

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Arvy's Service Station, Inc. : AFFIDAVIT OF MAILING  
and Robert Vigorito, as Officer :  
:   
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 9/1/80-5/31/83. :

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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 27th day of February, 1987, he/she served the within notice of Decision by certified mail upon Arvy's Service Station, Inc., and Robert Vigorito, as Officer the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arvy's Service Station, Inc.  
and Robert Vigorito, as Officer  
c/o Robert Vigorito  
1956 Stuart Street  
Brooklyn, NY 11229

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  
27th day of February, 1987.

David Parchuck

Janet M. Snay  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Arvy's Service Station, Inc. : AFFIDAVIT OF MAILING  
and Robert Vigorito, as Officer :  
:   
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 9/1/80-5/31/83. :

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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 27th day of February, 1987, he served the within notice of Decision by certified mail upon John A. Pannone, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John A. Pannone  
26 Court St.  
Brooklyn, NY 11242

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  
27th day of February, 1987.

David Parchuck

Janet M. Snay  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

February 27, 1987

Arvy's Service Station, Inc.  
and Robert Vigorito, as Officer  
c/o Robert Vigorito  
1956 Stuart Street  
Brooklyn, NY 11229

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:  
John A. Pannone  
26 Court St.  
Brooklyn, NY 11242

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
ARVY'S SERVICE STATION, INC. : DECISION  
and ROBERT VIGORITO, as OFFICER :  
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, 1980 :  
through May 31, 1983. :

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Petitioners, Arvy's Service Station, Inc. and Robert Vigorito, as Officer, 1956 Stuart Street, Brooklyn, New York 11229 filed petitions 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, 1980 through May 31, 1983 (File Nos. 46438 and 46439).

A 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 August 6, 1986 at 9:15 A.M. with all briefs to be submitted by October 31, 1986. Petitioners appeared by John A. Pannone, Esq. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly resorted to external indices to determine petitioners' tax liability.

II. Whether, if the resort to external indices was warranted, the assessment resulting from the audit was correct.

III. Whether petitioner, Robert Vigorito, was a person required to collect and pay sales and use taxes on behalf of Arvy's Service Station, Inc.

IV. Whether the Audit Division's imposition of fraud penalty should be sustained.

FINDINGS OF FACT

1. On July 21, 1983, the Audit Division issued against petitioner, Arvy's Service Station, Inc. ("Arvy's"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1980 through May 31, 1983, asserting a tax due of \$136,350.04 plus interest of \$28,443.19 and a fraud penalty of \$68,175.00 for a total due of \$232,968.23. On the same date, an identical notice was issued against petitioner, Robert Vigorito, as officer of Arvy's.

2. In 1982 Getty Oil Company ("Getty") provided the Audit Division with verification of monthly gasoline purchases for a large number of vendors, including Arvy's. In order to utilize the information, the Audit Division segregated purchases by vendor and aggregated them for each sales tax quarter. This procedure revealed that Arvy's purchased 705,027 gallons of gasoline during the period September 1, 1980 through November 30, 1981 at a total cost of \$785,779.06. During the same period, Arvy's filed State sales tax returns reporting total taxable sales of \$142,927.00. After completing its analysis of Arvy's purchases, the Central Office Audit Bureau assigned the case to a regional office to perform a sales and use tax field audit.

3. The auditor did not contact Mr. Vigorito nor make a request for Arvy's books and records prior to calculating the assessment under consideration.

4. From a car parked across the street, an auditor observed the service station operated by Arvy's. He saw two mechanics working on cars. Based on this observation and office audit experience, the auditor calculated repair sales for the audit period of \$399,360.00. He employed a formula for this purpose of \$30.00 per hour per mechanic (\$20.00 for labor and \$10.00 for parts) applied to

an 8 hour work day and a six day work week. He then used Getty's third party verification to calculate audited gasoline sales. Because Getty's records did not cover the entire audit period, purchases for the sales tax quarter ended November 30, 1981 were used to estimate purchases for the next three sales tax quarters. No gasoline sales were estimated for the last three quarters of the audit period. A markup of 15 percent was applied to total estimated gasoline purchases, and the result was adjusted by adding federal excise taxes. This yielded audited taxable gasoline sales of \$1,510,649.00 and total audited taxable sales of \$1,910,009.00 with a tax due on that amount of \$155,354.04. Tax previously paid was deducted from this amount, producing a total tax liability of \$136,350.04.

5. Following a tax appeals conference, petitioners submitted books and records to the Audit Division, including a general ledger containing sales and purchases and other expenses, and a cash disbursements journal for the period January through June 1981. The Audit Division also had available in its files copies of Arvy's Federal income tax returns for the fiscal years ended August 31, 1981, August 31, 1982 and August 31, 1983, showing purchases for the three year period of \$949,804.61 and gross sales of \$1,143,385.30. Based on the inadequacy of Arvy's records and the substantial discrepancies between Arvy's Federal income tax returns and State tax returns, the Audit Division determined that the original assessment was proper.

6. Robert Vigorito was an officer of Arvy's during the period under consideration. He supervised the operation of the gas station, wrote checks on the corporation's account, and signed all tax returns. Arvy's books were kept by an accountant hired for that purpose, and its tax returns were prepared by the same accountant.

7. Petitioners offered no documentary evidence to challenge the results of the audit. However, they did offer the general ledger and cash disbursements journal to support their contention that books and records were available but had never been requested.

#### CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law gives the Audit Division statutory authority for the use of external indices to determine the amount of tax due when a filed return is incorrect or insufficient. Resort to external indices to compute tax liability must be founded on an insufficiency of record keeping that makes it virtually impossible to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44). Chartair requires that the Audit Division request books and records before resorting to external indices, for it is the lack of books and records that authorizes the use of external indices to estimate taxable sales (Matter of Christ Cella v. State Tax Commission, 102 A.D.2d 352).

B. That inasmuch as the Audit Division made no request for books and records prior to issuing the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, there was no statutory authority for estimating the tax due on the basis of external indices. Accordingly, the assessments under consideration are cancelled. It is noted that proof gathered after the assessment is issued, which indicates that the assessment is reasonable, does not eliminate the requirement that a request for books and records be made prior to resorting to external indices (Matter of Theresa Roncone d/b/a Roncone's Grill, State Tax Commission, March 11, 1986).


C. That in view of Conclusion of Law "B", all other issues raised are rendered moot.

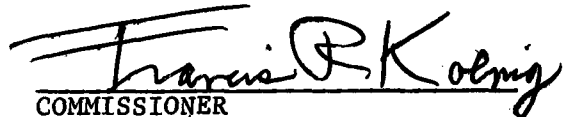
D. That the petitions of Arvy's Service Station, Inc. and Robert Vigorito are granted to the extent indicated in Conclusion of Law "B"; accordingly, the Audit Division is directed to cancel the notices of determination and demands for payment of sales and use taxes due.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 27 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER