

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

Cargain Service Station, Inc.

:

:

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 12/1/80 - 8/31/82.

:

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 29th day of December, 1986, he/she served the within notice of Decision by certified mail upon Cargain Service Station, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Cargain Service Station, Inc.  
Route 6  
Mahopac, NY 10541

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  
29th day of December, 1986.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Cargain Service Station, Inc. :

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 12/1/80 - 8/31/82.  
\_\_\_\_\_ :

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 29th day of December, 1986, he served the within notice of Decision by certified mail upon George H. Parker, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George H. Parker  
51 Chambers St., Suite 730  
New York, NY 10007

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  
29th day of December, 1986.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

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

December 29, 1986

Cargain Service Station, Inc.  
Route 6  
Mahopac, NY 10541

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  
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:  
George H. Parker  
51 Chambers St., Suite 730  
New York, NY 10007

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
CARGAIN 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 December 1, 1980 :  
through August 31, 1982. :

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Petitioner, Cargain Service Station, Inc., Route 6, Mahopac, New York 10541, 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, 1980 through August 31, 1982 (File No. 51052).

A 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 April 29, 1986 at 9:15 A.M. and was continued to conclusion at the same location on June 16, 1986 at 1:15 P.M., with all briefs to be submitted by July 1, 1986. Petitioner appeared by George Parker, Esq. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Audit Division properly estimated petitioner's sales tax liability on the basis of external indices.

FINDINGS OF FACT

1. Petitioner, Cargain Service Station, Inc., operated a Mobil gasoline service station located at Route 6, Mahopac, New York. Petitioner had three service bays to perform repair work.

2. The desk audit section of the Audit Division, by letter dated November 16, 1983, advised petitioner that its sales tax returns were being audited and requested that petitioner complete and return a Filling Station Questionnaire together with copies of schedule C or form 1120 of Federal tax returns filed for the years 1980 and 1981. On January 20, 1984, the Audit Division sent a follow-up letter indicating that it received no reply to the foregoing request.

3. On March 20, 1984 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period December 1, 1980 through August 31, 1982 for taxes due of \$22,397.56, plus penalty and interest of \$12,562.16, for a total of \$34,959.72. The notice contained the following explanation:

"The tax due was computed by marking up your purchases of gasoline reported by your distributor. Your average selling price of gasoline was computed for each period based on the average retail selling prices. The purchases other than gasoline were marked up based on normal industry practices. Your average selling price less exempt taxes was than [sic] applied to gasoline purchases plus other sales to determine taxable sales."

The notice was issued after the Audit Division received no reply to the above letters and the letters were not returned by the United States Postal Service.

4. On May 23, 1984, in response to a request from petitioner's appointed representative, Wolf Magalnick, CPA, the Audit Division sent a letter accompanied by a worksheet showing the computation of additional tax due. The Audit Division also enclosed a second questionnaire to be completed and advised Mr. Magalnick if the questionnaire was not returned a hearing would be scheduled. The Audit Division had received from Mobil Oil Corp. the quantity of gasoline purchased by petitioner for the years 1980, 1981 and 1982. Mobil's records showed

that petitioner purchased 602,269 gallons in 1981 and 554,196 gallons in 1982. The records indicated annual figures for purchases except for the month of December. The Audit Division computed average gallons purchased for a three month period in order to estimate sales on a quarterly filing basis. The statewide average retail selling prices of gasoline for each period under audit were obtained from the Miscellaneous Tax Bureau. Gasoline sales amounted to \$1,258,632.55. Repair sales and sales of items other than gasoline were estimated to be 38 percent of gasoline sales or \$478,278.00. This estimate was based on completed audits of similar businesses. The tax due on the estimated gasoline and repair sales was \$103,521.77 as opposed to \$81,124.21 paid over with returns filed, leaving additional taxes due of \$22,397.56.

5. On December 14, 1984, a pre-hearing conference was held by the Tax Appeals Bureau. The conferee directed the Audit Division to conduct a field examination of petitioner's books and records. The audit was scheduled by letter for February 13, 1985. Mr. Magalnick did not provide the Audit Division with any records until March 3, 1986. The only records made available at that time were bank statements, payroll records, a list of repair part purchases and workpapers used to prepare sales tax returns. A comparison of the worksheets with Mobil's records disclosed that petitioner purchased 283,988 gallons more than were reported sold. The purchases of repair parts amounted to \$179,118.00 for the audit period. The Audit Division applied a 40 percent markup (based on office experience) to the purchases to estimate part sales of \$250,765.00. Labor sales were estimated by doubling wages paid (\$264,226.00) and adjusting by 25 percent to allow for labor used to pump gasoline. Estimated repair sales totalled \$448,972.00. The Audit Division concluded that the field audit of the limited books and records made available substantiated the original assessment issued by the desk audit section.

6. Petitioner did not maintain any verifiable record of gasoline sales or repair sales. Wolf Magalnick determined gross sales reported on the sales tax returns by adding bank deposits to credit card sales.

7. Petitioner argued that the sales tax returns filed for the audit period accurately reflect the actual sales of the business. Furthermore, petitioner maintained that sufficient books and records were available to conduct an audit and as such the estimates made by the Audit Division were not warranted.

8. Petitioner offered no explanation to account for the substantial discrepancy in the gasoline purchases indicated in Finding of Fact "5".

#### 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".

B. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement. Hand-recorded entries on a worksheet of gross sales were not reliable records to satisfy the statutory requirements that records of individual sales be retained (Matter of Skiadas v. State Tax Commission, 95 AD2d 971).

C. That petitioner provided inadequate and incomplete books and records for purposes of verifying taxable sales. When records are not provided or are incomplete and insufficient, it is the duty of the Audit Division to select a

method of audit reasonably calculated to reflect taxes due (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576). Accordingly, the Audit Division's use of third party purchases and statewide average selling prices as a basis for determining petitioner's gasoline sales was proper pursuant to section 1138(a) of the Tax Law.

D. That the estimate procedures adopted by the Audit Division for repair sales were reasonable under the circumstances. When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223). Petitioner failed to sustain its burden of showing that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 AD 2d 858).

E. That the petition of Cargain Service Station, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 20, 1984 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 29 1986

Roderick W. Chen  
PRESIDENT

Francis P. Kolmij  
COMMISSIONER

Mark J. [Signature]  
COMMISSIONER



P 319 117 242

RECEIPT FOR CERTIFIED MAIL

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

★ U.S.G.P.O. 1985-480-794

Sent to <b>Cargain Service Station Inc</b>	
Street and No. <b>Route 6</b>	
P.O. State and ZIP Code <b>Mahopac, N.Y. 10541</b>	
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, June 1985

P 319 117 243

RECEIPT FOR CERTIFIED MAIL

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

★ U.S.G.P.O. 1985-480-794

Sent to <b>George H. Parker</b>	
Street and No. <b>51 Chambers St. Suite 730</b>	
P.O. State and ZIP Code <b>New York, N.Y. 10007</b>	
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, June 1985