

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition

of

FATHER & SON 170 ATLANTIC AVE. CAR CORP.

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 September 1, 1980  
through May 31, 1982.

---

In the Matter of the Petition

of

EDWARD MKRTICHIAN ,  
OFFICER OF FATHER & SON :  
170 ATLANTIC AVE. CAR CORP. :

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 September 1, 1980  
through May 31, 1982.

---

DECISION

In the Matter of the Petition

of

FATHER & SON 170 ATLANTIC AVE. CAR CORP.

for Redetermination of a Deficiency or for  
Refund of Corporation Franchise Tax under  
Article 9-A of the Tax Law for the Fiscal  
Years Ending June 30, 1981 and June 30, 1982.

---

In the Matter of the Petition

of

EDWARD AND LOUISE NKRTICHIAN

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1980 and 1981.

---

Petitioner, Father & Son 170 Atlantic Ave. Car Corp., 170 Atlantic Avenue, Lynbrook, New York 11563, 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 September 1, 1980 through May 31, 1982 (File No. 52401).

Petitioner, Edward Mkrtichian, Officer of Father & Son 170 Atlantic Ave. Car Corp., 57 Bulaire Road, East Rockaway, New York 11518, 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 September 1, 1980 through May 31, 1982 (File No. 53477).

Petitioner, Father & Son 170 Atlantic Ave. Car Corp., 170 Atlantic Avenue, Lynbrook, New York 11563, 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 fiscal years ending June 30, 1981 and June 30, 1982 (File No. 52991).

Petitioners, Edward and Louise Mkrtichian, 57 Bulaire Road, East Rockaway, New York 11518, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1980 and 1981 (File Nos. 53022 and 53238).

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 9, 1986 at 10:30 A.M. Petitioners appeared by Andrew Eracleous. 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 was

based on purchases reported by gasoline suppliers, estimated repair sales, and personal income as per an indirect audit method.

FINDINGS OF FACT

1. Petitioner, Father & Son 170 Atlantic Ave. Car Corp. ("the corporation"), operated a Texaco gasoline service station at 170 Atlantic Avenue, Lynbrook, New York, during the periods at issue. Petitioner Edward Mkrtichian was president and sole shareholder of the corporation. Petitioner Louise Mkrtichian is the wife of Edward Mkrtichian.

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>
Father & Son 170 Atlantic Ave. Car Corp.	Sales & Use Tax	6/1/80-5/31/82
Father & Son 170 Atlantic Ave. Car Corp.	Corporation Franchise Tax	FYE 6/30/81, 6/30/82
Edward & Louise Mkrtichian	Personal Income Tax	1980, 1981, 1982

The Sales Tax Audit

3. Gasoline distributor information was compared to the corporation's records for the following periods:

<u>DISTRIBUTOR</u>	<u>PERIOD</u>
Jal Oil Co., Inc.	12/80, 1/81, 2/81
Conlo Service, Inc.	9/80, 10/80, 11/80
Nobek Distributors, Inc.	6/81, 7/81, 8/81

The corporation's records revealed gasoline purchases from only one supplier, Jal Oil Co., Inc. Accordingly, the auditor requested purchase verification for the entire audit period from each supplier.

4. Verification for the entire audit period was received from Jal Oil Co., Inc. and Conlo Service, Inc., but nothing further was received from Nobek Distributors, Inc. Unreported gasoline purchases were determined to be 66,294

gallons for the fiscal year ending June 30, 1981 and 22,852 gallons for the fiscal year ending June 30, 1982.

5. Due to the lack of sales invoices and purchase invoices applicable to repairs and the omission of gasoline purchases, petitioner's records were deemed inadequate and external indices and the auditor's experience were used to determine tax due. The auditor marked up "other purchases" per books by 30 percent and then added labor as follows:

FYE 6/30/81	-	1 mechanic at \$20.00 per hour for 35 hours
FYE 6/30/82	-	2 mechanics at \$25.00 per hour for 35 hours

6. Additional taxable sales from gasoline and repairs were divided by taxable sales to determine the margin of error. The margin of error was then applied to reported taxable sales to arrive at the additional tax due:<sup>1</sup>

<u>PERIOD ENDED</u>	<u>ADDITIONAL TAX DUE</u>
11/30/80	\$ 861.66
2/28/81	948.23
5/31/81	842.27
8/31/81	1,012.43
11/30/81	1,192.16
2/28/82	1,018.66
5/31/82	<u>1,114.21</u>
Total	\$6,989.62

7. On March 2, 1984, the Audit Division issued notices of determination and demands for payment of sales and use taxes due against the corporation and Edward Mkrtichian, as officer. The notices were for \$6,989.62 in additional tax due, plus \$2,000.10 in simple interest, for a total of \$8,989.72 for the

---

1 It is noted that the auditor's worksheets as to these calculations are not in the record. Accordingly, the amounts of taxable sales, additional taxable sales, reported taxable sales and the margin of error, are unavailable.

period September 1, 1980 through May 31, 1982. The notice against Edward Mkrtichian contained the following explanation:

"You are personally liable as officer of Father & Son 170 Atlantic Avenue Car Corp. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

The Corporation Franchise Tax Audit

8. The auditor increased the corporation's income based on information obtained in the sales tax audit. The Statement of Franchise Tax Audit Changes dated March 5, 1984 explained as follows:

"As the result of a field audit the following adjustments are being made:

	<u>y/e 6/30 1981</u>	<u>y/e 6/30 1982</u>
Additional Sales per Audit	65,007.31	64,694.76
Unreported Purchases per 3rd Party Verification	(45,512.03)	(34,833.74)
Net Adjustment	19,495.28	29,861.02
Taxable Income as Reported	( 2,309.96)	43.79
Corrected Taxable Income	17,185.32	29,904.81"

9. On March 5, 1984, the Audit Division issued statements of audit adjustment and notices of deficiency to the corporation in the following amounts:

<u>F/Y/E</u>	<u>TAX</u>	<u>INTEREST</u>	<u>ADDITIONAL CHARGE</u>	<u>TOTAL</u>
6/30/81	\$1,468.53	\$572.81	\$ 73.43	\$2,114.77
6/30/82	2,740.48	573.77	137.02	3,451.27

The Income Tax Audit

10. Petitioners Edward and Louise Mkrtichian filed joint New York State resident income tax returns for the years 1980, 1981 and 1982.

11. Since cancelled checks and certain other records were not produced, the auditor analyzed Mr. and Mrs. Mkrtichian's income by using the cash availability method of income reconstruction for the years 1980 and 1981. The following **is** a summary of the analysis:

a) 1980

Cash In

Wages (net of taxes)	\$14,962	
Rental Income	15,412	
Royalty Income (as per IRS audit adjustment)	<u>8,912</u>	
Total Cash In		\$39,286

Cash Out

Deposits to: checking a/c	\$ 3,294 <sub>2</sub>	
savings a/c	<u>22,572</u>	
Total Deposits		\$25,866
Downpayment on purchase of rental property		38,375 <sup>3</sup>
Cash living expenses and rental property expenses	\$38,898 <sup>4</sup>	
Less: checks drawn	<u>( 3,250)</u>	
Net cash living expenses		<u>35,648</u>
Total Cash Out		<u>99,889</u>
Cash Shortage		\$60,603

- 
- 2 Interest increased from \$1,183.11 in 1979 to \$3,636.46 in 1981. Petitioners showed that \$1,099.05 was earned on a \$10,000.00 certificate of deposit. The balance of the increase, \$1,354.30, was extrapolated at 6 percent and net unexplained deposits of \$22,572.00 were determined.
- 3 Petitioners apparently made this downpayment on the purchase of rental property in March 1980.
- 4 Amounts for living expenses were estimated based on a review of returns and office experience.

b) 1981

Cash In

Wages (net of taxes)	\$15,352	
Rental Income	<u>22,015</u>	
Total Cash In		\$37,367

Cash Out

Deposits to: checking a/c	\$ 5,325	
savings a/c	<u>-0-</u>	
Total Deposits		5,325
Cash living expenses	39,214	
Less: checks drawn	<u>(5,349)</u>	
		<u>33,865</u>
Total Cash Out		<u>39,190</u>
Cash Shortage		\$ 1,823

12. A Statement of Personal Income Tax Audit Changes was issued to Mr. and Mrs. Mkrtichian on February 1, 1984 and explained as follows:

"As a result of a field examination, the following adjustments are being made:

	<u>1980</u> H	<u>1980</u> W	<u>1981</u> J
Other Income Erroneously Omitted	60,603.00		1,823.00
Unreported Federal Changes Royalty	<u>8,912.00</u>		
Net Adjustment	69,515.00	<u>-0-</u>	<u>1,823.00</u>
Taxable Income			
Previously Stated	13,119.56	2,886.46	16,357.07
Corrected Taxable Income	82,634.56	2,886.46	18,180.07"

13. On March 26, 1984, the Audit Division issued two notices of deficiency to Mr. and Mrs. Mkrtichian. One was for additional tax due of \$17.50 with no penalty and interest of \$6.19, for a total amount of \$23.69 for the year 1980. The second Notice of Deficiency was for additional tax of \$229.11, penalty of \$11.46 and interest of \$284.15, for a total amount due of \$524.72 for the year 1981. On April 6, 1984, a Notice of Deficiency for 1980 was issued to petitioner Edward Mkrtichian for additional tax due of \$9,455.58, penalty of \$472.78, and interest of \$3,349.37, for a total amount due of \$13,277.73.

CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law requires every person required to collect tax to maintain records of every sale and to make these records available for audit. In view **of** the gallonage reported by gasoline distributors, it was determined that the corporation's books were inadequate and incomplete. The Audit Division was thus authorized to estimate taxable sales, using the information available to it and an audit methodology reasonably calculated to reflect the taxes due (Tax Law § 1138[a][1]; Matter of Grant Co. v. Joseph, 2 NY2d 196, 206, cert. denied 355 US 869).

B. That the corporation and Edward Mkrtichian, as officer 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.)

C. That where there is some factual basis for deciding that the tax returns as filed do not accurately reflect the true income received by a taxpayer, the Audit Division may determine proper income using indirect methods. (See Holland v. United States, 348 US 121, 131-132.) The sales tax audit conducted by the Audit Division revealed additional sales tax due from the corporation. Such determination provided a factual basis for deciding that the income reported by the corporation on its corporation franchise tax reports was not accurate and, thus, the Audit Division properly used the sales tax audit findings to calculate corporation franchise tax. Nowhere **in** the Tax Law or regulations **is** the Audit Division precluded from utilizing the results of an audit conducted under one article of the Tax Law **in** an audit conducted under another article. (See Matter of Castaldo, State Tax Commission, February 15, 1985.) Moreover, the corporation has not met its burden of proof under section



1089(e) of the Tax Law to show that there were additional costs or expenses associated with the additional sales, nor was any other evidence produced indicating that the audit was inaccurate.


D. That the Audit Division utilized an indirect audit method in calculating additional personal income tax due from petitioners Edward and Louise Mkrtichian because cancelled checks and certain other records were not produced. Said petitioners have not met their burden of proving by clear and convincing evidence that the deficiency was erroneous. (See Matter of Scarpulla v. State Tax Commn., 120 AD2d 842.)

E. That the petitions of Father & Son 170 Atlantic Ave. Car Corp., Edward Mkrtichian, as officer of Father & Son 170 Atlantic Ave. Car Corp., and Edward and Louise Mkrtichian, are denied and the aforementioned notices of determination and demands for payment of sales and use taxes due and notices of deficiency are sustained.

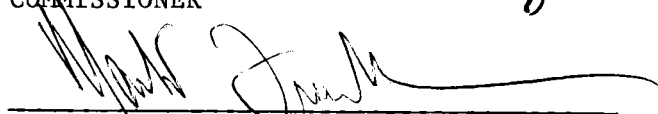
DATED: Albany, New York

STATE TAX COMMISSION

JUN 18 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER