

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

September 28, 1983

Brooklyn Tunnel Service Station, Inc.  
c/o Solomon Terkelstoub, Esq.  
535 Fifth Ave.  
New York, NY 10017

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 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 Law 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  
Law Bureau - Litigation Unit  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Solomon B. Terkelstoub  
535 Fifth Ave.  
New York, NY 10017  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
BROOKLYN TUNNEL 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 September 1,	:	
1974 through August 31, 1977.	:	

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Petitioner, Brooklyn Tunnel Service Station, Inc., c/o Solomon Terkelstoub, Esq., 535 Fifth Avenue, New York, New York 10017, 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 September 1, 1974 through August 31, 1977 (File No. 26676).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 18, 1982, at 1:15 P.M. Petitioner appeared by Solomon B. Terkelstoub, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether the audit procedures and tests used by the Audit Division to determine additional sales taxes due from petitioner were proper.

II. Whether the Notices of Determination and Demand for Payment of Sales and Use Taxes Due were timely issued.

FINDINGS OF FACT

1. On August 24, 1977 the Audit Division received from Columbia Service Station, Inc., a Notice of Sale, Transfer or Assignment in Bulk dated August 18,

1977, indicating that it was to purchase a retail gasoline station from Brooklyn Tunnel Service Station, Inc. for \$15,000.00. The scheduled date of sale was September 1, 1977.

2. The Audit Division subsequently conducted a sales tax audit of petitioner. The auditor examined petitioner's general ledger, cash receipts books, credit card sales book, cash disbursements journal and Federal income tax returns.

The only information available from which the selling price of gasoline could be determined was the credit card sales book. To arrive at adjusted taxable sales, the auditor multiplied total gallonage purchased for the period ended November 30, 1977 by the average selling price as computed from the credit card sales. The auditor then added to this figure sales of tires, batteries and accessories as recorded in the cash receipts book and arrived at a margin of error of 4.036 percent.

The auditor then audited purchase records. Petitioner's cash disbursements journal showed purchases of tires, batteries and accessories of \$203,332.00, while its cash receipts book showed sales of these items to be \$132,517.00. Because of this disparity, the auditor used external indices to determine sales. After applying a mark-up of 200 percent, which allowed for labor, the auditor reduced the figure arrived at by the amount reported as tires, batteries and accessories, above. The margin of error thereby determined was 32.112 percent.

During the course of the audit, the auditor discovered, that according to petitioner's books the actual selling price of the service station was \$16,604.40.

3. Petitioner did not execute a consent to extend the period of limitation for assessment of sales and use tax. Consequently, on December 20, 1977, the

Audit Division issued to petitioner, Brooklyn Tunnel Service Station, Inc. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period of September 1, 1974 through August 30, 1977 for taxes due in the amount of \$25,745.00, plus penalty and interest in the amount of \$10,210.00, for a total of \$35,955.00. Such notice was estimated based upon previously filed returns.

On July 20, 1978 a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period August 2, 1975 through August 31, 1977 was issued for taxes due in the amount of \$8,575.29, plus penalty of \$1,865.16 and interest of \$1,838.38, for a total of \$12,278.83. The taxes, penalty and interest asserted in the second notice are in addition to those asserted in the first notice.

4. Counsel for petitioner contends that the mark-up percentage used by the Audit Division was arbitrary and the reason that purchases were higher than sales could have been the result of special sales or a high ending inventory.

#### CONCLUSIONS OF LAW

A. That pursuant to § 1138(a) of the Tax Law there is statutory authority for the use of external indices when necessary for the determination of tax due when a return filed is incorrect or insufficient.

B. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit (Chartair, Inc. v. State Tax Commission, 65 A.D. 2d 44, 411 N.Y.S. 2d 41).

C. In view of the fact that petitioner's records revealed purchases substantially in excess of sales and the fact that the inventory transferred to Columbia Service Station, Inc. (the purchaser in bulk) was minor in comparison to that which would have been transferred if the purchases were not sold, it is clear that petitioner did not maintain adequate sales records upon which the exact amount of sales tax could be determined. Accordingly, the audit procedure utilized by the Audit Division to determine sales was reasonable under the circumstances (Manny Convissar v. State Tax Commission, 69 A.D. 2d 929, 930). Exactness is not required where it is the petitioner's own failure to maintain proper records which prevents exactness in the determination of sales tax liability (Markowitz v. State Tax Commission, 54 A.D. 2d 1023, 44 N.Y. 2d 684).

D. That section 1147(b) of the Tax Law provides that "...no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return...". Thus, the Notices of Determination and Demand for Payment of Sales and Use Taxes due, issued against petitioner, (Finding of Fact "3") were timely issued.

E. That the petition of Brooklyn Tunnel Service Station, Inc. is hereby denied and the Notices of Determination and Demand issued December 20, 1977 and July 20, 1978 are sustained.

DATED: Albany, New York

SEP 28 1983

STATE TAX COMMISSION

Rodriguez  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

Mark J. Smith  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Brooklyn Tunnel Service Station, Inc. :  
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 9/1/74-8/31/77. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

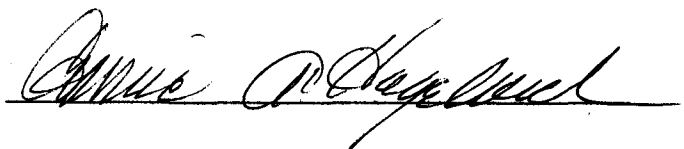
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Brooklyn Tunnel Service Station, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Brooklyn Tunnel Service Station, Inc.  
c/o Solomon Terkeltoub, Esq.  
535 Fifth Ave.  
New York, NY 10017

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  
28th day of September, 1983.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Brooklyn Tunnel Service Station, Inc. :  
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 9/1/74-8/31/77. :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

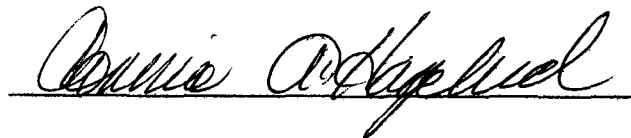
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Solomon B. Terkelstoub the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

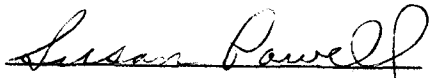
Solomon B. Terkelstoub  
535 Fifth Ave.  
New York, NY 10017

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
28th day of September, 1983.





AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

P 481 208 267

RECEIPT FOR CERTIFIED MAIL

INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Solomon B. Terkeltau	
Street and No.	
535 Fifth Ave.	
P.O., State and ZIP Code	
New York, NY 10017	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 481 208 266

RECEIPT FOR CERTIFIED MAIL

INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Brooklyn Tunnel Service	
J. A. Terkeltau, Inc.	
Street and No.	
535 Fifth Ave.	
P.O., State and ZIP Code	
New York, NY 10017	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982