

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

March 18, 1983

Jerry Cotignola
d/b/a Jerry's Service Station
415 Mill Rd.
Hewlett, NY 11557

Dear Mr. Cotignola:

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 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
George Lang
595 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JERRY COTIGNOLA	:	DECISION
D/B/A JERRY'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 December 1, 1974	:	
through November 30, 1978.	:	

Petitioner, Jerry Cotignola d/b/a Jerry's Service Station, 415 Mill Road, Hewlett, New York 11557, 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 December 1, 1974 through November 30, 1978 (File No. 26880).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 15, 1982 at 1:15 P.M. Petitioner appeared by George Lang, P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether a field audit performed by the Audit Division, whereby petitioner's purchases were marked up to determine sales, was proper and correct.

FINDINGS OF FACT

1. On June 15, 1979, the Audit Division issued two notices of determination and demand for payment of sales and use taxes due against Jerry Cotignola d/b/a Jerry's Service Station covering the period December 1, 1974 through November 30, 1978. The notices were issued as a result of a field audit and asserted a

total sales tax due of \$38,360.47, plus interest of \$7,642.98, for a total due of \$46,003.45.

2. Petitioner executed consents to extend the period of limitation for the issuance of an assessment to December 20, 1979.

3. Petitioner operated two gasoline stations during the audit period. The field audit performed covered both locations. The primary location at 415 Mill Road, Hewlett, New York, was a full service station and included sales of gasoline, oil and shop repairs. The second location at 408 Rockaway Boulevard, Cedarhurst, New York, known as The Two M's Gas Station, offered gasoline and oil for sale and was operated only during the period November 1, 1976 through May 31, 1978. Both stations sold cigarettes by the carton, with Jerry's Service Station also making single pack cigarette sales from a vending machine.

4. On audit, the Audit Division found that petitioner kept daily gas sheets on which metered gallons sold and receipts were recorded. The daily sheets were prepared at the end of each shift within each day. The Audit Division found that the gasoline sales were not recorded separately from other sales in petitioner's books; therefore, it could not verify the accuracy in reporting. The Audit Division also found that shop sales (parts, labor, tires, batteries, etc.) were recorded on non-serially numbered invoices and determined there was a lack of internal control for such sales. The Audit Division therefore performed a markup analysis using petitioner's costs and selling prices.

The Audit Division applied the markup percentages determined on audit to purchases made by petitioner and determined the following gross sales and adjustments thereto:

	<u>Jerry's</u>	<u>Two M's</u>
Period	12/1/74 - 11/30/77	11/1/76 - 11/30/77
Gross Sales Reported	\$5,699,613.	\$893,225.
Audited Gross Sales	\$6,047,035.	\$917,680.
Less: State Gasoline Tax	636,488.	110,292.
State Cigarette Tax	324,431.	30,073.
Audited Taxable Sales	<u>\$5,086,116.</u>	<u>\$777,315.</u>
Increase of Gross Sales	6.1%	2.7%
Percentage of Taxable Sales	84.1%	84.7%

The Audit Division updated its audit findings to include the period December 1, 1977 through November 30, 1978 by applying the appropriate percentage increases of audited gross sales for each location to the reported gross sales on sales and use tax returns filed and then applied the audited percentage of taxable sales thereto. The Audit Division determined total taxable sales for the entire audit period of \$8,217,424.00 for both locations and tax due thereon of \$599,356.86. Petitioner reported total sales tax of \$560,996.39 for the period December 1, 1974 through November 30, 1978. The Audit Division thereby determined additional sales tax due of \$38,360.47 for both locations.

5. At a subsequent conference held, petitioner submitted a markup analysis in addition to the one prepared by the Audit Division. The Audit Division used petitioner's analysis by combining the results of it with the one prepared by the Audit Division and redetermined the additional tax due for both locations to \$28,386.81.

6. Petitioner presented sales summaries of his gasoline and oil sales along with a sampling of the daily sales summaries prepared at the end of each shift. These showed the number of gallons of gasoline and quarts of oil sold and receipts taken in. The Audit Division conceded that sufficient control was exercised over gasoline and oil sales and that the gasoline and oil sales

should therefore be accepted as recorded in petitioner's summary of sales. The difference in the audited gasoline sales and those recorded was attributable to the constantly changing selling prices of gasoline.

7. Petitioner contended that the markups applied on audit were not indicative of his sales for the entire audit period. Other than the analysis that was submitted prior to the hearing, petitioner offered no evidence to show that the markups applied on audit were incorrect for sales other than for sales of gasoline and oil.

8. Petitioner submitted his purchases and sales summary for cigarettes covering the period February, 1974 through May, 1977 for the purpose of attempting to show that the cigarette sales were correct as reported. The sales summary was not conclusive as to the number of cartons purchased and sold nor was there any indication of an inventory control over cigarettes to support the proper recording of same. Further, no source documents were available to verify the accuracy of the sales as recorded.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that when a return filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices such as purchases.

B. That the Audit Division marked up purchases made by petitioner in order to determine the accuracy of petitioner's reported sales. That the markup audit disclosed that petitioner's records and returns prepared therefrom were insufficient and could not be fully relied upon for audit purposes. That the Audit Division later reduced its audit findings to additional sales tax due

of \$28,386.81 pursuant to Finding of Fact "5", based on the additional markup analysis submitted by petitioner.

C. That petitioner exercised sufficient control over his gasoline and oil sales as evidenced by the daily sales summaries submitted; therefore, the additional tax due is further reduced to the extent that petitioner's recorded gasoline and oil sales are accepted as recorded pursuant to Finding of Fact "6".

D. That the audit performed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law with respect to sales other than gasoline and oil sales.

E. That the petition of Jerry Cotignola d/b/a Jerry's Service Station is granted to the extent indicated in Conclusions of Law "B" and "C" above; that the Audit Division is directed to accordingly modify the notices of determination and demand for payment of sales and use taxes due issued June 15, 1979; and that, except as so granted, the petition is in all other respects denied.

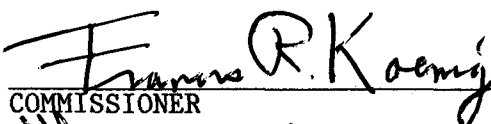
DATED: Albany, New York

STATE TAX COMMISSION

MAR 18 1983

ACTING

PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jerry Cotignola :
d/b/a Jerry's Service Station :
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 :
12/1/74-11/30/78. :

State of New York
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Jerry Cotignola d/b/a Jerry's Service Station, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jerry Cotignola
d/b/a Jerry's Service Station
415 Mill Rd.
Hewlett, NY 11557

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
18th day of March, 1983.

David Parchuck

James A. Hegeland
ADMINISTRATOR TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Jerry Cotignola	:	
d/b/a Jerry's Service Station	:	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 12/1/74-11/30/78.	:	

State of New York
County of Albany

David Parchuck, 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 18th day of March, 1983, he served the within notice of Decision by certified mail upon George Lang the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George Lang
595 Madison Ave.
New York, NY 10022

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
18th day of March, 1983.

David Parchuck

Janice A. Hegelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

P 389 758 705
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Jerry Cotigola</u>	
Street and No. <u>415 Mill Rd.</u>	
P.O., State and ZIP Code <u>Hewlett, NY 11557</u>	
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 389 758 706
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>George Lang</u>	
Street and No. <u>595 Madison Ave.</u>	
P.O., State and ZIP Code <u>New York, NY 10022</u>	
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