the store.

2. A field audit of petitioner's books and records was conducted by the Audit Division between August 1982 and March 1983. The following books and records were available: sales tax returns, federal and state income tax returns and related worksheets, depreciation schedules, a check register, purchase invoices and a calendar day book containing only hand written entries of dollar amounts of sales per day. Petitioner did not have cash register tapes and had no purchases or disbursements journals. The auditor concluded that the books and records were inadequate and decided to estimate taxable sales by the use of a test period and markup.

3. The sample period of January 1981 through December 1981 was used to calculate a taxable ratio. Taxable purchases (excluding gasoline) were found to equal 38.4 percent of total purchases (excluding gasoline). The auditor took the cost of goods sold figure from petitioner's accountant's year-end workpapers (which had been used to prepare the federal returns) and multiplied that figure by 38.4 percent and found taxable cost of goods sold (non-gasoline) of \$288,984.30. A markup of 27.4 percent above cost on the taxable items was calculated and multiplied by taxable cost of goods sold to result in taxable sales of store goods per audit of \$368,165.99. The 27.4 percent markup was computed from the test month of October, 1982.

4. Gasoline purchases were not verifiable through purchase invoices. Accordingly, the auditor obtained third party verification from petitioner's supplier, Green Bros. The total gallons reported by the supplier were multiplied by the Audit Division's average State-wide selling price of \$1.249 per gallon. After deducting taxes, the resulting taxable gasoline sales were found to be \$341,298.17.

5. Total taxable sales of \$709,464.16 determined through the audit (\$368,165.99 store goods plus \$341,298.17 gasoline) were reduced by documented

thefts and an additional 5 percent theft allowance on store goods, to \$684,269.86. This amount was divided by taxable sales reported to calculate an error rate of 60.6 percent. The error rate was multiplied by taxable sales reported of \$425,944.85 resulting in additional taxable sales of \$258,122.58 and additional tax due of \$13,127.50.

6. Petitioner executed consents extending the period of limitation for assessment to December 20, 1983.

7. On June 27, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner in the amount of \$13,127.50 in additional tax due for the period March 1, 1979 through February 28, 1982. No penalty was assessed and only minimum interest was imposed, as petitioner had an excellent filing record and the additional taxes appeared to be the result of an honest mistake or a lack of knowledge, rather than willfulness.

CONCLUSIONS OF LAW

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

"If a return required by this article is not filed, or 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, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors...."

B. That where a taxpayer's records are incomplete, or insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed

was erroneous. Surface Line Operators Fraternal Organization, Inc. v. Tully,
85 AD2d 858.


C. That petitioner's records were clearly incomplete and inadequate. Accordingly, it was proper for the Audit Division to perform a test period audit resulting in the assessment which was issued on June 27, 1983. Petitioner did not sustain his burden of proof to show that either the method of audit or the amount of tax assessed was erroneous.

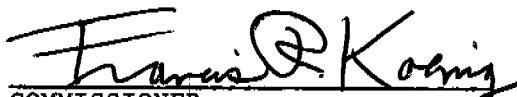
D. That the petition of Harold Langdon d/b/a Langdon's Grocery is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 27, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 03 1986


PRESIDENT


COMMISSIONER


COMMISSIONER