

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

ELIAS CABRERA  
D/B/A CABRERA'S GULF

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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, 1983.

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Petitioner, Elias Cabrera, d/b/a Cabrera's Gulf, Box 7, Kiamesha Lake, New York 12751, 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, 1983 (File No. 52251).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 10, 1986 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly determined additional sales tax due from petitioner based upon an examination of available books and records.

#### FINDINGS OF FACT

1. On February 20, 1984, the Audit Division, as the result of a field examination, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, Elias Cabrera, d/b/a Cabrera's Gulf. Said notice, which encompassed the period June 1, 1980 through August 31, 1983, assessed additional sales tax due of \$36,425.69, plus penalty of \$8,679.89 and interest of \$11,041.66, for a total due of \$56,147.24.

2. Petitioner, on September 12, 1983, executed a consent extending the period of limitation for assessment for the period June 1, 1980 through November 30, 1980 to March 20, 1984.

3. During the period at issue petitioner operated Cabrera's Gulf, a gasoline service station and automotive repair shop located in Kiamesha Lake, New York. Upon its examination, the Audit Division determined that petitioner's books and records were incomplete and inadequate. Petitioner did not maintain complete sales invoices, was missing cash receipts journals for 1982 and 1983, and did not have bank statements for 13 months out of the audit period.

4. In order to verify the accuracy of reported gasoline sales and diesel fuel sales, the Audit Division obtained information from petitioner's suppliers regarding the number of gallons of gasoline and diesel fuel purchased by Mr. Cabrera during the audit period. The Audit Division determined taxable gasoline sales of \$874,109.00 and taxable diesel fuel sales of \$28,989.00 by applying average selling prices to the number of gallons of gasoline and diesel fuel allegedly purchased by petitioner.

5. To compute taxable repair sales, the Audit Division used a test period to determine that repair parts were marked up 50.31 percent and that labor charges equaled 47.5 percent of repair part sales. Taxable repair sales of \$81,503.13 were computed in the following manner:

Parts purchases	\$36,761.60
Parts markup	<u>x 1.5031</u>
Subtotal	\$55,256.36
Labor charges	<u>x 1.475</u>
Total repair sales	<u>\$81,503.13</u>

6. Finally, the Audit Division used estimated markups of 40 percent to determine tire sales; 90 percent for oil, anti-freeze, filter and transmission fluid sales; and 40 percent for battery sales. Said estimated markups were

based on the Audit Division's experience auditing other vendors of a similar nature. The following table details the computation of the tire sales, oil, anti-freeze, filter and transmission fluid sales and battery sales:

	<u>Tires</u>	<u>Oil, etc.</u>	<u>Batteries</u>
Purchases	\$3,756.87	\$26,593.00	\$ 8,121.00
Estimated markup	x 1.40	x 1.90	x 1.40
Audited sales	<u>\$5,259.62</u>	<u>\$50,526.70</u>	<u>\$11,369.40</u>

7. Total audited taxable sales of \$1,051,756.85 (\$874,109.00 gas sales; \$28,989.00 diesel fuel sales; \$81,503.13 repair sales; \$5,259.62 tire sales; \$50,526.70 oil, etc. sales; and \$11,369.40 battery sales) were compared to reported taxable sales of \$531,390.00, to arrive at additional taxable sales of \$520,366.85. Application of the seven percent tax rate to additional taxable sales produced the tax due of \$36,425.69.

8. At the hearing held herein, petitioner alleged that the information received by the Audit Division from his suppliers grossly overstated the number of gallons of gasoline and diesel fuel he purchased during the audit period. No credible documentary or other evidence was presented by petitioner to refute any of the figures or procedures utilized by the Audit Division in determining additional taxable sales.

#### 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.

C. That petitioner provided inadequate and incomplete books and records for purposes of verifying taxable sales. Accordingly, the Audit Division's use of third party verification **of** purchases and average selling prices as a basis for determining petitioner's gasoline and diesel fuel sales was proper pursuant to section 1138(a) **of** the Tax Law.

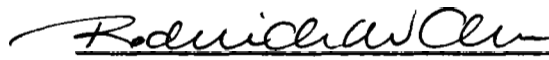
D. That the test period procedure adopted by the Audit Division to compute repair sales and the estimated markups utilized to compute tire sales, **oil**, etc. sales and battery sales were reasonable under the circumstances (Matter of Licata v. Chu, 64 NY2d 873). When a taxpayer's recordkeeping **is** faulty, exactness **is** not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223). Petitioner failed to sustain his 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 AD2d 858).


E. That the petition of Elias Cabrera, d/b/a Cabrera's Gulf, **is** denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated February 20, 1984 **is** sustained.

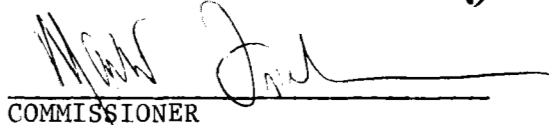
DATED: Albany, New York

MAR 11 1987

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER