

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
SJS Service Station, Inc. : AFFIDAVIT OF MAILING
and Harold Tepper, as 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 9/1/80-5/31/81. :

State of New York :

ss.:

County of Albany :

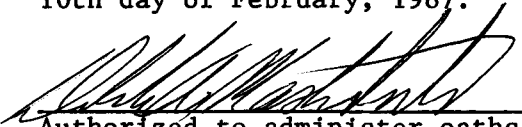
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 10th day of February, 1987, he/she served the within notice of Decision by certified mail upon SJS Service Station, Inc., and Harold Tepper, as Officer, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

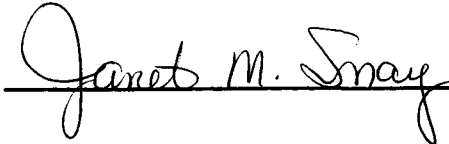
SJS Service Station, Inc.
and Harold Tepper, as Officer
25 Gary St.
Lindenhurst, NY 11757

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
10th day of February, 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 :
SJS Service Station, Inc. : AFFIDAVIT OF MAILING
and Harold Tepper, as Officer :
:
for Redetermination of a Deficiency or Revision :
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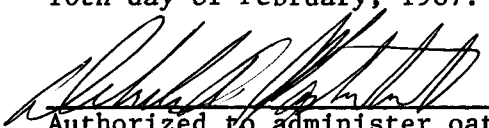
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 10th day of February, 1987, he served the within notice of Decision by certified mail upon Robert Wolk, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

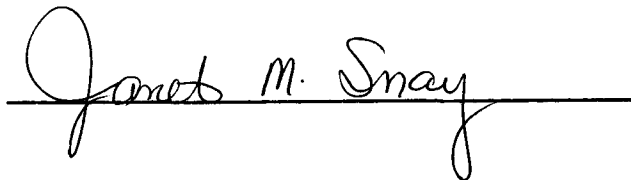
Robert Wolk
Wolk & Lawlor
37 Brighton 11th St.
Brooklyn, NY 11235

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
10th day of February, 1987.


Authorized to administer oaths
pursuant to Tax Law section 174



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

February 10, 1987

SJS Service Station, Inc.
and Harold Tepper, as Officer
25 Gary St.
Lindenhurst, NY 11757

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:
Robert Wolk
Wolk & Lawlor
37 Brighton 11th St.
Brooklyn, NY 11235

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
SJS SERVICE STATION, INC.	:	DECISION
AND HAROLD TEPPER, 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 September 1, 1980	:	
through May 31, 1981.	:	

Petitioners, SJS Service Station, Inc. and Harold Tepper, as officer, 25 Gary Street, Lindenhurst, New York 11757, each 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 September 1, 1980 through May 31, 1981 (File Nos. 52956 and 52957).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 20, 1986 at 1:15 P.M. Petitioners appeared by Robert Wolk, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined the additional sales taxes due from petitioner SJS Service Station, Inc. for the period at issue.

FINDINGS OF FACT

1. On April 20, 1984, the Audit Division, as the result of a field audit, issued to petitioner SJS Service Station, Inc. ("SJS") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a sales tax due of \$18,151.59, plus penalty of \$4,537.89 and interest of \$7,853.19, for a total

amount due of \$30,542.67 for the period September 1, 1980 through May 31, 1981. On the same date, the Audit Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Harold Teppar which was identical as to amounts and period as the notice issued to SJS. The notice issued to Mr. Teppar provided, in pertinent part, as follows:

"You are personally liable as officer of SJS Service Station, Inc. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

2. On August 8, 1983, SJS, by signature of its president, Mr. Teppar, executed a consent extending the statute of limitations for issuing an assessment for sales and use taxes for the period September 1, 1980 through August 31, 1981 to December 20, 1984.

3. SJS operated an Award service station at 643 Broadway in Massapequa, New York, from September 1, 1980 until approximately April 1981 when the station was closed because it was losing money. SJS employed one or two mechanics who performed auto repairs in addition to selling gasoline. Petitioner Harold Teppar does not contest the assertion that he was a responsible officer of SJS.

4. On May 17, 1983, more than two years after SJS had ceased operations, the Audit Division initiated an audit of its books and records. In the intervening period, SJS's source documents such as sales invoices, purchase invoices and cash register tapes were either lost or thrown out. In consideration of this deficiency, the auditor decided to use external indices such as third party information and prior auditing experience to determine SJS's sales tax liability.

5. The auditor first contacted SJS's gasoline distributor, Dart Petroleum, Inc. ("Dart"), and was advised that, for the audit period, SJS purchased

234,056 gallons of regular and unleaded gasoline. This amount was multiplied by the average retail selling price, after allowing for the New York State tax on gasoline and the sales tax, to compute audited taxable gasoline sales of \$265,563.51. The auditor next computed taxable repairs of \$33,600.00 by multiplying the number of mechanics employed per SJS's payroll records times \$20.00 per hour times 40 hours per week times 13 weeks per quarter. For the quarterly period beginning March 1, 1981, the auditor erroneously used 3 weeks instead of 7 weeks (when petitioner ceased operations). Taxable parts sales were estimated to be \$16,800.00, or 50 percent of taxable repairs based on prior auditing experience. The auditor then allowed a credit for a nontaxable sale to the U.S. Post Office of \$650.00. Lastly, the auditor computed audited taxable sales of \$315,313.00 ($\$265,563.51 + \$33,600.00 + \$16,800.00 - \650.00), which, when reduced by taxable sales reported of \$56,004.00, resulted in additional taxable sales of \$259,309.00 and additional sales tax due of \$18,151.63.

6. Petitioners argued that SJS purchased an amount of gasoline considerably less than reported by Dart. Subsequent to the conduct of the audit, petitioners attempted to obtain from Dart copies of signed delivery tickets, but was advised that they were not available. At the hearing, petitioners presented a general ledger, check stubs and bank statements for the audit period to support its contention. However, said records, absent source documents, are insufficient to show that the Audit Division's computation of additional gasoline sales is erroneous.

7. Petitioners also failed to present any evidence that the repair and parts sales as determined by the Audit Division were erroneous.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

B. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that if a sales and use tax return is not filed, or if filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices.

C. That the books and records of SJS Service Station, Inc. were inadequate and incomplete for purposes of determining taxable sales or sales tax due. Therefore, the use of external indices is permissible (Matter of Korba v. New York State Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division's determination of additional tax due was proper pursuant to section 1138(a)(1) of the Tax Law. Exactness is not required where it is the taxpayer's own failure to maintain proper records which prevents exactness in the determination of sales tax liability (Matter of Markowitz v. State Tax Commission, 54 AD2d 1023).


D. That the petitions of SJS Service Station, Inc. and Harold Tepper, as officer, are denied; and the notices of determination and demands for payment of sales and use taxes due issued April 20, 1984 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 10 1987


PRESIDENT


COMMISSIONER


COMMISSIONER