

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
CHRIS CURCIO	:	DECISION
D/B/A C & S SERVICE STATION	:	
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 February 28, 1982.	:	

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Petitioner, Chris Curcio d/b/a C & S Service Station, 3003 Coney Island Avenue, Brooklyn, New York 11235, 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 February 28, 1982 (File No. 54738).

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 October 22, 1986 at 1:15 P.M. Petitioner appeared by William T. Barbera, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

#### ISSUE

Whether it was proper for the Audit Division to compute petitioner's gasoline sales using information allegedly received from **his** distributor of gasoline.

#### FINDINGS OF FACT

1. Petitioner, Chris Curcio d/b/a C & S Service Station, operated a Mobil gasoline station at 3003 Coney Island Avenue, Brooklyn, New York. Timely New York State and local sales and use tax returns were filed by petitioner for all

four quarters during the period at issue herein. The return for the quarter ending February 28, 1982 was marked as "'Final' Business Closed 2/28/82".

2. The Audit Division sent a "Filling Station Questionnaire" to petitioner requesting that he furnish, for the quarter ending February 28, 1982, sales and purchase information from his books and records. **In** his response, petitioner indicated that for the months of December 1981 and January 1982 he purchased 23,000 gallons and 22,000 gallons of gasoline, respectively. On said questionnaire, Mr. Curcio also indicated that his gasoline sales (including federal and state fuel tax) totalled \$27,830.00 for December of 1981 and \$26,620.00 for January of 1982 and that there were no purchases or sales made in February of 1982 since the business had closed. Mr. Curcio certified that the information provided on the questionnaire accurately reflected the figures contained in his books and records. The sales information provided on said questionnaire was in substantial agreement with the sales figure reported on petitioner's return for the quarter ending February 28, 1982.

3. On April 30, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and **Use** Taxes Due to "C-S Service Curcio Chris". Said notice, which encompassed the period March 1, 1981 through February 28, 1982, assessed sales tax due of \$31,422.79, plus penalty of \$7,855.69 and interest of \$11,079.58, for a total amount due of \$50,358.06. The following explanation was provided in a document appended to said notice:

"Total tax due was determined from the following sources:

- (A) New York State Sales and Use Tax returns filed for period 03/01/81 - 02/28/82.
- (B) Form AU264.3 'Filling Station Questionnaire'
- (C) Distributor records indicating gallons and cost of product purchased for period 1981 and 1982.
- (D) Form 1040, Schedule C Profit or (Loss) from Business or Profession

Tax due was computed by marking up purchases of gasoline, as reported by the distributor.

The average selling price of gasoline was computed for each period based upon a comparison of your selling price as indicated on the submitted questionnaire, to the statewide average selling price.

The adjusted statewide average selling price, less exempt taxes, was then applied to gasoline purchases to determine taxable sales.

Added to these gasoline sales were sales of motor oil, as determined from the above listed sources and this departments [sic] auditing experience.

Sales tax at the rate of 8% and 8½% was applied to total audited sales, credit was given for sales and use taxes paid, penalty and interest was computed to April 30, 1984."

4. Submitted in evidence on behalf of the Audit Division as Exhibit "E" were three documents, each entitled "Sales To Individual Customers". These documents identified Chris Curcio as the customer and allegedly represent computerized breakdowns received from Mobil Oil Company showing the volume of gasoline purchased by Mr. Curcio. The documents for December of 1981 and December of 1982 each contained a column headed "Volume", wherein the following figures were shown:

<u>Product Description</u>		<u>Dec. 1981</u>	<u>Dec. 1982</u>
Mobil Super Unlead	C	25,500	28,000
	Y	223,500	264,925
Mobil Regular	C	65,175	31,550
	Y	274,468	425,450
Mobil Spec/Unld	C	19,825	24,450
	Y	188,525	242,625
Total	C	110,500	84,000
	Y	686,493	933,000

5. The Audit Division interpreted the "C" in the above chart to represent current month gasoline purchases and the "Y" to represent year-to-date gasoline purchases. The Audit Division apparently deemed petitioner's books and records inadequate and incomplete by comparing the 23,000 gallons of gasoline reported

by petitioner on the questionnaire as having been purchased in December of 1981 to the December 1981 current month volume figure of 110,500 as reported on the computerized document allegedly prepared by Mobil Oil Company.

6. The computerized documents also serve as the external indices utilized by the Audit Division in determining additional tax due. Specifically, the Audit Division divided by twelve the year-to-date volume figures shown on said computerized documents (686,493 for 1981 and 933,000 for 1982) to determine petitioner's monthly purchases of gasoline. Application of average taxable selling prices to the number of audited gallons of gasoline allegedly purchased by petitioner resulted in total audited sales of \$688,005.00.<sup>1</sup> Comparing total audited sales to reported taxable sales of \$304,223.00 produced additional taxable sales of \$383,782.00 and additional tax due of \$31,422.79.

7. Other than to consider the information provided by petitioner on the Filling Station Questionnaire, the Audit Division made no further request for additional information, nor did it make a physical inspection, audit or examination of petitioner's books and records.

#### CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law, in effect during the period in issue, requires every person required to collect sales tax to keep records of every sale and of the tax payable thereon. "Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum...". Section 1138(a) provides that if a sales tax return "is not filed, or 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

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1 Included in total audited sales were \$6,812.00 of oil and candy sales.

necessary, the tax may be estimated on the basis of external indices...."

"When records are not provided or are incomplete and insufficient, it is [the Tax Commission's] duty to select a method reasonably calculated to reflect the taxes due. The burden then rests upon the taxpayer to demonstrate...that the method of audit **or** the amount of the tax assessed was erroneous." (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858.)


B. That petitioner failed to produce any evidence in any form whatsoever to demonstrate that the method of audit or amount of tax assessed was erroneous. He has, therefore, failed to meet his burden of proof. With respect to whether petitioner maintained complete books and records from which a proper audit could be conducted, it should be noted that, not only did petitioner fail to produce evidence that he maintained any books and records, he did not **so** much as allege this fact in his petition or arguments. Petitioner's only argument was that the information relied on by the Audit Division was hearsay. While it is true that the Audit Division's entire case consisted of hearsay evidence, the "legal residuum rule" is "no longer the governing standard under State law" (Blodnick v. New York State Tax Commission, 507 NYS2d 536 [3d Dept. 1986]) and petitioner has the burden of proving such evidence to be incorrect.


C. That the petition of Chris Curcio d/b/a C & S Service Station is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated April 30, 1984 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

**FEB 24 1987**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER