

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Alfonso De Pietro :
d/b/a D P Service : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Sales & Use Tax :
under Article 28 & 29 of the Tax Law :
for the period 6/1/71 - 11/30/74. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 7th day of July, 1980, he served the within notice of Determination by mail upon Alfonso De Pietro, d/b/a D P Service, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

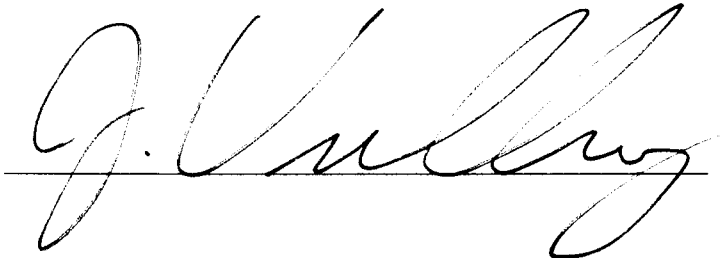
Alfonso De Pietro
d/b/a D P Service
154 Broadway
Hawthorne, NY 10532

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
7th day of July, 1980.

Detora Bank



STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

July 7, 1980

Alfonso De Pietro
d/b/a D P Service
154 Broadway
Hawthorne, NY 10532

Dear Mr. De Pietro:

Please take notice of the Determination of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|---|---|---------------|
| In the Matter of the Application | : | |
| of | : | |
| ALFONSO DE PIETRO d/b/a | : | DETERMINATION |
| DP SERVICE | : | |
| 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, 1971 through November 30, | : | |
| 1974. | : | |

Applicant, Alfonso DePietro d/b/a DP Service, 154 Broadway, Hawthorne, New York 10532, filed an application 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, 1971 through November 30, 1974 (File No. 10429).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 14, 1978 at 10:45 A.M. Applicant appeared pro se. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUE

Whether the Sales Tax Bureau correctly determined additional sales tax due from applicant for the period June 1, 1971 through November 30, 1974.

FINDINGS OF FACT

1. Applicant, Alfonso DePietro d/b/a DP Service, filed New York state and local sales and use tax returns for the periods June 1, 1971 through February 29, 1972, June 1, 1972 through August 31, 1972 and December 1, 1972 through November 30, 1974.

Applicant paid the amounts demanded in notices of determination and demand for payment of sales and use taxes due (ST-560B) issued for the periods

March 1, 1972 through May 31, 1972 and September 1, 1972 through November 30, 1972.

2. On October 3, 1975, as the result of an audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant for the period June 1, 1971 through November 30, 1974 in the amount of \$10,554.13, plus penalty and interest of \$3,936.98, for a total of \$14,491.11.

3. Applicant operated two Mobil service stations, one located in Hawthorne, New York, and the other in Valhalla, New York. Repair work was performed only at the Hawthorne station.

4. On audit, the Sales Tax Bureau summarized merchandise purchases into categories and estimated markup percentages for each category as follows:

| <u>ITEM</u> | <u>MARKUP</u> | <u>ITEM</u> | <u>MARKUP</u> |
|-------------|---------------|-------------|---------------|
| Gasoline | 25% | Antifreeze | 50% |
| Oil | 100% | Accessories | 100% |
| Tires, | | Misc. Parts | 200% |
| Batteries | 25% | | |

The estimated markups were applied to applicant's purchases for the audit period to determine taxable sales of \$1,157,613.69. Applicant reported taxable sales of \$1,002,631.89, leaving additional taxable sales of \$154,981.80 and tax due thereon of \$10,554.13.

5. The Sales Tax Bureau performed a markup test for gasoline based on actual costs and selling prices during the period July 17, 1971 through December 31, 1971, which disclosed "markups ranging from 14.93% to 15.45%". The Sales Tax Bureau took the position that said markups were inaccurate since they "were based on one grade" of gasoline and did not reflect the major price increases in 1973; therefore, the Bureau used an estimated markup.

6. The applicant's books and records were not adequate for the Sales Tax Bureau to determine the exact amount of the applicant's total taxable sales or

sales tax liability. Because of the inadequate records, the Sales Tax Bureau marked up the applicant's purchases.

CONCLUSIONS OF LAW

A. That applicant did not maintain sufficient books and records for the Sales Tax Bureau to determine the exact amount of the total sales tax liability. However, the applicant had some records available to enable the Sales Tax Bureau to determine actual markup percentages on gasoline. The Sales Tax Bureau properly determined applicant's markup on gasoline as set forth in Finding of Fact "5"; however, the Bureau's disregard of such markup was without merit. Accordingly, the markup on gasoline is reduced to 15%.

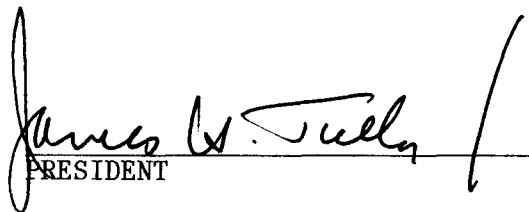
B. That the estimated markups used by the Sales Tax Bureau in determining sales of oil, antifreeze, tires, batteries, miscellaneous parts and accessories were made in accordance with section 1138(a) of the Tax Law. Applicant failed to sustain the burden of proving that such estimates were incorrect.

C. That the application of Alfonso DePietro d/b/a DP Service is granted to the extent indicated in Conclusion of Law "A" and Finding of Fact "5"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on October 3, 1975 is reduced from \$10,554.13 to \$5,133.20; and that, except as so granted, the application is in all other respects denied.

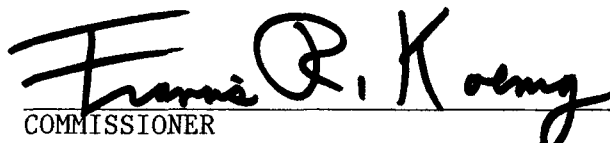
DATED: Albany, New York

JUL 07 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER