

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Jack Pellicano :  
T/A Pellicano's Service Station : 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 12/1/78-11/30/81. :

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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 30th day of October, 1985, he served the within notice of Decision by certified mail upon Jack Pellicano T/A Pellicano's Service Station, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack Pellicano  
T/A Pellicano's Service Station  
5 Fingerboard Rd.  
Staten Island, NY 10305

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  
30th day of October, 1985.

David Parchuck

Bernie R. Haglund  
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	:	
Jack Pellicano	:	
T/A Pellicano's Service Station	:	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 12/1/78-11/30/81.	:	

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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 30th day of October, 1985, he served the within notice of Decision by certified mail upon Mercurio J. Caruselle, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mercurio J. Caruselle  
1142 Hylan Blvd.  
Staten Island, NY 10305

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  
30th day of October, 1985.

David Parchuck

Carmin P. Haglund

Authorized to administer oaths  
pursuant to Tax Law section 174

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

October 30, 1985

Jack Pellicano  
T/A Pellicano's Service Station  
5 Fingerboard Rd.  
Staten Island, NY 10305

Dear Mr. Pellicano:

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  
Mercurio J. Caruselle  
1142 Hylan Blvd.  
Staten Island, NY 10305  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JACK PELLICANO	:	DECISION
T/A PELLICANO'S SERVICE STATION	:	
for Revision of a Determination or for Refund	:	
of Sales & Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1978	:	
through November 30, 1981.	:	

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Petitioner, Jack Pellicano t/a Pellicano's Service Station, 5 Fingerboard Road, Staten Island, New York 10305, 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, 1978 through November 30, 1981 (File No. 40611).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 25, 1985 at 1:15 P.M. with additional documentation to be submitted by petitioner on or before May 25, 1985. Petitioner appeared by Mercurio J. Caruselle, P.A. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales and use taxes due from Jack Pellicano t/a Pellicano's Service Station for the period December 1, 1978 through November 30, 1981.

FINDINGS OF FACT

1. On September 20, 1982, 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 the petitioner, Jack Pellicano t/a Pellicano's Service Station, for taxes due of \$13,127.79, plus interest of \$3,033.65, for a total amount due of \$16,161.44 for the period December 1, 1978 through November 30, 1981.

2. On January 18, 1982, the petitioner executed a consent extending the statute of limitations for assessment of sales and use taxes for the period December 1, 1978 through May 31, 1979 to September 20, 1982.

3. It is the position of the Audit Division that petitioner's books and records were inadequate and that its use of a test period audit method and information supplied by a third party to determine petitioner's sales tax liability was proper.

4. On December 13, 1982, the petitioner timely filed a petition for a hearing to review the notice of determination. Petitioner contends that the amount of purchases of gasoline and accessories as well as the markup on these items used by the Audit Division were excessive. The petitioner also claims that no allowance was given for sales made at a discount.

5. In or about January 1982, the Audit Division initiated an audit of petitioner's books and records. Petitioner operated a Getty gas station at 5 Fingerboard Road, Staten Island, New York. Petitioner's records were inadequate to perform a detailed audit. Petitioner did not maintain sales slips for sales of repairs, oil, tires, antifreeze, batteries and accessories, and, therefore, sales as recorded in the cash receipts journal could not be verified. Petitioner also kept no record of his credit card sales. Finally, petitioner was missing purchase invoices, therefore, purchases per his books and invoices were not in agreement.

6. In determining taxable gasoline sales for the audit period, the auditor first computed the markup for gasoline, using January, 1982 costs and selling prices, as follows:

	<u>Unleaded</u>	<u>Leaded</u>
Selling price	\$ 1.48	\$ 1.44
Less: N.Y. State excise tax	.08	.09
	\$ 1.40	\$ 1.35
Divided by 100% plus sales tax rate	108.25	108.25
	\$ 1.293	\$ 1.247
Less: Cost	1.134	1.094
Markup	\$ 0.159	\$ 0.173
Percentage markup on cost	14.02%	15.81%

The above percentages were applied to petitioner's gasoline purchases of petitioner's as supplied to the Audit Division by the Getty Refining and Marketing Company ("Getty") to determine taxable gasoline sales of \$864,945.00.

7. It should be noted that the auditor made an error in computing the markup on leaded gasoline sales. The correct markup is actually \$0.153 and the percentage markup on cost is 13.99%.

8. In order to compute taxable sales of other items, the auditor first reviewed purchase invoices for the months of April, July and November, 1979; January and December, 1980; and September and November, 1981; and found that 68% of petitioner's purchases were of parts, 17% were of tires and batteries and 15% were of lubricants and oils.

The auditor next applied the above percentages to petitioner's purchases per his books to determine total purchases of said items.

The auditor then, using January, 1982 costs and selling prices, computed taxable sales of other items, including soda and cigarettes as follows:

<u>Category</u>	<u>Purchases</u>	X	<u>Markup + 100%</u>	<u>Sales</u>
Soda	\$ 1,602.00		156.3%	\$ 2,504.00
Cigarettes	1,602.00		155.3%	1,916.00
Oils & Lubricants	16,735.00		154.8%	25,906.00
Tires & Batteries	13,830.00		150.0%	20,745.00
Parts	55,320.00		300.0%	165,960.00
Total taxable sales of other items				<u>\$217,031.00</u>

It should be noted that the taxable sales of cigarettes was computed by deducting the New York State excise tax and that the 50% markup applied to tires and batteries was actually estimated but was agreed to by the petitioner. Also, the markup on parts was originally determined to be 433%, however, after further explanation by petitioner was reduced to 200%.

9. Total taxable sales of gasoline and other items was therefore determined to be \$1,081,976.00 less taxable sales reported of \$919,330.00 for additional taxable sales of \$162,646.00 with a tax due thereon of \$13,045.70. Petitioner was also found to be liable for use tax of \$16.80 on the purchase of a drill press, however, said amount is not at issue here. Total additional taxes due were therefore computed to be \$13,062.50.

It should be noted that the notice of determination indicates a tax due of \$13,127.79 and that this discrepancy was not explained at the hearing. Therefore, the amount computed as due herein is the amount due from petitioner less any adjustments which may result from this decision.

10. In preparing his sales and use tax returns, the petitioner estimated gasoline sales of 40,000 gallons per quarter. Sales of other items were also estimated since no reliable records were maintained. There is no evidence of a reconciliation being made.

11. At the hearing, petitioner submitted purchase invoices for the audit period for gasoline which included thereon an item identified as "other" and

"other charges" of 2¢ and 3¢ per gallon. Petitioner claims that these charges are actually additional rent charges and should be excluded from gasoline purchases before applying the markup. The invoices submitted also included thereon an item identified as "rent" of between 2¢ and 5¢ per gallon which was subtracted from gasoline purchases by the auditor before applying the markup.

12. Petitioner submitted a computer printout of its purchases of gasoline and other items during the audit period which it received from Getty. Petitioner also submitted two worksheets whereon it listed and totalled its purchases by category. Petitioner did not explain the relevance of these documents. However, the documents show that the purchase figures used by the auditor were substantially correct.

13. Petitioner presented no substantial evidence that it made sales at a discount or that the markups utilized by the auditor were excessive.

#### CONCLUSIONS OF LAW

A. That since the books and records of Jack Pellicano t/a Pellicano's Service Station were incomplete and inadequate, the Audit Division properly determined additional taxes due from such information as was available and external indices in accordance with section 1138(a) of the Tax Law (Matter of George Korba v. State Tax Commission, 84 A.D.2d 655).

B. That, under the circumstances herein, the Audit Division reasonably calculated the tax liability of petitioner and petitioner has failed to demonstrate by clear and convincing evidence that both the method used to arrive at the assessment and the assessment itself are erroneous (Matter of Ristorante Puglia, Ltd. v. Chu 102 A.D.2d 348, 351; Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully 85 A.D.2d 858, 859). Petitioner failed to show that the purchases or markups used by the Audit Division were excessive, or that he made sales at a




discount. Petitioner failed to sustain the burden of proof to show that the "other" and "other charges" were actually charges for additional rent.


C. That the petition of Jack Pellicano t/a Pellicano's Service Station is granted to the extent indicated in Findings of Fact "7" and "9". The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1982; and that except as so granted, the petition is denied.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 30 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 153 387 618

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Sent to	<i>Jack Pellucaro</i>	
Street and No.	<i>10 Pellucaro Service Station</i>	
P.O. State and ZIP Code	<i>5 Amherst Rd Staten Island NY 10305</i>	
Postage	<i>\$</i>	<i>10305</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	<i>\$</i>	
Postmark or Date		

P 153 387 619

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Sent to	<i>Micraire J. Curran</i>	
Street and No.	<i>1142 Elyan Blvd.</i>	
P.O. State and ZIP Code	<i>Staten Island NY 10305</i>	
Postage	<i>\$</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	<i>\$</i>	
Postmark or Date		