

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

June 17, 1983

Floral Park Car Wash Corp.
Joseph Perry, Individually & As Officer
255-39 Jericho Tpke.
Floral Park, NY 11001

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
Leonard Bailin
299 Broadway
New York, NY 10007
AND
Joseph Perry
7 Wakefield Dr.
Muttontown, NY 11545
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
FLORAL PARK CAR WASH CORP. and	:	DECISION
JOSEPH PERRY, Individually and as an Officer	:	
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, 1975	:	
through May 31, 1978.	:	

Petitioners, Floral Park Car Wash Corp. and Joseph Perry, individually and as an officer of the corporation, 255-39 Jamaica Avenue, Floral Park, New York 11001, 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, 1975 through May 31, 1978 (File Nos. 25530 and 25547).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 14, 1982. Petitioners appeared by Leonard Bailin, P.C. (Leonard Bailin, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the Audit Division established a basis for its employment of an observation test to determine the amount of tax due.

II. If so, whether the audit procedures and calculations were nonetheless erroneous and improper for the following reasons: (a) failure to use actual prices and to take account that sales tax was included therein; (b) inclusion in taxable sales of the full price for hand waxing, a service provided from time to time on the car wash premises by independent contractors; (c) failure

to consider that prior to acquisition by the corporation of vacuum cleaners in 1977, such cleaners were unavailable for customer use; (d) failure to make allowances for inclement weather and mechanical breakdowns; and (e) failure to adjust for nontaxable and "no charge" sales.

FINDINGS OF FACT

1. On December 11, 1978, the Audit Division issued to petitioner Floral Park Car Wash Corp. ("Car Wash Corp.") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1975 through May 31, 1978, assessing taxes in the amount of \$46,434.88, plus penalty of \$9,792.34 and interest of \$10,204.41, for a total due of \$66,431.63.

On December 11, 1978, the Audit Division issued to petitioner Joseph Perry, individually and as an officer of Floral Park Car Wash Corp., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1975 through May 31, 1978, assessing taxes in the amount of \$46,434.88, plus penalty of \$9,792.34 and interest of \$10,204.41, for a total due of \$66,431.63.

On August 18, 1978, Mr. Perry had executed a consent extending the period of limitation for assessment of sales and use taxes against the corporation for the period at issue, to and including June 20, 1979.

2. In 1970, Dr. Gabriel Perry, Joseph Perry's father, organized Embassy Equities Corporation for the purpose of purchasing property in Floral Park, New York, upon which was situated an old building containing automated car wash equipment. The property was leased to petitioner Car Wash Corp., whose sole shareholder and officer, petitioner Joseph Perry, endeavored to operate the car wash. The car wash had been inoperative for several years, so Mr. Perry initially spent time cleaning and painting the building and hauling away trash.

Approximately 6 months after the purchase of the property, the car wash opened for business.

3. Mr. Perry worked at the car wash one or two days per week from 1970 to September, 1975. During that time, he also worked for a real estate corporation, managing rental properties.

4. From September, 1971 to July, 1979, Mr. Ronald White was manager of the car wash. He was responsible for beginning operations in the morning, supervising employees, collecting payment from customers, guiding vehicles onto the conveyor and making daily reports. There was no cash register on the premises. Cash receipts were placed in a drawer; customers were not furnished with a receipt unless they specifically requested one, in which event Mr. White handwrote a receipt.

Generally, Car Wash Corp. employed one other person besides Mr. White. The employee was stationed at the end of the conveyor and dried the vehicles.

5. In 1975, Car Wash Corp. charged its customers \$1.00 on weekdays and \$1.25 on weekends per car wash. In January, 1977, it increased the prices by 50 cents. The spraying on of hot wax was 50 cents extra. As advertised by the corporation, all prices included sales tax.

6. In the summertime and occasionally on weekends during other seasons, hand waxing was available on Car Wash Corp.'s premises from two high school students (who operated there with petitioners' consent). The students charged \$14.95 per waxing and turned over \$5.00 of each charge to Car Wash Corp. From time to time, the students' friends requested part-time work at the car wash and were so employed.

7. Car Wash Corp. sold car wash tickets in bulk, 100 to 200 at a time, to auto dealers for one-half the regular price. Mr. Perry estimated that during the period at issue, Car Wash Corp. sold 200 to 300 tickets monthly to dealers.

The corporation gave tickets, or sold tickets at a minimum price (100 or 200 for \$20.00), to service stations which used them to promote particular services, such as oil changes. Mr. Perry considered this practice worthwhile since "we were getting our name advertised," and estimated that 400 to 800 car washes per year were attributable to this practice.

In addition, Car Wash Corp. sold discount tickets to individual customers, entitling them to five washes for \$3.25 or after 1976, for \$6.25. Mr. Perry estimated that the corporation sold 10 to 20 booklets of discount tickets monthly.

8. In 1977, Car Wash Corp. purchased three vacuum machines at approximately \$300.00 each. These were available for customer use for 25 cents. Mr. White estimated that approximately 50 customers vacuumed their cars each week.

9. Mr. Perry intended the car wash to be open for business seven days a week, but due to inclement weather and frequent equipment breakdowns, it was actually operational three or four days weekly. Mr. White made the following estimates of the business done by Car Wash Corp: 50 to 60 car washes on a reasonably busy weekday during spring or fall; 150 car washes on a busy Saturday; one spray hot wax for every 20 vehicles washed; and 10 "no charge" washes (for the Perry family, Mr. White's family and for customers who expressed dissatisfaction about how their cars had turned out) on a busy day.

10. Car Wash Corp. expended approximately \$300.00 to \$500.00 annually for replacement parts for and repair work to the car wash equipment and \$2,000.00 to \$3,000.00 annually for soap and supplies. All expenses were paid in cash.

For the first two or three years of operation, Car Wash Corp. maintained a checking account but closed it when suppliers began demanding cash payment.

11. At closing time each day, Mr. White prepared a report, which included the number of vehicles washed as recorded by the counter, the number of no-charge washes, and cash expenses incurred, such as for replacement of a customer's antenna. He placed the report and the cash receipts in a paper bag. Approximately every two or three days, he delivered the bags to the Perry residence, or Mr. Perry or Dr. Perry stopped at the Car Wash Corp. to retrieve them. At the end of the week, Mr. White withdrew his salary and the salary of the other employee from the cash receipts and noted the withdrawals on his report.

12. In September, 1975, during a routine check-up, Mr. Perry was diagnosed as suffering from terminal cancer. He thereafter underwent major surgery on several occasions and a three-year program of chemotherapy and radiation therapy. During the period September, 1975 through 1978, he devoted little time to the car wash and no time whatsoever to his real estate activities. Mr. Perry, with his wife and three young children, took up residence with his parents in Muttontown, New York. Although Car Wash Corp. had earlier paid a monthly rental of \$400.00 to Embassy Equities Corporation, it ceased doing so in 1975 when Mr. Perry fell ill. As Dr. Perry testified, "[H]e was in no position to pay any rent anymore, and I could understand that."

13. Every two or three days, Mr. Perry, if he was able, or Nora Prochillo, who worked for Car Wash Corp. on an hourly basis, counted each day's cash receipts and expenditures and reconciled the amounts with Mr. White's report. Mr. Perry or Ms. Prochillo then entered in a diary the cash taken in for the day.

14. Petitioners introduced in evidence the four diaries used for the years 1975 through 1978. During the audit period, 292 days are blank; all other days reflected the receipts taken in that day. In preparing the sales tax returns for the quarterly periods at issue (except the period ended May 31, 1978 for which there is no record of a filing), Mr. Perry totalled the receipts as entered in the diary and then made adjustments to account for sales tax collected and for sales made to dealers, which he considered as made for resale. Car Wash Corp.'s sales as recorded in the diaries and as reported in its returns were as follows:

<u>PERIOD ENDED</u>	<u>SALES PER DIARIES</u>	<u>SALES REPORTED</u>
8/31/75	\$ 8,598.00	\$7,220.00
11/30/75	5,424.00	5,280.00
2/29/76	9,272.00	9,240.00
5/31/76	8,654.00	8,820.00
8/31/76	6,914.00	6,840.00
11/30/76	5,109.00	4,860.00
2/28/77	10,914.00	9,680.00
5/31/77	10,838.00	9,210.00
8/31/77	7,024.00	7,320.00
11/30/77	4,096.00	3,640.00
2/28/78	8,911.00	8,764.00
5/31/78	11,692.00	--

15. In July, 1978, Car Wash Corp. was notified by the Audit Division that its sales tax returns for the period June 1, 1975 through May 31, 1978 had been scheduled for audit and that all books and records should accordingly be made available. Petitioners made available federal corporation income tax returns, Mr. Perry's personal returns, the diaries and utility bills. The examiner concluded that these were tantamount to no records and in order to verify taxable sales, chose to conduct an observation test. On Wednesday, July 26, 1978, a day threatening rain, the examiner observed Car Wash Corp.'s operations from approximately 9:10 A.M. to 1:00 P.M. and counted 100 car washes, 2 hand

waxes and 20 vacuum uses. He assumed that the car wash operated eight hours per day, seven days per week and that business conducted on Saturdays was double that of other days, and employed the above figures in calculating the sales tax assessment, as follows:

Daily sales	
car washes, 200 cars @ \$2.00	\$ 400.00
hand waxes, 4 cars @ \$14.95	59.80
vacuums, 40 cars @ 25¢	10.00
	<u>\$ 469.80</u>
Weekly sales	
\$469.80 X 8	\$ 3,758.40
Quarterly sales	
\$3,758.40 x 13	\$48,859.20

Because of petitioners' failure to submit purchase invoices, fixed asset bills and a list of suppliers as requested, the examiner made an estimated assessment for purchases subject to use tax in the amount of \$75,000.00. According to his field audit report, "This \$75,000.00 includes recurring expense purchases the vendor may have purchased and also all fixed assets the vendor may have purchased in the audit period."

The examiner is currently employed by the Internal Revenue Service and was not present to testify at the hearing; his supervisor, who was present during a portion of the observation test (from approximately 9:10 A.M. to 10:30 A.M.), testified regarding the audit procedures, using the examiner's report and notes.

CONCLUSIONS OF LAW

A. That where a taxpayer maintains and makes available to the Audit Division records from which the exact amount of sales and use taxes due can be determined, he has the right to expect they will be used to determine his ultimate tax liability. Matter of Chartair, Inc. v. State Tax Comm., 65 A.D.2d

44 (3d Dept.). Where records are not provided or are incomplete and insufficient, resort may be had to estimate procedures, such as observation tests, so long as the methodology employed is reasonably calculated to reflect the taxes due.

Tax Law section 1138(a)(1); Matter of Surface Line Operators Fraternal Organization v. Tully, 85 A.D.2d 858 (3d Dept.) and authorities cited therein.

B. That the diaries provided to the sales tax examiners and introduced in evidence indicated only a daily figure and do not comply with the record keeping requirements of section 1135(a). The car wash manager prepared daily reports, showing among other things the number of car washes and waxes, the number of no-charge washes, expenditures made and the amount of cash turned over to Mr. Perry, but these were not offered to the examiners or to the Commission. The Audit Division's resort to an observation test was therefore warranted, and the results of the test are sustained. However, adjustment should be made for the 292 days the car wash was inoperative; and receipts for vacuum equipment used prior to 1977 should be eliminated. See Matter of Jack and Josephine Toia et al. (State Tax Comm., November 26, 1979), wherein use of an observation test was sustained but the results thereof adjusted downward, to take cognizance of the closing of a competing business on the day the test was conducted.

C. That the Audit Division's estimate for purchases subject to use tax is excessive. The Audit Division is hereby directed to recompute the use tax portion of the assessment, based on the following purchases made by Car Wash Corp. as established by the testimony of Mr. Perry: in 1977, three vacuum cleaners at a cost of \$300.00 each; for repairs and parts, \$500.00 annually; and for soap and supplies, \$3,000.00 annually.

D. That for the period June 1, 1975 through February 28, 1978, all penalties and interest in excess of the minimum amount of interest prescribed by statute are remitted.

E. That the petition of Floral Park Car Wash Corp. and Joseph Perry, individually and as an officer of the corporation, is granted to the extent indicated in Conclusions of Law "B", "C" and "D"; the notices of determination and demand issued on December 11, 1978 are to be modified accordingly; and except as so modified, the assessments are in all other respects sustained.

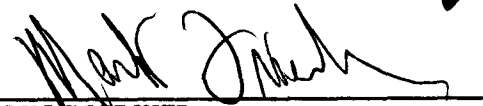
DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

REQUEST FOR BETTER ADDRESS

Requested by	Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Unit	Date of Request 7/5/83
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition F - Dec - 6-17-83
Name	Floral Park Can Wash Cpl.
Address	Joseph Perry Ind. & Co Officer 255-39 Jericho Tpke Floral Park, NY 11001

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input checked="" type="checkbox"/> Other:	Refused.

Searched by	Section	Date of Search

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

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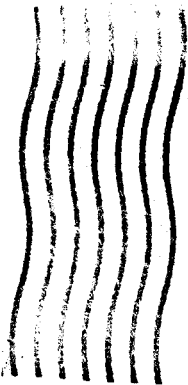
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Floral Park Car Wash Corp.
Joseph Perry, Individually & As Officer
255-39 Jericho Tpke.
Floral Park, NY 11001

Handwritten signature

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FLORAL PARK, NY
JUN 20
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