

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
CARGAIN SERVICE STATION, 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 December 1, 1980	:	
through August 31, 1982.	:	

Petitioner, Cargain Service Station, Inc., Route 6, Mahopac, New York 10541, 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, 1980 through August 31, 1982 (File No. 51052).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on April 29, 1986 at 9:15 A.M. and was continued to conclusion at the same location on June 16, 1986 at 1:15 P.M., with all briefs to be submitted by July 1, 1986. Petitioner appeared by George Parker, Esq. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Audit Division properly estimated petitioner's sales tax liability on the basis of external indices.

FINDINGS OF FACT

1. Petitioner, Cargain Service Station, Inc., operated a Mobil gasoline service station located at Route 6, Mahopac, New York. Petitioner had three service bays to perform repair work.

2. The desk audit section of the Audit Division, by letter dated November 16, 1983, advised petitioner that its sales tax returns were being audited and requested that petitioner complete and return a Filling Station Questionnaire together with copies of schedule C or form 1120 of Federal tax returns filed for the years 1980 and 1981. On January 20, 1984, the Audit Division sent a follow-up letter indicating that it received no reply to the foregoing request.

3. On March 20, 1984 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period December 1, 1980 through August 31, 1982 for taxes due of \$22,397.56, plus penalty and interest of \$12,562.16, for a total of \$34,959.72. The notice contained the following explanation:

"The tax due was computed by marking up your purchases of gasoline reported by your distributor. Your average selling price of gasoline was computed for each period based on the average retail selling prices. The purchases other than gasoline were marked up based on normal industry practices. Your average selling price less exempt taxes was than [sic] applied to gasoline purchases plus other sales to determine taxable sales."

The notice was issued after the Audit Division received no reply to the above letters and the letters were not returned by the United States Postal Service.

4. On May 23, 1984, in response to a request from petitioner's appointed representative, Wolf Magalnick, CPA, the Audit Division sent a letter accompanied by a worksheet showing the computation of additional tax due. The Audit Division also enclosed a second questionnaire to be completed and advised Mr. Magalnick if the questionnaire was not returned a hearing would be scheduled. The Audit Division had received from Mobil Oil Corp. the quantity of gasoline purchased by petitioner for the years 1980, 1981 and 1982. Mobil's records showed

that petitioner purchased 602,269 gallons in 1981 and 554,196 gallons in 1982. The records indicated annual figures for purchases except for the month of December. The Audit Division computed average gallons purchased for a three month period in order to estimate sales on a quarterly filing basis. The statewide average retail selling prices of gasoline for each period under audit were obtained from the Miscellaneous Tax Bureau. Gasoline sales amounted to \$1,258,632.55. Repair sales and sales of items other than gasoline were estimated to be 38 percent of gasoline sales or \$478,278.00. This estimate was based on completed audits of similar businesses. The tax due on the estimated gasoline and repair sales was \$103,521.77 as opposed to \$81,124.21 paid over with returns filed, leaving additional taxes due of \$22,397.56.

5. On December 14, 1984, a pre-hearing conference was held by the Tax Appeals Bureau. The conferee directed the Audit Division to conduct a field examination of petitioner's books and records. The audit was scheduled by letter for February 13, 1985. Mr. Magalnick did not provide the Audit Division with any records until March 3, 1986. The only records made available at that time were bank statements, payroll records, a list of repair part purchases and workpapers used to prepare sales tax returns. A comparison of the worksheets with Mobil's records disclosed that petitioner purchased 283,988 gallons more than were reported sold. The purchases of repair parts amounted to \$179,118.00 for the audit period. The Audit Division applied a 40 percent markup (based on office experience) to the purchases to estimate part sales of \$250,765.00. Labor sales were estimated by doubling wages paid (\$264,226.00) and adjusting by 25 percent to allow for labor used to pump gasoline. Estimated repair sales totalled \$448,972.00. The Audit Division concluded that the field audit of the limited books and records made available substantiated the original assessment issued by the desk audit section.

6. Petitioner did not maintain any verifiable record of gasoline sales or repair sales. Wolf Magalnick determined gross sales reported on the sales tax returns by adding bank deposits to credit card sales.

7. Petitioner argued that the sales tax returns filed for the audit period accurately reflect the actual sales of the business. Furthermore, petitioner maintained that sufficient books and records were available to conduct an audit and as such the estimates made by the Audit Division were not warranted.

8. Petitioner offered no explanation to account for the substantial discrepancy in the gasoline purchases indicated in Finding of Fact "5".

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that "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" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

B. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement. Hand-recorded entries on a worksheet of gross sales were not reliable records to satisfy the statutory requirements that records of individual sales be retained (Matter of Skiadas v. State Tax Commission, 95 AD2d 971).

C. That petitioner provided inadequate and incomplete books and records for purposes of verifying taxable sales. When records are not provided or are incomplete and insufficient, it is the duty of the Audit Division to select a

method of audit reasonably calculated to reflect taxes due (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576). Accordingly, the Audit Division's use of third party purchases and statewide average selling prices as a basis for determining petitioner's gasoline sales was proper pursuant to section 1138(a) of the Tax Law.

D. That the estimate procedures adopted by the Audit Division for repair sales were reasonable under the circumstances. When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223). Petitioner failed to sustain its burden of showing that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 AD 2d 858).

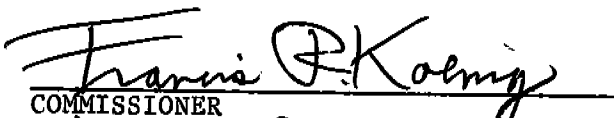
E. That the petition of Cargain Service Station, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 20, 1984 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 29 1986


PRESIDENT


COMMISSIONER


COMMISSIONER