

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ANRAY SERVICE, INC. :

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, 1979 through :
May 31, 1981. :

In the Matter of the Petition :
of :
ANTHONY ROBERTO, :
AS OFFICER OF ANRAY SERVICE, INC. :

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, 1979 through :
May 31, 1981. :

DECISION

In the Matter of the Petition :
of :
ANRAY SERVICE, INC. :

for Redetermination of a Deficiency or for Refund :
of Corporation Franchise Tax under Article 9-A :
of the Tax Law for the Fiscal Years Ending :
March 31, 1980 and March 31, 1981. :

In the Matter of the Petition :
of :
MID-CENTER SERVICE CENTER, INC. :

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, 1979 through :
August 31, 1981. :

In the Matter of the Petition :
of :
ANTHONY ROBERTO, :
AS OFFICER OF MID-CENTER :
SERVICE CENTER, INC. :

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, 1979 through :
August 31, 1981, :
:

In the Matter of the Petition :
of :
MID-CENTER SERVICE CENTER, INC. :

for Redetermination of a Deficiency or for Refund :
of Corporation Franchise Tax under Article 9-A of :
the Tax Law for the Fiscal Years Ending :
July 31, 1980 and July 31, 1981 :
:

DECISION

In the Matter of the Petition :
of :
PHYLLIS SERVICE CENTER. INC. :

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, 1979 through :
August 31, 1981. :
:

In the Matter of the Petition :
of :
ANTHONY ROBERTO, :
AS OFFICER OF PHYLLIS :
SERVICE CENTER, INC. :

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, 1979 through :
August 31, 1981. :

In the Matter of the Petition :
of :
PHYLLIS SERVICE CENTER, INC. :
for Redetermination of a Deficiency or for Refund :
of Corporation Franchise Tax under Article 9-A of :
the Tax Law for the Fiscal Years Ending :
June 30, 1980 and June 30, 1981. :
:

In the Matter of the Petition :
of :
GASLITE SERVICE CENTER, INC. :
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, 1979 through :
May 31, 1981. :
:

DECISION

In the Matter of the Petition :
of :
ANTHONY ROBERTO, :
AS OFFICER OF GASLITE :
SERVICE CENTER, INC. :
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, 1979 through :
May 31, 1981. :
:

In the Matter of the Petition :
of :
ANTHONY ROBERTO :
AND ROSE ROBERTO :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the :
Tax Law for the Years 1980 and 1981. :
:

Petitioners, Anray Service, Inc. ("Anray") and Anthony Roberto, as officer, 19 Lodi Street, Islip Terrace, New York 11752 filed an exception to the determination of the Administrative Law Judge issued on December 23, 1987 with respect to their petitions 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, 1979 through May 31, 1981 (File Nos. 800851 and 800852).

Petitioner Anray Service, Inc., 19 Lodi Street, Islip Terrace, New York 11752 filed an exception to the determination of the Administrative Law Judge issued on December 23, 1987 with respect to its petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ending March 31, 1980 and March 31, 1981 (File No. 801230).

Petitioners Mid-Center Service Center, Inc. ("Mid-Center") and Anthony Roberto, as officer, 19 Lodi Street, Islip Terrace, New York 11752, filed an exception to the determination of the Administrative Law Judge issued on December 23, 1987 with respect to their petitions for revision of a determination or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1979 through August 31, 1981 (File Nos. 800848 and 800855).

Petitioner Mid-Center Service Center, Inc., 19 Lodi Street, Islip Terrace, New York 11752, filed an exception to the determination of the Administrative Law Judge with respect to its petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ending July 31, 1981 (File No. 801232).

Petitioners Phyllis Service Center, Inc. ("Phyllis") and Anthony Roberto, as officer, 19 Lodi Street, Islip Terrace, New York 11752, filed an exception to the determination of the Administrative Law Judge issued on December 23, 1987 with respect to their 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 June 1, 1979 through August 31, 1981 (File Nos. 800850 and 800853).

Petitioner Phyllis Service Center, Inc., 19 Lodi Street, Islip Terrace, New York 11752 filed an exception to the determination of the Administrative Law Judge issued on December 23, 1987 with respect to its petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ending June 30, 1980 and June 30, 1981 (File No. 801231).

Petitioners Gaslite Service Center, Inc. ("Gaslite") and Anthony Roberto, as officer, 19 Lodi Street, Islip Terrace, New York 11752, filed an exception to the determination of the Administrative Law Judge issued on December 23, 1987 with respect to their 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 June 1, 1979 through May 31, 1981 (File Nos. 800849 and 800854).

Petitioners Anthony Roberto and Rose Roberto, 19 Lodi Street, Islip Terrace, New York 11752, filed an exception to the determination of the Administrative Law Judge issued on December 23, 1987 with respect to their petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1980 and 1981 (File No. 801264).

A hearing was held on January 30, 1987 before Administrative Law Judge Robert Mulligan. Petitioner appeared by Patrick A. Troise., Esq. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq. of counsel).

Petitioners filed a brief on exception, the Division did not. Oral argument was heard on June 7, 1988.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner Anthony Roberto was under a duty to collect sales and use taxes as an officer of the corporate petitioners during the periods at issue.

II. Whether petitioner Anthony Roberto's liability for sales, franchise or income tax should be further reduced due to his severance from Anray Service., Inc. and Gaslite Service Center, Inc. on September 1, 1981.

III. Whether corporation franchise tax assessments issued to Mid-Center Service Center, Inc. and Phyllis Service Center, Inc. are time barred.

IV. Whether the Division of Taxation was required to call as a witness the auditor who performed the audit.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination. Such facts are incorporated herein by this reference and are summarized as follows.

A multi-audit of petitioners, Anray Service, Inc., Mid-Center Service Center, Inc., Phyllis Service Center, Inc., Gaslite Service Center, Inc. and Anthony and Rose Roberto, was conducted by the Suffolk District Office. The taxes and periods involved were as follows:

<u>Petitioner</u>	<u>Tax</u>	<u>Period</u>
Anray Service, Inc.	Sales and Use	6/1/79-5/31/81
Anray Service, Inc.	Corporation Franchise	FYE 3/31/80, 3/31/81
Mid-Center Service Center, Inc.	Sales and Use	6/1/79-8/31/81
Mid-Center Service Center, Inc.	Corporation Franchise	FYE 7/31/80, 7/31/81
Phyllis Service Center, Inc.	Sales and Use	6/1/79-8/31/81
Phyllis Service Center, Inc.	Corporation Franchise	FYE 6/30/80, 6/30/81
Gaslite Service Center, Inc.	Sales and Use	6/1/79-5/31/81
Anthony & Rose Roberto	Personal Income	1980, 1981

Anray Service, Inc.

Petitioner Anray Service, Inc. ("Anray") operated a Shell gasoline station at One Jericho Plaza, Jericho, New York. The station had six pumps with ten hoses and also had two service bays.

Anray Sales Tax

Records available for audit were ledgers, cash book, journals, trial balances., bank statements and checks. Anray's gasoline purchases, as per books, could not be reconciled with its gasoline purchases as reported by Shell Oil Company. Accordingly, a markup audit was performed for the period April 1, 1979 to March 31, 1981.

April 1, 1979 to March 31, 1980

Gasoline	\$1,179,309 + 20% markup	\$1,415,170
Oil	587 + 50% markup	704 ¹
Repairs	one week parts 1,052	

¹The auditor made a calculation error in that a markup of 50 percent on \$587.00 does not yield \$704.00, but \$880.50. The difference, however has a negligible effect on the overall audit results.

	one week labor	508	
	1,560 x 52 weeks		81,120
Inspections	10 per week @ \$12.50 x 52 weeks		<u>6,500</u>
Total audited sales			\$1,503,494
Less: inspections (nontaxable)			<u>(6,500)</u>
Total audited taxable sales			\$1,496,994
Less: taxable sales reported			<u>(1,207,333)</u>
Additional taxable sales			\$ 289,661

April 1, 1980 to March 31, 1981

Gasoline	\$1,739,009 + 20% markup		\$2,086,811
Oil	16,824 + 50% markup		25,236
Repairs	one week parts	1,052	
	one week labor	508	
		1,560	x 52 weeks
			81,120
Inspections	10 per week @	\$12.50	x 52 weeks
			<u>6,500</u>
Total audited sales	\$2,199,667		
Less: inspections (nontaxable)			<u>(6,500)</u>
Total audited taxable sales			\$2,193,167
Less: taxable sales reported			<u>(1,703,282)</u>
Additional taxable sales			\$ 489,885

The gross markup per Federal returns for the two years, April 1, 1979 to March 31, 1981, excluding inspections, averaged 12.63 percent (\$357,213.00 gross profit minus \$13,000.00 inspections divided by \$2,726,201.00 cost of goods sold). The auditor found \$3,416,702.00 in taxable sales for the audit period resulting in \$239,169.14 in tax. As \$187,980.95 in tax had been paid, additional tax due was calculated at \$51,188.19.

A consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through November 30, 1979 to March 31, 1983 was executed on behalf of Anray on August 3, 1982 by Marie Verdi, as secretary. A second consent extending the period

of limitation for the period June 1, 1979 through May 31, 1980 to October 31, 1983 was executed on December 20, 1982 by Raymond Verdi, as president.²

On September 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Anray for the period June 1, 1979 through May 31, 1981 in the amount of \$51,188.19 in tax, \$12,797.05 in penalty and \$17,819.64 in interest, for a total due of \$81,804.88. On the same date, a similar notice was issued to petitioner Anthony Roberto, as officer of Anray.

Anray Corporation Franchise Tax

The auditor performed a standard corporate income-type audit which did not result in any changes. However, in view of the additional sales found in the sale tax audit, the auditor adjusted Anray's income by adding additional sales, less additional purchases:

	FYE 3/31/80	FYE 3/31/81
Additional sales	\$ 336,751.00	\$282,996.00
Less: additional purchases	(171,618.00)	(22,250.00)
Net adjustment	\$ 165,133.00	\$260,746.00
Additional tax due	\$ 16,070.60	\$ 25,347.10

On April 4, 1983, a consent extending the period of limitation for assessment of tax for the fiscal year ending March 31, 1980 to June 15, 1984 was executed on behalf of Anray by Raymond Verdi, as president.

On October 12, 1983, the Audit Division issued a Statement of Franchise Tax Audit Changes to Anray for \$16,070.60 in additional tax for the fiscal year ending March 31, 1980 and \$25,347.10 in additional tax for the fiscal year ending March 31, 1981.

On March 16, 1984, notices of deficiency were issued to Anray as follows:

²²This consent was dated, presumably by the department, on December 20, 1982. The corporate officer for petitioner, however, chose not to expressly indicate the date on which he signed the consent by leaving that space blank (Exhibit A6).

<u>FYE</u>	<u>Tax</u>	<u>Interest</u>	<u>Additional Charge</u>	<u>Total Due</u>
3/31/80	\$16,070.60	\$ 8,302.28	\$ 803.53	\$25,176.41
3/31/81	25,347.10	10,797.29	1,267.35	37,411.74

Mid-Center Service Center, Inc.

Mid-Center Service Center, Inc. ("Mid-Center") operated a Shell gasoline station at 1537 Middle Country Road, Centereach, New York. The station was self-service and had six pumps with twelve hoses. There were no service bays.

Mid-Center Sales Tax

The auditor examined Mid-Center's records, which included ledgers, cash books, journals, trial balances, bank statements and checks. Gasoline purchases per books did not reconcile with gasoline purchases reported by Mid-Center's supplier, Shell Oil Company. Accordingly, a sales tax markup audit was performed.

For the year ending 7/31/80, gasoline purchases per books were \$2,413,802.00 while purchases reported by Shell were \$2,487,793.00, resulting in additional unreported purchases of \$73,991.00. On May 9, 1983, the auditor visited the station and found pump prices of \$1.209 per gallon for regular, \$1.279 for unleaded and \$1.459 for super unleaded. These prices were compared with costs for gas purchased on May 10, 1983 and it was found that \$10,793.00 in purchases would be sold at \$11,293.00 at the pump, resulting in an overall markup of 4.63 percent. Despite the calculated markup, the auditor used a markup of 10 percent. Accordingly, gasoline purchases as per Shell of \$2,487,793.00 were, after the 10 percent markup, \$2,736,572.00. As the station had no repairs, this figure was used as total audited sales. Additional sales for this period were \$215,639.00.

For the year ending 7/31/81, gasoline purchases per books were \$2,613,086.00 while purchases reported by Shell were \$2,701,503.00, resulting in additional purchases of \$88,417.00. The ten percent markup was again used. Accordingly, gasoline purchases as per Shell of \$2,701,503.00, after the ten percent markup, were \$2,971,653.00 and additional sales were found to be \$879,388.00.

Markup as per the Federal income tax returns for the two year period was 4.70 percent (\$236,033.00 gross profit divided by \$5,021,129.00 in cost of goods sold). The additional sales for the fiscal years ending July 31, 1980 and July 31, 1981, totaling \$1,095,028.00, were spread over the sales tax audit period (there was one month difference) resulting in \$76,651.75 in additional tax.

On August 3, 1982, a consent extending the period of limitation for assessment for the period June 1, 1979 through November 30, 1979 to March 31, 1983 was executed by Anthony Roberto, as president, on behalf of Mid-Center. A similar consent extending the period of limitation for assessment for the period June 1, 1979 through May 31, 1980 to October 31, 1983 was signed by Anthony Roberto, as president, on December 20, 1982.

On September 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Mid-Center for the period June 1, 1979 through August 31, 1981 for \$76,651.75 in tax, \$19,162.94 in penalty and \$23,767.23 in interest, for a total of \$119,581.92. On the same date, a similar notice was issued to petitioner Anthony Roberto, as officer of Mid-Center.

Mid-Center Corporation Franchise Tax

The auditor noted that a corporate income-type audit did not produce any changes. In view of the additional sales found in the sales tax audit, the auditor adjusted Mid-Center's income by adding additional sales less additional purchases:

	FYE 7/31/80	FYE 7/31/81
Additional sales	\$209,273.00	\$241,790.00
Less: additional purchases	(73,991.00)	(88,417.00)
Net adjustment	\$135,282.00	\$153,373.00
Additional tax due	\$ 12,859.30	\$ 14,963.20

On June 7, 1983, a consent extending the period of limitation for assessment for the fiscal year ending July 31, 1980 to October 15, 1984 was executed by Anthony Roberto, as president of Mid-Center. A Statement of Franchise Tax Audit Changes was issued to Mid-Center on October 12, 1983 for \$12,859.30 in additional tax due for the fiscal year ending July 31, 1980 and \$14,963.20 for the fiscal year ending July 31, 1981. On March 16, 1984, the Audit Division issued notices of deficiency to Mid Center as follows:

<u>FYE</u>	<u>Tax</u>	<u>Interest</u>	<u>Additional Charge</u>	<u>Total Due</u>
7/31/80	\$12,859.30	\$6,253.68	\$642.97	\$19,755.95
7/31/81	14,963.20	5,682.71	798.16	21,394.07

Phyllis Service Center, Inc.

Petitioner, Phyllis Service Center, Inc. ("Phyllis") , operated a Shell gasoline station at 197 Sunrise Highway, Patchogue, New York. It was a "gas only" station, with six pumps and twelve hoses. Three of the pumps were self-service and three were full service.

Phyllis Sales Tax

The auditor examined ledgers, cash books, journals, trial balances, bank statements and checks. Gasoline purchases per books did not reconcile with gas purchases reported by Phyllis' supplier, Shell Oil Company. Accordingly, a sales tax markup audit was performed.

For the year ending June 30, 1980, purchases of gasoline and oil per books were \$992,966.00 while purchases reported by Shell were \$1,052,355.00, resulting in additional unreported purchases of \$59,389.00.

Gasoline purchases as per Shell of \$1,044,840.00 were marked up ten percent resulting in gasoline sales of \$1,149,324.00, while oil purchases as per Shell of \$7,515.00 were marked up fifty percent, resulting in oil sales of \$11,273.00. The station did not perform repairs, so total audited sales were \$1,160,597.00.

For the year ending June 30, 1981, purchases of gasoline and oil per books were \$1,060,710.00 while purchases as per Shell were \$1,098,500.00, a difference of \$37,790.00. Gasoline purchases as per Shell of \$1,077,394.00 were marked up ten percent resulting in gasoline sales of \$1,185,133.00 and oil purchases as per Shell of \$21,106.00 were marked up fifty percent, resulting in oil sales of \$31,659.00. Total audited sales were \$1,216,792.00.

The markup as per the Federal income tax returns for the two years averaged 5.76 percent (\$118,214.00 gross profit divided by \$2,050,909.00 cost of goods sold). The additional sales for fiscal years ending June 30, 1980 and June 30, 1981, totaling \$360,075.00, were spread over the sales tax audit period resulting in \$25,205.22 in additional tax.

On August 3, 1982, a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through November 30, 1979 to March 31, 1983 was executed on behalf of Phyllis by Anthony Roberto, as president. On December 20, 1982, a consent extending the period of limitation for sales and use taxes for the period June 1, 1979 through May 31, 1980 to October 31, 1983 was executed on behalf of Phyllis by Anthony Roberto, as president. On September 20, 1983, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued against Phyllis for the period June 1, 1979 through August 31, 1981 in the amount of \$25,205.22 in tax and \$8,532.81 in interest, for a total due of \$33,738.03. On the same date, a similar notice was issued to Anthony Roberto, as officer of Phyllis.

Phyllis Corporation Franchise Tax

The auditor noted that a corporate income-type audit did not produce any changes. In view of the additional sales found in the sales tax audit, the auditor adjusted Phyllis' income by adding additional sales less additional purchases:

	FYE 6/30/80	FYE 6/30/81
Additional sales	\$124,829.00	\$86,497.00
Less: additional purchases	<u>(59,389.00)</u>	<u>(37,790.00)</u>
Net adjustment	\$ 65,440.00	\$48,707.00
Additional tax due	\$ 6,386.00	\$ 4,716.00

On June 7, 1983, a consent extending the period of limitation for assessment of corporation franchise tax for the fiscal year ending June 30, 1980 to September 15, 1984 was executed on behalf of Phyllis by Anthony Roberto, as president. On October 12, 1983, a Statement of Franchise Tax Audit Changes was issued to Phyllis for tax due of \$6,386.40 and penalty of \$319.32 for the fiscal year ending June 30, 1980 and \$4,716.00 in tax and \$235.80 in penalty for the fiscal year ending June 30, 1981. On March 16, 1984, the Audit Division issued notices of deficiency to Phyllis as follows:

<u>FYE</u>	<u>Tax</u>	<u>Interest</u>	<u>Additional Charge</u>	<u>Total Due</u>
6/30/80	\$6,386.40	\$3,153.40	\$319.32	\$9,859.12
6/30/81	4,716.00	1,861.29	235.80	6,813.09
<u>Gaslite Service Center, Inc.</u>				

Gaslite Service Center, Inc. ("Gaslite") operated a Shell service station at 375 Deer Park Avenue, Babylon, New York during the period at issue. It had four pumps (two double, two single) and two service bays. It also provided railroad commuter parking. The station had been closed and was boarded up prior to the audit. The only assessment at issue is with respect to sales tax.

The auditor examined ledgers, cash books, journals, trial balances, bank statements and checks. Gasoline purchases as per the books did not reconcile with gasoline purchases reported by Gaslite's supplier, Shell Oil Company. Accordingly, the markup method of audit was used.

For the year ending March 31, 1980, purchases per books were \$466,039.00 while purchases reported by Shell were \$500,770.00, resulting in additional unreported gasoline purchases of \$34,731.00. All purchases except \$3,732.00 of Shellzone were of gasoline. The purchases were marked up 20 percent resulting in sales of Shell products of \$600,924.00. Repair sales were estimated at \$1,000.00 per week for each of the two bays, or \$104,000.00. Railroad parking was calculated at 40 cars at \$20.00 per month, or \$9,600.00 per year. Total audited sales were \$714,524.00. Total audited sales less parking (\$9,600.00), less reported sales (\$537,556.00), resulted in \$167,368.00 in additional taxable sales.

For year ending March 31, 1981, purchases per books were \$579,192.00 while purchases as per Shell were \$570,272.00, or \$8,920.00 less than purchases per books. The purchases per Shell of \$570,272.00, all gasoline, were marked up 20 percent resulting in gasoline sales of \$684,326.00. Repairs were again estimated at \$1,000.00 per week per bay, or \$104,000.00. Railroad parking again was estimated at 40 cars at \$20.00 per month, or \$9,600.00. Total audited sales were \$797,926.00. Total audited sales less parking (\$9,600.00) less reported sales (\$552,776.00) resulted in \$235,550.00 in additional taxable sales.

The markup as per the Federal returns for the two years averaged 13.15 percent after allowances for nontaxable parking of \$9,600.00 per year. The \$167,368.00 in additional taxable sales for the fiscal year ending March 31, 1980 and \$235,550.00 for the fiscal year ending March 31, 1981 totaled \$402,918.00 for the two fiscal years. As the sales tax quarters differed from Gaslite's fiscal year, \$375,021.00 of said total was applied as additional sales for the sales tax period June 1, 1979 through May 31, 1981.

On August 6, 1982, a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through November 30, 1979 to March 31, 1983 was executed on behalf of Gaslite by Marie Verdi, as secretary. On December 20, 1982, another such consent extending period of limitation for assessment for the period June 1, 1979 through May 31, 1980 to October 31, 1983 was executed on behalf of Gaslite by Raymond Verdi, as president.

On September 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Gaslite for the period June 1, 1979 through May 31, 1981 for \$26,253.92 in tax, \$6,563.48 in penalty and \$9,224.71 in interest, for a total amount due of \$42,042.11. On the same date, a similar notice was issued to Anthony Roberto, as officer of Gaslite.

Anthony Roberto and Rose Roberto

A Detailed income tax audit of petitioners, Anthony Roberto and Rose Roberto, was performed by the cash availability method of income reconstruction. Records examined included corporate records, Federal tax returns, bank statements, cancelled checks, savings accounts and other financially-related data. The cash availability study resulted in a \$6,809.00 shortage for 1980, but this amount was not utilized in calculating a deficiency. The deficiency was based on additional shares of undistributed taxable income from Anray and Gaslite:

	<u>FYE</u>	<u>1980</u>	<u>1981</u>
Anray	3/31/80	\$ 82,566.50	\$130,373.00
Gaslite	3/31/80	69,544.50	68,033.00
		\$158,920.00	\$198,406.00

On January 10, 1984, the Audit Division issued a revised Statement of Audit Changes to petitioners Anthony and Rose Roberto asserting additional tax due of \$20,747.55 and \$1,037.38 as a penalty under Tax Law section 685(b), on a joint basis for 1980, and \$26,760.24 in tax and \$1,338.01 as a penalty for 1981.

On March 26, 1984, the Audit Division issued two notices of deficiency to Mr. and Mrs. Roberto: one in the amount of \$20,747.55 in tax and \$1,037.38 in penalty, plus interest, for 1980; the other in the amount of \$26,760.24 in tax and \$1,338.01 in penalty, plus interest, for 1981.

Anthony Roberto's Involvement in the Businesses

Petitioner, Anthony Roberto, was employed by the United States Post Office Department when he was asked by his brother-in-law, Raymond Verdi, to join him in a service station business venture. At the time, Mr. Verdi was involved with Shell Oil Company in some capacity. In February, 1972, petitioner Roberto joined Raymond Verdi in forming Anray and operating the Anray station. Mr. Roberto worked basically as a mechanic. He and Raymond Verdi eventually acquired interests in eight corporations operating eight separate gasoline stations, including Anray, Mid-Center, Phyllis and Gaslite. The stations were owned by Shell Oil Company and leased to petitioner, Mr. Roberto, and Raymond Verdi. Mr. Roberto made no financial investment when the stations were acquired, but Mr. Verdi advanced monies for security on the leases.

Anthony Roberto was a field man for the eight stations. He would get up at about 5:00 a.m. each day and check out all of the stations. He would perform repairs, fix pumps and hoses and fill in if an employee did not show up. He would empty the stations' safes of cash and bring the cash back to the office. Raymond Verdi would deposit the cash in a bank. We also find that petitioner neither managed nor dictated any of the corporations' day-to-day responsibilities.

Petitioner, Anthony Roberto, had authority to sign checks on behalf of the corporations; however, he rarely used this authority, since checks, as a rule, were signed by Raymond Verdi. Raymond Verdi generally signed all purchase orders and tax returns and dealt with the banks.

Effective September 1, 1981, Anthony Roberto and Raymond Verdi decided to part company and the eight service stations were divided between the two individuals. Of the four corporations at issue here, the stock of Anray and Gaslite was acquired by Raymond Verdi and the stock of Mid-Center and Phyllis was acquired by Anthony Roberto. On said date, Mr. Roberto resigned as officer and director of Anray and Gaslite.

Raymond Verdi withdrew the sum of \$22,000.00 from Woodlake Service Center, Inc., one of the service stations owned by petitioner and Raymond Verdi, on April 15, 1980 without Mr. Roberto's approval. A judgment of \$65,000.00 was rendered against petitioner due to a loan guarantee which was executed on July 10, 1981. This guarantee pertained to a loan made to Anray on November 3, 1982, a date more than a year after petitioner had severed connections with Anray. The loan had been made without petitioner's knowledge and he had been misled by Mr. Verdi into not cancelling the guarantee.

In addition to the facts found by the Administrative Law Judge we find that Anthony Roberto neither managed nor dictated any of the corporations' day-to-day affairs. When Anthony Roberto terminated his relationship with Anray and Gaslite he explicitly agreed to have no further involvement in their business affairs and no relationship with them as employee, officer or director.

OPINION

The Administrative Law Judge determined that the Division of Taxation properly resorted to a markup audit of the petitioner corporations but that the markup percentages utilized were too high. Accordingly, the Administrative Law Judge reduced the markup percentages. The Administrative Law Judge also found that Anthony Roberto was a person required to collect tax

for all of the petitioner corporations and was liable for all sale taxes due from all of the corporations except for sales taxes due from Anray and Gaslite for periods ending prior to June 1, 1980. The Administrative Law Judge concluded that Anthony Roberto was not liable for this tax because the consents extending the period of limitation on assessment for this tax had been executed by Raymond Verdi after Mr. Roberto had ended his relationship with Anray and Gaslite.

The Administrative Law Judge sustained the corporate franchise tax assessments against Anray, Mid-Center and Phyllis with modifications to reflect the modifications to the sales tax audits,

The Administrative Law Judge modified the income tax assessment against Anthony and Rose Roberto to limit it to a \$6,809.00 shortage of reported income determined for 1980 by the cash availability analysis. This modified assessment was in lieu of the deficiency attributable to undistributable taxable income from Anray and Gaslite as determined by the Division of Taxation.

Petitioners now assert before this Tribunal that: (1) petitioner, Anthony Roberto, was at no time a "person responsible to collect tax" within the meaning of Tax Law section 1131(l) for all corporate petitioners, (2) even if petitioner, Anthony Roberto, were found to have been a "person responsible to collect tax," his severance from Anray and Gaslite frees him from any sales, corporate franchise and personal income tax liability derived from Anray and Gaslite for all periods prior to September 1, 1980 and after August 31, 1981, (3) all franchise tax assessments against petitioners Mid-Center and Phyllis are time barred, and (4) the Division of Taitation should have produced for cross examination the auditor who conducted the audit.

We consider first whether petitioner Anthony Roberto was a responsible officer within the meaning of Tax Law Section 1131(l). We conclude he is. "Persons required to collect tax" and a

"person required to collect any tax imposed by this article (Article 28)" include any officer or employee of a corporation who, as such officer or employee, is "under a duty to act for such corporation in complying with any requirement of [Article 28]" (Tax Law § 1131[I]) (hereinafter "responsible officer").

The determination that an individual is a responsible officer depends upon the particular facts of each case (Stacy v. State, 82 Misc 2d 181, 183). Some factors are whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

Other factors have been stated as: the authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (Blodnick v. State Tax Commn., 124 AD2d 437); the individual's possible shared status as an officer, director or stockholder (Cohen v. State Tax Commn., 128 AD2d 1022, 1023); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (Vogel v. NY Tax & Finance, 98 Misc 2d 222, 225-226); and the payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States (Chevlowe v. Koerner, 95 Misc 2d 388, 391). Within closely held corporations, "an officer's knowledge of the corporate affairs and his benefits received from corporate profits (are) extremely important considerations" (Vogel v. NY Tax and Finance, supra at 226).

Applying these factors to the present case we find petitioner's signatory status as an officer for each corporation with the accounts and leases clearly was involvement with the corporations' financial affairs. He was authorized to sign checks on behalf of each corporation. He was responsible for collecting the gross daily cash receipts from each station. Mr. Roberto also was a director and 50% shareholder of each corporate petitioner herein. The fact that he, as an officer and director, failed to exercise his share of the responsibility does not operate to shed him of liability since, "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge" (Ragonesi v. State Tax Commn., 88 AD2d 707, 708; Capoccia v. State Tax Commn., 105 AD2d 528, 529). Thus, the Administrative Law Judge's determination that petitioner was a responsible officer personally liable for all of petitioner corporations' unpaid sales taxes during the audit period was correct.

We deal next with petitioner, Anthony Roberto's, assertion that the sales tax assessments against Anray and Gaslite for the period which ended August 31, 1980 may not be enforced against Mr. Roberto, in view of the Administrative Law Judge's determination that the consents to extend the period of limitations signed by Raymond Verdi on behalf of Anray and Gaslite did not bind Anthony Roberto. We affirm the Administrative Law Judge. The Division's notices of determination and demand for payment of sales and use taxes due are dated September 20, 1983. Anray and Gaslite were required to file quarterly sales tax returns (Tax Law 11136[a]) for "periods ending on the last day of February, May, August and November of each year, and each return . . . shall be filed within twenty days after the end of the quarterly period covered thereby" (Tax Law 11136[b]). Thus the last date on which the Anray and Gaslite quarterly sales tax returns for the

period June 1, 1980 through August 31, 1980 were to have been filed was September 20, 1980. Regardless of when either return was actually filed, "a return filed before the last day prescribed by law or regulation for the filing thereof shall be deemed to be filed on such last day" (Tax Law 51147[b]). The Division thus had three years from September 20, 1980 to issue notices to Anray and Gaslite that sales and use taxes were due for this quarterly period (Tax Law 11147[b]). Having done so on September 20, 1983, the notices were timely without the need for any consent to extend the period for assessment.

We deal next with petitioner, Anthony Roberto'-s, assertion that he should not be held liable for any sales, franchise or income tax liabilities of Anray or Gaslite which arise after September 1, 1981, the date he ended his relationship with Anray and Gaslite. We affirm the Administrative Law Judge. First, there were no sales tax assessments at issue in this proceeding against Anray or Gaslite for any period beginning after June 1, 1981. Secondly, Anthony Roberto was not personally assessed for any corporation franchise tax of Anray or Gaslite. Moreover, no corporation franchise tax assessment was at issue in this proceeding against Gaslite and the last period assessed against Anray was for the fiscal year ended March 31, 1981.

With respect to the income tax liability relating to undistributed taxable income from these two corporations, the Administrative Law Judge's determination eliminated the deficiency based on undistributed income from the corporations. Instead, the Administrative Law Judge limited the income tax assessment to the \$6,809.00 shortage in reported income found as a result of the cash availability analysis. Since petitioners, Anthony and Rose Roberto, have proven no error with respect to the assessment on this basis, it must be sustained.

We deal next with petitioners' assertion that failure on the Division's part to admit into the record an extension of the statute of limitations concerning the corporation franchise tax assessments against petitioners Phyllis and Mid-Center releases such corporations from any liability therefor. Taxpayers such as Mid-Center and Phyllis are obligated to file a franchise tax report within two and one-half months after the close of their respective fiscal years (Tax Law §211[1]). The Division then has three years after the franchise tax return was deemed filed (the last day allowed for the filing of the return Tax Law §1083[b]) to assess any tax imposed by Article 9-A (Tax Law §1083[a], 20 NYCRR 8-1.2), unless "before the expiration of the time prescribed in this section for the assessment of tax, both the tax commission and the taxpayer have consented in writing to its assessment after such time, (so that) the tax may be assessed at any time prior to the expiration of the period agreed upon" (Tax Law §1083[c][2]).

On March 16, 1984, Mid-Center was sent by certified mail two "Notice of Deficiency - Article 9-A, Tax Law" notices assessing its corporation franchise tax for its fiscal years ending on July 31, 1980 and July 31, 1981. On the same date, Phyllis was likewise sent the same type of notices for its fiscal years ending on June 30, 1980 and June 30, 1981. Only those franchise taxes due for Mid-Center's fiscal year ending July 31, 1981 and Phyllis' fiscal year ending June 30, 1981, were within the three years prior to March 16, 1984. Consents to extend the period of limitation were thus needed for the fiscal years ending in 1980.

Though the consents were not specifically mentioned at the hearing, they were introduced into the record as part of the Mid-Center and Phyllis corporate tax audit files (Division's Exhibit G8 and J8). We note that each contains Anthony Roberto's signed consent as president of Mid-Center and Phyllis extending the period of limitation for the assessment of franchise tax for the

fiscal years ending in 1980. Mid-Center's consent extends the period to October 15, 1984, and Phyllis' period was likewise extended to September 15, 1984. As both notices were sent on March 16, 1984, the corporation franchise tax assessments were timely.

Finally, we deal with petitioners' general exception to the Division of Taxation's failure to produce the auditor who conducted the audit. We find it without merit. The petitioners bear the burden of proof (former 20 NYCRR 601.9[d][4], see also 20 NYCRR 3000.10[d][4]); the Division of Taxation is not responsible for demonstrating the propriety of its tax assessment, including the basis of its audit (Blodnick v. State Tax Commn. 124 AD2d 437).

If the testimony of the auditor was essential to petitioners to satisfy their burden of proof, the auditor could have been subpoenaed (former 20 NYCRR 601.11 [c]; see also 20 NYCRR 3000.6[c]).

We note that the Division did make an auditor available to explain the audit.

For these reasons, we affirm the Administrative Law Judge's determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of the petitioners, Anray Service, Inc., Mid-Center Service Center, Inc., Gaslite Service Center, Inc., Phyllis Service Center, Inc., Anthony Roberto and Rose Roberto are denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petitions of Anray Service, Inc., Mid-Center Service Center, Inc., Gaslite Service Center, Inc., Phyllis Service Center, Inc., Anthony Roberto and Rose Roberto are granted to the extent indicated in conclusion of law "L" of the Administrative Law Judge's determination but except as so granted are denied.

Dated: Albany, New York
DEC 01 1988

John Dugan
President

Francis R. Koenig
Commissioner
