

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petitions

of

SJS SERVICE STATION, INC.  
AND HAROLD TEPPER, AS OFFICER

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 September 1, 1980 :  
through May 31, 1981.

---

Petitioners, **SJS** Service Station, Inc. and Harold Tepper, as officer, 25 Gary Street, Lindenhurst, New York 11757, each 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, 1981 (File Nos. 52956 and 52957).

A 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 October 20, 1986 at 1:15 P.M. Petitioners appeared by Robert Wolk, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Mark F. **Volk**, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly determined the additional sales taxes due from petitioner SJS Service Station, Inc. for the period at issue.

#### FINDINGS OF FACT

1. On April 20, 1984, the Audit Division, as the result of a field audit, issued to petitioner SJS Service Station, Inc. ("SJS") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a sales tax due **of** \$18,151.59, plus penalty of \$4,537.89 and interest of \$7,853.19, for a total

amount due of \$30,542.67 for the period September 1, 1980 through May 31, 1981. On the same date, the Audit Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Harold Teppner which was identical as to amounts and period as the notice issued to SJS. The notice issued to Mr. Teppner provided, in pertinent part, as follows:

"You are personally liable as officer of **SJS** Service Station, Inc. 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."

2. On August 8, 1983, SJS, by signature of its president, Mr. Teppner, executed a consent extending the statute of limitations for issuing an assessment for sales and use taxes for the period September 1, 1980 through August 31, 1981 to December 20, 1984.

3. SJS operated an Award service station at 643 Broadway in Massapequa, New York, from September 1, 1980 until approximately April 1981 when the station was closed because it was losing money. SJS employed one or two mechanics who performed auto repairs in addition to selling gasoline. Petitioner Harold Teppner does not contest the assertion that **he** was a responsible officer of SJS.

4. On May 17, 1983, more than two years after SJS had ceased operations, the Audit Division initiated an audit of its books and records. In the intervening period, **SJS's** source documents such as sales invoices, purchase invoices and cash register tapes were either lost or thrown out. In consideration of **this deficiency, the auditor decided to use external indices such as third party information and prior auditing experience to determine SJS's sales tax liability.**

5. The auditor first contacted SJS's gasoline distributor, Dart Petroleum, Inc. ("Dart"), and was advised that, for the audit period, SJS purchased

234,056 gallons of regular and unleaded gasoline. This amount was multiplied by the average retail selling price, after allowing for the New York State tax on gasoline and the sales tax, to compute audited taxable gasoline sales of \$265,563.51. The auditor next computed taxable repairs of \$33,600.00 by multiplying the number of mechanics employed per SJS's payroll records times \$20.00 per hour times 40 hours per week times 13 weeks per quarter. For the quarterly period beginning March 1, 1981, the auditor erroneously used 3 weeks instead of 7 weeks (when petitioner ceased operations). Taxable parts sales were estimated to be \$16,800.00, or 50 percent of taxable repairs based on prior auditing experience. The auditor then allowed a credit for a nontaxable sale to the U.S. Post Office of \$650.00. Lastly, the auditor computed audited taxable sales of \$315,313.00 ( $\$265,563.51 + \$33,600.00 + \$16,800.00 - \$650.00$ ), which, when reduced by taxable sales reported of \$56,004.00, resulted in additional taxable sales of \$259,309.00 and additional sales tax due of \$18,151.63.

6. Petitioners argued that SJS purchased an amount of gasoline considerably less than reported by Dart. Subsequent to the conduct of the audit, petitioners attempted to obtain from Dart copies of signed delivery tickets, but was advised that they were not available. At the hearing, petitioners presented a general ledger, check stubs and bank statements for the audit period to support its contention. However, said records, absent source documents, are insufficient to show that the Audit Division's computation of additional gasoline sales is erroneous.

7. Petitioners also failed to present any evidence that the repair and parts sales as determined by the Audit Division were erroneous.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of 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.

B. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that if a sales and use tax return **is** not filed, **or** if filed **is** incorrect or insufficient, the amount **of** tax due shall be determined from such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices.

C. That the books and records of SJS Service Station, Inc. were inadequate and incomplete for purposes of determining taxable sales or sales tax due. Therefore, the use of external indices **is** permissible (Matter of Korba v. New York State Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division's determination **of** additional tax due was proper pursuant to section 1138(a)(1) of the Tax Law. Exactness **is** not required where it **is** the taxpayer's **own** failure to maintain proper records which prevents exactness in the determination **of** sales tax liability (Matter of Markowitz v. State Tax Commission, 54 AD2d 1023).

D. That the petitions of SJS Service Station, Inc. and Harold Tepper, as officer, are denied; and the notices **of** determination and demands for payment of sales and use taxes due issued April 20, 1984 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 10 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER