

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of

Robert Corton, Officer of : AFFIDAVIT OF MAILING  
3400 Baychester Avenue Service Station, Inc.

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 6/1/79-5/31/83.  
\_\_\_\_\_

State of New York :

ss.:

County of Albany :

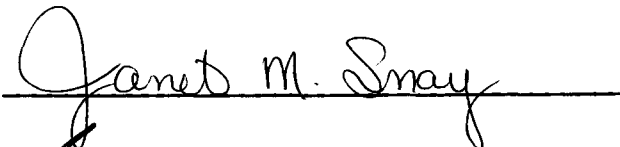
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 6th day of April, 1987, he/she served the within notice of decision by certified mail upon Robert Corton, Officer of, 3400 Baychester Avenue Service Station, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Corton, Officer of  
3400 Baychester Avenue Service Station, Inc.  
1095 Grant Avenue  
Pelham Manor, NY 10803

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  
6th day of April, 1987.

  
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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

Robert Corton, Officer of : AFFIDAVIT OF MAILING  
3400 Baychester Avenue Service Station, Inc.

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax  
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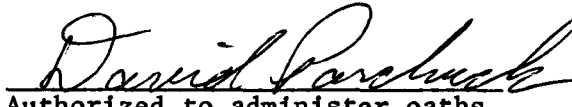
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 6th day of April, 1987, he served the within notice of decision by certified mail upon Chetney C. Clark, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

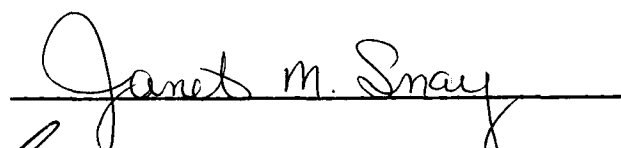
Chetney C. Clark  
40 Manning Circle  
Pelham, NY 10801

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  
6th day of April, 1987.

  
\_\_\_\_\_  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

April 6, 1987

Robert Corton, Officer of  
3400 Baychester Avenue Service Station, Inc.  
1095 Grant Avenue  
Pelham Manor, NY 10803

Dear Mr. Corton:

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:  
Chetney C. Clark  
40 Manning Circle  
Pelham, NY 10801

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
ROBERT CORTON, OFFICER OF	:	DECISION
3400 BAYCHESTER AVENUE SERVICE STATION, 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 June 1, 1979	:	
through May 31, 1983.	:	

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Petitioner, Robert Corton, Officer of 3400 Baychester Avenue Service Station, Inc., 1095 Grant Avenue, Pelham Manor, New York 10803, 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 June 1, 1979 through May 31, 1983 (File No. 54739).

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 December 9, 1986 at 1:15 P.M. Petitioner appeared by Chetney C. Clark. The Audit Division appeared by John P. Dugan, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether the Audit Division correctly determined sales tax due from the petitioner on the basis of external indices.

FINDINGS OF FACT

1. On April 20, 1984, as the result of a field audit, the Audit Division issued to petitioner, Robert Corton, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1979 through November 30, 1982 asserting additional taxes due in the amount of \$53,603.81 plus penalty

and interest. On the same date, a second notice was issued to Mr. Corton for the period December 1, 1982 through May 31, 1983 asserting taxes due in the amount of \$5,124.16 plus penalty and interest. Both notices explain that Mr. Corton's personal liability for the taxes due derive from his position as an officer of 3400 Baychester Avenue Service Station, Inc. ("Baychester").

2. On behalf of Baychester, Mr. Corton executed two consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law. The first, executed on September 10, 1982, extended the period of assessment for the taxable period June 1, 1979 through November 30, 1979 to February 20, 1983. The second, executed on February 17, 1983, extended the period of assessment for the taxable period June 1, 1979 through August 31, 1980 to December 20, 1983.

3. An auditor visited the Baychester station on April 5, 1982 and completed a worksheet where he noted: there was one mechanic on the premises and one gas attendant; all pumps were full service; the station performed State inspections; and there were two repair bays. Some books and records were made available, consisting primarily of bank statements and cancelled checks. Since these were deemed inadequate to verify reported taxable sales, sales were estimated on the basis of available information. Baychester's gasoline purchases were obtained from its supplier for the period March 1, 1980 through August 31, 1981. The average statewide selling price of gasoline for that period (adjusted for excise and sales taxes included in the price) was applied to purchases to obtain audited gasoline sales for the period. Repair sales were estimated at \$200.00 per repair bay per day (or \$2,400.00 per week). Total audited taxable sales for the period were determined to be \$554,550.00. An error rate of 154.36 percent was calculated by dividing reported taxable sales of \$218,014.00

by audited taxable sales. The error rate was applied to reported taxable sales for the audit period to calculate additional taxable sales of \$727,227.00 with a tax due on that amount of \$58,727.97.

4. Mr. Corton operated the Baychester station throughout the audit period. During that time he employed one mechanic. Mr. Corton suffered from a heart condition for which he was hospitalized in 1982 and again in 1983. As a consequence, he performed few automobile repairs himself. Mr. Corton's accountant asserted that sale of repair services for the audit period averaged \$450.00 per week. His estimate was based on his memory of customer repair invoices, but no invoices were submitted to show actual sales of repair services. Mr. Corton also asserted that the gasoline prices used by the Audit Division were higher than actual prices charged. He presented no evidence of actual prices.

#### CONCLUSIONS OF LAW


A. That in light of the fact that petitioner did not maintain verifiable records of sales as required by Tax Law § 1135, the Audit Division was authorized to estimate taxable sales, using the information available to it and an audit methodology reasonably calculated to reflect the taxes due (Tax Law § 1138(a)(1); Matter of Grant Co. v. Joseph, 2 NY2d 196, 206, cert. denied 355 U.S. 869). The Audit Division's markup of gasoline sales was such a methodology, and Mr. Corton presented no credible evidence to establish that audited gasoline sales were inaccurate. However, Mr. Corton did show that the estimate of repair sales was unreasonable inasmuch as it was inconsistent with the fact that only one mechanic was employed at the station. Accordingly, repair sales are to be recalculated, using a figure of \$1,200.00 per week during the audit period.

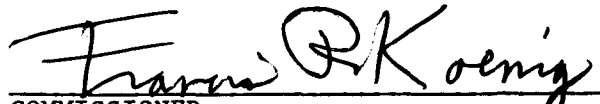
B. That the petition of Robert Corton, Officer of 3400 Baychester Avenue Service Station, Inc. is granted to the extent indicated in Conclusion of Law "A"; that the notices of determination and demands for payment of sales and use taxes due issued on April 20, 1984 shall be modified accordingly; and that in all other respects, the petition is denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1987.

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER