

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jo-Ann Spain : AFFIDAVIT OF MAILING
d/b/a J.J. Service Station and James Spain

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 9/1/77 - 5/31/80.

State of New York :

ss.:

County of Albany :

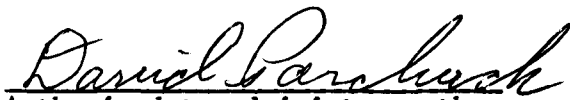
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 23rd day of December, 1986, he/she served the within notice of Decision by certified mail upon Jo-Ann Spain, d/b/a J.J. Service Station and James Spain the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

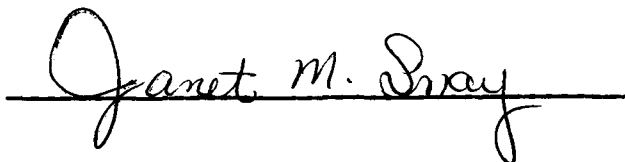
Jo-Ann Spain
d/b/a J.J. Service Station and James Spain
Route 82
Greenville, NY 12083

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
23rd 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

Jo-Ann Spain : AFFIDAVIT OF MAILING
d/b/a J.J. Service Station and James Spain

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 9/1/77 - 5/31/80.

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 23rd day of December, 1986, he served the within notice of Decision by certified mail upon Dale Dorner, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dale Dorner

Greenville, NY 12083

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
23rd 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 23, 1986

Jo-Ann Spain
d/b/a J.J. Service Station and James Spain
Route 82
Greenville, NY 12083

Dear Mr. & Mrs. Spain:

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:
Dale Dorner

Greenville, NY 12083

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

JO-ANN SPAIN
D/B/A J & J SERVICE STATION AND
JAMES SPAIN

DECISION

for Revision of Determinations or for Refunds
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period September 1, 1977
through May 31, 1980.

Petitioners, Jo-Ann Spain d/b/a J & J Service Station and James Spain, Route 82, Greenville, New York 12083, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1977 through May 31, 1980 (File Nos. 41119 and 41128).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Building #9, W. Averill Harriman State Office Building Campus, Albany, New York, on August 8, 1986 at 10:00 A.M. Petitioner Jo-Ann Spain d/b/a J & J Service Station appeared by Dale Dorner, Esq. The Audit Division appeared by John P. Dugan, Esq. (Arnold M. Glass, Esq., of counsel). Petitioner James Spain did not appear.

ISSUES

I. Whether petitioners failed to report and remit the correct amount of sales and use taxes for the period September 1, 1977 through May 31, 1980.

II. Whether petitioners are liable for fraud penalty pursuant to Tax Law §1145(a)(2).

FINDINGS OF FACT

1. On August 20, 1982, the Audit Division issued to petitioners, Jo-Ann Spain d/b/a J & J Service Station and James Spain, notices and demands for payment of sales and use taxes due¹ for the period September 1, 1977 through May 31, 1980 (the "audit period"). Said notices assessed tax due in the sum of \$13,257.53, fraud penalty of \$6,628.79 and interest of \$5,716.00, for a total amount due of \$25,602.32.

2. Since 1968, petitioners have operated a gasoline service station, J & J Service Station, making retail sales of gasoline, oil and repairs.

3. The assessments were the result of an audit by the Audit Division of the business operations of petitioners for the audit period. Petitioners did not produce any business records to the auditors as requested.

4. The auditors spoke with James Spain who managed the J & J Service Station and discerned that all gasoline was purchased from Getty Refining and Marketing Company ("Getty") of Rensselaer, New York. Verification of petitioner's purchases for the audit period was obtained from Getty, revealing more purchases per verification than gross sales reported per sales tax returns. Petitioners did not offer an explanation for the large discrepancy between these two figures.

1 The notices to petitioners should have been issued on notices of determination and demands for payment of sales and use taxes due rather than notices and demand; however, the statement on the notice meets all the notices requirements of §1138(a) of the Tax Law, to wit: the notices issued informed petitioners (a) that taxes had been determined in accordance with §1138 of the Tax Law; (b) that the assessment was based upon available records and information; (c) that the petitioners were entitled to a hearing on the assessment; and (d) that they must file a petition within ninety days to obtain a hearing.

5. The Audit Division calculated sales tax liability for gasoline sales from the information received from Getty. Repairs and oil sales were estimated based upon the experience of the auditor.

6. The Audit Division prepared a schedule of gasoline purchases listing the following: the number of gallons purchased; the profit per gallon, including an additional four cents per gallon federal excise tax to correct petitioners' admitted mistake regarding the proper amount of the tax; the cost excluding taxes; the resulting total taxable gasoline sales and the quarterly totals of taxable gasoline sales. Total taxable gasoline sales were determined to be \$217,372.45.

7. The Audit Division found the oil purchases obtained from Getty to be too low to be credible. There was a period of one year within the audit period when the Getty records indicated no purchases of oil. The Audit Division, based upon its experience in many gas station audits, determined \$150.00 in oil sales for each quarter of the audit period, totalling \$1,650.00 in taxable oil sales for the entire audit period.

8. The Audit Division was unable to determine petitioners' repair sales because there were no records or documentation of parts purchases or receipts for repairs. Therefore, the Audit Division estimated repair sales at twenty dollars for each one dollar of oil sales, based upon its experience in numerous gas station audits. The total taxable repair sales for the audit period were determined to be \$33,000.00.

9. The Audit Division added the total taxable gasoline, oil and repair sales for the audit period, \$252,022.45, subtracted reported taxable sales, \$62,629.00, and multiplied the remainder, or additional taxable sales, \$189,393.45,

by the sales tax rate of seven percent, yielding additional tax due for the audit period of \$13,257.53.

10. The Audit Division analyzed the amount of taxable sales reported and tax paid in each quarter and determined that the discrepancy was so great that it evidenced a fraudulent intent by petitioners and, therefore, assessed fraud penalties.

11. Petitioner Jo-Ann Spain d/b/a J & J Service Station was listed as the person conducting business on the certificate of conducting business under an assumed name filed in the Green County Clerk's Office on June 18, 1969. Jo-Ann Spain also had sole check-writing authority on the business checking account and did, on occasion, perform menial duties for her husband, James Spain, the manager of the business. Petitioner Jo-Ann Spain did not have any other responsibilities concerning the business and during the audit period she was employed outside of the home and business. She signed no tax returns during the audit period and had no direct knowledge of the recordkeeping of the business.

12. Petitioner James Spain managed every other facet of the business, including its day-to-day operations. However, James Spain did not appear at the hearing despite notice thereof.

CONCLUSIONS OF LAW

A. That Tax Law §1138(a) 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 Tax Law §1135(a) 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.

C. That petitioners produced no books or records as requested by the Audit Division and, therefore, the third party verification and estimates based on Audit Division experience were fair and reasonable methods of determining petitioners' tax liability. Petitioners had the burden of showing that said audit method and the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858). Petitioners have failed to sustain their burden.

D. That with respect to the imposition of the fraud penalty against petitioners, the Audit Division failed to show by clear and convincing evidence every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation by petitioners and resulting in deliberate nonpayment or underpayment of taxes due and owing (Matter of Walter Shutt, State Tax Commission, June 4, 1982).


E. That petitioners are liable for penalties for failing to pay taxes within the time required pursuant to Tax Law §1145(a).


F. That the petitions of James Spain and Jo-Ann Spain d/b/a J & J Service Station are denied except as provided in Conclusion of Law "D" above, and the notices and demands for payment of sales and use taxes due, issued August 20, 1982, are sustained together with penalties and such additional interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 23 1986


PRESIDENT


COMMISSIONER


COMMISSIONER