

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

ROBERT CORTON, OFFICER OF
3400 BAYCHESTER AVENUE SERVICE STATION, 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 June 1, 1979
through May 31, 1983.

Petitioner, Robert Corton, Officer of 3400 Baychester Avenue Service Station, Inc., 1095 Grant Avenue, Pelham Manor, New York 10803, 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 June 1, 1979 through May 31, 1983 (File No. 54739).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 9, 1986 at 1:15 P.M. Petitioner appeared by Chetney C. Clark. The Audit Division appeared by John P. Dugan, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether the Audit Division correctly determined sales tax due from the petitioner on the basis of external indices.

FINDINGS OF FACT

1. On April 20, 1984, as the result of a field audit, the Audit Division issued to petitioner, Robert Corton, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1979 through November 30, 1982 asserting additional taxes due in the amount of \$53,603.81 plus penalty

and interest. On the same date, a second notice was issued to Mr. Corton for the period December 1, 1982 through May 31, 1983 asserting taxes due in the amount of \$5,124.16 plus penalty and interest. Both notices explain that Mr. Corton's personal liability for the taxes due derive from his position as an officer of 3400 Baychester Avenue Service Station, Inc. ("Baychester").

2. On behalf of Baychester, Mr. Corton executed two consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law. The first, executed on September 10, 1982, extended the period of assessment for the taxable period June 1, 1979 through November 30, 1979 to February 20, 1983. The second, executed on February 17, 1983, extended the period of assessment for the taxable period June 1, 1979 through August 31, 1980 to December 20, 1983.

3. An auditor visited the Baychester station on April 5, 1982 and completed a worksheet where he noted: there was one mechanic on the premises and one gas attendant; all pumps were full service; the station performed State inspections; and there were two repair bays. Some books and records were made available, consisting primarily of bank statements and cancelled checks. Since these were deemed inadequate to verify reported taxable sales, sales were estimated on the basis of available information. Baychester's gasoline purchases were obtained from its supplier for the period March 1, 1980 through August 31, 1981. The average statewide selling price of gasoline for that period (adjusted for excise and sales taxes included in the price) was applied to purchases to obtain audited gasoline sales for the period. Repair sales were estimated at \$200.00 per repair bay per day (or \$2,400.00 per week). Total audited taxable sales for the period were determined to be \$554,550.00. An error rate of 154.36 percent was calculated by dividing reported taxable sales of \$218,014.00

by audited taxable sales. The error rate was applied to reported taxable sales for the audit period to calculate additional taxable sales of \$727,227.00 with a tax due on that amount of \$58,727.97.

4. Mr. Corton operated the Baychester station throughout the audit period. During that time he employed one mechanic. Mr. Corton suffered from a heart condition for which he was hospitalized in 1982 and again in 1983. As a consequence, he performed few automobile repairs himself. Mr. Corton's accountant asserted that sale of repair services for the audit period averaged \$450.00 per week. His estimate was based on his memory of customer repair invoices, but no invoices were submitted to show actual sales of repair services. Mr. Corton also asserted that the gasoline prices used by the Audit Division were higher than actual prices charged. He presented no evidence of actual prices.

CONCLUSIONS OF LAW


A. That in light of the fact that petitioner did not maintain verifiable records of sales as required by Tax Law § 1135, the Audit Division was 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 U.S. 869). The Audit Division's markup of gasoline sales was such a methodology, and Mr. Corton presented no credible evidence to establish that audited gasoline sales were inaccurate. However, Mr. Corton did show that the estimate of repair sales was unreasonable inasmuch as it was inconsistent with the fact that only one mechanic was employed at the station. Accordingly, repair sales are to be recalculated, using a figure of \$1,200.00 per week during the audit period.

B. That the petition of Robert Corton, Officer of 3400 Baychester Avenue Service Station, Inc. is granted to the extent indicated in Conclusion of Law "A"; that the notices of determination and demands for payment of sales and use taxes due issued on April 20, 1984 shall be modified accordingly; and that in all other respects, the petition is denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1987


PRESIDENT


COMMISSIONER


COMMISSIONER