

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

GUY MONTI SERVICE CENTER, INC.

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 March 1, 1981
through August 31, 1982.

Petitioner, Guy Monti Service Center, Inc., 254 Elmont Road, Elmont, New York 11003, 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 March 1, 1981 through August 31, 1982 (File No. 54731).

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 22, 1986 at 9:15 A.M., with all briefs to be filed by December 31, 1986. Petitioner appeared by Peter R. Newman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was properly given to petitioner.

II. Whether the Audit Division properly determined additional sales taxes due from petitioner for the period March 1, 1981 through August 31, 1982.

III. If so, whether penalty should be cancelled.

FINDINGS OF FACT

1. On April 25, 1984, the Audit Division issued to "Monti Guy Service Center, Inc. [sic]" a Notice of Determination and Demand for Payment of Sales

and Use Taxes Due (No. S840413402C). The notice was issued to the above corporation at 254 Elmont Road, Elmont, New York. The notice asserted a sales tax due of \$94,620.61, plus penalty of \$23,475.90 and interest of \$27,834.41, for a total amount due of \$145,930.92, for the period March 1, 1981 through August 31, 1982. The notice also contained the following explanation:

"The tax due was computed by marking up your purchases of gasoline reported by your distributor. Your average selling price of gasoline was computed for each period based **on** the average retail selling prices. The sales other than gasoline were marked up based **on** normal industry practices. Your average selling price less exempt taxes was then applied to gasoline purchases plus other sales to determine taxable sales."

It should be noted that "Monti Guy Service Center, Inc," is not a known legal entity.

2. On July 23, 1984, petitioner, Guy Monti Service Center, Inc., filed a petition to review Notice No. S840413402C. Petitioner contended that the assessment was made without adequate audit and in an arbitrary and capricious manner.

3. On September 10, 1984, the Audit Division issued a letter to petitioner's representative wherein it explained the basis for issuing the assessment. The letter provided, in pertinent part, the following:

"On June 27, 1983 a letter and questionnaire were sent to you. On August 18, 1983 a follow up letter was sent. There were **no** replies to our letters.

Enclosed is a copy of the worksheet used to determine the additional tax due. As you **can** see the information used was supplied by the distributor. Since the questionnaire was not returned, these were the only figures we had to go by.

The situation may be resolved prior to the scheduling of a hearing, but in order to do so the enclosed questionnaire must be completed and returned within twenty (20) days.

If you choose not to complete the questionnaire, a hearing will then be scheduled. Please advise us of your decision."

4. During the period at issue, petitioner operated an Exxon service station at 254 Elmont Road, Elmont, New York. In addition to gasoline and oil sales, petitioner also performed auto repairs.

5. By contacting the Exxon Corporation, petitioner's distributor, the Audit Division ascertained that petitioner purchased 888,700 gallons of gasoline during the audit period. Petitioner also purchased motor oil, tires and batteries from Exxon. The gallons purchased were multiplied by the average retail selling price, after allowing for the New York State excise tax and the sales tax, to determine audited taxable gasoline sales of \$1,052,693.20. This amount was increased by 38 percent (\$400,023.42) to \$1,452,716.62 in consideration of petitioner's auto repairs and sales of motor oil, tires and batteries. This amount, audited taxable sales, **was** multiplied by the applicable sales tax rate to determine sales tax due of \$104,356.53, which, when reduced by sales tax paid by petitioner of \$9,735.92, resulted in additional sales tax due of \$94,620.61.

6. On or about January 31, 1986, petitioner filed a Tax Amnesty Application whereby it agreed to a portion of the sales tax found due, specifically \$37,826.95, plus interest. Petitioner's accountant testified that this underpayment was the result of an error committed by an individual in his employ. Petitioner paid the required one-half of this amount, plus applicable interest, at the time of filing the application and the remaining balance, plus applicable interest, in two equal installments on February 26 and March 28, 1986.

7. At the hearing, petitioner argued that the notice was jurisdictionally defective because it was addressed to Monti Guy Service Center, Inc., an unknown entity, and not Guy Monti Service Center, Inc. In the alternative, petitioner argued that the assessment should be cancelled because the audit workpapers introduced into evidence were not supported by testimony **of** the

auditor who prepared them. Finally, petitioner argued that the penalty should be cancelled in the event the assessment is sustained.

8. The auditor who testified at the hearing could not explain the source of the workpapers, but merely attested to their mathematical accuracy.

9. Petitioner did not offer its books and records into evidence.

10. Petitioner also failed to present any evidence that its failure to remit the taxes at issue was due to reasonable cause and not due to willful neglect.

CONCLUSIONS OF LAW

A. That, in this case, the fact that the Audit Division's Notice of Determination and Demand for Payment of Sales and Use Taxes Due misnamed petitioner as Monti Guy Service Center, Inc. is merely a minor technical defect which should be disregarded. A misnomer of a notice is not, in all instances, a jurisdictional defect which renders it void. The misnomer in the notice should be ignored because petitioner acted upon the notice as though it were addressed to petitioner. The misnaming is more in the nature of a clerical error, and does not require dismissal of the notice. (See Matter of Luciano Stemberger, State Tax Commission, February 10, 1987; Matter of Paul and Doreen Panza, State Tax Commission, June 17, 1986.)

B. That **in** light of petitioner's failure to respond to the Audit Division's questionnaire, the Audit Division was justified in employing external indices, in this instance information from a third party and normal industry practices, to determine petitioner's sales tax liability.

C. That, under the circumstances herein, the Audit Division reasonably calculated the tax liability of petitioner and petitioner has failed to demonstrate by clear and convincing evidence that the method used to arrive at the assessment or the assessment itself was erroneous (Matter of Ristorante Puglia, Ltd. v. Chu, 102 AD2d 348, 351; Matter of Surface Line Operators Fraternal

Organization, Inc. v. Tully, 85 AD2d 858, 859). Petitioner has failed to present its books and records for review.

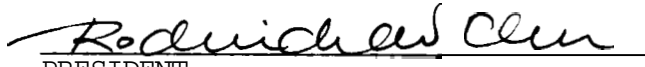
D. That the penalty imposed on the \$37,826.95 which petitioner paid under Amnesty is hereby cancelled. However, since the petitioner did not explain or show that reasonable cause existed for the understatement of its tax liability, penalty imposed on the remainder of its liability is sustained.

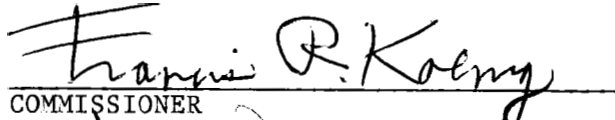
E. That the petition of Guy Monti Service Center, Inc. **is** granted to the extent indicated in Conclusion of Law "D"; the Audit Division **is** hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 25, 1984; and that, except as so granted, the petition is denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 13 1987


PRESIDENT


COMMISSIONER


COMMISSIONER