

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of :

ROBERT FLANAGAN
AS OFFICER OF COUNTRY BRIDGE SERVICE, INC.

DECISION

for Revision of Determinations or for Refunds
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1978
through August 31, 1982.

Petitioner, Robert Flanagan, as Officer of Country Bridge Service, Inc.,
59 Cedar Street, Hicksville, New York 11801, filed a petition for revision of
determinations or for refunds of sales and use taxes under Articles 28 and 29
of the Tax Law for the period December 1, 1978 through August 31, 1982 (File
No. 51424).

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 28, 1987 at 1:15 P.M., with all briefs to be submitted by July 30, 1987.
Petitioners appeared by John J. Lynch, Esq. The Audit Division appeared by
John P. Dugan, Esq. (Gary Palmer, ~~Esq.~~, of counsel).

ISSUES

I. Whether the Audit Division's determination of Country Bridge Service,
Inc.'s sales and use tax liability during the period at issue was proper.

II. Whether petitioner **is** personally liable pursuant **to** sections 1131(1)
and 1133(a) of the Tax Law for the sales and use tax due from Country Bridge
Service, Inc.

III. Whether the Audit Division's assertion of fraud penalty pursuant to
section 1145(a)(2) of the Tax Law was proper.

FINDINGS OF FACT

1. On January 18, 1984, following an audit, the Audit Division issued to petitioner, Robert Flanagan, as Officer of Country Bridge Service, Inc., two notices of determination and demands for payment of sales and use taxes due for the period December 1, 1978 through August 31, 1982, which collectively asserted \$328,151.18 in tax due plus \$164,075.64 in fraud penalty and \$143,256.68 in interest.

2. Country Bridge Service, Inc. (the "corporation") was a gasoline service station located at 225 West Old Country Road, Hicksville, New York. Throughout the period at issue petitioner was president of the corporation and in control thereof.

3. On February 6, 1982 and January 30, 1983 petitioner executed two consents on behalf of the corporation which collectively extended the period of limitation for assessment for the period December 1, 1978 through November 30, 1980 until March 20, 1984.

4. On audit the Audit Division requested access to the corporation's **books** and records. The corporation did not provide the Audit Division with **copies of, or access to, its sales or purchase journals, sales or purchase** invoices or general ledger. The corporation did make available its Federal and State tax returns for the audit period and cancelled checks and bank statements in respect **of** a portion of the audit period.

5. The Audit Division determined that the corporation's records were inadequate for the purpose of verifying taxable sales and therefore estimated the corporation's sales tax liability using the following methodology:

(a) The Audit Division contacted the corporation's gasoline supplier to determine the corporation's purchases of gasoline throughout the audit period;

(b) Average monthly gasoline purchases were multiplied by the statewide average selling price (less state gasoline tax) to determine average monthly gross sales of gasoline during the audit period. **This** amount was then multiplied by the number of months in the audit period to arrive at total taxable gasoline sales for the audit period.

(c) Repair and **TBA** (tires, batteries & accessories) sales were estimated by multiplying \$2,000.00 in such sales per repair bay per week to determine total taxable repair sales for the audit period. The Audit Division's estimate of \$2,000.00 in such sales per bay per week was based upon prior audit experience.

6. Petitioner presented no evidence to refute the audit methodology or results except to question the accuracy and reliability of the computer printout which was provided to the Audit Division by **the** corporation's supplier and which was relied upon by the Audit Division in its determination of **the** gallons of gasoline purchased by the corporation during the audit period.

7. Petitioner signed all sales tax returns filed by the corporation during the period at issue.

8. During the course of conducting the audit, the Audit Division made several appointments with the corporation's accountant and with petitioner. On several occasions the petitioner or the accountant cancelled the appointments. **On** two occasions the appointments were kept.

9. Petitioner's Federal income tax returns indicated the following With respect to interest income, real estate taxes paid and mortgage interest paid for the years 1979 through 1981:

	1979	1980	1981
Interest Income	\$ 268.00	\$ 172.00	\$1,355.00
Real Estate Taxes Paid	2,044.00	2,287.00	4,517.00
Mortgage Interest Paid	1,999.00	1,964 .00	5,501.00

The Audit Division contended that the increases in the amounts set forth above indicated that petitioner had personally benefited from the corporation's failure to report and remit the additional sales tax found on audit.

10. The Audit Division contended that the fraud penalty asserted against petitioner was proper in light of the amount of underreporting of tax due as shown by the audit; petitioner's lack of cooperation with the Audit Division (as purportedly shown by Finding of Fact "8"); and his increased interest income, real estate taxes and mortgage interest as reported on his income tax returns.

CONCLUSIONS OF LAW

A. 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.

B. That section **1138(a)(1)** 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" including purchases.

C. That in view of Finding of Fact "4" the corporation maintained inadequate and incomplete books and records for purposes of verifying taxable sales. Under these circumstances the Audit Division properly utilized external indices to determine additional tax due from the corporation (Tax Law § 1138[a][1]; see Matter of Korba v. New York State Tax Commission, 84 AD2d 655).

D. That the audit methodology employed by the Audit Division herein was reasonably calculated to reflect sales tax due from the corporation (see Matter of Grecian Square v. New York State Tax Commn., 119 AD2d 948). Petitioner has failed to show that both the method used to arrive at the deficiency and **the** deficiency itself were erroneous (see Matter of Guiragossian v. Chu, 515 NYS2d 670) ■ Additionally, petitioner has failed **to** show that the information provided to the Audit Division by the gas station's supplier was in any way inaccurate.

E. That in general, section 1133(a) of the Tax Law imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law, personal liability for the tax imposed, collected, or required to be collected. Section 1131(1) of the Tax Law defines persons required to collect tax to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28.

F. That petitioner was a person required to collect tax imposed by Article 28 of the Tax Law within the meaning of section 1131(1) of the Tax Law and he was therefore personally liable pursuant to section 1133(a) of the Tax Law for the sales tax required to be collected by the corporation. The relevant factors leading to this conclusion were as follows: Petitioner was president of the corporation throughout the audit period; petitioner signed all corporate

sales tax returns during the audit period; petitioner presented no evidence to show that he was not such a person within the meaning of the statute.

G. That the Audit Division bears the burden of proof with respect to the fraud penalty asserted against petitioner herein pursuant to Tax Law § 1145(a)(2). A finding of fraud with respect to said penalty "'requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing' (Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982)." (Matter of Nicholas Kucherov d/b/a Nick's Marine, State Tax Commission, April 15, 1987).

H. That upon review of the evidence presented, the Audit Division has failed to sustain its burden of proving that the imposition of the fraud penalty herein was proper. Specifically, the Audit Division failed to establish that petitioner was uncooperative with the Audit Division. The Audit Division **also** failed to establish that any portion of the deficiency herein inured to the personal benefit of petitioner (Finding of Fact "9"). In this regard it is noted that no analysis was made of the sources of the apparent additional income reported by petitioner on his 1981 return. Accordingly, the fraud penalty imposed against petitioner herein is cancelled.


I. That the petition of Robert Flanagan, as Officer of Country Bridge Service, Inc., is granted to the extent indicated in Conclusion of Law "H"; the Audit Division is directed to adjust the notices of determination and demands

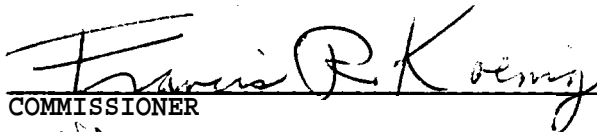
for payment of sales and use taxes due, dated January 18, 1984 in accordance therewith; and except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 28 1987


PRESIDENT


COMMISSIONER


COMMISSIONER