

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Mel Bern Servicecenter 6 Corp. :
and Bernard Schwartz and Melvin Karshan : 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 :
12/1/74-11/30/77. :

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 18th day of January, 1984, he served the within notice of Decision by certified mail upon Mel Bern Servicecenter 6 Corp. and Bernard Schwartz and Melvin Karshan, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mel Bern Servicecenter 6 Corp.
and Bernard Schwartz and Melvin Karshan
700 Sunrise Highway
Valley Stream, NY 11581

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
18th day of January, 1984.

David Parchuck

Emile P. Hayduk
pursuant to Tax Law section 174

Authorized to administer oaths

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Mel Bern Servicecenter 6 Corp. :
and Bernard Schwartz and Melvin Karshan : 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 12/1/74-11/30/77. :

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

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 18th day of January, 1984, he served the within notice of Decision by certified mail upon Robert F. Dehney, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert F. Dehney
Dehney & Sperendi
1001 Franklin Ave.
Garden City, NY 11530

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 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 January, 1984.

David Archuck

William A. Hapner Authorized to administer oaths
pursuant to Tax Law section 174

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

January 18, 1984

Mel Bern Servicecenter 6 Corp.
and Bernard Schwartz and Melvin Karshan
700 Sunrise Highway
Valley Stream, NY 11581

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, 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
Robert F. Dehney
Dehney & Sperendi
1001 Franklin Ave.
Garden City, NY 11530
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MEL BERN SERVICENTER 6 CORP.,	:	
MELVIN KARSHAN and BERNARD SCHWARTZ	:	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 December 1, 1974	:	
through November 30, 1977.	:	

Petitioners, Mel Bern Servicenter 6 Corp., Melvin Karshan and Bernard Schwartz, 700 Sunrise Highway, Valley Stream, New York 11581, 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, 1977 (File No. 24863).

A formal 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 April 21, 1983 at 1:15 P.M. Petitioners appeared by Robert F. Dehney, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division was authorized to use a "test period" and markup audit as a basis for determining additional sales taxes due from Mel Bern Servicenter 6 Corp.

FINDINGS OF FACT

1. Petitioner Mel Bern Servicenter 6 Corp. ("Mel Bern") operated an Amoco gasoline service station located at 700 West Sunrise Highway, Valley Stream, New York.

2. On October 23, 1978, 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 Mel Bern covering the period December 1, 1974 through November 30, 1977 for taxes due of \$81,064.71, plus penalty and interest of \$41,875.05, for a total of \$122,939.76.

On the same date, notices in the same amounts were issued to petitioners Melvin Karshan and Bernard Schwartz, individually and as officers of Mel Bern.

3. Mel Bern executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1974 through August 31, 1977, to December 20, 1978.

4. On audit, the Audit Division could not determine nor could Mel Bern provide the actual quantity of gasoline purchased for any part of the audit period. This was due to the manner in which purchases were recorded in the cash disbursements journal. The Audit Division attempted to reconcile purchases per the cash disbursements journal for the period June, 1976 through August, 1976; however, August was the only month that all the purchase invoices were available to make such a reconciliation. The cash disbursements journal showed total purchases of \$174,767.29 for August, 1976. From the purchase invoices, the Audit Division determined gasoline purchases of \$202,572.30, of which \$158,437.67 was recorded in the cash disbursements journal for August, 1976. The balance of gasoline purchases, \$44,134.63, was paid with credit card receipts and not included in the cash disbursements journal. The other purchases recorded in the cash disbursements journal for August (\$16,329.62) were cigarettes, \$15,979.43, and miscellaneous parts and supplies, \$350.19. The Audit Division compared the gallons of gasoline purchased for August, 1976 with the gallons sold from Mel Bern's books and found that there were 70,967 more gallons

purchased than reported sold, or 24.25 percent. This percentage was applied to gallons sold per books for the audit period of 9,192,055 to arrive at additional gallons sold and not reported of 2,229,441.

The Audit Division determined that gasoline purchases for August, 1976 represented 115.9 percent of purchases shown in the cash disbursements journal (\$202,572.30 divided by \$174,767.29). This percentage was applied to purchases from the cash disbursements journal for the audit period of \$5,204,567.69 to arrive at total gasoline purchases of \$6,023,093.94.

A markup test based on cost and selling prices of premium, regular and unleaded gasoline (excluding sales tax) in effect on January 9, 1978 and weighted according to reported gallons sold of each grade revealed an overall markup of 4.3 percent. Gasoline sales were then computed as follows:

Purchases	\$6,023,093.94
x 4.3% markup	258,993.03
Gasoline sales	<u>\$6,282,086.97</u>
Less: state gasoline tax (11,421,496 gal. @ .08)	913,719.68
Taxable gasoline sales	<u>\$5,368,367.29</u>

The Audit Division accepted the accuracy of gross cigarette sales per books based on a comparison with cigarette purchases which showed an adequate markup percentage. However, it was discovered that petitioner erroneously deducted cigarette tax of \$2.30 a carton rather than \$1.50 a carton when computing taxable cigarette sales. Therefore, the Audit Division recomputed taxable cigarette sales of \$489,627.00.

The Audit Division, as a result of its testing procedures, also accepted the accuracy of reported sales of parts, labor and accessories totalling \$95,132.95.

The combined taxable sales above amounted to \$5,953,127.24. Petitioner reported taxable sales of \$4,837,155.00 for the same period, leaving additional taxable sales of \$1,115,972.24 and taxes due thereon of \$81,064.71.

5. Mel Bern argued that books and records were available for the entire period under review and should have been examined by the auditor. Petitioner took the position that since the books and records were available to conduct a complete audit, the "test period" and "markup" audit methods were invalid and the notice should be cancelled.

Notwithstanding the foregoing argument, petitioner maintained that the results of the test and percentages derived therefrom were totally inaccurate and, further, that it was improper to determine markup percentages outside the audit period.

6. Petitioner's books and records were stored in a building adjacent to the station. The building and all its contents were destroyed by fire on September 16, 1979. Consequently, petitioner was unable to produce records at the hearing to show any inaccuracies in the audit findings.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that "if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available", and authorizes, if necessary, an estimate of tax due on the basis of external indices, including purchases.

That although there is statutory authority for the use of a test period to determine the amount of tax due, resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a

complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

B. That the Audit Division could not verify the accuracy of reported gasoline sales without adequate purchase records. The analysis of purchase invoices for August, 1976 as set forth in Finding of Fact "4" compared with gasoline purchases and gallons sold shown in the books and records indicated that gasoline purchases paid by credit card receipts had not been recorded as purchases in the books and records.

That the foregoing analysis clearly established that Mel Bern's Books and records were unreliable and inaccurate (Matter of George Korba v. State Tax Commission, 84 A.D.2d 655).

C. That because of petitioner's inadequate record keeping, the Audit Division's use of a "test period" and markup audit as a basis for determining petitioner's liability was proper under section 1138(a) of the Tax Law (Matter of Sakran v. State Tax Commission, 73 A.D.2d 989; Matter of Chartair, Inc., supra).


D. That the audit procedures were reasonable under the circumstances and petitioner has failed to meet its burden of showing error (Matter of Convissar v. State Tax Commission, 69 A.D.2d 929); moreover, the computation of a markup percentage based on a day not within the audit period was not unreasonable (Matter of Murray's Wines and Liquors v. State Tax Commission, 78 A.D.2d 947).

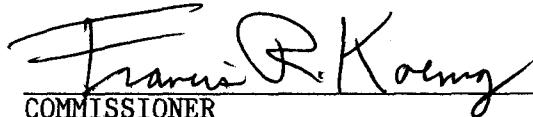
E. That the petition of Mel Bern Servicenter 6 Corp., Melvin Karshan and Bernard Schwartz is denied and the notices of determination and demand for payment of sales and use taxes due issued October 23, 1978 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 440 976 695

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Robert E. Dehney	
Street and No.	
1001 Franklin Ave.	
P.O., State and ZIP Code	
Garden City, NY 11530	
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 440 976 694

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Milburn Service Center	
Street and No.	
700 Sunrise Highway	
P.O., State and ZIP Code	
Valley Stream, NY 11581	
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