

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Gaylord Snyder :  
d/b/a Snyder Shell Service : 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 :  
6/1/74 - 2/28/77. :

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

Gaylord Snyder  
d/b/a Snyder Shell Service  
Rte. 37  
Malone, NY 12953

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.

David Parschuck

James R. Haglund  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

November 9, 1984

Gaylord Snyder  
d/b/a Snyder Shell Service  
Rte. 37  
Malone, NY 12953

Dear Mr. Snyder:

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  
Henry Gelles  
Habor Theater, Bldg. Box 590  
Lake Placid, NY 12946  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
GAYLORD SNYDER	:	DECISION
D/B/A SNYDER SHELL SERVICE	:	
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, 1974	:	
through February 28, 1977.	:	

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Petitioner, Gaylord Snyder d/b/a Snyder Shell Service, Main Street, Box 382, North Bangor, New York 12966, 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, 1974 through February 28, 1977 (File No. 20427).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, State Office Campus, Albany, New York, on January 30, 1984 at 1:00 P.M., with all briefs to be submitted by February 29, 1984. Petitioner appeared by Henry Gelles, Esq. The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

#### ISSUE

Whether the audit procedure employed by the Audit Division in an examination of petitioner's books and records was proper and the resultant findings of additional taxable sales were correct.

#### FINDINGS OF FACT

1. There was a previous small claims hearing on this matter conducted by Judy M. Clark, Hearing Officer, in Utica, New York on July 23, 1980 after which a decision was rendered by the State Tax Commission on June 8, 1984.

Petitioner subsequently brought an Article 78 proceeding in the Supreme Court, Albany County whereupon it was discovered that a tape recorder malfunction at the first hearing had caused the loss of part of the oral testimony at the 1980 hearing. Thus both parties on appeal stipulated that a rehearing be held to establish a complete record and that the State Tax Commission issue a new determination before any further review proceedings were commenced.

2. On July 28, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Gaylord Snyder d/b/a Snyder Shell Service for the period June 1, 1974 through February 28, 1977. The Notice was issued as a result of a field audit which asserted additional tax due of \$5,522.25 plus penalties and interest. The amount of tax currently in dispute is \$5,119.24 plus penalties and interest. (See Finding of Fact 5.)

3. Petitioner operated a gasoline service station and a small grocery store. In December, 1975, petitioner expanded his operation to include the sale of mobile homes.

4. The audit conducted by the Audit Division consisted of two phases. First, the Audit Division examined purchases made during March, 1976 and found that 46.49 percent of petitioner's grocery and miscellaneous purchases were taxable when resold and that 85.05 percent of his gasoline purchases were taxable<sup>1</sup>. It performed a markup test based on petitioner's selling prices which were either stamped on the grocery items or stated by petitioner. The Audit Division determined a markup on taxable grocery and miscellaneous taxable purchases of 25 percent and a markup on gasoline of 13 percent. It then applied the appropriate markups to the taxable purchases for the period June 1,

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<sup>1</sup> The Audit Division netted out 8 cents per gallon for the State gasoline tax.

1976 through February 28, 1977 and determined taxable sales of \$60,399.00. Petitioner reported taxable sales of \$44,466.00 for groceries and gasoline. Therefore, the Audit Division determined a margin of error of 35.83 percent. It then applied the margin of error to the taxable grocery and gasoline sales reported for the entire audit period which resulted in additional taxable sales of \$68,589.00.

In the second phase of the audit, the Audit Division examined mobile home sales for the entire period during which they were sold. It found one sale of a mobile home in the amount of \$10,300.00 which was not reported on petitioner's sales and use tax returns filed for the period in issue. The Audit Division determined total additional taxable sales of \$78,889.00 and tax due thereon of \$5,522.25 for the audit period.

5. The amount of sales tax in dispute was reduced to \$5,119.24 plus penalties and interest as a result of the prior State Tax Commission decision rendered on June 8, 1982. This amount was further reduced at the rehearing to \$4,318.24 plus penalties and interest upon stipulation by the Audit Division that petitioner paid the \$721.00 of sales tax due on the mobile home sale of \$10,300.00.

6. It was the Audit Division's position that petitioner's sales records were insufficient for verification of his taxable sales and that the markup test performed and the resultant margin of error disclosed the insufficiency of those records.

7. Petitioner contended that his records reflected the correct amount of sales and sales tax collected. Petitioner introduced into evidence his cash register receipts and sales summaries for the entire period in issue. The cash register receipts showed the daily totals of grocery and gasoline sales and the

tax collected thereon. They did not show the individual items sold or verify that the proper amount of tax was collected thereon.

Petitioner further argued that all records were available and should have been used for a more detailed analysis than that performed by the Audit Division. Petitioner introduced his profit and loss summaries for the entire period in issue. By using petitioner's actual purchases for the entire audit period, additional taxable sales of groceries and gasoline are \$62,832.00 as opposed to \$68,589.00. Petitioner did not introduce evidence to show that the taxable ratio of purchases as determined by the Audit Division was incorrect.

8. Petitioner contended that unrefrigerated beer was sold at reduced prices and that he often engaged in price wars with competitors to induce business. Petitioner offered no documentary evidence to show the volume of items sold at reduced selling prices or the corresponding costs of those items sold for comparison to the markup percentages determined by the Audit Division.

9. Petitioner sold more regular gasoline which had a lower markup than the other grades sold. For that reason, the Audit Division conceded at the original hearing that the average markup on gasoline purchases should be reduced to 12 percent.

10. Petitioner was granted 30 days after the close of the rehearing to submit additional documentation as to inventory but no such evidence was submitted within this period.

11. The application of penalties and interest was not raised at the hearing.

#### CONCLUSIONS OF LAW

A. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability

must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit. Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41. Petitioner's records were incomplete because it was impossible to verify that sales tax was paid on the sale of each taxable item. The markup test performed by the Audit Division disclosed that petitioner's records were insufficient to determine the exact amount of tax on beer and grocery sales. Therefore, the Audit Division properly used external indices to determine the amount of said sales. A review of petitioner's purchases indicates that additional taxable sales totalled \$62,832.00.

B. That petitioner's average markup on gasoline purchases was 12 percent as noted in Finding of Fact "9".

C. That except as noted in Conclusions "A" and "B" above, the audit performed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law. Matter of Urban Liquors, Inc. v. State Tax Commission, 90 A.D.2d 576, 456 N.Y.S.2d 138; Matter of Lemmes, Inc. (State Tax Commission, July 7, 1980.

D. That the petition of Gaylord Snyder d/b/a Snyder Shell Service is granted to the extent indicated in Conclusions "A" and "B" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 28, 1977; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 1984

Roderick W. Cline  
PRESIDENT  
Francis R. Koenig  
COMMISSIONER  
Mark J. O'Neil  
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	Sent to		Gaillard Snyder
	Street and No.		8161A Snyder Shell 505.
	P.O., State and ZIP Code		He-37
	Postage	Malone, NY 12953	
	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	\$	
PS Form 3800, Feb. 1982	Postmark or Date		

P 693 168 887

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517	Sent to		Henry Gelles
	Street and No.		Harbor Theater, Bldg. Box 590
	P.O., State and ZIP Code		Lake Placid, NY 12946
	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	\$	
PS Form 3800, Feb. 1982	Postmark or Date		