

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Edward Perretta :
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 6/1/80 - 8/31/82. :
:

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, 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 18th day of February, 1986, he/she served the within notice of Decision by certified mail upon Edward Perretta, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward Perretta
Bay Shore & Schember Rds.
Bayshore, NY 11706

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
18th day of February, 1986.

Doris E. Steinhardt

Jean Coughlin
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Edward Perretta :
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 6/1/80 - 8/31/82. :
:

State of New York :

ss.:

County of Albany :

Doris E. Steinhardt, 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 18th day of February, 1986, he served the within notice of Decision by certified mail upon Michael L. Gargiulo, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael L. Gargiulo
400 W. Main St.
Babylon, NY 11702

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
18th day of February, 1986.

Doris E. Steinhardt

Jan Cargiulo
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 18, 1986

Edward Perretta
Bay Shore & Schember Rds.
Bayshore, NY 11706

Dear Mr. Perretta:

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
Michael L. Gargiulo
400 W. Main St.
Babylon, NY 11702
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EDWARD PERRETTA	:	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 June 1, 1980	:	
through August 31, 1982.	:	

Petitioner, Edward Perretta, Bay Shore and Schember Roads, Bayshore, New York, 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 June 1, 1980 through August 31, 1982 (File No. 49595).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 9, 1985 at 9:30 A.M., with all documents to be submitted by October 23, 1985. Petitioner appeared by Michael Gargiulo, CPA. The Audit Division appeared by John P. Dugan, Esq. (Michael Glannon, Esq., of counsel).

ISSUE

Whether a desk audit of petitioner's business utilizing third party information and industry standard markups was justified and, if so, whether petitioner has provided sufficient evidence to warrant reduction or cancellation of the assessment resulting from such audit.

FINDINGS OF FACT

1. Petitioner, Edward Perretta, operates a Chevron gasoline service station located at 62 Bay Shore Road, Bay Shore, New York. In addition to selling gasoline, Mr. Perretta performs repair work on automobiles and

sells parts, tires, batteries and accessories in conjunction therewith. Until just prior to the period in issue, Mr. Perretta had operated the business in partnership with his father, doing business as Perretta and Son. During and since the audit period, petitioner operated and has operated the business as a sole proprietorship and was and has been the only person present and performing all work at the premises.

2. By a letter dated August 5, 1983, the Audit Division advised petitioner that his sales tax returns were being audited and requested petitioner to complete and return within twenty days an attached Filling Station Questionnaire, together with copies of either Federal Schedule C or Form 1120 for the years 1980 and 1981.

3. On or about September 30, 1983, petitioner returned the aforementioned questionnaire together with a copy of Federal Form 1065 (U.S. Partnership Return of Income) for 1980 and a copy of Federal Schedule C (Profit or (Loss) From Business or Profession) for 1981.

4. The questionnaire was largely incomplete, indicating only that the business was open Monday through Friday from 7:30 A.M. to 6:00 P.M., was closed Saturdays and Sundays, had one employee (presumably Mr. Perretta), no trucks or service vehicles and two service bays. It indicated also that petitioner sold two products, leaded (regular) and unleaded gasoline, through four pumps at selling prices of \$1.25 per gallon and \$1.35 per gallon, respectively.¹ The remainder of the questionnaire, which requested specific information from the business' books and records regarding total sales and total purchases for the

1 These selling prices were as of September 28, 1983.

months of September, October and November of 1980 was left blank, except for the following handwritten notation:

"[w]e do not have records available. We changed accountants at this time and accountant could not account for business ledgers."

5. Upon receipt of the questionnaire, as described, the Audit Division utilized gasoline purchase records from petitioner's supplier to calculate petitioner's net gasoline sales. More specifically, petitioner's gasoline purchases per quarterly period from June 1, 1980 through August 31, 1982 were multiplied by the statewide miscellaneous average gasoline selling price (less exempt taxes included therein) for each quarter to arrive at audited net gasoline sales. In addition, the Audit Division, based on experience from similar filling station audits, determined audited "other" sales (i.e. repairs, parts, tires, batteries and accessories) as thirty eight percent of petitioner's audited net gasoline sales. Sales tax due was calculated upon audited taxable sales (consisting of audited net gasoline sales plus "other" sales) and, after reduction for sales tax paid by petitioner (per quarterly returns), additional sales tax of \$19,802.10 was determined to be due.

6. On November 18, 1983, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Tax Due for the period June 1, 1980 through August 31, 1982 in the amount of \$19,802.10, plus penalty and interest, attached to which was the following explanation:

"[t]he tax due was computed by marking up your purchases of gasoline reported by your distributor. The average selling price of gasoline for each period was based on the statewide miscellaneous average.

The purchases other than gasoline were marked up based on normal industry practices. The average selling price less exempt taxes was applied to gasoline purchases plus other sales to determine taxable sales."

7. Petitioner asserts that the gallonage reported as purchased per third party (distributor) records was overstated and inaccurate, that the gasoline selling prices utilized by the Audit Division were too high, and that the Audit Division has not established the accuracy of its base figures.

8. Petitioner offered in evidence bank deposit records indicating that petitioner's deposits were less, in total, than audited sales as determined by the Audit Division. Petitioner also submitted some purchase invoices for the period in question. However, there were no invoices submitted for the months of June 1980, June and July 1981 and February, May and July 1982, notwithstanding that records from petitioner's distributor reflected purchases by petitioner during such months.

9. At the hearing, petitioner submitted evidence to show that for the period June 1, 1980 through May 31, 1981 "other" sales totalled \$9,520.00, or \$2,380.00 per sales tax quarter.

10. At the hearing, the Audit Division's representative noted that the Answer, as filed, asserted a deficiency in the amount of \$15,551.11 plus penalty and interest, in error, rather than \$19,802.10 as assessed per the Notice of Determination. This error was occasioned by the belief that the deficiency had been reduced as the result of a pre-hearing conference. However, no such binding reduction of liability was arrived at between the parties. Petitioner did not contest the Audit Division's request to conform the Answer to the Notice of Determination.

CONCLUSIONS OF LAW

A. That every person required to collect tax is under a duty to keep adequate records pertaining thereto and to make such records available for examination by the Audit Division (Tax Law §§1135, 1142.5). In turn, where, as here, adequate records and information are either not maintained or are not

made available upon request, it is well settled that the Audit Division may estimate the amount of tax due from such information as is available and may resort to the use of external indices reasonably calculated to arrive at a determination of tax liability [Tax Law §1138(a)].

B. That given petitioner's response to the filling station questionnaire, and specifically the handwritten notation quoted in Finding of Fact "4", the Audit Division's resort to estimation procedures and external indices as described was appropriate. There has been no showing that the distributor's records of purchases as relied upon by the Audit Division were inaccurate, nor any evidence of selling prices more appropriate than the average prices used by the Audit Division. Finally, petitioner's showing that bank deposits were lower than audited taxable sales does not cast doubt upon the audit results, inasmuch as there is no evidence showing that all receipts were deposited nor any evidence showing how many bank accounts existed.


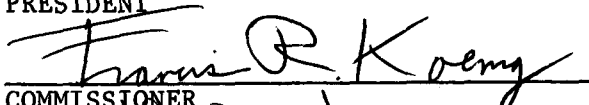
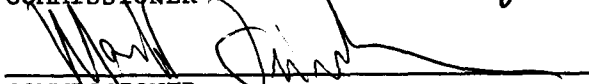
C. That petitioner has shown that sales of repairs, parts, tires, batteries, and accessories for the period June 1, 1980 through May 31, 1981 were actually \$9,520.00. Petitioner's sales of such items for the period June 1, 1981 through August 31, 1982 are hereby determined to be \$11,900.00 (\$2,380.00 per quarter).

D. That the petition of Edward Perretta is granted to the extent indicated in Conclusion of Law "C"; the Audit Division is hereby directed to modify the Notice of Determination and Demand dated November 18, 1983; and that, except as so granted, the petition is denied.

DATED: Albany, New York

FEB 18 1986

STATE TAX COMMISSION


PRESIDENT

COMMISSIONER

COMMISSIONER

P 684 313 469

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Michael L. Gaigala</i>	
Street and No. <i>402 W. Main St</i>	
P.O., State and ZIP Code <i>Barryman NY 11702</i>	
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 684 313 468

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Edward Peretta</i>	
Street and No. <i>Box 5000 & Schenck Rd</i>	
P.O., State and ZIP Code <i>Depue NY 11706</i>	
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. 1983-403-517

PS Form 3800, Feb. 1982

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982