

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
ROBERT W. FLANAGAN	:	DETERMINATION
D/B/A MID ISLAND PLAZA MOBIL	:	
	:	
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 December 1, 1978	:	
through August 31, 1982.	:	

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Petitioner, Robert W. Flanagan d/b/a Mid Island Plaza Mobil, 59 Cedar Street, Hicksville, New York 11801, 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 December 1, 1978 through August 31, 1982 (File No. 802026).

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on November 29, 1988 at 1:45 P.M., with all briefs to be submitted by March 16, 1989. Petitioner appeared by John J. Lynch, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined sales and use taxes due from petitioner based on computer printouts of gasoline purchases obtained from petitioner's supplier, Mobil Oil Corporation.

II. Whether petitioner is liable for the fraud penalty under Tax Law § 1145(a)(2) or, in the alternative, the penalty under Tax Law § 1145(a)(1).

FINDINGS OF FACT

During the period at issue, petitioner, Robert W. Flanagan d/b/a Mid Island Plaza Mobil, operated a Mobil gasoline service station at 216 North Broadway, Hicksville, New York 11801.

The Audit

An audit of petitioner's business was commenced by the auditor's visit to the station on or about April 30, 1982. The gasoline station information sheet prepared by the auditor on said date shows the following:

a) Gasoline Pumps: There were two pumps selling regular leaded gasoline at \$1.139 per gallon; two pumps selling unleaded gasoline at \$1.189 per gallon; and two pumps selling

super unleaded gasoline at \$1.279 per gallon.

b) Employees: The auditor observed three mechanics and one gasoline attendant working at the station.

c) Hours of Operation: The station's business hours were noted to be from 7:00 A.M. to 10:00 P.M. Monday through Saturday and from 8:00 A.M. to 9:00 P.M. on Sunday.

d) Service Bays: The station had four service bays from December 1, 1978 through August 31, 1980, and two bays from September 1, 1980 through August 31, 1982. Two bays were rented to A & B Auto and Truck Service during the latter period.

The only records available for audit were check stubs for May and June 1980 and bank statements for August 1981 through September 1982. Upon audit, petitioner's accountant stated that all other records had been thrown out by mistake. At the hearing, petitioner's representative stipulated that petitioner's books and records were inadequate.

December 1, 1978 through August 31, 1980

For the period December 1, 1978 through August 31, 1980, taxable gasoline sales were determined by applying an average taxable selling price of \$1.25 per gallon to average gallons of gasoline purchased per month of 53,766, as reported to the Division of Taxation by Mobil Oil Corporation. Monthly taxable gasoline sales were thus \$67,207.50, which represented \$1,411,358.00 in total taxable gasoline sales for the 21 months from December 1, 1978 through August 31, 1980.

Repair sales were estimated, based on office experience, at \$2,000.00 for each of four bays per week, for 91 weeks, to arrive at total taxable repair sales of \$728,000.00.

Total audited taxable sales were \$2,139,358.00. Petitioner had reported taxable sales of \$127,675.00, resulting in additional taxable sales of \$2,011,683.00 with additional tax due of \$140,817.88.

On November 23, 1983 a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner for \$140,817.88 in tax due, \$70,408.92 as a fraud penalty, plus interest.

September 1, 1980 through August 31, 1982

For the period September 1, 1980 through August 31, 1982, average monthly gallonage per the Mobil verification was 54,082.14. Multiplied by an average taxable selling price of \$1.25 per gallon, the average gallonage resulted in \$67,602.68 per month in taxable gasoline sales. For the 24 months in the aforesaid period, total audited taxable gasoline sales were found to be \$1,622,464.32.

Repairs were estimated based on office experience at \$30.00 per hour times 60 hours per week for each of two bays, or \$3,600.00 per week. Over the 104 weeks in the period September 1, 1980 through August 31, 1982, taxable repair sales totalled \$374,400.00.

Total audited taxable sales for the period September 1, 1980 through August 31, 1982 were \$1,996,864.32. As taxable sales reported were \$159,895.14, additional taxable sales were \$1,836,969.18. Additional taxes due were \$131,037.77.

On March 20, 1984, the Division of Taxation issued a notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner for \$131,037.77 in tax due and \$65,518.88 as a fraud penalty, plus interest.

Miscellaneous

The Federal Form 1040, Schedule C, filed by petitioner for each of the years 1979, 1980 and 1981, showed the following gross receipts or sales, compared with gross and taxable sales shown per sales tax returns for the corresponding period:

<u>Year</u>	<u>Schedule C</u>	<u>Sales Tax Return</u>
1979	\$134,092.30	\$ 63,947.00
1980	180,664.16	86,407.00
1981	<u>196,735.20</u>	<u>78,555.00</u>
Total	\$511,491.66	\$228,909.00

Petitioner offered no evidence to challenge the assessment.

In its answer, the Division of Taxation claimed that in the event the fraud penalty is not sustained, a penalty under Tax Law § 1145(a)(1) be imposed as an alternative.

CONCLUSIONS OF LAW

A. That during the period at issue, Tax Law § 1138(a)(former [1]) provided, 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 when a taxpayer's records are incomplete or insufficient, the Division of Taxation 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 Tax Law § 1135 provides that every person required to collect tax shall maintain records of every sale and make such records available for inspection and examination. The records produced by petitioner in this case were incomplete and inadequate and, thus, the Division of Taxation was authorized to estimate taxable sales using the information available and an audit methodology reasonably calculated to reflect the taxes due (Tax Law § 1138[a]; Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, 206, cert denied 355 US 869).

D. That petitioner failed to sustain his burden of proof to show that the method of audit or amount of tax assessed was erroneous. It is noted that petitioner did not testify and, in fact, offered no evidence in opposition to the audit. While petitioner's representative took issue with the fact that the audit was based on computer printouts supplied by Mobil, rather than by the

actual Mobil purchase records, petitioner did not issue a subpoena duces tecum to Mobil for said purchase records. Also, although petitioner's representative criticized the fact that the original auditor did not testify at the hearing because she had left State service, petitioner did not subpoena said auditor or request a continuance in order to do so.

E. That the sales tax returns filed by petitioner were willfully false and fraudulent. This is evidenced by the fact that petitioner consistently reported only a small fraction of sales on his sales tax returns. For example, for the period at issue, petitioner reported only \$287,570.14 in gross and taxable sales, while audited gasoline sales, based on Mobil purchase records, were \$3,033,822.32. Thus, reported sales amounted to only 9.5% of gasoline sales and an even lesser percentage of total sales when repair sales are considered (see, Rogers v. Commissioner, 111 F2d 987 [6th Cir 1940]). Fraud is also evidenced by the fact that petitioner reported only \$228,909.00 in gross and taxable sales on his sales tax returns for 1979, 1980 and 1981, while reporting \$511,491.66 in gross receipts or sales on his Federal returns for said years (Finding of Fact "12"). Accordingly, the fraud penalty asserted pursuant to Tax Law § 1145(a)(2) is sustained.

F. That the petition of Robert W. Flanagan d/b/a Mid Island Plaza Mobil is denied and the notices of determination and demands for payment of sales and use taxes due issued November 23, 1983 and March 20, 1984 are sustained.

DATED: Troy, New York

July 27, 1989

/s/ Robert F. Mulligan

ADMINISTRATIVE LAW JUDGE