

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
B & M Service Center, Inc. : AFFIDAVIT OF MAILING
and William & Margaret Schwing, as Officers :
:
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 12/1/80-8/31/82. :

State of New York :

ss.:

County of Albany :

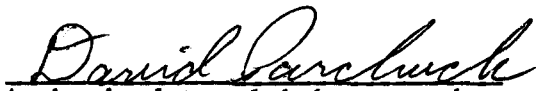
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 9th day of January, 1987, he/she served the within notice of Decision by certified mail upon B & M Service Center, Inc., and William & Margaret Schwing, as Officers the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

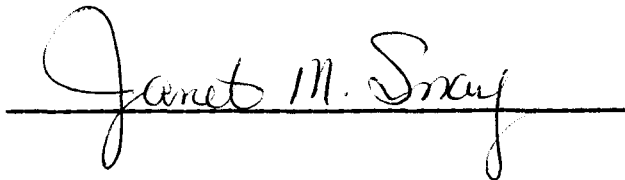
B & M Service Center, Inc.
and William & Margaret Schwing, as Officers
569 Route 109
W. Babylon, NY 11704

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
9th day of January, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

January 9, 1987

B & M Service Center, Inc.
and William & Margaret Schwing, as Officers
569 Route 109
W. Babylon, NY 11704

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
B & M SERVICE CENTER, INC. AND	:	DECISION
WILLIAM SCHWING AND MARGARET SCHWING, AS OFFICERS :	:	
for Revision of Determinations or for Refunds of	:	
Sales and Use Taxes under Articles 28 and 29 of	:	
the Tax Law for the Period December 1, 1980	:	
through August 31, 1982.	:	

Petitioners, B & M Service Center, Inc. and William Schwing and Margaret Schwing, as officers, 569 Route 109, West Babylon, New York 11704, 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 December 1, 1980 through August 31, 1982 (File Nos. 52372, 53048 and 53049).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 16, 1986 at 2:15 P.M., with additional evidence to be submitted by September 15, 1986. Petitioner William Schwing appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Michael Infantino, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales taxes due on the basis of external indices.

II. Whether William Schwing and Margaret Schwing were persons required to collect tax and were, therefore, personally liable for all sales and use taxes due from B & M Service Center, Inc.

FINDINGS OF FACT

1. On March 8, 1984, the Audit Division issued against petitioner, B & M Service Center, Inc. ("B & M"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1980 through August 31, 1982, asserting a tax due of \$75,467.00, plus penalty of \$18,517.70 and interest of \$25,768.43, for a total due of \$119,753.13. Identical notices were mailed to petitioners, William Schwing and Margaret Schwing, as officers of B & M, on April 30, 1984.

2. By letter dated July 19, 1983, the Audit Division informed B & M that an audit of its State tax returns was being conducted and requested that petitioner respond to a questionnaire and provide a copy of certain Federal tax returns. Two follow-up letters were sent on or about September 7, 1983 and November 14, 1983, respectively. No reply was received to any of the letters sent.

3. Because B & M failed to respond to the Audit Division's requests, additional sales tax due was determined on the basis of available information. B & M's gasoline supplier provided the Audit Division with a record of B & M's gasoline purchases for the periods under consideration. Within each sales tax quarter, the number of gallons purchased was multiplied by the statewide average selling price of gasoline during the same quarter to determine audited gasoline sales. The selling prices were appropriately adjusted to remove sales tax included in the price.

4. Prior to the audit of B & M, the Audit Division's District Office had conducted a survey of gasoline stations in the Long Island area. The auditor who observed B & M noted that there were two mechanics on duty and three repair bays, from which it was concluded that B & M performed a moderate number of

repairs, including tax exempt New York State inspections. Based on past audit experience, repair sales were estimated at 38 percent of audited gasoline sales.

5. Using the methodology described, the Audit Division calculated additional tax due as follows:

Audited gasoline sales	\$ 864,417.00
Audited repair sales	328,479.00
Total audited sales	<u>\$1,192,896.00</u>
Audited tax due	\$ 85,032.00
Sales tax paid	9,565.00
Additional tax due	<u>\$ 75,467.00</u>

6. William Schwing was the president of B & M. He operated the gas station; hired, fired and paid employees; signed all sales tax returns; and provided information to an account from which all tax returns were prepared.

7. Margaret Schwing was the vice president of B & M. Her association with the corporation was merely a formality. She had no involvement with the operation of the gas station, did not maintain or review its books and records and signed checks only on occasion and at the direction of her husband.

8. Petitioners strongly objected to the audit methodology and results. However, no documentary evidence was introduced which supported their contention that the assessment was in error.

CONCLUSIONS OF LAW

A. That in light of B & M's failure to respond to the Audit Division's questionnaire or to make available any records from which its reported sales could be verified, the Audit Division was justified in estimating B & M's tax liability on the basis of the information available to it (Tax Law §1138[a][1]; Matter of Ristorante Puglia v. Chu, 102 AD2d 348, 350). Because petitioners

failed to demonstrate that either the audit methodology or the result arrived at was erroneous, the assessment is upheld.

B. That petitioner William Schwing was actively involved in the day-to-day operations of B & M, signed checks on the corporate account, hired and fired employees and signed tax returns. Therefore, he was a person required to collect sales and use taxes and is personally liable for the taxes imposed by Articles 28 and 29 of the Tax Law (Tax Law §§1131[1]; 1133[a]).

C. That Margaret Schwing had no day-to-day responsibilities in the corporation and no knowledge of or involvement in the financial affairs and management of the corporation. Therefore, she is not personally liable for sales and use taxes due from B & M.

D. That the petition of Margaret Schwing is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued against Margaret Schwing on April 30, 1984 is cancelled.

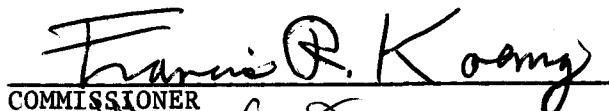
E. That the petitions of B & M Service Center, Inc. and William Schwing are denied and the notices of determination and demands for payment of sales and use taxes due issued March 8, 1984 and April 30, 1984, respectively, are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 09 1987


PRESIDENT


COMMISSIONER


COMMISSIONER