

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Costas Mastromihalis :  
d/b/a Gus Service Station : AFFIDAVIT OF MAILING  
:  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax :  
under Article 28 & 29 of the Tax Law for the Period :  
9/1/78-5/31/81. :

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State of New York }  
ss.:  
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 5th day of December, 1984, he served the within notice of Decision by certified mail upon Costas Mastromihalis d/b/a Gus Service Station, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Costas Mastromihalis  
d/b/a Gus Service Station  
90-11 149th St.  
Jamaica, NY 11435

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
5th day of December, 1984.

David Parchuck

James A. Haggard  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

December 5, 1984

Costas Mastromihalis  
d/b/a Gus Service Station  
90-11 149th St.  
Jamaica, NY 11435

Dear Mr. Mastromihalis:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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  
Peter Cooperman  
125-20 Queens Blvd.  
Kew Gardens, NY 11415  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
COSTAS MASTROMIHALIS	:	DECISION
d/b/a GUS 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 September 1, 1978	:	
through May 31, 1981.	:	

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Petitioner, Costas Mastromihalis, d/b/a Gus Service Station, 90-11 149th Street, Jamaica, New York 11435, 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, 1978 through May 31, 1981 (File No. 38190).

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 March 13, 1984 at 10:45 A.M. Petitioner appeared by Peter Cooperman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether the audit procedures and tests used by the Audit Division in an examination of petitioner's books and records were proper and whether the additional taxable sales determined as a result thereof were correct.

FINDINGS OF FACT

1. Petitioner, Costas Mastromihalis, d/b/a Gus Service Station, operated an automobile repair shop. Petitioner occasionally sold used cars.
2. On May 20, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due

against petitioner covering the period September 1, 1978 through May 31, 1981 for taxes due of \$10,364.87, plus penalty and interest of \$5,425.05, for a total of \$15,789.92.

3. Petitioner executed a consent extending the period of limitations for assessment of sales and use taxes for the period at issue to June 20, 1982.

4. On audit, the Audit Division examined the cash receipts and cash disbursements journal. These records showed gross sales of \$39,519.00 and purchases of \$13,360.00 for the audit period. Petitioner did not have sales invoices or purchase invoices available for audit. In order to verify purchases, the Audit Division examined the records of petitioner's three largest suppliers of automobile parts and found the following:

<u>Supplier</u>	<u>Purchases per Supplier</u>	<u>Purchases per Cash Disbursements</u>	<u>Periods Examined</u>
S & R Auto	\$1,453.63	\$ 80.00	February 28, 1978, August 31, 1980, Month of May 1981
Neil's Auto Parts	2,310.00	750.00	May 31, 1980, August 31, 1980, Month of May 1981
Marathon Auto Parts	<u>2,481.51</u>	<u>588.00</u>	February 28, 1979, August 31, 1980, Month of May 1981
TOTAL	\$6,245.14	\$1,418.00	

The difference in the above amounts (\$4,827.19) was considered unrecorded purchases and was divided by purchases recorded in the cash disbursements journal (\$1,418.00) to determine an error factor of 340.42 percent. This percentage was applied to total purchases per books to arrive at adjusted purchases of \$45,480.00.

A markup of 221.558 percent was computed using the sales and purchases shown on petitioner's 1979 and 1980 federal income tax returns. The markup was applied to the adjusted purchases to determine sales of \$146,245.00 and tax due

thereon of \$11,699.60. Petitioner paid sales tax of \$1,334.73 for the same period, leaving additional tax due of \$10,364.87.

5. The invoices examined at S & R Auto only indicated that the purchaser was "Gus". Petitioner's business is located one block away from S & R and therefore these sales were considered made to petitioner. The Audit Division was aware that there were other automobile repair businesses with the name "Gus Service Station" in the area.

Petitioner argued that the purchases from S & R determined by the Audit Division to have been made by petitioner were actually made by other businesses. Petitioner also argued that another automobile repair business nearby, as well as his relatives, used his name at Neil's Auto Parts and Marathon Auto Parts to purchase parts in order to take advantage of a 20 percent discount and avoid paying the sales tax.

Petitioner offered no evidence to establish that he did not make the purchases found by the Audit Division.

6. Petitioner took the position that the Audit Division incorrectly applied the 340 percent error to total purchases when the error was based on an examination of only three suppliers.

7. Petitioner purchases supplies and parts from Amoco Oil Co. and Dial Mobile on a regular basis. However, the cash disbursements journal for the audit period reflected one purchase from Amoco and four from Dial Mobile.

#### CONCLUSIONS OF LAW

A. That petitioner failed to maintain sales invoices or any other verifiable record of receipts; therefore, the available books and records were inadequate and insufficient for audit. The Audit Division's independent verification of

purchases further established the unreliability and inadequacy of petitioner's books and records.

When books and records are incomplete and unreliable, as here, a "test period" audit using external indices is permissible (Matter of Hanratty's/732 Amsterdam Tavern, Inc. v. N.Y.S. Tax Commission, 88 A.D.2d 1028; Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

Accordingly, the Audit Division's determination of additional taxable sales and sales tax due was proper pursuant to section 1138(a) of the Tax Law.

B. That the Audit Division reasonably calculated petitioner's tax liability. When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 A.D.2d 223. The burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization Inc. v. Tully, 85 A.D.2d 858).


Petitioner failed to overcome this burden of showing error.

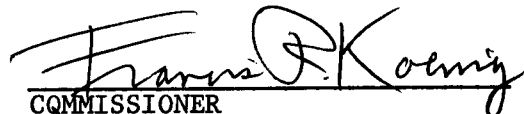
C. That the petition of Costas Mastromihalis is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 20, 1982 is sustained.

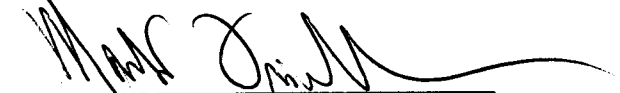
DATED: Albany, New York

DEC 05 1984

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

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**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to <i>Peter Cooperman</i>	
Street and No. <i>125-25 Queens Blvd.</i>	
P.O., State and ZIP Code <i>Reg Gardens, NY 11415</i>	
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	

P 693 166 106

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to <i>Costas Mastromihalis</i>	
Street and No. <i>11617 Gussus Station</i>	
P.O., State and ZIP Code <i>90-11 149th St.</i>	
Postage	\$ <i>11435</i>
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	