

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Americo Service Station, 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 6/1/78-5/31/81. :

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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 6th day of February, 1985, he served the within notice of Decision by certified mail upon Americo Service Station, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Americo Service Station, Inc.  
215 Saw Mill River Rd.  
Elmsford, NY 10523

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  
6th day of February, 1985.

David Parchuck

James W. Hagelund

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Americo Service Station, 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 6/1/78-5/31/81. :

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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 6th day of February, 1985, he served the within notice of Decision by certified mail upon Charles R. Fausel, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles R. Fausel  
219 Westchester Ave., P.O. Box 1188  
Portchester, NY 10573

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  
6th day of February, 1985.





Authorized to administer oaths  
pursuant to Tax Law section 174

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

February 6, 1985

Americo Service Station, Inc.  
215 Saw Mill River Rd.  
Elmsford, NY 10523

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  
Charles R. Fausel  
219 Westchester Ave., P.O. Box 1188  
Portchester, NY 10573  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
AMERICO SERVICE STATION, 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 June 1, 1978 :  
through May 31, 1981.

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Petitioner, Americo Service Station, Inc., a/k/a Elmsford Brake & Clutch, Inc., 215 Saw Mill River Road, Elmsford, New York 10573, 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, 1978 through May 31, 1981 (File No. 36001).

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 May 24, 1984 at 9:15 A.M. Petitioner appeared by Charles R. Fausel, C.P.A. The Audit Division appeared by John P. Dugan, Esq., (William Fox, Esq., of counsel).

ISSUE

Whether the audit procedures used by the Audit Division in an examination of petitioner's books and records were proper.

FINDINGS OF FACT

1. Petitioner, Americo Service Station, Inc., operated a Getty gasoline service station. Petitioner did not perform any service or repair work. The business was sold on approximately June 15, 1981.

2. On September 22, 1981, 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 June 1, 1978 through May 31, 1981 for taxes due of \$19,126.80, plus interest of \$2,442.02, for a total of \$21,568.82.

3. On audit, the Audit Division selected the period June through August, 1980 to verify taxable sales reported by petitioner. The gross sales reported for this period were \$267,026.00. The Audit Division deducted the state gasoline tax of \$15,180.56 included in that amount, as well as the sales tax of \$10,060.61, to arrive at taxable sales of \$241,785.00. Petitioner reported taxable sales of \$201,212.00 for the same period, leaving additional taxable sales of \$40,573.00 which represented an underreporting factor of 20.16 percent. The Audit Division did not employ the foregoing procedures for any other period. Instead, the error factor was applied to taxable sales reported for the audit period to determine total unreported sales of \$382,536.00 and additional taxes due thereon of \$19,126.80.

4. Petitioner did not maintain records of receipts, except for bank deposit records. Purchase invoices were not available for examination except for the period January, 1981 through May 31, 1981.

5. At a pre-hearing conference held on October 20, 1972, the Audit Division agreed to recompute taxable sales using actual gallons of gasoline purchased. The purchases were obtained from petitioner's supplier (Getty Oil). The average selling price of gasoline for each period under audit was applied to the gallons purchased to determine gross sales of \$2,252,091.00. After excluding the state gasoline tax and the sales tax, the taxable sales amounted to \$1,990,136.00 as compared to reported taxable sales of \$1,809,058.00, for a

difference of \$181,078.00. The additional taxes due were revised to \$9,053.90<sup>1</sup>.

6. Petitioner argued that the audit methods used by the Audit Division were improper in that all the available books and records were not utilized in determining the liability.

Petitioner offered no evidence to establish that the results of the audit were in any way erroneous.

#### 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 where necessary, an estimate of tax due "on the basis of external indices" including purchases.

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 make 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 petitioner maintained inadequate and incomplete books and records (Finding of Fact "4"). Moreover, the analysis of gasoline sales for the period June through August, 1980 disclosed a substantial underreporting of taxable sales which further established the unreliability of petitioner's books and records. Because of petitioner's inadequate record keeping, the Audit Division's

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1 The schedule recomputing the taxable sales (Exhibit G) showed a revised liability of \$11,159.20. However, there was an error in the computation for the period ending November 30, 1979 which overstated additional taxable sales by \$42,106.00.

use of a test period and markup audit as a basis for determining petitioner's liability was proper in accordance with section 1138(a) of the Tax Law (Matter of Sakran v. State Tax Commission, 73 A.D.2d 989; Matter of Chartair, Inc., supra).


If the audit method was reasonable, the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization v. Tully, 85 A.D.2d 858). Petitioner has failed to overcome this burden of showing error.

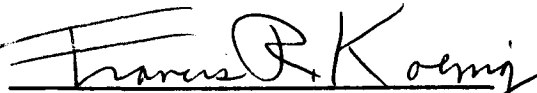
C. That the petition of Americo's Service Station, Inc. is granted to the extent that the taxes due are reduced to \$9,053.90. In all other respects the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 22, 1981 is sustained.

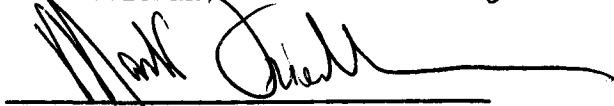
DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 693 169 515

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

★ U.S.G.P.O. 1983-403-517

Sent to	
<i>Charles R. Fausel</i>	
Street and No.	
<i>219 Westchester Ave POBx 188</i>	
P.O., State and ZIP Code	
<i>Westchester NY 10573</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 693 169 514

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

★ U.S.G.P.O. 1983-403-517

Sent to	
<i>America Service Station Inc.</i>	
Street and No.	
<i>215 Sun Mill Lane Rd.</i>	
P.O., State and ZIP Code	
<i>Longford NY 10523</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	