

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
S. A. Service Station, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales and Use Tax
under Article(s) 28 & 29 of the Tax Law :
for the Period 3/1/79 - 5/31/82.

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 S. A. Service Station, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


S. A. Service Station, Inc.
59-36 Maurice Avenue
Maspeth, NY 11378

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.





Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
S. A. Service Station, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales and Use Tax
under Article(s) 28 & 29 of the Tax Law :
for the Period 3/1/79 - 5/31/82.

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 Leonard Klinghoffer, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard Klinghoffer
7000 Boulevard East
Guttenberg, NJ 07093

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

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

August 14, 1987

S. A. Service Station, Inc.
59-36 Maurice Avenue
Maspeth, NY 11378

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:
Leonard Klinghoffer
7000 Boulevard East
Guttenberg, NJ 07093

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
S. A. SERVICE STATION, INC.	:	DECISION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 & 29	:	
of the Tax Law for the Period March 1, 1979	:	
through May 31, 1982.	:	

Petitioner, S. A. Service Station, Inc., 59-36 Maurice Avenue, Maspeth, New York 11378, 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 March 1, 1979 through May 31, 1982 (File No. 42578).

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 December 8, 1986 at 1:15 P.M., with all briefs to be submitted by February 16, 1987. Petitioner appeared by Leonard Klinghoffer, P.A. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined sales and use taxes due from S. A. Service Station, Inc.

FINDINGS OF FACT

1. During the period at issue, petitioner, S. A. Service Station, Inc., operated a Gulf service station at 59-36 Maurice Avenue, Maspeth, New York.
2. A field audit of petitioner was conducted by the Queens District Office:
 - (a) The only records made available to the auditor were petitioner's 1979 and 1980 Federal income tax returns and its purchase invoices for the quarter September 1, 1980 through November 30, 1980.

(b) Since the records were incomplete, the auditor performed a test period audit utilizing said quarter as a test period.

(c) Gallons of gas purchased as per petitioner's records were multiplied by statewide average selling prices per grade as determined by the Audit Division (less state gasoline tax of 8¢ per gallon, Federal gasoline tax of 4¢ per gallon and sales tax). The calculation is as follows:

<u>Type of Gasoline</u>	<u>Gallons Purchased 9/1/80 - 11/30/80</u>	<u>Average Selling Price</u>	<u>Taxable Receipts</u>
Regular	91,033	\$1.094	\$ 99,590.00
Unleaded	71,530	1.138	81,401.00
Super Unleaded	<u>40,519</u>	1.182	<u>47,893.00</u>
TOTAL	203,082		\$228,885.00

(d) Repairs and accessory sales were estimated at \$5,000.00 per month for the station's one service bay, or \$15,000.00 for the test period.

(e) Total taxable sales of gasoline, repairs and accessories were calculated at \$243,885.00 for the test period, resulting in \$19,510.00 in sales tax due.

(f) Sales tax reported for the test period was \$2,933.20, resulting in a percentage of underreporting of 565.17%.

(g) The underreporting percentage of 565.17% was applied to sales tax reported for the entire audit period of \$42,724.85, resulting in additional sales tax due of \$241,468.62.

4. Third party verification was obtained from petitioner's supplier, Gulf Oil Corporation, showing a total of 850,492 gallons delivered in 1980, resulting in an average of 212,623 gallons per quarter, or 9,541 gallons more than shown by petitioner's purchase records for the test quarter.

5. Petitioner's United States Corporation Income Tax Return for 1979 shows sales of \$524,627.03 and cost of goods sold of \$465,411.81 (Schedule A

showing purchases for 1979 is not in the record). Petitioner's United States Corporation Income Tax Return for 1980 shows sales of \$930,866.91 and cost of goods sold of \$855,992.74, with purchases (excluding parts) of \$838,463.25 (including .025¢ per gallon "rent") and \$14,929.49 in "parts". Beginning 1980 inventory was \$3,200.00 and ending 1980 inventory was \$7,500.00.

6. On December 13, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner for \$241,468.62 in tax, \$49,884.09 in penalty and \$57,425.05 in interest, for a total amount due of \$348,777.76. On the same date a similar Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to Steve Aprigliano, President of S. A. Service Station, Inc., under Tax Law §§ 1131(1) and 1133(a). Mr. Aprigliano's liability as a person required to collect tax on behalf of the petitioner is not at issue herein.

7. Petitioner offered no testimony or documentary evidence to challenge the audit findings.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in pertinent part, as follows:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That where a taxpayer's records are incomplete or insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate

by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous. (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858.)


C. That in this case, petitioner's records were incomplete, since the only information furnished by petitioner was the 1979 and 1980 Federal income tax returns and the purchase invoices for one quarter. Accordingly, it was proper for the Audit Division to perform a test period audit resulting in the assessments which were issued on December 13, 1982. Petitioner did not sustain its burden of proof to show that either the method of audit or the amount of tax assessed was erroneous. It is noted that the third party verification from Gulf Oil Corporation, while not used directly in computing the assessment, confirms the auditor's determination and, in fact, indicates that the amount of the assessment could have been higher. It is also noted that the sales shown on petitioner's own Federal income tax returns confirm that petitioner seriously underreported sales on its sales tax returns.

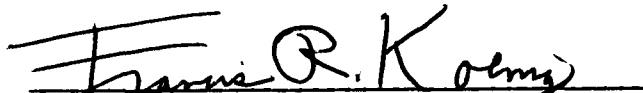
D. That the petition of S. A. Service Station, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 13, 1982, is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 14 1987


PRESIDENT


COMMISSIONER


COMMISSIONER