

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Garage Shalom, Inc. :

AFFIDAVIT OF MAILING

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 12/1/78 - 5/31/81.

State of New York :

ss.:

County of Albany :

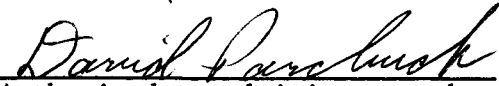
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 11th day of March, 1987, he/she served the within notice of Decision by certified mail upon Garage Shalom, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

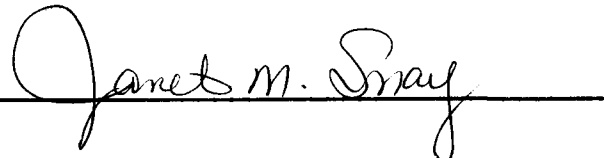
Garage Shalom, Inc.
c/o H. Wapnick
2024 E. 18th Street
Brooklyn, NY 11229

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
11th day of March, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

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of
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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 11th day of March, 1987, he served the within notice of Decision by certified mail upon Carl H. Becker, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carl H. Becker
Fireman & Kramer
305 Avenue U
Brooklyn, NY 11223

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
11th day of March, 1987.

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

March 11, 1987

Garage Shalom, Inc.
c/o H. Wapnick
2024 E. 18th 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:
Carl H. Becker
Fireman & Kramer
305 Avenue U
Brooklyn, NY 11223

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

GARAGE SHALOM, INC.

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 December 1, 1978
through May 31, 1981. :

Petitioner, Garage Shalom, Inc., c/o H. Wapnick, 2024 East 18th Street, Brooklyn, New York 11229, 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 December 1, 1978 through May 31, 1981 (File No. 39287).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 10, 1986 at 2:45 P.M. Petitioner appeared by Fireman & Kramer, Esqs. (Carl H. Becker, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined audited sales by increasing petitioner's reported sales by a multiple of fifteen.

II. Whether reasonable cause existed for petitioner's failure to pay the proper sales tax due, thereby warranting cancellation of both the penalty imposed under Tax Law § 1145(a)(1)(i) and those interest charges in excess of minimum interest.

FINDINGS OF FACT

1. On January 20, 1982, the Audit Division, as the result of a field examination, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, Garage Shalom, Inc. Said notice, which encompassed the period December 1, 1978 through May 31, 1981, assessed tax due of \$46,914.56, plus penalty of \$9,952.67 and interest of \$8,109.90, for a total amount due of \$64,977.13.

2. From early 1978 until approximately mid-May of 1981, petitioner operated an automotive repair shop at 438 Tenth Avenue, New York, New York. Petitioner vacated said premises at the request of the landlord and in June of 1981 the building, a gas station, was demolished. Petitioner had not removed its books and records from said building prior to demolition and, therefore, all its books and records were destroyed.

3. The auditor assigned to this case contacted both petitioner's president and its accountant in an effort to locate petitioner's books and records. After learning that all books and records had been destroyed, the auditor next visited the premises at 438 Tenth Avenue and found "an empty lot". From her inspection of the property, the auditor was able to determine that gasoline storage tanks were still in place on the premises. The auditor also questioned an employee of a hardware store which was located adjacent to petitioner's business and was informed that petitioner operated a gas station. The auditor did not inquire of this employee whether or not petitioner ever sold gasoline, but rather assumed that gasoline was sold because of the existence of gasoline storage tanks.

4. Petitioner's reported taxable sales for the audit period totalled \$41,888.00, an average of \$4,188.80 per quarter. The auditor deemed reported

taxable sales insufficient for a gasoline station located in Manhattan and, since no books and records were available for audit, she multiplied reported taxable sales of \$41,888.00 by fifteen to compute audited taxable sales of \$628,320.00. Application of the eight percent tax rate to additional taxable sales of \$586,432.00 (\$628,320.00 minus \$41,888.00) produced the tax due figure of \$46,914.56. The auditor determined reported taxable sales insufficient and used a multiplication factor of fifteen premised on the belief that petitioner sold gasoline on a regular and continuous basis.

5. When petitioner first leased the premises at 438 Tenth Avenue, rental payments totalled \$400.00 per month. In 1980, petitioner's rent was increased to \$1,000.00 per month. Prior to the rent increase, petitioner generated its sales solely from the repair of automobiles and was not engaged in the retail sale of gasoline. When its rent was increased, petitioner attempted to increase revenues through the retail sale of gasoline. Petitioner purchased 2,500 gallons of no lead gasoline from Pronto Petroleum Corp. on each of three separate occasions in early 1980. The 7,500 gallons of gasoline purchased in early 1980 represented petitioner's total gasoline purchases for the audit period. After the 7,500 gallons of gasoline were sold, no further purchases were made because (i) the entrance to the station was restricted, thus reducing gasoline sales; (ii) the station had only one island containing two pumps; and (iii) the gasoline storage tanks at the station had a combined capacity of only 2,500 gallons and petitioner's supplier of gasoline refused to make any further deliveries since it was cost ineffective to deliver such a small quantity.

6. Petitioner specialized in low cost brake repairs and oil changes and its president, Jacob Melamed, testified that repair sales totalled approximately \$1,000.00 per week.

CONCLUSIONS OF LAW

A. That absent adequate books and records, it is permissible for the Audit Division to resort to the use of estimates to determine tax due (Tax Law § 1138[a]). In the instant matter, the Audit Division computed audited taxable sales by increasing reported taxable sales fifteen times. Said multiplication factor was determined based on the belief that petitioner was engaged in the retail sale of gasoline. Petitioner, however, has established that it was not engaged in the retail sale of gasoline on a regular and continuous basis during the audit period. Accordingly, it was improper, in the case at hand, to increase reported taxable sales fifteen times to compute audited taxable sales.

B. That petitioner's taxable repair sales were \$1,000.00 per week, or a total of \$13,000.00 per quarter. Since there are ten quarters in the audit period, taxable repair sales total \$130,000.00. Taxable gasoline sales total \$8,625.00 (7,500 gallons x \$1.15¹). Audited taxable sales total \$138,625.00 (\$130,000.00 + \$8,625.00) and, when compared to reported taxable sales of \$41,888.00, produces \$96,737.00 of additional taxable sales and a tax due of \$7,738.96.

C. That Tax Law § 1145(a)(1)(ii) provides for the waiver of penalty and that portion of interest charges in excess of minimum interest if it is determined that failure to pay the proper sales tax "was due to reasonable cause and not due to willful neglect". Petitioner, in the instant matter, has failed to

1 For purposes of this decision, the taxable selling price of each gallon of unleaded gasoline was estimated at \$1.15. Petitioner presented no evidence to establish what its actual selling price of gasoline was during the audit period.

establish reasonable cause for its failure to remit the proper sales tax and, therefore, penalties and statutory interest are sustained.

D. That the petition of Garage Shalom, Inc. is granted to the extent indicated in Conclusions of Law "A" and "B", supra; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 11 1987.

Roderick W. Clum
PRESIDENT

Francis R. Koehn
COMMISSIONER

Mark J. Fink
COMMISSIONER