

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

ELM-LIN CORNER SERVICE STATION, INC.

DETERMINATION

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, Elm-Lin Corner Service Station, Inc., 241-01 Linden Boulevard, Elmont, New York 11003, 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. 48927).

A hearing was held at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 13, 1987 at 1:30 P.M., with all briefs to be filed by July 6, 1987. Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (James H. Tully, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined the sales tax liability of Elm-Lin Corner Service Station, Inc. for the period June 1, 1980 through August 31, 1982.

11. Whether the penalty imposed on the additional sales tax found due pursuant to section 1145 of the Tax Law should be waived.

FINDINGS OF FACT

1. On September 20, 1983, the Audit Division, as the result of a desk audit, issued to petitioner, Elm-Lin Corner Service Station, Inc., a Notice of

Determination and Demand for Payment of Sales and Use Taxes Due assessing a sales tax due of \$228,643.00, plus penalty of \$52,745.14 and interest of \$60,418.98, for a total amount due of \$341,807.12 for the period June 1, 1980 through August 31, 1982.

2. On October 20, 1983, petitioner timely filed a petition for a hearing to review the notice.

3. On August 1, 1980, petitioner took over the operation of an Exxon service station **on** the corner of Linden Boulevard and Elmont Road in Elmont, New York, from the Exxon Company, U.S.A. ("Exxon"). In addition to gasoline, Exxon sold tires, batteries and motor oil. Exxon did not perform repairs. **In** order to be competitive (there were twelve other stations in the vicinity of petitioner's business), petitioner established a repair business which developed slowly before maturing in 1983. In 1983, petitioner maintained three service bays, had two employees and was open each day from 7:00 A.M. to 11:00 P.M. At all times, Eddy Nalbant was the president of petitioner.

4. On June 27, 1983, the Audit Division sent petitioner a service station questionnaire requesting information regarding its business operations, which could be obtained from its books and records if properly maintained. **On** or about July 12, 1983, petitioner returned the questionnaire, partially completed. Importantly, information regarding petitioner's purchases was not furnished. In addition to figures on sales for the months of September, October and November 1981, petitioner submitted the following regarding its gasoline pricing on July 12, 1983:

<u>Grade</u>	<u>No. of Pumps</u>	<u>Self Service</u> <u>Selling Price</u>	<u>No. of Pumps</u>	<u>Full Service</u> <u>Selling Price</u>
Reg.-leaded	2	\$1.20	2	\$1.25
Prem.-leaded	2	1.42	2	1.47
Unleaded	2	1.30	2	1.35

In view of petitioner's failure to provide information about purchases, the auditor decided to compute petitioner's sales tax liability on the basis of external indices, namely, audit experience, third party verification of purchases, and information provided by petitioner from the questionnaire.

5. The Audit Division received from Exxon a listing of petitioner's purchases of gasoline, tires, batteries and motor oil. The listing showed purchases starting on or about January 1, 1980 through August 31, 1982. The listing further identified petitioner as station No. 3-7478 and Exxon customer No. 3-921 788 00.

6. The auditor first determined petitioner's average gasoline selling price on July 12, 1983 to be \$1.331 by dividing the total of petitioner's selling prices on said date (~~see~~ Finding of Fact "4") by six. The \$1.331 was compared to the average retail selling price of regular gasoline (based on an Audit Division quarterly survey of ten selected truck stops widely scattered throughout the State) for the quarter ended August 31, 1983 of \$1.298, whereby it was determined that petitioner's selling prices were 2.5 percent higher than the average retail selling price. Accordingly, the auditor computed petitioner's gasoline selling prices for the audit period by increasing the average retail selling price of regular gasoline as determined by the Audit Division on a quarterly basis by 2.5 percent. The number of gallons of gasoline purchased, as provided by Exxon, for the audit period on a quarterly basis was multiplied by the appropriate audited selling price (less the 8¢ per gallon State gasoline tax and the State and local sales tax) to compute audited taxable gasoline sales of \$2,669,366.00. Taxable sales other than gasoline were determined to be 38 percent of taxable gasoline sales, based on prior audit experience, or \$1,014,361.00. Audited taxable sales were therefore determined to be \$3,683,727.00

(\$2,669,366.00 + \$1,014,361.00) which, when multiplied by the appropriate State and local sales tax rate, resulted in audited tax due of \$298,835.00. Credit was given for sales tax paid of \$70,192.00 to compute the additional sales tax due of \$228,643.00.

7. At a pre-hearing conference held on January 11, 1985, petitioner presented books and records which proved that its gasoline selling prices were actually 94 percent of the average retail selling price. Petitioner also presented evidence that its business operations began on August 1, 1980.

Furthermore, taxable sales other than gasoline were recomputed based on the following: a 40 hour work week, 3 employees per hour, \$25.00 per hour, and an additional 50 percent for sales of repair parts. Other sales were therefore computed as follows: $40 \text{ hours} \times \$25.00 \times 3 = \$3,000.00$ + $\$1,500.00$ (50%) = \$4,500.00 per week, or \$487,500.00 for the audit period. The effect of the above adjustments reduced the additional sales tax due to \$125,492.00. At the hearing, the Audit Division agreed with the adjustments and conceded that this is the amount now at issue.

8. Petitioner does not contend that its books and records were adequate or that the Audit Division was precluded from using external indices to determine its sales tax liability, but rather contends that the methodology employed was unreasonable because it was not calculated to accurately reflect the tax due. Petitioner pointed out that it started business on August 1, 1980, yet the list from Exxon, relied upon by the Audit Division, indicated purchases beginning January 1, 1980. Petitioner introduced into evidence copies of gasoline purchase invoices from Exxon which identified it and further referred to station No. 3-7478 and Account No. 3259895001. Petitioner noted that the Exxon list identified it as Customer No. 3-921 788 00. Therefore, petitioner maintained

that one-half of the gasoline delivered to that station (3-921 788 00) was delivered to someone else. Lastly, petitioner claims that due to the intense competition in its area it was forced to sell gasoline 1¢ to 4¢ above cost and that its actual markup on gasoline was approximately 90.7 percent of the average retail selling price.

9. Petitioner recomputed its taxable sales of items other than gasoline, i.e., tires, batteries, motor oil and repairs, during the audit period based on purchase invoices for repair parts maintained by petitioner and information supplied by Exxon on purchases of tires, batteries and motor oil. Repair sales were calculated to be \$31,420.00 for the audit period, and tire, battery and motor oil sales were calculated to be \$41,228.00 for the audit period, for total non-gasoline sales of \$72,648.00.

10. Petitioner failed to present any evidence to support its other contentions or to show that the failure to remit the taxes at issue was due to reasonable cause and not due to willful neglect.

CONCLUSIONS OF LAW

A. That, under the circumstances herein, the Audit Division reasonably calculated the tax liability of petitioner and, except for non-gasoline sales, petitioner has failed to demonstrate by clear and convincing evidence that the method used to arrive at the assessment or the assessment itself was erroneous (Matter of Ristorante Puglia, Ltd. v. Chu, 102 AD2d 348, **351**; Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858, 859). Furthermore, petitioner has failed to present its books and records for review in accordance with Tax Law § 1135(a).

B. That with respect to non-gasoline sales, petitioner's recomputation (Finding of Fact "9") was based on actual purchase records and information


received from its supplier, Exxon. It was, therefore, a more reasonable and accurate reflection of actual non-gasoline sales during the audit period. Accordingly, such sales are reduced to \$72,648.00.

C. That since petitioner did not explain or show that reasonable cause existed for the understatement of its tax liability, penalty imposed on the remainder of its liability is sustained.

D. That the petition of Elm-Lin Corner Service Station, Inc. is granted to the extent indicated in Conclusion of Law "B" above; the Audit Division is directed to recompute the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1983 and revised as the result of the pre-hearing conference (see Finding of Fact "7"); and that, except as so granted, the petition is denied.

DATED: Albany, New York

SEP 24 1987


ADMINISTRATIVE LAW JUDGE