

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions

of

COUSINS SERVICE STATION, INC.
AND THOMAS FORCA AND THOMAS AMARI, AS OFFICERS :

for Revision of Determinations or for Refunds :
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period March 1, 1979
through February 28, 1981.

In the Matter of the Petition

of

COUSINS SERVICE STATION, INC.

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Years 1979 :
and 1980.

DETERMINATION

In the Matter of the Petition

of

THOMAS AMARI AND VIVIAN AMARI

for Redetermination of a Deficiency or for
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law and New York
City Personal Income Tax under Chapter 46,
Title T of the Administrative Code of the City :
of New York for the Years 1979 and 1980.

In the Matter of the Petition

of

THOMAS FORCA AND ANITA FORCA

for Redetermination of a Deficiency or for
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law and New York
City Personal Income Tax under Chapter 46,
Title T of the Administrative Code of the City :
of New York for the Years 1979 and 1980.

Petitioners Cousins Service Station, Inc. and Thomas Forca and Thomas Amari, as officers, 240 Atlantic Avenue, Brooklyn, New York 11201, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1979 through February 28, 1981 (File Nos. 51957, 51958 and 51959).

Petitioner Cousins Service Station, Inc., 240 Atlantic Avenue, Brooklyn, New York 11201, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1979 and 1980 (File No. 51953).

Petitioners Thomas Amari and Vivian Amari, 120 Rockville Avenue, Staten Island, New York 10314, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1979 and 1980 (File No. 52089).

Petitioners Thomas Forca and Anita Forca, 111 Gary Place, Staten Island, New York 10314, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1979 and 1980 (File No. 52088).

A consolidated hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 11, 1986 at 9:15 A.M. and continued on December 9, 1986 at 9:15 A.M. Petitioners appeared by Moe D. Karash, **Esq.** The Audit Division appeared by John P. Dugan, **Esq.** (Lawrence A. Newman, **Esq.**, of counsel).

ISSUE

Whether the sales tax assessments and the deficiencies in corporation franchise tax and personal income tax were proper, where the multi-audit findings were based on purchases reported by a gasoline supplier, estimated parking and repair sales and an indirect audit of personal income.

FINDINGS OF FACT

1. During the periods at issue, petitioner Cousins Service Station, Inc. ("the corporation") operated a Gulf gasoline service station at 240 Atlantic Avenue, Brooklyn, New York. Petitioner Thomas Amari was president of the corporation and petitioner Thomas Forca was secretary. Mr. Amari and Mr. Forca each owned 50 percent of the outstanding shares of the corporation.

2. The Audit Division conducted a multi-audit of petitioners for the following taxes and periods:

<u>Petitioner</u>	<u>Tax</u>	<u>Period</u>
Cousins Service Station, Inc.	Sales and Use	3/1/79-2/28/81
Cousins Service Station, Inc.	Corporation Franchise	1979, 1980
Thomas Amari and Vivian Amari	Personal Income	1979, 1980
Thomas Forca and Anita Forca	Personal Income	1979, 1980

The Sales Tax Audit

3. The auditor discovered that all purchase invoices were not available. It was also determined that credit card sales had not been included in reported gross sales and that gasoline purchased by credit card vouchers had not been accounted for.

4. (a) The auditor received a report of gasoline sold to the corporation by Gulf Oil Corporation. After determining that the station's markup averaged 11.91 percent, gasoline sales were calculated as follows:

<u>Year</u>	<u>Purchases from Gulf</u>	<u>Markup at 11.91%</u>	<u>Total Sales</u>
1979	\$402,628.00	\$ 47,953.00	\$ 450,581.00
1980	690,655.00	82,257.00	772,912.00
1981	912,388.00	108,665.00	1,021,053.00

(b) Parts and accessories purchases were determined to be \$716.00 per month, with a 200 percent markup.

(c) The auditor estimated taxable income from parking at \$9,000.00 per quarter.

(d) Additional sales were calculated as follows:

1979

Gasoline sales (see "4[a]")	\$450,581.00
Parts and accessories	25,776.00
Parking	<u>36,000.00</u>
Total audited taxable sales	\$512,357.00
Less: Excise tax	<u>(52,482.00)</u>
Audited taxable sales	\$459,875.00
Less: Taxable sales reported	<u>(242,463.00)</u>
Additional taxable sales per year	\$217,412.00
Additional taxable sales per quarter	\$ 54,353.00

1980

Gasoline sales (see "4[a]")	\$772,912.00
Parts and accessories	25,776.00
Parking	<u>36,000.00</u>
Total audited taxable sales	\$834,688.00
Less: Excise tax	<u>(58,428.00)</u>
Audited taxable sales	\$776,260.00
Less: Taxable sales reported	<u>(222,862.00)</u>
Additional taxable sales per year	\$553,398.00
Additional taxable sales per quarter	\$138,350.00

(e) A copy of the auditor's workpapers in the record indicates a computation which taxed the \$9,000.00 per quarter parking receipts at 6 percent and the balance of taxable sales at 8 percent. However, additional tax appears to have been computed by treating all additional taxable sales as taxable at 8

percent. The assessments (infra) appear to reflect no allowance for the lower rate for parking.

5. On March 20, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to the corporation in the amount of \$67,036.00 in tax due, \$33,518.00 as a fraud penalty and \$32,793.08 in interest. On the same date, the Audit Division issued similar notices to Mr. Amari and Mr. Forca, as officers of the corporation.

The Income Tax Audits

THOMAS AMARI AND VIVIAN AMARI

6. Records available with respect to Mr. and Mrs. Amari consisted of Federal income tax returns for 1979 and 1980, checking account records and cancelled checks. The auditor determined that such records were insufficient for proper determination of tax and utilized an indirect audit by the cash availability method. The sources and applications for 1979 and 1980 were as follows:

<u>Sources</u>	<u>1979</u>	<u>1980</u>
Wages (net)	\$13,326.00	\$17,327.00
Checks to cash	1,049.00	680.00
Income from house	2,400.00	3,480.00
	<u>\$16,775.00</u>	<u>\$21,487.00</u>

<u>Applications</u>		
Deposits to checking account	\$14,071.00	\$14,107.00
Cost of living*	11,640.00	11,640.00
	<u>\$25,711.00</u>	<u>\$25,747.00</u>
Excess Applications over Sources	\$ 8,936.00	\$ 4,260.00

*Cost of living calculated as follows:

Food, \$125.00 per week x 52 weeks	\$ 6,500.00
Pocket money, \$70.00 per week x 52 weeks	3,640.00
Clothing	750.00
Car expense, vacations, etc.	750.00
Total	<u>\$11,640.00</u>

7. On November 25, 1982, petitioners Thomas Amari and Vivian Amari executed a consent which extended the period of limitation on assessment for the year 1979 to April 15, 1984.

8. On November 23, 1983, the Audit Division issued a Statement of Audit Changes to petitioners, Thomas Amari and Vivian Amari, increasing income by \$8,936.00 for 1979 and \$4,260.00 for 1980, on the basis that said amounts were constructive dividends from the corporation.

9. On March 26, 1984, the Audit Division issued a Notice of Deficiency to petitioners Thomas Amari and Vivian Amari for \$1,812.00 in additional New York State and New York City income tax and \$91.00 in penalty, plus interest, for the years 1979 and 1980.

THOMAS FORCA AND ANITA FORCA

10. Records available with respect to Mr. and Mrs. Forca were 1979 and 1980 Federal income tax returns, personal checking account records and a savings account record. The auditor found that the records were insufficient for proper determination of tax and utilized an indirect audit by the cash availability method. The sources and applications for 1979 and 1980 were as follows:

<u>Sources</u>	<u>1979</u>	<u>1980</u>
Wages (net)	\$13,326.00	\$17,327.00
<u>Applications</u>		
Deposits to checking account	\$ 750.00	\$ 1,167.00
Mortgage and tax by cash	4,500.00	4,500.00
Con Edison	1,000.00	1,000.00
Brooklyn Union Gas	800.00	800.00
New York Telephone	480.00	480.00
Contributions by cash	500.00	400.00
	<u>\$ 8,030.00</u>	<u>\$ 8,347.00</u>

Cost of living"	<u>\$13,640.00</u>	<u>\$14,640.00</u>
	\$21,670.00	\$22,987.00
Excess Applications over Sources	\$ 8,344.00	\$ 5,660.00

*Cost of living calculated as follows:

Food, \$125.00 per week x 52 weeks	\$ 6,500.00	
Pocket money, \$70.00 per week x 52 weeks	3,640.00	
Vacations, etc.	1,500.00	
Car, clothing, etc.	<u>2,000.00</u>	
Total	\$13,640.00	for 1979
	Increased to \$14,640.00	for 1980

11. On November 27, 1982, petitioners Thomas Forca and Anita Forca executed a consent extending the period of limitation on assessment of personal income tax for the year 1979 to April 15, 1984.

12. On November 23, 1983, the Audit Division issued a Statement of Audit Changes to petitioners Thomas Forca and Anita Forca showing additional constructive dividends from the corporation of \$8,344.00 for 1979 and \$5,660.00 for 1980.

13. On March 26, 1984, the Audit Division issued a Notice of Deficiency to petitioners Thomas Forca and Anita Forca for 1979 and 1980 for \$1,953.00 in New York State and New York City personal income tax and \$98.00 in penalty, plus interest.

The Corporation Franchise Tax Audit

14. Although bank deposits and other records of the corporation were analyzed, the auditor utilized the constructive dividends determined to have been made to the two officer/shareholders and treated same as additional income to the corporation:

	<u>1979</u>	<u>1980</u>
Thomas Amari	\$ 8,936.00	\$4,260.00
Thomas Forca	<u>8,344.00</u>	<u>5,660.00</u>
Additional Income	\$17,280.00	\$9,920.00

15. On November 23, 1983, the Audit Division issued a Statement of Franchise Tax Audit Changes to the corporation showing \$17,280.00 in additional income for 1979 and \$9,920.00 in additional income for 1980, and claiming \$1,140.00 in additional tax for 1979, with \$57.00 in penalty and \$298.00 in tax for 1980, with \$15.00 in penalty.

16. On February 21, 1984, the Audit Division issued statements of audit adjustment and notices of deficiency to the corporation as follows:

(a) For the year ending December 31, 1979, \$1,140.00 in tax, \$552.00 in interest, additional charge of \$57.00, for a total of \$1,749.00.

(b) For the year ending December 31, 1980, \$298.00 in tax, \$118.00 in interest, additional charge of \$15.00, for a total of \$431.00.

Business Operations

17. The corporation's business consisted of selling gasoline and oil, making repairs and parking cars. It had eight gasoline pumps, two service bays and an alignment machine. It was also a New York State inspection station.

18. Petitioners' accountant prepared the corporation's sales tax returns based on check stubs., He was not given gasoline delivery tickets or daily sheets. He was unaware that credit card slips were given to the gasoline truck drivers and credited against the cost of the gasoline being delivered.

19. Apart from the testimony of petitioners' accountant and copies of two of said accountant's worksheets, petitioners offered **no** evidence in support of their position. Petitioners were offered additional time to subpoena the records of Gulf Oil Corporation if they disagreed with the reports offered by the Audit Division, but elected not to do so.

20. Petitioners assert that the statute of limitations for all periods ending prior to August 31, 1980 had expired as to sales tax, as such tax was

not assessed until March 20, 1984 and no consent extending the period of limitation on assessment had been signed. The Department contends that since fraud was involved, no statute of limitation applies.

CONCLUSIONS OF LAW

A. That Tax Law §§ 1135 and 1142.5 require every person required to collect tax to maintain records of every sale and to make such records available for inspection and examination. The records produced by the corporation in this case were incomplete and inadequate and, thus, the Audit Division was authorized to estimate taxable sales using the information available and an audit methodology reasonably calculated to reflect the taxes due (Tax Law § 1138[a]; Matter of Grant Co. v. Joseph, 2 NY2d 196, 206, cert denied 355 US 869).

B. That the corporation and Thomas Amari and Thomas Forca, as officers, failed to sustain their burden of establishing that the audit method or the amount of sales and use tax assessed was erroneous (see Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858). It is noted that petitioners were offered an opportunity to subpoena Gulf Oil Corporation records, but elected not to do so.

C. That the sales tax returns filed by the corporation were willfully false and fraudulent. This is evidenced by the fact that the corporation consistently reported approximately one-half or less than one-half of its taxable sales on its quarterly sales and use tax returns (Finding of Fact "2[d]"; see Rogers v. Commissioner of Internal Revenue, 111 F2d 987 [6th Cir 1940] and by the fact that it concealed its credit card sales (Findings of Fact "3" and "18"). Accordingly, the three year period of limitation on assessment imposed by section 1147(b) of the Tax Law does not apply and all

notices of determination and demands for payment of sales and use taxes due were timely issued.

D. That as the failure to pay over the unpaid sales and use tax was due to fraud, the fraud penalty asserted under Tax Law § 1145(a)(2) is sustained.

E. That where there is some factual basis for deciding that tax returns, as filed, do not accurately reflect the true income received by a taxpayer, the Audit Division may determine proper income by using indirect methods (see Holland v. U.S., 348 US 121, 131-132).

F. That petitioners Thomas Amari and Vivian Amari failed to sustain their burden of proof set forth under Tax Law § 689(e) and Administrative Code § T46-189.0(e) to show that the deficiencies in personal income tax generated by the cash availability method were incorrect.

G. That petitioners Thomas Forca and Anita Forca failed to sustain their burden of proof set forth under Tax Law § 689(e) and Administrative Code § T46-189.0(e) to show that the deficiencies in personal income tax generated by the cash availability method were incorrect.

H. That likewise it was proper for the Audit Division to base a deficiency of corporation franchise tax on the constructive dividends calculated in the income tax audits. The corporation did not sustain its burden of proof under Tax Law § 1089(e) to show that such deficiencies were incorrect.

I. That, notwithstanding the above, the Audit Division is directed to determine if the assessments reflect the proper rate of tax on estimated parking receipts (Finding of Fact "4[e]").

J. That the petitions of Cousins Service Station, Inc. and Thomas Forca and Thomas Amari, as officers, Thomas Amari and Vivian Amari and Thomas Forca and Anita Forca, are denied and the aforementioned notices of determination and

demands **for** payment of sales and use taxes due and notices of deficiency are sustained.

DATED: Albany, New **York**

SEP 11 1987


ADMINISTRATIVE LAW JUDGE