

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

My Place Auto Center, Inc. : AFFIDAVIT OF MAILING
and Samuel Izsak, 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 6/1/80-12/31/81.

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 16th day of January, 1987, he/she served the within notice of Decision by certified mail upon My Place Auto Center, Inc., and Samuel Izsak, Officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

My Place Auto Center, Inc.
and Samuel Izsak, Officer
141-05 Northern Blvd.
Flushing, NY 11354

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
16th day of January, 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

January 16, 1987

My Place Auto Center, Inc.
and Samuel Izsak, Officer
141-05 Northern Blvd.
Flushing, NY 11354

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 Petition	:	
of	:	
MY PLACE AUTO CENTER, INC.	:	DECISION
and SAMUEL IZSAK, 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 June 1, 1980	:	
through December 31, 1981.	:	

Petitioners, My Place Auto Center, Inc. and Samuel Izsak, 141-05 Northern Blvd., Flushing, New York 11354, 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, 1980 through December 31, 1981 (File No. 42541).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on September 10, 1986 at 1:45 P.M. Petitioners appeared by Samuel Izsak. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined sales and use taxes due from My Place Auto Center, Inc.

II. Whether Samuel Izsak was a person required to collect tax on behalf of My Place Auto Center, Inc.

FINDINGS OF FACT

1. Petitioner My Place Auto Center, Inc. ("the corporation") operated a gasoline service station business at 175-14 Horace Harding Boulevard, Queens, New York.

2. Petitioner Samuel Izsak was hired by one Ralph Benaim to manage the station as of March 17, 1980. At that time the business was known as Tel Aviv Service Station and was operated by Mr. Benaim.

3. On or about June 1, 1980, Mr. Benaim caused the corporation to be formed. Mr. Izsak was named secretary and 25 percent of the corporation's stock was issued in his name. Mr. Benaim's nephew, Hasiba Galai, was named president and held 75 percent of the stock.

4. Mr. Izsak and a mechanic's helper actually operated the business for the corporation.

5. Mr. Izsak had the authority to, and in fact did, sign checks on behalf of the corporation.

6. When Mr. Izsak came to the station on the morning of June 1, 1981, he found that the station was already open and that the safe was open and everything in it had been removed. Mr. Benaim had keys to the station and had evidently opened the station and the safe. On that same morning, Mr. Izsak was "thrown out" of the business by Mr. Benaim and was permitted to take only his personal tools.

7. Mr. Izsak testified that during the period June 1, 1980 through May 31, 1981 Mr. Benaim took \$38,142.00 in cash and gasoline out of the business and that the station was operated by another corporate entity after said period.

8(a). No records were available at the time of the audit. Mr. Izsak told the auditor that Mr. Galai had the records and had evidently left the country, returning to his native Turkey.

(b). Gasoline sales were estimated by a third party verification from EFCO Oil Corp. ("EFCO"), which showed the following:

<u>Month</u>	<u>Gallons</u>
June 1981	12,000
July 1981	48,055
August 1981	<u>78,002</u>
TOTAL	138,057

Total gallons for the three months, 138,057, multiplied by an average selling price of \$1.25 per gallon resulted in audited gasoline sales of \$172,571.25 per quarter.

(c). Repair sales were estimated by assuming that each of the two bays of the gas station had \$10,000.00 per month in repairs. This amounted to \$60,000.00 in repair sales per quarter.

(d). Tires, batteries and accessories ("TBA") sales were estimated at \$5,000.00 per month or \$15,000.00 per quarter.

(e). Estimated gasoline, repair and TBA sales amounted to \$247,571.25 which amount was rounded to \$250,000.00 per quarter for assessment purposes.

(f). Additional taxable sales were computed as follows:

<u>Quarter Ending</u>	<u>Estimated Taxable Sales</u>	<u>Taxable Sales Reported</u>	<u>Additional Taxable Sales</u>
8/31/80	\$250,000.00	\$23,105.00	\$226,895.00
11/30/80	250,000.00	25,186.00	224,814.00
2/28/81	250,000.00	19,461.00	230,539.00
5/31/81	250,000.00	-0-	250,000.00
8/31/81	250,000.00	-0-	250,000.00
11/30/81	250,000.00	-0-	250,000.00
12/31/81	83,333.00	-0-	83,333.00

9. On January 11, 1983 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner My Place Auto Center, Inc. in the amount of \$122,079.81 in tax, and \$28,063.71 in penalty, plus interest. Similar notices were issued to Hasiba Galai, as president, and Mr. Izsak, as secretary.

10(a). After the assessment, the Audit Division issued subpoenas to Chevron USA, Inc. ("Chevron"), seeking petroleum sales information with respect to the corporation, Ralph Benaim and 175 Horace Service Station, Inc., all regarding the 174-14 Horace Harding Boulevard location.

(b). Chevron's records show the station's account to be in the name of Ralph Benaim/Tel Aviv Chevron through June 30, 1981 with a change to 175 Horace Service Station, Inc. as of July 1, 1981.

(c). Total Chevron gasoline sales to the station for 1980 were 218,992 gallons. Sales from June 1, 1980 through December 31, 1980 were 110,977 gallons. There were no Chevron TBA sales to the station for 1980 (in fact it appears that no TBA purchases had been made from Chevron since February 1979).

(d). Chevron gasoline sales to the station for 1981 were 112,790 gallons which, Chevron reported, was 48 percent lower than the prior year. No TBA was shown as having been sold to the station by Chevron for 1981.

11. During the period June 1, 1980 through May 31, 1981 the station was open six days a week for approximately 12 hours per day. The labor rate for repairs was \$25.00 per hour.

12. The petition filed by Mr. Izsak on behalf of the corporation was clearly intended to protest his own liability as officer, as well as that of the corporation. Accordingly, the petition and perfected petition are deemed amended to include Mr. Izsak as a petitioner.

CONCLUSIONS OF LAW

A. That since no books or records were available, it was permissible for the Audit Division to estimate the amount of tax due by external indices (Tax Law § 1138[a]). The tax estimated by the auditor must, however, be revised in view of evidence adduced at the hearing.

B. That it was improper to project the EFCO purchases over the entire audit period. It appears that the EFCO purchases commenced with the new management effective June 1981, starting with only 12,000 gallons during that month, increasing to 48,055 gallons in July and 78,002 gallons in August. Moreover, Chevron sales for 1981 were only about one-half of the 1980 sales, which shows a lessened dependence on Chevron. Accordingly, gasoline sales are hereby determined to be as follows:

- (1) June 1, 1980 - May 31, 1981: 15,853 gallons per month on average (based on Chevron records for the seven month period June 1, through December 31, 1980) times \$1.25 per gallon for \$19,816.25 per month or \$59,448.75 per quarter.
- (2) June 1, 1981 - December 31, 1981: As per audit.

C. Sales of tires, batteries and accessories are hereby deemed to be as follows:

- (1) June 1, 1980 - May 31, 1981: Sales are reduced to 8.7 percent of gasoline sales or \$5,172.00 per quarter (using the same ratio of gasoline to TBA as used in the audit).
- (2) June 1, 1981 - December 31, 1981: As per audit.

D. Repair sales are hereby determined to be as follows:

- (1) June 1, 1980 - May 31, 1981: Sales for this period are reduced to \$29,250.00 per quarter, on the basis that the mechanic and one mechanic's helper would bill 10 hours per day at \$25.00 per hour for six days per week (as they also had to pump gas) and that sales of parts were equal to one-half of labor sales.
- (2) June 1, 1981 - December 31, 1981: As per audit.

E. That in view of the above, the assessment is to be reduced based on the following:

<u>Quarter Ending</u>	<u>Estimated Taxable Sales</u>	<u>Taxable Sales Reported</u>	<u>Additional Taxable Sales</u>
8/31/80	\$ 93,871.00	\$23,105.00	\$ 70,766.00
11/30/80	93,871.00	25,186.00	68,685.00
2/28/81	93,871.00	19,461.00	74,410.00
5/31/81	93,871.00	-0-	93,871.00
8/31/81	250,000.00	-0-	250,000.00
11/30/81	250,000.00	-0-	250,000.00
12/31/82	83,333.00	-0-	83,333.00

F. That petitioner Samuel Izsak was not a person required to collect sales and use taxes on behalf of petitioner after May 31, 1981 and in fact is not liable for tax after the quarter ending February 28, 1981. Mr. Izsak was literally thrown out of the business on June 1, 1981 and was not in the position to remit tax on behalf of the corporation for the immediately preceding quarter. Mr. Izsak is liable, however, under sections 1133(a) and 1131(1) of the Tax Law for the period June 1, 1980 through February 28, 1981.

G. That the petition of My Place Auto Center, Inc. and Samuel Izsak is granted to the extent provided for in Conclusions of Law "E" and "F", and, except as so granted, the petition is otherwise denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 16 1987

Rodriguez
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Jirik
COMMISSIONER