

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Nicola Alfieri :
d/b/a Nicks Service Station

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article(s) 28 & 29 of the Tax Law :
for the Period 12/1/79 - 11/30/82.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 17th day of June, 1986, he/she served the within notice of Decision by certified mail upon Nicola Alfieri, d/b/a Nicks Service Station the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nicola Alfieri
d/b/a Nicks Service Station
81-67 Liberty Ave.
Ozone Park, NY 11417

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
17th day of June, 1986.

Janet M. Snay

Daniel J. Ravallo
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of
Nicola Alfieri :
d/b/a Nicks Service Station

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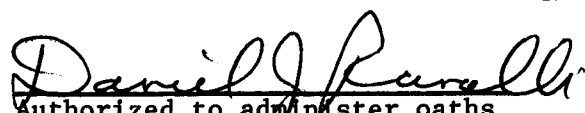
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 17th day of June, 1986, he served the within notice of Decision by certified mail upon Nicholas Felella, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

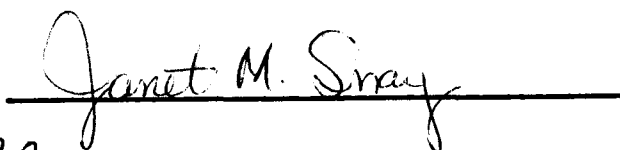
Nicholas Felella
81-67 Liberty Ave.
Ozone Park, NY 11417

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
17th day of June, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



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

June 17, 1986

Nicola Alfieri
d/b/a Nicks Service Station
81-67 Liberty Ave.
Ozone Park, NY 11417

Dear Mr. Alfieri:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Nicholas Felella
81-67 Liberty Ave.
Ozone Park, NY 11417

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|---|---|----------|
| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| NICOLA ALFIERI | : | DECISION |
| D/B/A NICK'S SERVICE STATION | : | |
| | : | |
| 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, 1979 | : | |
| through November 30, 1982. | : | |

Petitioner, Nicola Alfieri d/b/a Nick's Service Station, 81-67 Liberty Avenue, Ozone Park, New York 11417, 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, 1979 through November 30, 1982 (File No. 45993).

A hearing was commenced before Frank Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 19, 1985 at 9:15 A.M., and continued to conclusion at the same location on March 3, 1986 at 1:15 P.M. Petitioner appeared by Nicholas Felella, P.A. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined the additional sales taxes due from petitioner, Nicola Alfieri d/b/a Nick's Service Station, for the period at issue.

II. Whether penalties and interest in excess of the minimum statutory rate should be waived.

FINDINGS OF FACT

1. On August 19, 1983, subsequent to the conduct of a field audit, the Audit Division issued to petitioner, Nicola Alfieri d/b/a Nick's Service Station, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1979 through November 30, 1982 in the amount of \$43,681.94, plus penalty of \$10,062.75 and interest of \$12,180.57, for a total of \$65,925.26. On March 4, 1983 and again on June 7, 1983, the petitioner had executed two consents extending the period of limitations for assessment of taxes for the taxable period December 1, 1979 through May 31, 1980 to June 20, 1983 and September 20, 1983, respectively.

2. On August 29, 1983, the Tax Appeals Bureau received a properly completed petition to review the aforementioned notice. Petitioner claims that the Audit Division's estimate of his repair sales was excessive and, further, that they improperly computed his markup on gasoline.

3. For approximately five years, the petitioner has operated an Amoco gasoline service station at 81-67 Liberty Avenue in Ozone Park, New York. The station contains five repair bays and is open daily from 7:30 A.M. to 6:00 P.M. Petitioner operates the station with the assistance of one part-time mechanic. In addition to gasoline and repairs, the petitioner's sales consisted of oil, grease, batteries, antifreeze and other automotive accessories.

4. On or about January 18, 1983, the auditor examined copies of petitioner's sales tax returns and Federal and State income tax returns and a sampling of gasoline purchase invoices for the period June, July and August of 1982. The auditor requested but was not provided with the following: general ledger, cash receipts journal, cash disbursements journal, purchase invoices (other

than gasoline), sales invoices, exemption certificates, bank statements and day sheets. The petitioner's accountant indicated that no books or records were maintained for the audit period. Presumably, sales as reported on sales tax returns were estimated by petitioner.

5. The auditor first obtained gasoline purchases for the audit period from Amoco Oil Company of \$419,557.85, excluding all taxes. A markup test was performed based on costs and selling prices as observed by the auditor on December 31, 1982, which resulted in an overall markup of 21.1 cents or 18.54 percent. The markup percentage was applied to the above gasoline purchases resulting in audited gasoline sales net of Federal excise tax of \$497,343.87. Federal excise tax of 4 cents per gallon was calculated on a total of 377,312 gallons purchased during the audit period resulting in \$15,092.48. The total audited taxable gasoline sales was determined to be \$512,436.35 (\$497,343.87 + \$15,092.48). Repair and other sales were estimated at \$1,000.00 per week, or \$156,000.00 for the audit period, based on the auditor's experience. Total audited taxable sales amounted to \$668,436.35 for a sales tax liability of \$51,121.98. After giving credit for total tax paid of \$7,440.04, additional sales tax liability was determined to be \$43,681.94.

6. At the hearing held herein, the petitioner presented evidence that his repair sales for the audit period were actually \$70,018.00. Petitioner did not indicate why this information was not made available to the auditor, nor did he present any evidence regarding his gasoline sales. It should be noted that the petitioner reported taxable sales of \$91,712.00 for the audit period.

7. Subsequent to the hearing, petitioner's representative requested that, due to the lengthy delay involved in an appeal, Mr. Alfieri should not be

charged penalties and interest during the time it took for his petition to be heard.

CONCLUSIONS OF LAW

A. That in light of petitioner's inability to produce complete and adequate books and records, the Audit Division was justified in employing external indices, in this instance, information from a third party and the auditor's experience, to determine petitioner's sales tax liability. Tax Law §§1135 and 1138. The repair sales should be reduced to \$70,018.00 in accordance with Finding of Fact "6".

B. That since the petitioner did not explain or show that reasonable cause existed for the understatement of his tax liability, penalty and maximum interest are due on the additional sales tax determined. Petitioner's basis for waiving penalty and interest, as specified in Finding of Fact "7", does not constitute reasonable cause. See 20 NYCRR 536.1(b).

C. That the petition of Nicola Alfieri d/b/a Nick's Service Station is granted to the extent indicated in Conclusion of Law "A"; the Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 19, 1983; and that, except as so granted, the petition is denied.

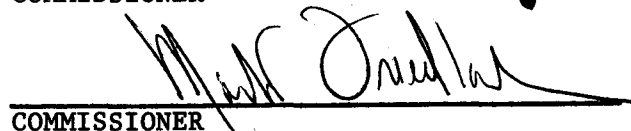
DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

P 319 372 750

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

| | |
|---|----|
| Sent to | |
| Nicola Alfieri | |
| Street and No. | |
| 81-67 Liberty Ave | |
| P.O., State and ZIP Code | |
| Ozone Park, N.Y. 11417 | |
| 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 319 372 751

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

| | |
|---|----|
| Sent to | |
| Nicholas Felella | |
| Street and No. | |
| 81-67 Liberty Ave | |
| P.O., State and ZIP Code | |
| Ozone Park, N.Y. 11417 | |
| 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 | |