

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions

of

B & M SERVICE CENTER, INC. AND  
WILLIAM SCHWING AND MARGARET SCHWING, AS OFFICERS :

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, 1980  
through August 31, 1982.

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Petitioners, B & M Service Center, Inc. and William Schwing and Margaret Schwing, as officers, 569 Route 109, West Babylon, New York 11704, 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 December 1, 1980 through August 31, 1982 (File Nos. 52372, 53048 and 53049).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 16, 1986 at 2:15 P.M., with additional evidence to be submitted by September 15, 1986. Petitioner William Schwing appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Michael Infantino, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly determined additional sales taxes due on the basis of external indices.

II. Whether William Schwing and Margaret Schwing were persons required to collect tax and were, therefore, personally liable for all sales and use taxes due from B & M Service Center, Inc.

FINDINGS OF FACT

1. On March 8, 1984, the Audit Division issued against petitioner, B & M Service Center, Inc. ("B & M"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1980 through August 31, 1982, asserting a tax due of \$75,467.00, plus penalty of \$18,517.70 and interest of \$25,768.43, for a total due of \$119,753.13. Identical notices were mailed to petitioners, William Schwing and Margaret Schwing, as officers of B & M, on April 30, 1984.

2. By letter dated July 19, 1983, the Audit Division informed B & M that an audit of its State tax returns was being conducted and requested that petitioner respond to a questionnaire and provide a copy of certain Federal tax returns. Two follow-up letters were sent on or about September 7, 1983 and November 14, 1983, respectively. No reply was received to any of the letters sent.

3. Because B & M failed to respond to the Audit Division's requests, additional sales tax due was determined on the basis of available information. B & M's gasoline supplier provided the Audit Division with a record of B & M's gasoline purchases for the periods under consideration. Within each sales tax quarter, the number of gallons purchased was multiplied by the statewide average selling price of gasoline during the same quarter to determine audited gasoline sales. The selling prices were appropriately adjusted to remove sales tax included in the price.

4. Prior to the audit of B & M, the Audit Division's District Office had conducted a survey of gasoline stations in the Long Island area. The auditor who observed B & M noted that there were two mechanics on duty and three repair bays, from which it was concluded that B & M performed a moderate number of

repairs, including tax exempt New York State inspections. Based on past audit experience, repair sales were estimated at 38 percent of audited gasoline sales.

5. Using the methodology described, the Audit Division calculated additional tax due as follows:

Audited gasoline sales	\$ 864,417.00
Audited repair sales	328,479.00
Total audited sales	<u>\$1,192,896.00</u>
Audited tax due	\$ 85,032.00
Sales tax paid	9,565.00
Additional tax due	<u>\$ 75,467.00</u>

6. William Schwing was the president of B & M. He operated the gas station; hired, fired and paid employees; signed all sales tax returns; and provided information to an account from which all tax returns were prepared.

7. Margaret Schwing was the vice president of B & M. Her association with the corporation was merely a formality. She had no involvement with the operation of the gas station, did not maintain or review its books and records and signed checks only on occasion and at the direction of her husband.

8. Petitioners strongly objected to the audit methodology and results. However, no documentary evidence was introduced which supported their contention that the assessment was in error.

#### CONCLUSIONS OF LAW

A. That in light of B & M's failure to respond to the Audit Division's questionnaire or to make available any records from which its reported sales could be verified, the Audit Division was justified in estimating B & M's tax liability on the basis of the information available to it (Tax Law §1138(a)(1); Matter of Ristorante Puglia v. Chu, 102 AD2d 348, 350). Because petitioners

failed to demonstrate that either the audit methodology or the result arrived at was erroneous, the assessment is upheld.

B. That petitioner William Schwing was actively involved in the day-to-day operations of B & M, signed checks on the corporate account, hired and fired employees and signed tax returns. Therefore, he was a person required to collect sales and use taxes and is personally liable for the taxes imposed by Articles 28 and 29 of the Tax Law (Tax Law §§1131[1]; 1133[a]).

C. That Margaret Schwing had no day-to-day responsibilities in the corporation and no knowledge of or involvement in the financial affairs and management of the corporation. Therefore, she is not personally liable for sales and use taxes due from B & M.

D. That the petition of Margaret Schwing is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued against Margaret Schwing on April 30, 1984 is cancelled.

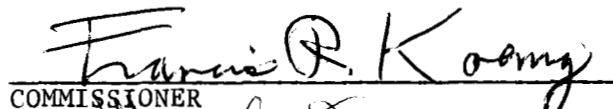
E. That the petitions of B & M Service Center, Inc. and William Schwing are denied and the notices of determination and demands for payment of sales and use taxes due issued March 8, 1984 and April 30, 1984, respectively, are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

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