

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Kelly Tire Service Center, 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 3/1/80 - 2/28/83. :
_____:

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 14th day of November, 1986, he/she served the within notice of Decision by certified mail upon Kelly Tire Service Center, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kelly Tire Service Center, Inc.
2701 Knapp Street
Brooklyn, NY 11235

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
14th day of November, 1986.

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

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Kelly Tire Service Center, 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 3/1/80 - 2/28/83. :
_____:

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 14th day of November, 1986, he served the within notice of Decision by certified mail upon William T. Barbera, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William T. Barbera
111 Wolfs Lane
Pelham, NY 10803

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
14th day of November, 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

November 14, 1986

Kelly Tire Service Center, Inc.
2701 Knapp Street
Brooklyn, NY 11235

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:
William T. Barbera
111 Wolfs Lane
Pelham, NY 10803

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

KELLY TIRE SERVICE CENTER, 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 March 1, 1980
through February 28, 1983. :

Petitioner, Kelly Tire Service Center, Inc., 2701 Knapp Street, Brooklyn, New York 11235, 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, 1980 through February 28, 1983 (File No. 45916).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 17, 1986 at 1:15 P.M. Petitioner appeared by William T. Barbera, Esq. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined sales and use taxes due from petitioner.

II. Whether the Audit Division properly asserted a penalty based upon fraud.

FINDINGS OF FACT

1. During the period at issue, petitioner, Kelly Tire Service Center, Inc., operated a Sunoco gas station at 2701 Knapp Street, Brooklyn, New York. On two separate occasions the auditor visited the business premises and observed that,

in addition to six pumps for dispensing gas, petitioner had three bays and employed two mechanics for maintaining and repairing cars.

2. After each of his four attempts to review petitioner's books and records proved fruitless because petitioner failed to present any records for audit, the auditor decided to use external indices to determine petitioner's sales and use tax liability. He first contacted petitioner's gasoline distributor, Sun Refining and Marketing Company in Melville, New York, and was advised that for the audit period petitioner purchased 1,103,714 gallons. The Audit Division determined petitioner's selling price per gallon to be \$1.25, exclusive of sales tax, State tax on gasoline and the tax of the City of New York on leaded gasoline, based on its experience in auditing similar businesses. The auditor multiplied the number of gallons purchased by \$1.25 to compute audited taxable sales of \$1,379,643.00 which when reduced by taxable sales reported of \$242,656.00 resulted in additional taxable gasoline sales of \$1,136,987.00 with a tax due thereon of \$92,179.56. The auditor then computed taxable repair sales for the audit period of \$449,280.00 with a tax due thereon of \$36,504.00 based on two mechanics working eight hours per day, six days per week with an hourly rate of \$30.00. The \$30.00 amount was also based on the Audit Division's experience in auditing similar businesses. The auditor next computed unpaid sales taxes on purchases due of \$1,600.00 based on the following fixed assets and estimated costs which he observed at the premises: tow truck, \$5,000.00; inspection machine, \$7,000.00; compressor, \$2,000.00; and lift equipment, \$6,000.00. As a result of the above, the auditor computed additional taxes due of \$130,283.56 (\$92,179.56 + \$36,504.00 + \$1,600.00).

3. On June 20, 1983, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a tax

due of \$130,283.56, plus a 50 percent fraud penalty of \$65,141.79 and interest of \$29,768.89, for a total amount due of \$225,194.24 for the period March 1, 1980 through February 28, 1983.

4. The Audit Division offered no evidence to support its assertion of fraud penalty.

5. Petitioner, in its perfected petition, claimed that the sales taxes which it reported were correct and that the assessment by the Audit Division was arbitrary and capricious. No evidence was presented in support of these contentions.

6. Petitioner also failed to present any evidence that the failure to remit the taxes at issue was due to reasonable cause and not due to willful neglect.

CONCLUSIONS OF LAW

A. That in view of petitioner's failure to present books and records for audit as required, the Audit Division was justified in utilizing external indices to determine petitioner's sales and use tax liability (Tax Law §§ 1135, 1138). Because the petitioner has failed to demonstrate that either the audit method or the result arrived at were erroneous, the additional sales and use taxes are sustained in full.


B. That based on the evidence presented, the Audit Division has not sustained the burden of proving that the imposition of a fraud penalty is warranted. However, since petitioner has failed to show that the failure to pay the taxes at issue was due to reasonable cause and not due to willful neglect, the petitioner is liable for the penalty imposed by Tax Law § 1145(a)(1)(i).

C. That the petition of Kelly Tire Service Center, Inc. is granted to the extent indicated in Conclusion of Law "B". The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1983; and that except as so granted, the petition is denied.


DATED: Albany, New York

NOV 14 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

TA-26 (7/85)

STATE OF NEW YORK

State Tax Commissioner

TAX APPEALS BUREAU

W. A. Hesterman, Clerk

ALBANY, N.Y. 12242

claim check

5833

REASON CHECKED
☒ Unclaimed
☐ No such number
☐ Addressee unknown
☐ Mailed, left no address
☐ Mailed, not forwardable
☐ Addressee unknown

Date

Hold

Fold at line over top of envelope to the right
 of the return address

CERTIFIED

P 319 372 028

MAIL

ALBANY
 NOV 14 1986
 U.S. POSTAGE
 114

RECEIVED
 TAX APPEALS BUREAU
 DEC 10 1986

Kelly Tire Service Center, Inc.
 2701 Knapp Street
 Brooklyn, NY 11235

1ST NOTICE
FINAL NOTICE
 Return

Discharged from
 PS Form 3800-A
 Oct. 1985

P 319 372 029

RECEIPT FOR CERTIFIED MAIL

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

Sent to William T. Barbera	
Street and No. 111 Wolfs Lane	
City, State and ZIP Code Pelham, N.Y. 10803	
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	

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

P 319 372 028

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 Kelly Pire Service Center	
Street and No. 2701 Knapp Street	
P.O., State and ZIP Code Brooklyn, N.Y. 11235	
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	

REQUEST FOR BETTER ADDRESS

Requested by <i>ST</i> Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Unit Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request <i>12/12/86</i>
---	---	------------------------------------

Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition <i>Dec - 11/14/86</i>
Name <i>Helly Fire Service Center, Inc.</i>	
Address <i>2701 Knapp Street Brooklyn, N.Y. 11235</i>	

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input checked="" type="checkbox"/> Other:	<i>Unclaimed</i>

Searched by <i>DB</i>	Section	Date of Search <i>12/12/86</i>
--------------------------	---------	-----------------------------------

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

TA-26 (7/85)

STATE OF NEW YORK

State Tax Commissioner

TAX APPEALS BUREAU

W. A. Hoffmann Campus

ALBANY, N.Y. 12227



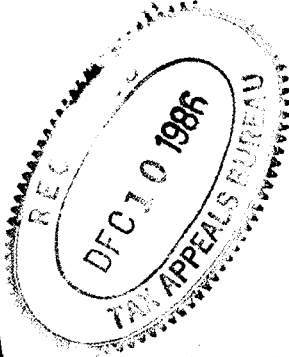
OFFICE

CERTIFIED

P 319 372 028

MAIL

Kelly Tire Service Center, Inc.
2701 Knapp Street
Brooklyn, NY 11235





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

November 14, 1986

Kelly Tire Service Center, Inc.
2701 Knapp Street
Brooklyn, NY 11235

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:
William T. Barbera
111 Wolfs Lane
Pelham, NY 10803

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

KELLY TIRE SERVICE CENTER, 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 March 1, 1980
through February 28, 1983. :

Petitioner, Kelly Tire Service Center, Inc., 2701 Knapp Street, Brooklyn, New York 11235, 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, 1980 through February 28, 1983 (File No. 45916).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 17, 1986 at 1:15 P.M. Petitioner appeared by William T. Barbera, Esq. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined sales and use taxes due from petitioner.

II. Whether the Audit Division properly asserted a penalty based upon fraud.

FINDINGS OF FACT

1. During the period at issue, petitioner, Kelly Tire Service Center, Inc., operated a Sunoco gas station at 2701 Knapp Street, Brooklyn, New York. On two separate occasions the auditor visited the business premises and observed that,

in addition to six pumps for dispensing gas, petitioner had three bays and employed two mechanics for maintaining and repairing cars.

2. After each of his four attempts to review petitioner's books and records proved fruitless because petitioner failed to present any records for audit, the auditor decided to use external indices to determine petitioner's sales and use tax liability. He first contacted petitioner's gasoline distributor, Sun Refining and Marketing Company in Melville, New York, and was advised that for the audit period petitioner purchased 1,103,714 gallons. The Audit Division determined petitioner's selling price per gallon to be \$1.25, exclusive of sales tax, State tax on gasoline and the tax of the City of New York on leaded gasoline, based on its experience in auditing similar businesses. The auditor multiplied the number of gallons purchased by \$1.25 to compute audited taxable sales of \$1,379,643.00 which when reduced by taxable sales reported of \$242,656.00 resulted in additional taxable gasoline sales of \$1,136,987.00 with a tax due thereon of \$92,179.56. The auditor then computed taxable repair sales for the audit period of \$449,280.00 with a tax due thereon of \$36,504.00 based on two mechanics working eight hours per day, six days per week with an hourly rate of \$30.00. The \$30.00 amount was also based on the Audit Division's experience in auditing similar businesses. The auditor next computed unpaid sales taxes on purchases due of \$1,600.00 based on the following fixed assets and estimated costs which he observed at the premises: tow truck, \$5,000.00; inspection machine, \$7,000.00; compressor, \$2,000.00; and lift equipment, \$6,000.00. As a result of the above, the auditor computed additional taxes due of \$130,283.56 (\$92,179.56 + \$36,504.00 + \$1,600.00).

3. On June 20, 1983, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a tax

due of \$130,283.56, plus a 50 percent fraud penalty of \$65,141.79 and interest of \$29,768.89, for a total amount due of \$225,194.24 for the period March 1, 1980 through February 28, 1983.

4. The Audit Division offered no evidence to support its assertion of fraud penalty.

5. Petitioner, in its perfected petition, claimed that the sales taxes which it reported were correct and that the assessment by the Audit Division was arbitrary and capricious. No evidence was presented in support of these contentions.

6. Petitioner also failed to present any evidence that the failure to remit the taxes at issue was due to reasonable cause and not due to willful neglect.

CONCLUSIONS OF LAW

A. That in view of petitioner's failure to present books and records for audit as required, the Audit Division was justified in utilizing external indices to determine petitioner's sales and use tax liability (Tax Law §§ 1135, 1138). Because the petitioner has failed to demonstrate that either the audit method or the result arrived at were erroneous, the additional sales and use taxes are sustained in full.

B. That based on the evidence presented, the Audit Division has not sustained the burden of proving that the imposition of a fraud penalty is warranted. However, since petitioner has failed to show that the failure to pay the taxes at issue was due to reasonable cause and not due to willful neglect, the petitioner is liable for the penalty imposed by Tax Law § 1145(a)(1)(i).

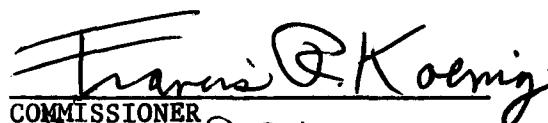
C. That the petition of Kelly Tire Service Center, Inc. is granted to the extent indicated in Conclusion of Law "B". The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1983; and that except as so granted, the petition is denied.

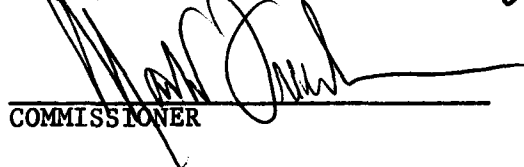
DATED: Albany, New York

STATE TAX COMMISSION

NOV 14 1986


PRESIDENT


COMMISSIONER


COMMISSIONER