

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Sha-Dim Gasoline Service, Ltd. : 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 9/1/78 - 5/31/82.

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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 5th day of December, 1986, he/she served the within notice of Decision by certified mail upon Sha-Dim Gasoline Service, Ltd. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sha-Dim Gasoline Service, Ltd.  
150-17 Cross Island Parkway  
Whitestone, NY 11357

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  
5th 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

In the Matter of the Petition :  
of  
Shaya's Service Station, Ltd. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales and Use Tax  
under Article(s) 28 & 29 of the Tax Law :  
for the Period 9/1/79 - 5/31/83.

State of New York :

ss.:

County of Albany :

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Shaya's Service Station, Ltd.  
150-17 Cross Island Pkwy.  
Whitestone, NY 11357

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.

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Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Fred Shaya : AFFIDAVIT OF MAILING  
Officer of Shaya's Service Station, Ltd.

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 9/1/79 - 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 5th day of December, 1986, he/she served the within notice of Decision by certified mail upon Fred Shaya, Officer of Shaya's Service Station, Ltd. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fred Shaya  
Officer of Shaya's Service Station, Ltd.  
147-12 14th Avenue  
Whitestone, NY 11357

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.

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Sha-Dim Gasoline Service, Ltd. : AFFIDAVIT OF MAILING

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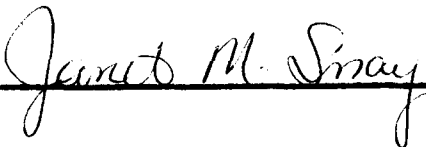
Benjamin Zadka  
30 Hawthorne Lane  
Great Neck, NY 11023

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  
5th day of December, 1986.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Shaya's Service Station, Ltd. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales and Use Tax  
under Article(s) 28 & 29 of the Tax Law :  
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Benjamin Zadka  
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Great Neck, NY 11023

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STATE OF NEW YORK

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of :  
Fred Shaya : AFFIDAVIT OF MAILING  
Officer of Shaya's Service Station, Ltd.

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax :  
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Great Neck, NY 11023

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Sworn to before me this  
5th 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 5, 1986

Sha-Dim Gasoline Service, Ltd.  
150-17 Cross Island Parkway  
Whitestone, NY 11357

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:  
Benjamin Zadka  
30 Hawthorne Lane  
Great Neck, NY 11023

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

December 5, 1986

Shaya's Service Station, Ltd.  
150-17 Cross Island Pkwy.  
Whitestone, NY 11357

Gentlemen:

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Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Benjamin Zadka  
30 Hawthorne Lane  
Great Neck, NY 11023



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

December 5, 1986

Fred Shaya  
Officer of Shaya's Service Station, Ltd.  
147-12 14th Avenue  
Whitestone, NY 11357

Dear Mr. Shaya:

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.

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Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Benjamin Zadka  
30 Hawthorne Lane  
Great Neck, NY 11023

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

SHA-DIM GASOLINE SERVICE, LTD.

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 September 1, 1978  
through May 31, 1982.

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In the Matter of the Petition

of

SHAYA'S SERVICE STATION, LTD.

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 September 1, 1979  
through May 31, 1983.

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In the Matter of the Petition

of

FRED SHAYA, OFFICER OF  
SHAYA'S SERVICE STATION, LTD.

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 September 1, 1979  
through May 31, 1983.

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Petitioners Sha-Dim Gasoline Service, Ltd. and Shaya's Service Station, Ltd., 150-17 Cross Island Parkway, Whitestone, New York 11357 and Fred Shaya, Officer of Shaya's Service Station, Ltd., 147-12 14th Avenue, Whitestone, New York 11357 filed petitions for revisions of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods

September 1, 1978 through May 31, 1982 and September 1, 1979 through May 31, 1983 (File Numbers 43007, 43357, 43358 and 48692).

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 May 1, 1986 at 9:15 A.M. with all briefs to be submitted by June 30, 1986. Petitioners appeared by Benjamin Zadka. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

#### ISSUE

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

#### FINDINGS OF FACT

1. Shaya's Service Station, Ltd. "(Shaya)" operated a gasoline service station located at 150-17 Cross Island Parkway, Whitestone, New York. Shaya also had two service bays to perform repair work. Sha-Dim Gasoline Service Ltd. ("Sha-Dim") was a distributor of gasoline and diesel fuel located on the same premises as Shaya. Fred Shaya was an officer and stockholder in both corporations.

2. On February 4, 1983 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Sha-Dim covering the period September 1, 1978 through February 28, 1982 for taxes due of \$350,815.58, plus penalty and interest of \$189,894.49, for a total of \$540,710.09. A second notice was issued for the period March 1, 1982 through May 31, 1982 for taxes due in the amount of \$281.66 plus penalty and interest. This notice was subsequently revised to tax due of \$27,919.49.

3. On September 12, 1983, the Audit Division issued notices of determination and demands for payment of sales and use taxes due against Shaya covering the

periods September 1, 1979 through August 31, 1982 and September 1, 1982 through May 31, 1983 for tax due of \$376,496.22 and \$12,353.07, respectively, plus applicable penalty and interest. The notice for the period September 1, 1979 through August 31, 1982 was a revised notice. The original assessment was issued February 4, 1983 for tax due of \$380,912.73.

4. Fred Shaya was assessed individually, as president, for the taxes determined due from Shaya. He filed a petition contesting such responsibility, however, at the hearing he conceded that he was a responsible officer of Shaya.

5. Neither Sha-Dim nor Shaya provided any books and records to the Audit Division for examination. The Audit Division obtained from General Oil Corp. the quantity and cost of gasoline purchased by Sha-Dim for the period April 1, 1980 through May 31, 1982. The records of General Oil Corp. showed that during the period June 1, 1980 through February 28, 1982, Sha-Dim purchased 1,011,292 gallons of regular; 1,080,679 gallons of unleaded; and 5,104 gallons of diesel for a total cost of \$2,647,615.27. The average of these gallons was used to determine gasoline sold in periods for which General Oil Corp. did not furnish the information. The Audit Division estimated total sales of \$5,077,709.00 by applying the average statewide retail selling price of regular and unleaded gasoline and diesel fuel to the gallonage for each quarterly period under audit. The taxable sales amounted to \$4,369,993.00 (excluding the state gasoline tax and sales tax) with tax due thereon of \$351,097.24. The Audit Division determined that the purchases furnished by General Oil Corp. for the period ending May 31, 1982 were incomplete and consequently it used the average quarterly gallons sold as computed above which increased the tax due for said period from \$281.66 to \$27,919.49. Sha-Dim did not file any sales tax returns during the audit period.

6. On the audit of Shaya's, the Audit Division considered that the entire amount of gasoline and diesel purchased by Sha-Dim was sold to Shaya's since they were located on the same premises and there were no records to show otherwise. In addition, research of the Department's records disclosed no other supplier of gasoline for Shaya's. Using the gasoline purchases indicated above for Sha-Dim, the Audit Division determined taxable gasoline and diesel sales of \$4,143,257.00 for the period September 1, 1979 through August 31, 1982.<sup>1</sup> Repair sales were also estimated due to the unavailability of books and records. Such sales were estimated at \$10.00 per hour for each service bay for a total of \$60,000.00 for each quarterly reporting period. The total taxable sales for the audit period were \$5,043,257.00 as opposed to reported taxable sales of \$232,999.00 leaving a balance of \$4,810,258.00 in additional taxable sales and tax due thereon of \$388,849.29.

7. At an informal conference held subsequent to the issuance of the assessment, Sha-Dim produced purchase invoices from General Oil Corp. that confirmed the gallons used by the Audit Division in computing gasoline sales. At the hearing, Sha-Dim conceded that such gallons were not in dispute. Petitioners also admitted they did not maintain any books and records due to the small size of the business.

8. Sha-Dim did not make retail sales of gasoline. Sha-Dim substantiated by delivery tickets that 525,835 gallons of gasoline were sold to various retail gasoline service stations during the period September 1, 1979 through

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1 Effective September 1, 1982 the retailer of gasoline no longer collected the sales tax.

August 31, 1982. The balance of 1,566,136 gallons of gasoline was sold to Shaya's.

CONCLUSIONS OF LAW

A. 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.

B. That petitioners did not have books and records available for audit. 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). The Audit Division properly determined petitioners' sales on the basis of purchases and the auditor's experience with audits of similar businesses in accordance with section 1138(a) of the Tax Law.

C. That petitioners have the 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 AD2d 858; Matter of Urban Liquors, supra). Sha-Dim established that it did not make any retail sales of gasoline and diesel fuel. Accordingly, the notices issued against Sha-Dim are cancelled. Moreover, the gallons of gasoline that form the basis of the assessment against Shaya's shall be reduced to 1,566,136 gallons as set forth in Finding of Fact "8".

D. That the petition of Sha-Dim Gasoline Service, Ltd. is granted and the notices of determination and demands for payment of sales and use taxes due

issued February 4, 1983 are cancelled. The petitions of Shaya's Service Station, Ltd. and Fred Shaya, Officer are granted to the extent indicated in Conclusion of Law "C"; the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued September 12, 1983 and February 4, 1983, and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 05 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER