

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Kingston Service Station, Ltd. : AFFIDAVIT OF MAILING
and Rubenia White, as Officer :

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, :
1979 through August 31, 1982. :

State of New York :

ss.:

County of Albany :

Connie A. Ward, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 14th day of August, 1987, she served the within notice of decision by certified mail upon Kingston Service Station, Ltd., and Rubenia White, as Officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kingston Service Station, Ltd.
and Rubenia White, as Officer
165-25 Liberty Avenue
Jamaica, NY 11432

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
14th day of August, 1987.

Connie A. Ward

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Kingston Service Station, Ltd. : AFFIDAVIT OF MAILING
and Rubenia White, as Officer :

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, :
1979 through August 31, 1982. :

State of New York :

ss.:

County of Albany :

Connie A. Ward, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 14th day of August, 1987, he served the within notice of decision by certified mail upon Kenneth L. Robinson, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kenneth L. Robinson
Levine & Robinson, P.C.
50 Charles Lindbergh Blvd.
Mitchel Field, NY 11553

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
14th day of August, 1987.

Connie A. Ward

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

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

August 14, 1987

Kingston Service Station, Ltd.
and Rubenia White, as Officer
165-25 Liberty Avenue
Jamaica, NY 11432

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) 453-4301

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Kenneth L. Robinson
Levine & Robinson, P.C.
50 Charles Lindbergh Blvd.
Mitchel Field, NY 11553

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
KINGSTON SERVICE STATION, LTD. : DECISION
AND RUBENIA WHITE, AS OFFICER :
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, 1979 :
through August 31, 1982. :
:

Petitioners, Kingston Service Station, Ltd. and Rubenia White, as officer, 165-25 Liberty Avenue, Jamaica, New York 11432, 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, 1979 through August 31, 1982 (File Nos. 45997 and 45998).

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 December 11, 1986 at 1:15 P.M., with all briefs to be submitted by April 17, 1987. Petitioners appeared by Levine & Robinson, P.C. (Kenneth L. Robinson, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUE

Whether the Audit Division properly estimated petitioners' gasoline, oil and accessory sales on the basis of external indices.

FINDINGS OF FACT

1. On May 27, 1983, following a field audit, the Audit Division issued to petitioner, Kingston Service Station, Ltd., a Notice of Determination and

Demand for Payment of Sales and Use Taxes Due for the period December 1, 1979 through August 31, 1982 stating total tax due of \$116,063.26, penalty of \$26,487.44 and interest of \$29,955.38, for a total amount due of \$172,506.08. On the same date, the Audit Division issued to petitioner, Rubenia White, officer of Kingston Service Station, Ltd., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1979 through August 31, 1982 stating total tax due, penalty and interest in the same amounts assessed to petitioner Kingston Service Station, Ltd. Petitioners, by their duly appointed representative, David Gross, had previously executed a validated consent allowing assessment for the noted period to be made at any time on or before June 20, 1983.

2. Petitioners operate a gasoline service station in Jamaica, New York, making sales of gasoline, oil, tires, batteries and accessories (the latter three hereinafter referred to as "TBA").

3. After written request by the Audit Division, petitioners produced Federal and State income tax returns, sales tax returns, a cash receipts journal, a check disbursements journal and purchase invoices. Notably, however, petitioners were never able to provide sales invoices or cash register tapes. Moreover, petitioners did not record daily gallonage and, therefore, it was virtually impossible to determine daily sales of gasoline. Further, no records were provided to substantiate sales of oil and TBA.

4. Petitioners reported their sales during the audit period on part-quarterly sales tax returns. Taxable sales were determined by multiplying the gallons of regular gasoline sold by the monthly average selling price, plus the gallons of premium gasoline sold, multiplied by the monthly average selling

price, less the excise and sales tax included in the sales price, the monthly ending inventory and estimated tax. An obvious error in the formula used by petitioners was that no adjustment was made for inventory on hand at the beginning of each month, resulting in an artificially low total taxable sales figure for the month.

5. Petitioners' failure to credit themselves with an opening inventory in their taxable sales computation led the Audit Division to conclude that they could not ascertain from petitioners' books an accurate number of gallons purchased from petitioners' supplier, Amoco Oil Co. ("Amoco"), and they sought third party verification of petitioners' purchases of gasoline, oil and TBA from Amoco.

6. The Audit Division completed its audit of petitioners by taking the total number of gallons purchased of regular unleaded gasoline and multiplying it by an average taxable selling price provided by the Audit Division's Albany office (less excise and sales tax) to arrive at an adjusted taxable sales figure for regular unleaded gasoline. This same process was utilized for super unleaded gasoline as well. Purchases of oil and TBA, also verified by Amoco, were marked up by 100 percent and 50 percent, respectively, to arrive at adjusted taxable sales for those items. The percentages utilized to arrive at adjusted taxable sales of oil and TBA were determined by the Queens District Office of the Audit Division after numerous audits of similar gasoline stations.

7. Petitioners provided delivery receipts for virtually every delivery made during the audit period. These delivery receipts often included check numbers which could be traced to the check disbursements journal which verified amounts paid on each delivery. Each delivery receipt stated the purchaser as

"Ancel White", Kingston Service Station, 165-25 Liberty Avenue, Jamaica, New York 11433, the gallons of each type of gasoline purchased and the price paid for each. The identity of "Ancel White" was not disclosed at the hearing. From these receipts it was apparent that petitioners received one to three deliveries per day during the months of July and September 1980, months which were randomly selected by the Hearing Officer at hearing. Petitioners' gasoline purchases for the audit period per records totalled 3,820,078 gallons of regular unleaded gas, including 191,000 gallons estimated for the period June 1, 1982 through August 31, 1982 and 1,898,301 gallons of premium gas, including 191,000 gallons estimated for the period June 1, 1982 through August 31, 1982. Amoco supplied third party verification of shipments through a distributor, totaling 4,278,387 gallons of regular unleaded gasoline, and 2,037,119 gallons of premium unleaded gasoline during the same period. These figures represent gasoline shipped to the distributor; they do not constitute the amount of gasoline actually delivered to petitioner.

8. The Audit Division took the total number of gallons purchased of regular unleaded gasoline per Amoco verification and multiplied it by the average taxable selling price determined from an average selling price provided by the Albany District Office, less excise tax and sales tax, to arrive at adjusted taxable sales of regular unleaded gasoline of \$4,975,252.00. Next, the Audit Division took the total number of gallons purchased of super unleaded gasoline per Amoco verification and multiplied it by an average taxable selling price determined from the taxable selling price of regular unleaded gasoline plus ten cents to arrive at adjusted taxable sales of super unleaded gasoline of \$2,565,276.00. Oil purchases of \$4,314.00 were marked up by 100 percent,

determined by the auditor's past audit experience, to arrive at adjusted taxable oil sales for the audit period of \$8,628.00. Finally, TBA purchases of \$4,036.00 were marked up by 50 percent, a percentage again determined by the auditor's past audit experience of similar establishments, to arrive at adjusted taxable TBA sales for the audit period of \$6,054.00. Total adjusted taxable sales were \$7,555,220.00, compared to petitioners' reported taxable sales of \$6,117,091.00. The difference, \$1,438,129.00, was assessed at the prevailing tax rate yielding additional tax of \$116,063.26 for the audit period.

9. The Audit Division assessed a penalty because of the substantial difference between the third party verification figures provided by Amoco and those reported by petitioners.

10. Petitioners contend that the Department's assessment is invalid because it relied upon an estimate of sales when actual records were available; that the evidence used to estimate sales was unreliable; that the Department failed to state in its notices of determination and demands for payment that the petitioners' sales and use tax returns were either not filed or incorrect or insufficient; and that the petitioners' statutory and due process rights were violated by the Department's failure to provide notice of the method and basis of the tax determination.

CONCLUSIONS OF LAW

A. That where, as here, complete, adequate and accurate records are neither maintained nor presented upon request for audit, as required, it is well settled that the Audit Division may resort to such information as is available, including external indices, in arriving at a reasonably calculated determination of tax liability (Tax Law §§ 1135, 1142.5, 1138[a][1]; Matter of Urban Liquors, Inc. v. State Tax Commission 90 AD2d 576). That the estimate

procedures adopted by the Audit Division for oil and TBA sales were reasonable under the circumstances. When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223). However, in accordance with Finding of Fact "7", petitioners herein provided adequate documentation of gallons of gasoline purchased, which in this instance is a more accurate reflection of gasoline delivered to petitioners than those figures provided by the Amoco Oil Co., due to Amoco's figures representing total gallons given to the distributor, and not necessarily those delivered directly to petitioners. This case is distinguishable from previous State Tax Commission cases dealing with third-party verification of gasoline purchases in that in those cases the petitioners failed to offer any documentation serving to refute the accuracy of the information supplied by the major oil company. (See, e.g., Matter of Curcio, State Tax Commission, February 24, 1987; Matter of Don Pat Service, Inc., State Tax Commission, March 11, 1986.) The Audit Division is therefore directed to recalculate taxable sales using petitioners' gasoline gallonage figures for the audit period and the Audit Division's own average retail sales price previously used in the audit. In light of petitioners' failure to substantiate any sales through sales invoices or cash register tapes, its records were clearly inadequate and, other than the gasoline gallonage figures, the Audit Division's use of external indices is permissible and in this instance proper (Matter of Korba v. New York State Tax Commission, 84 AD2d 655).

B. That Tax Law § 1145(a)(1), in effect during the audit period herein, stated, in pertinent part, as follows:

"Any person failing to file a return or to pay or pay over any tax to the tax commission within the time required by this article shall be subject to a penalty of five percent of the amount of tax due if such

failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate;...."

Accordingly, petitioners are subject to penalty.

C. That petitioners' contention that the Department failed to state in its notices that Kingston's sales and use tax returns had either not been filed or were incorrect or insufficient is invalid since the provisions of section 1138 are incorporated by reference and inferred by the language stated on said notices which clearly state that the tax was determined to be due in accordance with section 1138 of the Tax Law.

D. That the constitutionality of the laws of the State of New York and their application in particular instances is presumed at the administrative level. Further, petitioners' contention that they were not provided with lawful notice of the method and bases of the determination of the taxes due is erroneous. As stated in Conclusion of Law "C" above, the notices sent to petitioners herein apprised them that the taxes assessed were estimated or determined to be due in accordance with the provisions of section 1138 of the Tax Law.

E. That Rubenia White, officer of Kingston Service Station, Ltd., conceded at hearing, through her appointed representative, that she was a person liable as officer of Kingston Service Station, Ltd. under sections 1131(1) and 1133 of the Tax Law for the taxes determined to be due against Kingston Service Station, Ltd.


F. That the petitions of Kingston Service Station, Ltd. and Rubenia White, as officer, are granted to the extent set forth in Conclusion of Law

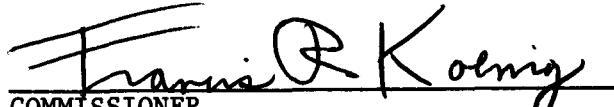
"A"; the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued May 27, 1983; and that, except as so granted, the petitions are in all other respects denied.

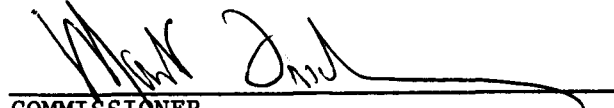
DATED: Albany, New York

STATE TAX COMMISSION

AUG 14 1987.


PRESIDENT


COMMISSIONER


COMMISSIONER