

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

CASTLEWOOD SERVICE CENTER, INC.

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, Castlewood Service Center, Inc., 819 West Jericho Turnpike, Smithtown, New York 11787, 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. 49036).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 4, 1986 at 3:00 P.M., with all briefs to be submitted by November 13, 1986. Petitioner appeared by Myron S. Raisman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales tax due from the petitioner on the basis of a markup of purchases.

FINDINGS OF FACT

1. On September 20, 1983, as the result of a desk audit program, the Audit Division issued to petitioner, Castlewood Service Center, Inc. ("Castlewood"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, asserting sales and use taxes for the period June 1, 1980 through August 31, 1982 in the amount of \$95,388.23 plus penalty and interest.

2. As part of a desk audit program of gasoline service stations, the Central Office Audit Bureau ("COAB") mailed a letter, dated June 10, 1983, to Castlewood, requesting a copy of Schedule C or Form 1120 of Castlewood's Federal tax return for the years 1980 or 1981 and completion of a Filling Station Questionnaire.

3. Castlewood returned a partially completed questionnaire and advised COAB that the remainder of the requested information was in the possession of **its** accountant who was not immediately available. Castlewood stated that the remainder of the information would be provided upon its accountant's return.

4. COAB had obtained from the Mobil Oil Corporation ("Mobil") a computer printout of the gasoline gallonage sold by Mobil to Castlewood for the calendar years 1980, 1981 and 1982. An auditor evenly apportioned the yearly gallonage to the 13 sales tax quarters in the audit period. Quarterly purchases were then marked up by the statewide average selling price of gasoline during the same quarter, as determined by a price survey taken by the Miscellaneous Tax Bureau. Appropriate adjustments were made for excise and sales taxes included in the average selling prices. Based on the Audit Division's audit experience, it was determined that repair sales and services would equal approximately 38 percent of gasoline sales, and these sales were estimated accordingly. Audited gasoline and repair sales were totaled within each quarter, and the applicable sales tax rate was applied to the total to calculate sales tax due. Sales tax paid was subtracted from sales tax due, resulting in a tax liability of \$95,388.23.

5. A copy of COAB's workpapers showing the above calculations was sent to Castlewood's accountant in March 1983. The accountant asserted that Castlewood's average selling price of gasoline was less than the statewide average utilized

in COAB's purchase markup procedure. He also claimed that repair sales were lower than estimated by COAB. No records were submitted to substantiate these claims. Thereafter, the Audit Division issued a notice asserting additional tax due on the basis of the audit technique described in Finding of Fact "4".

6. It is Castlewood's position that the audit results are erroneous for these reasons: (1) that Mobil's records are an unreliable source for determining Castlewood's purchases; (2) that Castlewood's actual gasoline selling prices were lower than the prices used by COAB; (3) that in estimating repair sales COAB should have used the figure of \$750.00 per week per repair bay (a formula then being used by the Audit Division's Suffolk District Office); (4) that COAB should have made an adjustment for gas leakage; and (5) that COAB had failed to make a clear and unequivocal request for Castlewood's books and records and thus was not justified in resorting to external indices to estimate taxes due.

7. A letter dated January 20, 1986 from Mobil to its customers regarding refund payments to be made pursuant to a Department of Energy Consent Order states the following:

"In March, Mobil will provide you with monthly volume schedules for the products our records indicate you purchased from us [during portions of the period March 6, 1973 through January 27, 1981]. Due to the age and condition of certain records, Mobil cannot assure the completeness of these volume schedules. Your own records may be more accurate and you are free to file a claim based on whatever evidence you have."

8. Castlewood submitted a letter on Mobil letterhead dated May 7, 1985, addressed to Richard Barnes (Castlewood's owner and operator) and signed by "R. Hampton". The letter provides gallonage figures for calendar year 1981 and June through December 1980. Presumably these figures were meant to represent Castlewood's purchases for those periods.

9. A letter dated August 1, 1986 addressed to the Department of Taxation and Finance and signed by W.M. Coughlin, "Admin. & Controls Manager" of Mobil states: "We contacted our Employee Relations Department in Valley Forge, PA and verified that Mr. Hampton's employment with Mobil ended on November 5, 1983."

10. A book presented by Castlewood, entitled "Mobil Money Management Records for Mobil Dealers: Sales Record", showed the average selling price of gasoline for each month in 1981. It was prepared by Mr. Barnes after 1981 using whatever documents he had available. It **is** not, and was not purported to be, a contemporaneous business record. The documents that formed the basis of the book's entries were not offered in evidence.

11. The New York State Energy Office sent Castlewood a letter and official publication showing that the selling price of gasoline on Long Island tends to be lower than the selling price upstate.

12. Mr. Barnes **is** a member of the Tri-County Gasoline Retailers and Allied Trades Association, Inc. which has stated publicly that station operators are frequently short changed on gasoline deliveries. This association has requested legislation requiring delivery trucks to be metered in order to insure that station operators receive all the gasoline for which they pay. Castlewood did not produce documentation to show that it had ever been charged for more gasoline than was actually delivered to it.

13. Evidence was submitted showing that three leaking gasoline storage tanks used by Castlewood were replaced in 1982. The amount of gas lost from leakage during the audit period **is** not known.

14. Castlewood employed one mechanic during the audit period. **No** one other than that mechanic performed car repairs.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law gives the Audit Division statutory authority for the use of external indices to determine the amount of tax due when a filed return **is** incomplete or insufficient. Castlewood did not effectively respond to COAB's request for Federal tax returns and other information. Consequently, the only information available to the Audit Division were purchase records from Mobil, and they indicated that Castlewood significantly underreported taxable sales during the audit period. Furthermore, COAB presented Castlewood with the results of its purchase markup audit and gave it an opportunity to submit books and records to substantiate its claim that sales tax returns were correct as submitted. Since Castlewood still provided **no** books or records, the Audit Division was warranted in determining sales and use taxes due on the basis of the information available to it.

B. That the Audit Division's markup of gasoline purchases was a method reasonably calculated to reflect the taxes due, and the evidence submitted by Castlewood was not sufficient to establish that any error existed in the audit procedure. It is especially damaging that Castlewood failed to produce any document kept in the normal course of business to substantiate its claim that gasoline purchases and gasoline selling prices were overstated. In light of Castlewood's inability to authenticate the letter from R. Hampton (see Findings of Fact "8" and "9", supra), it cannot be considered to be credible evidence of actual purchases.


C. That the Audit Division's estimate of repair sales was unreasonable, in that it was inconsistent with the fact that Castlewood employed only one mechanic during the audit period. Accordingly, repair sales are to be recalculated, using a figure of \$750.00 per week in repair sales during the audit period.


D. That the petition of Castlewood Service Center, Inc. *is* granted to the extent indicated in Conclusion **of** Law "C"; that the Notice **of** Determination and Demand for Payment **of** Sales and **Use** Taxes Due issued on September 20, 1983 *is* to be modified accordingly; and that in all other respects, the petition is denied.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 10 1987


PRESIDENT


COMMISSIONER


COMMISSIONER