

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Shevlin Service, Inc. : 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 3/1/74-8/31/78. :

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 9th day of August, 1984, he served the within notice of Decision by certified mail upon Shevlin Service, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Shevlin Service, Inc.
4 Dickinson Lane
Englishtown, NJ 07726

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
9th day of August, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

Bonnie R. Hammond
Authorized to administer oaths
pursuant to Tax Law section 174

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

August 9, 1984

Shevlin Service, Inc.
4 Dickinson Lane
Englishtown, NJ 07726

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
Seymour Diamond
Diamond, Charles & Co.
2116 Merrick Ave.
Merrick, NY 11566
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SHEVLIN SERVICE, INC.	:	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 March 1, 1974	:	
through August 31, 1978.	:	

Petitioner, Shevlin Service, Inc., 4 Dickinson Lane, Englishtown, New Jersey 07726, 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 March 1, 1974 through August 31, 1978 (File No. 28802).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 12, 1983 at 2:00 P.M., and continued to conclusion on December 9, 1983 at 9:00 A.M. Petitioner appeared by James Shevlin, President. The Audit Division appeared by John P. Dugan, Esq. (Patricia Brumbaugh and Irwin Levy, Esqs., of counsel).

ISSUE

Whether the Audit Division used proper audit procedures in determining petitioner's additional sales and use tax liability.

FINDINGS OF FACT

1. On November 20, 1979, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Shevlin Service, Inc., in the amount of \$25,471.18, plus penalty of \$6,367.81 and interest of \$12,379.18, for a total

due of \$44,218.17 for the period March 1, 1974 through August 31, 1977. On the same date, the Audit Division issued a second Notice against petitioner in the amount of \$5,292.23, plus penalty of \$1,179.55 and interest of \$998.30, for a total due of \$7,470.08 for the period September 1, 1977 through August 31, 1978.

2. Petitioner, by its president, James C. Shevlin, had signed consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1974 through February 28, 1977 to December 19, 1979.

3. Petitioner operated a Hess Service Station in Staten Island, New York. Petitioner sold gasoline, oil and soda at the station. The station had five islands with four pumps on each island for a total of twenty pumps. Petitioner was in operation under a franchise from Hess for 15 years, however, when Hess raised the rent by \$4,000.00 a month, petitioner could no longer remain competitive and was forced to cease operations. During its years of operation, petitioner employed as many as 30 employees working 10 to a shift on 3 shifts for 24 hours a day.

4. The Audit Division conducted an audit of petitioner which was completed on September 10, 1979. Upon review by the Audit Evaluation Bureau, the case was sent back to the auditor for additional field work for several reasons. Among the conclusions reached by the reviewer were that "[t]he month of September, 1978 was the only test period used to determine a mark-up on gasoline even though the vendor's records were available." The reviewer also stated that the auditor used inaccurate markup percentages on gasoline because he did not take into account the disparity between the markups on unleaded and regular gasoline. Additionally, the auditor had used a 65 percent markup on soda purchases without stating the basis for such a markup in the audit report.

5. Upon completion of additional audit work, the auditor decided to continue to rely on a one month markup test of gasoline because petitioner kept no cash register receipts and the auditor could find no records indicating the selling prices of gasoline for any other months within the audit period. The auditor checked petitioner's sales per books against sales as reported on Federal income tax returns and found them to be in agreement. The auditor revised the gasoline markup test to reflect the different markups of unleaded and regular gasoline and determined a combined markup ratio of 13.8 percent. Oil sales were tested and the auditor determined a markup of 71.82 percent. The auditor tested soda purchases for July, 1977 and computed a markup of 66.34 percent. The latter figure was reduced to 65 percent to "better reflect a possible lower mark-up ratio for prior years". The soda markup of 65 percent was applied to soda purchases for 1977. The result was divided by total sales of all products to derive a ratio of soda sales to total sales for the entire audit period. The auditor determined that total soda sales for the audit period were \$14,109.29. The auditor took total audited sales and compared them to sales reported on sales tax returns and determined a margin of error of approximately 4.5 percent which was applied to sales reported to determine additional taxable sales.

6. The auditor also found that petitioner had purchases of supplies and equipment such as gas caps and gas nozzles for which there were no invoices indicating sales tax was paid. Such purchases amounted to \$156.81 for the month of July, 1977. It is unclear from the record or from the auditor's testimony just where he found these purchases, since he testified that no invoices were available. When asked how he determined that no tax was paid on the purchase of these items, the auditor responded that he guessed "when no

invoice is presented, that is why it was disallowed". The auditor compared these supply purchases to total sales for the audit period and determined that petitioner made \$10,024.28 in such purchases during the audit period for which sales tax was unpaid. The Audit Division showed no basis for a correlation between sales of gasoline and oil and purchases of items such as gas caps and gas nozzles. No evidence was shown which would indicate that petitioner made such large amounts of supply purchases without paying sales tax. Mr. Shevlin, petitioner's president, testified that he made all such purchases at stores and that the stores would not have sold him the items if he had not paid the sales tax at the time of purchase. There was also no indication that petitioner made any such purchases for resale for which it gave the suppliers resale certificates.

7. The auditor also did a detailed analysis of fixed asset purchases and determined that sales tax was due on \$4,313.42 in taxable fixed asset purchases. Petitioner did not contest this amount.

8. Petitioner maintained that it did keep adequate daily sales records. Mr. Shevlin produced several forms entitled "Shift Report" for various dates during the audit period. These reports contained the pump readings of gallons of gasoline dispensed and dollar amounts of sales for each of the pumps at the station. The reports also listed amounts of motor oil removed from inventory and the selling price of each type of oil sold. Mr. Shevlin or an employee recorded the pump readings every 24 hours. Mr. Shevlin testified that he had such records for every day of the audit period and that, in preparing for the audit, he assembled all the daily reports in a large box to turn over to his accountant. The auditor did not use any of petitioner's daily reports and did not ask Mr. Shevlin if he maintained any such records. In fact, the auditor testified that he never went to the station during the audit and that he

conducted the entire audit at petitioner's accountant's office. The auditor sent an assistant to check the pump prices on one day in September, 1978, but he never personally visited the station and apparently failed to inquire further into the possibility that such records existed. Mr. Shevlin conceded that he did not have cash register tapes and had no daily sales records of soda.

9. An examination of the limited number of shift reports submitted by petitioner indicated that the sales prices determined by the auditor's markup test and the gallons sold as determined by the auditor's inspection of purchase invoices were accurate when compared to petitioner's daily reports. It is apparent that the auditor's findings would closely approximate the figures contained in petitioner's records if they had been available.

10. Mr. Shevlin submitted a dealer close-out statement from Hess indicating that \$31,614.15 of petitioner's security deposit with Hess had been withheld by Hess and turned over to the Tax Commission. Mr. Shevlin wished to advise the Commission that petitioner's liability, if any, should be offset by the deposit, if in fact it has been turned over to the Commission.

CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law, in effect during the period in issue, requires every person required to collect sales tax to keep records of every sale and of the tax payable thereon. "Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum...". Section 1138(a) provides that if a sales tax return "is not filed, or 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. If necessary, the tax may be estimated on the basis of external indices...".

B. That a resort to use of a test period "must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit" (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44). Petitioner maintained records, compiled daily, listing total gallons of gasoline pumped and total sales of gasoline for each pump at the station. The same records contained listings of all motor oil sold on a daily basis. The record is vague and inconsistent as to why the auditor was unable to use such records or even if the records existed at the time of the audit. Initially, the auditor reported that no records were available, yet on review, Audit Evaluation issued a report saying that records were available and a one month test period was the only test used. A "taxpayer who maintains comprehensive records as required has a right to expect that they will be used in any audit to determine his ultimate tax liability" (65 A.D.2d at 47), however such records must be made available for audit. Petitioner did not supply the shift reports to the auditor during the audit and was unable to produce more than a few at the hearing even though eleven months were allowed for petitioner to produce all the records. Moreover, it appears that the audit findings were fairly accurate and that, if petitioner's records were produced, it is more likely than not that they would serve to support the audit findings. Therefore, that portion of the assessment with respect to additional tax due on sales of gasoline and oil is sustained.

C. That the audit method adopted must be reasonably calculated to reflect the taxes due (W. T. Grant Co. v. Lazarus, 2 N.Y.2d 196). The Audit Division failed to show any reasonable basis for projecting \$156.81 in purchases of supplies for which no invoices were available over the four year audit period to arrive at the conclusion that petitioner made over \$10,000.00 in purchases

upon which no tax was paid. There is no evidence in the record indicating a pattern of purchasing by petitioner without paying sales tax over the entire audit period. Therefore, that portion of the assessment with respect to supply purchases is reduced to the tax due on the \$156.81 for which no invoices were available showing sales tax paid.


D. That, inasmuch as petitioner kept no sales receipts for sales of soda, the auditor was justified in using a markup test of purchases to determine the amount of soda sales. The taxable soda sales of \$14,109.29, as determined by the auditor, is sustained and the additional tax due on said amount is to be recomputed with an allowance for taxable sales previously reported. The tax due on \$4,313.42 in fixed asset purchases upon which tax was unpaid is likewise sustained.

E. That the petition of Shevlin Service, Inc. is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is directed to modify the notices of determination and demand for payment of sales and use taxes due issued November 20, 1979 accordingly; and that, except as so granted, the petition is in all other respects denied.

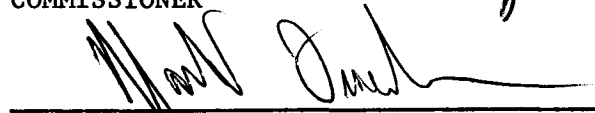
DATED: Albany, New York

STATE TAX COMMISSION

AUG 09 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Shewlin Service, Inc.</i>	
Street and No. <i>4 Dickinson Lane</i>	
P.O., State and ZIP Code <i>Englishtown, NJ 07966</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	

PS Form 3800, Feb. 1982

P 440 977 402

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Gymour Diamond</i>	
Street and No. <i>2116 Merrick Ave.</i>	
P.O., State and ZIP Code <i>Merrick, NY 11566</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	

PS Form 3800, Feb. 1982