

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Joseph A. Ciatto : AFFIDAVIT OF MAILING  
d/b/a Patterson Power Test :  
:   
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 3/1/79-8/31/82. :

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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 28th day of April, 1986, he/she served the within notice of Decision by certified mail upon Joseph A. Ciatto, d/b/a Patterson Power Test the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph A. Ciatto  
d/b/a Patterson Power Test  
Routes 22 & 311  
Patterson, NY 12563

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  
28th day of April, 1986.

David Parchuck

Janet M. Snay  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

April 28, 1986

Joseph A. Ciatto  
d/b/a Patterson Power Test  
Routes 22 & 311  
Patterson, NY 12563

Dear Mr. Ciatto:

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

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
JOSEPH A. CIATTO  
D/B/A PATTERSON POWER TEST  
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 March 1, 1979  
through August 31, 1982.

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DECISION

Petitioner, Joseph A. Ciatto d/b/a Patterson Power Test, Routes 22 and 311, Patterson, New York 12563, 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 March 1, 1979 through August 31, 1982 (File Nos. 44506 and 49871).

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 November 20, 1985 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner based on examination of available books and records.

FINDINGS OF FACT

1. Petitioner, Joseph A. Ciatto d/b/a Patterson Power Test, operated a gasoline service station located at Routes 22 and 311, Patterson, New York. Petitioner did not perform any repairs.

2. On October 20, 1982, 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 March 1, 1979 through August 31,

1980 for taxes due of \$34,102.04, plus penalty and interest of \$20,083.89, for a total due of \$54,185.93. On December 20, 1983, a second notice was issued covering the period September 1, 1980 through August 31, 1982 in the amount of \$33,564.63, plus penalty and interest of \$17,009.25, for a total due of \$50,573.88. Also on December 20, 1983, a Notice of Assessment Review was issued which revised the tax due on the first notice to \$17,720.59.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1979 through February 28, 1982 to November 30, 1982.

4. Petitioner provided the Audit Division with the following books and records for audit: sales tax returns, federal and state income tax returns, bank deposit records, purchases journal and daily sales sheets which showed the gallons of gasoline pumped, selling prices and total receipts. The Audit Division reconciled bank deposits with sales tax returns and found that the deposits for the audit period exceeded gross sales reported on the sales tax returns by \$937,218.00 (loans and taxes paid were deducted from deposits). Because of the substantial discrepancy in receipts, the Audit Division determined that the books and records were unreliable and it was necessary to reconstruct sales based on purchases of gasoline. The Audit Division obtained the quantity of gasoline purchased by petitioner for the period March, 1980 through October, 1981 from Power Test, petitioner's supplier. These purchases were used to estimate the taxes due on the notice issued October 20, 1982. Following the issuance of the notice, a conference was held at the White Plains District Office at which time petitioner produced purchase invoices for the period March 1, 1979 through August 31, 1982, as well as daily sales sheets which had the selling price for each grade of gasoline. The purchase invoices were verified against the Power

Test purchase records and were found to be complete. From the purchase invoices, the Audit Division listed the total gallons of gasoline purchased by grade for each month in the audit period. The gallons were multiplied by the selling price on the 15th day of the month to arrive at gasoline sales of \$3,011,929.00. The taxable sales after deducting the state gasoline tax were \$2,813,972.00. The Audit Division then allowed for personal use of the gasoline and excluded the sales tax which reduced the taxable sales to \$2,658,282.00. Petitioner reported taxable sales of \$1,746,680.00 for the same period, leaving additional taxable sales of \$911,602.00 and tax due thereon of \$50,790.74. Petitioner was also assessed use tax of \$494.48 on the personal consumption of gasoline for a total deficiency of \$51,285.22.

5. Petitioner took the position that the gasoline sales determined by the Audit Division were excessive for the following reasons:

- a) the gasoline delivered by Power Test was not metered and, therefore, there was no way to determine whether the quantity of gasoline shown on the invoices was actually received;
- b) the Audit Division's estimate of sales was based on selling prices effective on the 15th of the month while prices varied every few days;
- c) Power Test set the selling price of gasoline and occasionally such price was less than cost.

6. An analysis of petitioner's selling prices of gasoline over the entire audit period showed that selling prices on the 15th of any particular month represented the average selling price for that month.

#### 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.

B. That the discrepancy between the bank deposits and the sales shown on sales tax returns, as well as the substantial underreporting of taxable sales disclosed by the audit, established the unreliability of petitioner's books and records. When books and records are incomplete and unreliable, the use of external indices is permissible (Matter of Korba v. New York State Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division properly determined petitioner's tax liability pursuant to the provisions of section 1138(a) of the Tax Law.

C. That the Audit Division reasonably calculated petitioner's tax liability and, therefore, petitioner had the burden of showing that the audit method or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization v. Tully, 85 A.D.2d 858). Petitioner failed to sustain this burden.

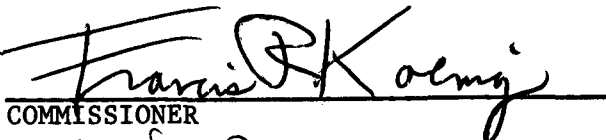
D. That the petition of Joseph A. Ciatto d/b/a Patterson Power Test is denied and the notices of determination and demand for payment of sales and use taxes due issued October 20, 1982, as revised, and December 20, 1983 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

**APR 28 1986**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 319 373 680

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 <u>Joseph A. Ciatto</u>	
<u>attn: Patterson Power Test</u>	
<u>Routes 22 + 311</u>	
P.O., State and ZIP Code <u>Patterson, N.Y. 12563</u>	
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	