

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

RONALD G. PROCTOR  
D/B/A SPRINGWATER AUTOMOTIVE SERVICE

DECISION

for Revision of a Determination or for Refund :  
of Sales and Use Taxes Under Article 28 and 29  
of the Tax Law for the Period June 1, 1980  
through November 30, 1983.

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Petitioner, Ronald G. Proctor d/b/a Springwater Automotive Service, P.O. Box 153, Springwater, New York 14560, 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 November 30, 1983 (File No. 51979).

A hearing was held before Frank Landers, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on March 12, 1987 at 9:15 A.M. with all briefs to be submitted by May 26, 1987. Petitioner appeared by Emil J. Karcich, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUES

I. Whether the Notice of Determination and Demand for Payment of Sales and Use Taxes due was timely issued.

11. Whether the field audit properly determined the amount of sales and use taxes due from petitioner.

111. Whether petitioner **is** subject to a fraud penalty.

FINDINGS OF FACT

1. Petitioner, Ronald G. Proctor d/b/a Springwater Automotive Service, operates a gasoline station and grocery store in Springwater, New York, a rural community about 45 miles south of Rochester. Taxable sales during the periods at issue consisted of gasoline, automotive repairs, hardware, beer, soda, candy, cigarettes and taxable groceries.

2. Petitioner has been registered as a vendor for sales tax purposes since 1966 and filed sales tax returns for all periods up to and including the quarter ending November 30, 1979. Petitioner filed no other sales tax returns until he filed for the quarters ending February 28, 1983, May 31, 1983, August 31, 1983 and November 30, 1983. The returns for the four last mentioned quarters were filed late and were received on April 19, 1983, July 19, 1983, February 15, 1984 and April 18, 1984, respectively.

3. A field audit of petitioner's books and records was conducted by the Rochester District Office for the period June 1, 1980 through November 30, 1983:

- (a) Records Available. The records available were sales tax returns and related worksheets, Federal and state income tax returns, sales journal, purchases journal, purchase invoices, gas pump readings and fuel suppliers' delivery records. The general condition of the records was described as "fair".
- (b) Test Period. The months of September, October and November 1980 were selected as a test period to verify tax due and paid on sales.
- (c) Gasoline Sales. It was found that gasoline sales and tax due were correct as posted in the sales journal and tax accrual account. Tax due on gasoline was \$29,483.11 and represented taxable sales correctly recorded on the books but not reported on the sales tax returns.

- (d) Non-Gasoline Sales. Petitioner's records as to non-gasoline sales were found to be inadequate, since they did not indicate each item sold and whether tax had been collected.
- (i) Purchases for resale of taxable grocery, hardware, cigarettes and soda for the test period were examined to calculate taxable purchases made and taxable ratio. The analysis showed that 63.3% of purchases would generate taxable sales. Accordingly, 63.3% of gross purchases made for the period June 1, 1980 through November 30, 1980 were considered to be taxable. Taxable purchases for the period December 1, 1981 through December 31, 1982 were accepted as shown in the purchases journal. Petitioner's purchases journal showed a taxable percentage of 66% for said period. For the period January 1, 1983 through November 30, 1983, taxable purchases were based on a review of purchase invoices, as purchases for said period were not posted in the purchases journal. Taxable purchases were marked up 27% to calculate sales and tax due for the audit period. The markup was based on conversations between the the auditor and petitioner and by the auditor spot checking shelf prices. Tax due on sales of taxable groceries, hardware, cigarettes and soda was \$9,979.90.
  - (ii) Total purchases of beer as shown in the purchases journal from June 1, 1980 through December 31, 1982 and per purchase invoices for the period January 1, 1983 through November 30, 1983, were marked up by 27% to calculate tax of \$5,253.13 due on beer sales.
  - (iii) Total purchases of oil and kerosene were marked up 50% to calculate tax due of \$1,098.44. The 50% markup was suggested by petitioner and accepted by the auditor.
  - (iv) Tax due on automotive maintenance and repairs was accepted as shown in the sales journal. Tax due was \$197.54.
- (e) No additional tax was found to be due on recurring purchases or capital assets.
- (f) Total tax due on all categories was found to be \$45,967.14. Tax paid for the period December 1, 1982 through August 31, 1983 was \$2,184.24, resulting in total additional tax due of \$43,782.90.

(g) Petitioner cooperated fully in the audit.

4. A consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1980 through August 31, 1980 to December 20, 1983, dated July 18, 1983 with the vendor name "Springwater Automotive Service - Proctor" bears the signature "Ronald G. Proctor" with the title "owner" and the signature date of July 26, 1983. A second such consent extending the period of limitation for the period June 1, 1980 through February 28, 1981 to June 20, 1984 and dated December 8, 1983 bears the signature "Ronald G. Proctor" with the title "owner" and a signature date of December 8, 1983. The second consent also contained the following legend:

"This consent is in addition to, and supplemental to, consent previously executed under date of July 18, 1983 which extended the Statute of Limitations for the periods June 1, 1980 through August 31, 1980 to December 20, 1983 as concerns period of limitations for assessment of taxes noted."

At the hearing, petitioner's representative contended that the first consent dated July 18, 1983 did not bear petitioner's signature. Petitioner, however, offered no evidence that the signature was not his. It is noted that said signature resembles those of petitioner on the second consent and on the sales tax returns, the petition and the power of attorney.

5. On February 28, 1984 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes due to petitioner for the period June 1, 1980 through November 30, 1983 for \$43,782.90 in tax due, \$21,891.47 as a fraud penalty and \$13,647.05 in interest, for a total of \$79,321.42.

6. At a Tax Appeals Bureau conference, the Audit Division agreed to reduce the amount of tax by \$1,089.59 to allow for exempt sales and an inventory adjustment. Accordingly, the assessment was reduced to \$42,693.31, plus fraud penalty and interest.

7. Petitioner had previously been audited for the period March 1, 1979 through May 31, 1980 and tax, penalty and interest were assessed for said period. Petitioner made regular payments on said assessment during the period at issue herein. In 1980 petitioner paid \$24,659.64 against said assessment; he subsequently paid \$5,491.69 in 1981 and \$5,312.63 in 1982.

8. An income tax audit of petitioner Ronald G. Proctor and his wife, Rosa E. Proctor, for the years 1980, 1981 and 1982, which was performed by the net worth method of income reconstruction, showed the following shortages in reported income for said years:

1980	-	\$11,744.52
1981	-	20,883.30
1982	-	287.18

The income tax audit report notes that Mr. and Mrs. Proctor owned a building known as the American Hotel, which they sold in 1980.

#### CONCLUSIONS OF LAW

A. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued within three years of the filing of the returns for the quarters ending February 28, 1983, May 31, 1983, August 31, 1983 and November 30, 1983. Since no returns were filed for the period June 1, 1980 through November 30, 1982, the three year period of limitation of assessment does not apply to said quarters (Tax Law § 1147[b]). Moreover, with respect to the issue of the validity of the consent extending the period of limitation for assessment dated July 18, 1983, it is noted that petitioner has not sustained his burden of proof to show that said consent was invalid. Not only does the signature on the signed consent resemble petitioner's signature on other documents in the record, but the subsequent consent dated December 8, 1983 refers to and acknowledges the earlier consent. Accordingly, the Notice of

Determination and Demand for Payment of Sales Tax and Use Taxes Due was timely issued on February 28, 1984.

B. That Tax Law § 1138(a)(1) provides, in pertinent part, as follows:

"If a return required by this article is not filed, or 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. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

C. That where a taxpayer's records are incomplete or insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous. (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858.)

D. That since petitioner's records as to non-gasoline sales were inadequate (Finding of Fact "3[d]"), it was proper for the Audit Division to perform a markup test on non-gasoline items. The markup test was properly conducted. Moreover, tax assessed due to gasoline sales was based on petitioner's own sales journal and tax accrual account. Petitioner has not sustained his burden of proof to **show** that the audit method or the amount of sales tax assessed was erroneous.

E. That the Audit Division has not sustained its burden of proof to show that petitioner should be subject to a fraud penalty under Tax Law § 1145(a)(2). Although petitioner failed to file some returns and late filed others, he did not attempt to conceal his tax liability. He was, in fact, making regular payments on an earlier tax assessment. While petitioner may be guilty of poor business practices and lack of diligence, there was no showing that his failure

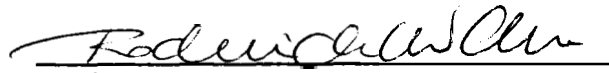
to pay over the tax was due to fraud. The income tax audit findings (Finding of Fact "8") are not persuasive as to fraud, as they are not limited to income from sales connected with the business. It is noted that such findings include Mrs. Proctor's income and any gain generated by the sale of the hotel property in 1980. Petitioner, however, is subject to the 25% penalty set forth in Tax Law § 1145(a)(1).


F. That the petition of Ronald G. Proctor d/b/a Springwater Automotive Service is granted to the extent indicated in Conclusion of Law "E" and is otherwise denied. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on February 28, 1984 **is** to be modified accordingly and, as so modified, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 31 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER