

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Woda's Service Center, Inc. : AFFIDAVIT OF MAILING
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, 1981 :
through August 31, 1982. :
:

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 7th day of October, 1986, he/she served the within notice of Decision by certified mail upon Woda's Service Center, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Woda's Service Center, Inc.
Route 17 & 52
Liberty, New York 12754

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
7th day of October, 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 :
Sally Woda : AFFIDAVIT OF MAILING
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, 1981 :
through August 31, 1982. :
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State of New York :

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Sally Woda
31 Mager Avenue
Liberty, New York 12754

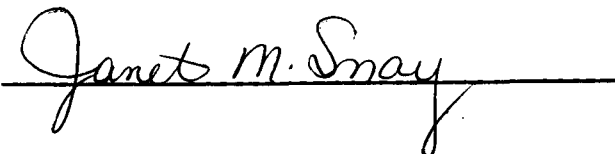
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31 Mager Avenue
Liberty, New York 12754

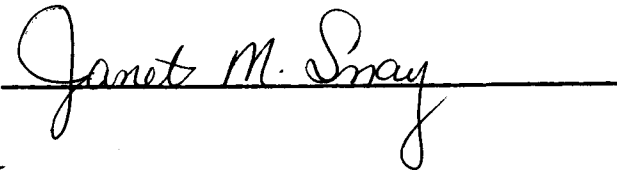
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State of New York :

ss.:

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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 7th day of October, 1986, he served the within notice of Decision by certified mail upon David Sussman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David Sussman
585 West End Avenue
New York, NY 10024

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
7th day of October, 1986.

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

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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State of New York :

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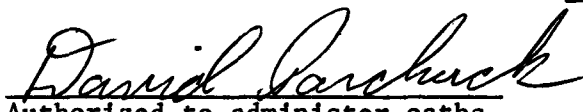
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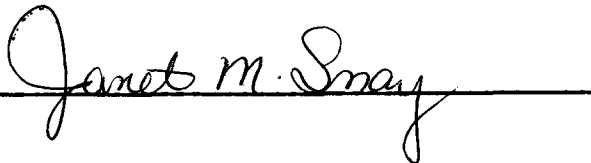
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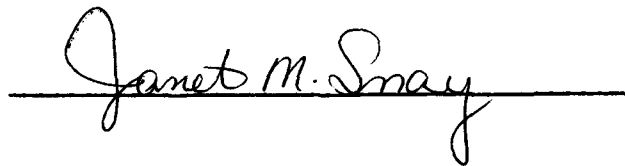
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585 West End Avenue
New York, NY 10024

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Sworn to before me this
7th day of October, 1986.


Authorized to administer oaths
pursuant to Tax Law section 174



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

October 7, 1986

Woda's Service Center, Inc.
Route 17 & 52
Liberty, New York 12754

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:
David Sussman
585 West End Avenue
New York, NY 10024

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

October 7, 1986

Sally Woda
31 Mager Avenue
Liberty, New York 12754

Dear Mrs. Woda:

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:
David Sussman
585 West End Avenue
New York, NY 10024

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

October 7, 1986

Sam Woda
31 Mager Avenue
Liberty, New York 12754

Dear Mr. Woda:

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:
David Sussman
585 West End Avenue
New York, NY 10024

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

WODA'S SERVICE CENTER, INC.

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, 1981
through August 31, 1982.

In the Matter of the Petition

of

SALLY WODA

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, 1981
through August 31, 1982.

In the Matter of the Petition

of

SAM WODA

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, 1981
through August 31, 1982.

Petitioner, Woda's Service Center, Inc., Routes 17 and 52, Liberty, New York 12754, 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 periods March 1, 1981 through August 31, 1982 (File No. 54415).

Petitioner, Sally Woda, 31 Mager Avenue, Liberty, New York 12754, 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, 1981 through August 31, 1982 (File No. 54414).

Petitioner, Sam Woda, 31 Mager Avenue, Liberty, New York 12754, 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, 1981 through August 31, 1982 (File No. 54416).

A consolidated hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on May 12, 1986 at 1:15 P.M. Petitioners appeared by David Sussman, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly employed purchase markup procedures to calculate additional sales tax due.

II. Whether penalties and interest in excess of the statutory minimum should be abated.

III. Whether petitioners, Sally Woda and Sam Woda, were persons required to collect and pay over sales taxes within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law.

FINDINGS OF FACT

1. On April 11, 1984, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Woda's Service Center, Inc. ("Woda's") in the amount of \$12,914.37 plus penalty and statutory interest for the period March 1, 1981 through August 31, 1982. On the same date, the Audit Division issued identical

notices against petitioners Sally Woda, as officer of Woda's, and Sam Woda, as manager of the gasoline service station owned and operated by Woda's.

2. During his field examination of Woda's, the auditor twice met with Sam Woda in his home. Mr. Woda identified himself as the manager of the service station and provided the auditor with information regarding the station's operation, including a daybook for 1982 prepared and maintained by Mr. Woda. Sally Woda was not present at these meetings.

3. The daybook and a copy of Woda's 1983 federal income tax return were the only records made available to the auditor. The daybook consisted of daily entries for the year 1982, showing meter readings for each gasoline pump, the total number of gallons of gasoline sold and total receipts from gasoline per day. The auditor deemed these records inadequate for the purpose of verifying taxable sales. Furthermore, the auditor's review of the daybook revealed a significant discrepancy between reported taxable sales and taxable sales as entered in the daybook. Consequently, the auditor employed a markup of purchases to determine taxable sales for the period under consideration.

4. Using information furnished by Woda's supplier, the auditor determined total gasoline purchases for the audit period and the average cost per gallon to Woda's. He then calculated an average selling price per gallon using figures obtained from Woda's daybook. A markup of 7.55 percent was computed by dividing average cost per gallon by average selling price per gallon. This markup figure was applied to Woda's gasoline purchases for the audit period to obtain audited taxable gasoline sales of \$618,617.00. Reported taxable sales of \$437,726.00 were subtracted from this figure to obtain additional taxable gasoline sales of \$180,891.00. Since Mr. Woda had informed the auditor that Woda's had taxable oil sales of \$200.00 per week,

the auditor added \$3,600.00 to the additional taxable gasoline sales to calculate total additional taxable sales of \$184,491.00 with a tax due on that amount of \$12,914.37.

5. Sally Woda is the president of Woda's. She did not take part in the tax audit under consideration, but she did sign all sales tax returns for Woda's.

6. Petitioners presented no evidence to support their contentions that the Audit Division used too high a markup figure to determine gasoline sales and that Sam Woda was not a person required to collect sales and use tax for Woda's.

CONCLUSIONS OF LAW

A. That where, as here, a taxpayer is unable to produce complete books and records to verify reported taxable sales, the Audit Division is empowered by section 1138(a)(1) of the Tax Law to determine the tax due, using external indices if necessary. The purchase markup procedure employed by the auditor was reasonable, and petitioners have failed to show that error existed in either the method employed or the results achieved (see Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858).

B. That section 1133(a) of the Tax Law imposes upon any person required to collect sales and use tax, personal liability for the tax imposed, collected or required to be collected. Section 1131(1) of the Tax Law defines person required to collect tax to include, among others, corporate officers and employees who are under a duty to act for the corporation in complying with the requirements of Article 28 of the Tax Law.

C. That the determination of whether an individual is a person or officer under a duty to act for the corporation is based upon the facts presented (Vogel v. New York State Department of Taxation and Finance, 98

Misc. 2d 222). The relevant factors include, but are not limited to: the individual's daily involvement in the corporation; the individual's participation and involvement in the financial affairs of the corporation; and the individual's authority to draft checks on the firm's bank accounts.

D. That petitioners, Sally Woda and Sam Woda, were persons under a duty to collect sales and use tax during the audit period. Sally Woda was the president of Woda's and signed all sales tax returns. Sam Woda was the manager of Woda's; he prepared Woda's daybook (the only records available); and he held himself out as a person both knowledgeable about and responsible for the corporation's financial affairs and day-to-day operations.

E. That inasmuch as petitioners have not shown that their failure to comply with the Tax Law was attributable to reasonable cause, there are no grounds for abatement of penalty (Tax Law §1145[a]; 20 NYCRR 536.1[b]).

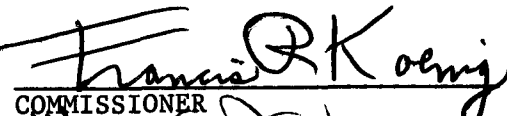
F. That the petitions of Woda's Service Center, Inc., Sally Woda and Sam Woda are denied, and the notices of determination and demands for payment of sales and use taxes due issued on April 11, 1984 are sustained.

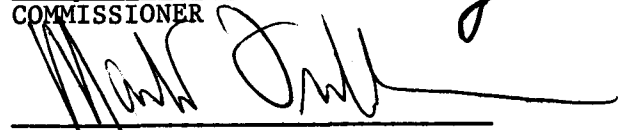
DATED: Albany, New York

STATE TAX COMMISSION

OCT 07 1986


PRESIDENT


COMMISSIONER


COMMISSIONER