

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Fred Monte

d/b/a Riteway Mobil :

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 3/1/75-11/30/77.

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 2nd day of May, 1984, he served the within notice of Decision by certified mail upon Fred Monte, d/b/a Riteway Mobil the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fred Monte
d/b/a Riteway Mobil
274 Forbell Street
Brooklyn, NY 11208

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
2nd day of May, 1984.

David Parchuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Fred Monte :
d/b/a Riteway Mobil :

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 3/1/75-11/30/77.

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 2nd day of May, 1984, he served the within notice of Decision by certified mail upon Michael Santoli, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael Santoli
Mason, Raich & Company
60 Cutter Mill Rd.
Great Neck, NY 11021

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
2nd day of May, 1984.

David Parchuck

James A. Hagedorn

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 2, 1984

Fred Monte
d/b/a Riteway Mobil
274 Forbell Street
Brooklyn, NY 11208

Dear Mr. Monte:

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
Michael Santoli
Mason, Raich & Company
60 Cutter Mill Rd.
Great Neck, NY 11021
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
FRED MONTE D/B/A RITEWAY MOBIL : DECISION
for Revision of a Determination or for Refund :
of Sales & Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1975 :
through November 30, 1977.

Petitioner, Fred Monte d/b/a Riteway Mobil, 274 Forbell Street, Brooklyn, New York 12208, filed a petition for revision of a determination or for refund of sales and use taxes under Article 28 and 29 of the Tax Law for the period March 1, 1975 through November 30, 1977 (File No. 28674).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on August 11, 1983 at 9:15 A.M. Petitioner appeared by Mason, Raich & Company (Michael Santoli, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether, as the result of a field audit, the Audit Division properly determined the amount of sales and use taxes due.

II. Whether the Audit Division properly imposed a penalty.

FINDINGS OF FACT

1. During the period in issue, petitioner Fred Monte was the sole proprietor of a gasoline station known as Riteway Mobil ("Riteway"). Riteway was located in Island Park, New York and sold gasoline as well as parts and cigarettes.

During a portion of the audit period, Riteway offered automotive repair services to its customers. Mr. Monte sold Riteway on November 1, 1977.

2. On November 6, 1978, the Audit Division commenced an audit of Riteway. Initially, the auditors asked the accountant who then represented petitioner for all of Riteway's books and records. Thereafter, petitioner's accountant produced the general ledger and cash disbursement journal for the period March 1, 1976 through February 28, 1977. The auditors then requested "date books", additional information on sales, repair invoices, parts purchases, and gasoline purchases. These materials, however, were not provided.

3. The auditors compared the purchases reflected on Riteway's general ledger to the purchases reflected on Riteway's cash disbursement journal. The examination disclosed that the purchases on the cash disbursement journal were higher. The auditor also found that the purchases reflected on the cash disbursement journal corresponded with the purchases reflected on the federal income tax return. As a result, the auditors utilized the larger purchase figures reported on the cash disbursement journal. Since there was no information available upon which to compute a mark-up percentage, the auditors utilized mark-up percentages based upon experience gained in conducting audits of other gasoline stations. This markup reflected the type and location of gasoline station.

4. The markup initially utilized by the auditors was twenty percent for gasoline, twenty-one percent for cigarettes, and two hundred percent for parts and labor.

5. The purchases were multiplied by the markups to generate an amount of audited sales for the period March 1, 1976 through February 28, 1977. The amount of audited sales of gasoline and cigarettes for this period, however,

were reduced by the amount of excise tax. The computations resulted in audited sales of \$494,990.46. This amount was then compared to the sales reported on the sales tax returns of \$202,244.00. The difference between the reported sales and sales found through the audit resulted in an error rate of one hundred forty-five percent. This percentage was then multiplied by the reported taxable sales from March 1, 1975 to August 31, 1977 resulting in additional taxable sales of \$924,901.35 and additional tax due of \$68,522.16. The auditors concluded that the maximum penalty should be asserted because of the large discrepancy between audited and reported sales.

6. After the issuance of the Notice of Determination and Demand for Payment of Sales and Use Taxes Due of June 5, 1979, petitioner submitted carbon copies of credit card slips reflecting gasoline sales. On the basis of this information, the Audit Division reduced the estimated markup on gasoline from twenty percent to fifteen and eight-tenths percent. This resulted in a reduction of audited gasoline sales and a corresponding reduction of sales tax alleged to be due of \$68,522.16 to \$65,095.00.

7. Petitioner utilized the services of an accountant to maintain his records during the period he operated Riteway. On a monthly basis, the accountant would go to Riteway and maintain petitioner's books. Petitioner left the books at the gasoline station when he sold the business in November, 1977. Thereafter, the books were thrown away.

8. During the audit period, petitioner at various times operated the service bay, rented the service bay to a mechanic to operate it as an independent business, or did not use the service bay at all. Petitioner operated the service bay as part of his business for only one-third of the audit period.

9. At the hearing, petitioner testified that the markups utilized by the Audit Division were too high. Petitioner maintained that he sold regular gasoline for two or three cents over cost and sold unleaded gasoline for four to six cents beyond cost. Petitioner also stated that approximately sixty-five to seventy percent of his sales were of regular gasoline during the audit period. Petitioner argued that the markup percentage utilized by the Audit Division was distorted because it was based upon mostly unleaded gasoline. Petitioner further submitted that his markup was lower than average because there were other gasoline stations in the immediate vicinity which charged lower than average prices and petitioner had to stay competitive.

10. Petitioner also testified that he made approximately five to seven cents on the sale of a pack of cigarettes and that the selling price during this period was approximately fifty to sixty cents a pack.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides in part, that if a return required to be filed is incorrect or insufficient, the Tax Commission shall determine the amount of tax due on the basis of such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices. The records that were produced were completely insufficient for the verification of taxable sales. Accordingly, it was proper for the Audit Division to utilize external indices (Tax Law §1138(a)).

B. That in determining the amount of a sales tax assessment it is the duty of the Audit Division to select a method "'reasonably calculated to reflect the taxes due' Matter of Grant Co. v. Joseph, 2 NY2d 196, 206)."

(Matter of Meyer v. State Tax Commission, 61 AD2d 223, 227 lv. to app. den. 44

NY2d 645). When the Audit Division employs such a method, it becomes incumbent upon the petitioner to establish error (Matter of Meyer v. State Tax Commission, supra.)

C. That assuming the veracity of petitioner's testimony regarding the profit he had on the sale of regular and unleaded gasoline, it is impossible to utilize this information to determine a proper markup on gasoline without specific information as to, respectively, the amount of the purchases of regular and unleaded gasoline. Similarly, it is impossible to utilize the information provided by petitioner pertaining to his profit on cigarettes without knowledge of the cost and number of packs of cigarettes he sold during the audit period. It is unfortunate that petitioner was unaware that he was required to save his records for audit for a period of three years (Tax Law §1135). However, exactness is not required when it is petitioner's own failure to maintain proper records which prevents exactness in the determination of sales tax liability (Matter of Markowitz v. State Tax Commission, 54 AD2d 1023, aff'd 44 NY2d 684). It is noted that the markup percentage on gasoline sales ultimately utilized by the Audit Division was based on invoices actually presented by petitioner.

D. That in view of the fact that petitioner operated petitioner's service bay for only one year, the error rate applied to petitioner's reported sales over a three year period was too high. Accordingly, the error rate and assessment should be adjusted to reflect the fact that for two years of the three year period, petitioner did not have any sales of parts and labor.

E. That in view of the fact that petitioner retained the services of an accountant who maintained current records; that petitioner unknowingly disposed


of his records; and that petitioner appears to have been operating in good faith, the penalty is cancelled.

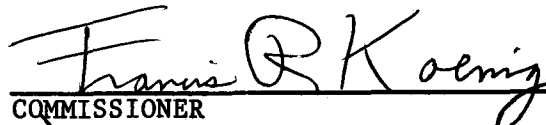
F. That the petition of Fred Monte d/b/a Riteway Mobil is granted to the extent of Conclusions of Law "D" and "E" and is, in all other respects, denied.

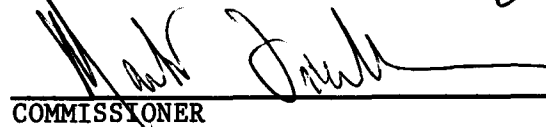
DATED: Albany, New York

STATE TAX COMMISSION

MAY 02 1984

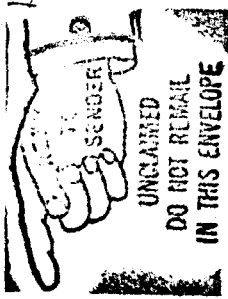

PRESIDENT


COMMISSIONER

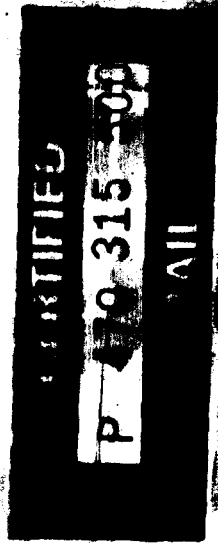

COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227



Fred Monte
d/b/a Riteway Mobil
274 Forbell Street
Brooklyn, NY 11208



CLAIM NO.
14303

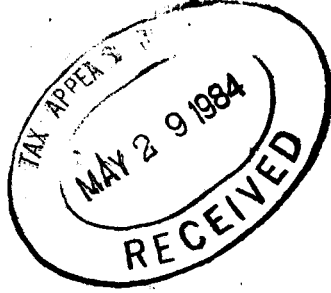
☐ HOLD

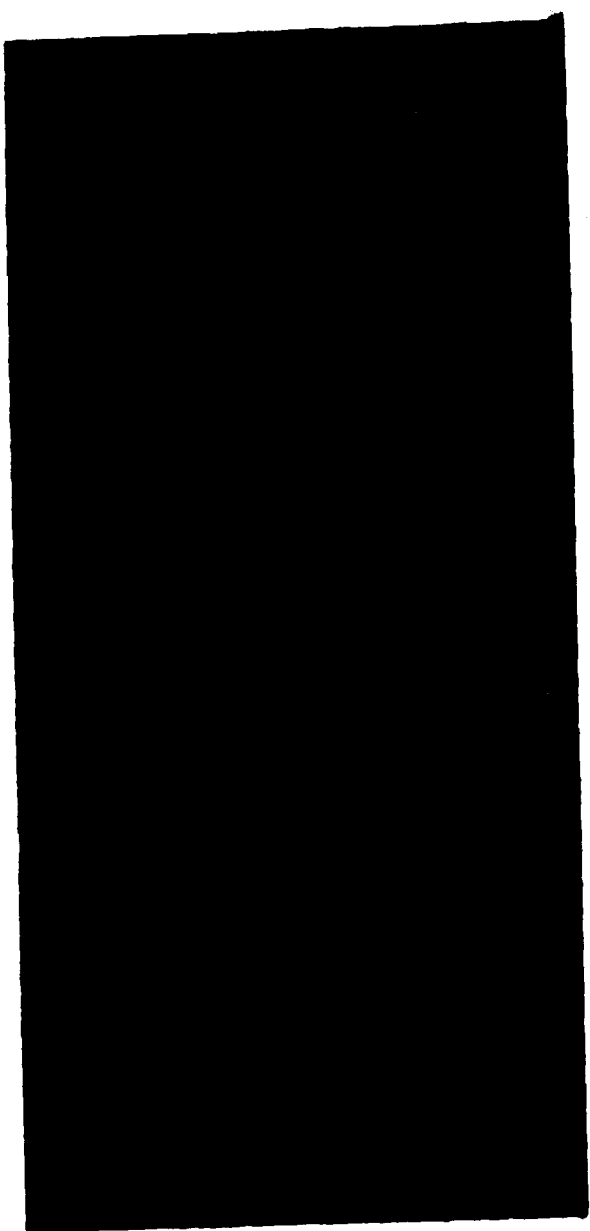
[Signature]

[Signature]

RETURN

MAIL NOTICE
Postage and Fees Paid
PS Form 3800-A
Feb. 1979





P 440 977 010

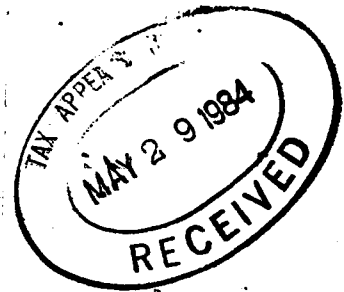
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Michael Santoli</i>	
Street and No. <i>Mason Road & Co.</i>	
P.O., State and ZIP Code <i>60 Carter Mill Rd Short Neck NY 11021</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	

PS Form 3800, Feb. 1982



CLAIM CH
14303

DATE *MAY 29*
HOLD
RETURN
FINAL NOTICE
PS Form 3800-A
Feb. 1978

Fred Monte
d/b/a Riteway Mobil
274 Forbell Street
Brooklyn, NY 11208

P 470 315 500

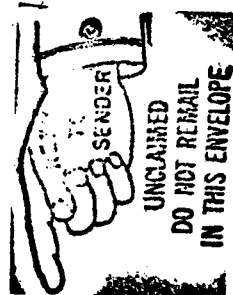
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Sent to <i>Fred Monte d/b/a Riteway Mobil</i>	
Street and No. <i>274 Forbell St.</i>	
P.O., State and ZIP Code <i>Brooklyn NY 11208</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

10, Feb. 1982



TA 26 (9-79)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CERTIFIED
P 470 315 500
MAIL

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

May 2, 1984

Fred Monte
d/b/a Riteway Mobil
274 Forbell Street
Brooklyn, NY 11208

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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Michael Santoli
Mason, Raich & Company
60 Cutter Mill Rd.
Great Neck, NY 11021
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
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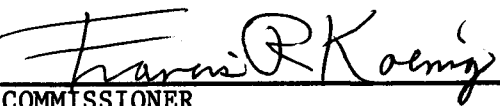
F. That the petition of Fred Monte d/b/a Riteway Mobil is granted to the extent of Conclusions of Law "D" and "E" and is, in all other respects, denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 02 1984


PRESIDENT


COMMISSIONER


COMMISSIONER