

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
REMSTER 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 March 1, 1981	:	
through August 31, 1982.	:	

Petitioner, Remster Service Station, Inc., 972 Remsen Ave., Brooklyn, New York 11236, 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. 54884).

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 May 15, 1986 at 11:00 A.M., with all briefs to be submitted by July 11, 1986. Petitioner appeared by William T. Barbera, Esq. The Audit Division appeared by John P. Dugan, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined sales and use taxes due from petitioner.

FINDINGS OF FACT

1. On June 20, 1984, the Audit Division issued against petitioner, Remster Service Station, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a tax liability of \$114,770.00 plus penalty of \$28,692.50 and interest of \$37,103.91 for a total of \$180,566.41 for the period March 1, 1981 through August 31, 1982.

2. By letter dated February 14, 1984, the Audit Division informed petitioner that an audit of its State tax returns was being conducted and requested that petitioner respond to a questionnaire and provide a copy of certain Federal tax returns. A follow-up letter was sent to petitioner on or about March 21, 1984. No reply was received to either letter.

3. Because no other information was available, the Audit Division resorted to external indices to determine sales taxes due. Petitioner's gasoline supplier, Sun Oil Co. ("Sun"), provided the Audit Division with a computer printout of records, showing gasoline purchases by petitioner for the months of September, October and November 1980. Total gallons purchased from Sun in that period were multiplied by an average retail selling price of \$1.25 per gallon to determine audited gross sales for the period of \$216,224.00. Reported sales of \$33,234.00 were subtracted from audited sales to obtain additional taxable sales of \$182,990.00. An error rate of 550.6 percent was calculated by dividing additional taxable sales by reported taxable sales. Taxable sales reported by petitioner for each quarterly period under consideration were increased by this error rate to obtain audited taxable sales for the entire audit period. The sales tax due on audited taxable sales decreased by the sales tax paid resulted in additional tax due of \$114,770.00.

4. Petitioner strenuously objected to the admission into evidence of computer printouts from Sun on the grounds that no one from Sun was present to authenticate those records or to testify to their reliability. No evidence was presented in support of the petition.

CONCLUSIONS OF LAW

A. That in light of petitioner's failure to respond to the Audit Division's questionnaire or to make available any records from which its reported sales

could be verified, the Audit Division was justified in employing a test period and markup of purchases procedure to estimate petitioner's tax liability (Tax Law §1138[a][1]; Matter of Ristorante Puglia v. Chu, 102 AD2d 348,350).

Because petitioner has failed to demonstrate that either the audit method or the result arrived at were erroneous, the assessment is upheld.

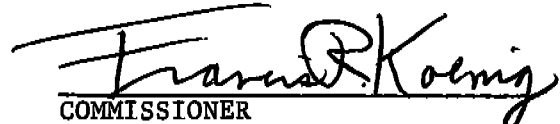
B. That the petition of Remster Service Station, Inc. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on June 20, 1984 is sustained.

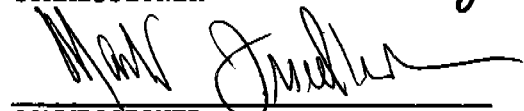
DATED: Albany, New York

STATE TAX COMMISSION

OCT 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER