

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DAWSON WHITMAN SERVICE 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 August 31, 1982. :

In the Matter of the Petition :
of :
ARTHUR MILICI, :
OFFICER OF DAWSON WHITMAN SERVICE 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 August 31, 1982. :

DECISION

In the Matter of the Petition :
of :
KENNETH KAHN, :
OFFICER OF DAWSON WHITMAN SERVICE 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 August 31, 1982. :

Petitioner Dawson Whitman Service Corp., 231 Walt Whitman Road, Huntington Station, New York 11746, 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 August 31, 1982 (File Nos. 52602/54217/55348).

Petitioner Arthur Milici, officer of Dawson Whitman Service Corp., 693 Wildwood Road, West Hempstead, New York 11552, 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 August 31, 1982 (File Nos. 52603/54216/55349).

Petitioner Kenneth Kahn, officer of Dawson Whitman Service Corp., c/o 880 Old Country Road, Ltd., 880 Old Country Road, Westbury, New York 11590, 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 August 31, 1982 (File Nos. 52604/54218/55350).

A consolidated hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 29, 1986 at 2:00 P.M. Petitioners appeared by Frederic N. Bruckner, Esq. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether, prior to the conduct of a field audit, the Audit Division may utilize external indices.

II. Whether the Audit Division properly assessed a penalty based upon fraud.

FINDINGS OF FACT

1. On December 20, 1983, the Audit Division, as the result of an audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to each of the petitioners herein, Dawson Whitman Service Corp. ("Dawson"), Arthur Milici and Kenneth Kahn, assessing taxes due of \$38,932.62, plus a 50

percent fraud penalty of \$19,466.31 and interest of \$15,246.87, for a total due of \$73,645.80 for the period September 1, 1980 through February 28, 1981.

2. On June 20, 1984, the Audit Division issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due to each of the petitioners assessing taxes due of \$8,269.15, plus a 50 percent fraud penalty of \$4,134.58 and interest of \$3,292.87, for a total due of \$15,696.60 for the period March 1, 1981 through August 31, 1981.

3. Lastly, on August 20, 1984, the Audit Division issued a third Notice of Determination and Demand for Payment of Sales and Use Taxes Due to each of the petitioners assessing taxes due of \$71,874.27, plus a 50 percent fraud penalty of \$35,937.14 and interest of \$22,855.87, for a total due of \$130,667.28 for the period September 1, 1981 through August 31, 1982.

4. During the period at issue, Dawson operated an Award Service Station at 231 Walt Whitman Road, Huntington Station, New York. Petitioners Arthur Milici and Kenneth Kahn were officers of Dawson and they do not contest the fact that they are liable for the taxes determined to be due from Dawson. Dawson's gasoline distributor was Award Petroleum, Inc. ("Award").

5. At a point in time not indicated in the record, the Audit Division's Central Office Audit Bureau in Albany saw a discrepancy between taxable sales as reported on Dawson's sales tax return for the period September, October and November, 1980 and those which it computed based on information supplied by Award for the same period. Therefore, on May 11, 1982, Dawson was assigned to the Suffolk District Office for audit.

6. On November 16, 1982, the auditor met with Dawson's accountant and, despite prior notice, the only records presented were copies of sales tax returns for part of the audit period. In a letter dated November 17, 1982 to

Award, the auditor requested Dawson's gasoline purchases for the period November 1, 1980 through August 31, 1982. On March 17, 1983, the auditor met with Dawson's accountant and again, despite prior notice, no books and/or records were presented for audit. Dawson's books and records, if any, were never made available to the auditor, and the auditor subsequently issued the above notices based on information supplied by Award.

7. At the hearing, petitioners' representative did not protest the computation of the additional taxes, but rather contended that petitioners were denied the opportunity to produce books and records within a reasonable amount of time. Petitioners also argue that the Audit Division has failed to establish an adequate foundation for contacting the third party involved in this case, Award, and, consequently, the Audit Division should not be allowed to use the information obtained from Award.

8. Petitioners did not offer in evidence their books and/or records.

9. The auditor testified that fraud penalty was imposed because of the magnitude of the additional taxes in relation to taxes reported by Dawson on its sales tax returns. The auditor computed taxable sales for the audit period of \$2,135,004.00, whereas Dawson reported taxable sales of \$469,324.00.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law governs when external indices may be used. The statute provides, in pertinent part, 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. 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.

B. That, in this regard, Matter of Christ Cella, Inc. v. State Tax Comm. (102 A.D.2d 352) instructs us that the markup test could not be used unless petitioner's records were so insufficient that their sales could not be verified or such records were unavailable. In the instant case, the auditor used the external index to compute petitioners' sales tax liability after it became obvious that books and records would not be forthcoming. Further, there is nothing in the Tax Law which prohibits the Audit Division from reviewing an external index.

C. That section 1145(a)(2) of the Tax Law was added by section 2 of chapter 287 of the laws of 1975. During the period in issue, this paragraph provided:

"If the failure to file a return or to pay over any tax to the tax commission within the time required by this article is due to fraud, there shall be added to the tax a penalty of fifty percent of the amount of the tax due (in lieu of the penalty provided for in subparagraph (i) of paragraph one), plus interest..."

D. Section 1145(a)(2) of the Tax Law was enacted by the Legislature with the intention of having a penalty provision in the Sales and Use Tax Law which was similar to that which already existed in the Tax Law with respect to deficiencies of, inter alia, personal income tax (N.Y. Legis. Ann., 1975, p. 350). Thus, the burden placed upon the Audit Division to establish fraud at a hearing involving a deficiency of sales and use tax is the same as the burden placed upon the Audit Division in a hearing involving a deficiency of personal income tax. A finding of fraud at such a hearing "requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations,

resulting in deliberate nonpayment or underpayment of taxes due and owing."

(Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982).

E. That based on the evidence presented, the Audit Division has not sustained its burden of proving that the imposition of a fraud penalty is warranted. However, since the petitioners have failed to demonstrate that the failure to pay the taxes at issue was due to reasonable cause and not due to willful neglect, a penalty pursuant to Tax Law section 1145(a)(1) is hereby imposed.

F. That the petitions of Dawson Whitman Service Corp., Arthur Milici and Kenneth Kahn are granted to the extent indicated in Conclusion of Law "E"; the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued December 20, 1983, June 20, 1984 and August 20, 1984; and that, except as so granted, the petitions are denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 07 1986


PRESIDENT


COMMISSIONER


COMMISSIONER