

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petitions	:
of	:
KLEIN'S BAILEY FOODS, INC.,	:
KLEIN'S ELMWOOD FOODS, INC.,	: DETERMINATION
KLEIN'S PLAZA FOODS, INC.	:
and KLEIN'S FOODS, INC.	:
for Revision of Determinations or for Refunds	:
of Sales and Use Taxes under Articles 28 and 29	:
of the Tax Law.	:

Petitioners, Klein's Bailey Foods, Inc., Klein's Elmwood Foods, Inc., Klein's Plaza Foods, Inc. and Klein's Foods, Inc., 2050 Elmwood, Buffalo, New York 14207, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law¹ (File Nos. 800955, 800956, 800957, 800958 and 801015).

A consolidated hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on February 3, 1987 at 1:15 P.M., with all briefs to be submitted by May 12, 1987. Petitioners appeared by Robshaw, Abramowitz & Tobia, P.C. (John A. Collins, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the Audit Division's denial of exemption from imposition of sales and use taxes with respect to certain purchases of electricity consumed in the operation of petitioners' supermarkets was proper.

II. Whether the method used by the Audit Division to determine the amount of exempt kilowatt-hours of electricity consumed by certain equipment in petitioners' supermarkets was

¹The periods at issue with respect to each of the petitions herein are set forth, infra, at Findings of Fact "2" and "20".

proper.

FINDINGS OF FACT

1. Petitioners herein each owned and operated supermarkets in the City of Buffalo, New York at all times relevant herein. Petitioner Klein's Foods, Inc. operated two such stores -- Klein's Genesee and Klein's Delaware. Petitioners filed refund claims and also claimed credit on sales tax returns filed with respect to sales tax paid on certain purchases of electricity consumed in the operation of their respective stores. Petitioners' refund claims asserted that the electricity at issue was consumed in production and was therefore exempt from sales tax pursuant to Tax Law § 1115(c).

2. The periods, amounts and amounts remaining at issue with respect to each store's² refund/credit claim are as follows:

<u>Petitioner</u>	<u>Period - Amount of Refund Claim</u>	<u>Period - Amount of Claimed Credit</u>	<u>Amount Remaining at Issue</u>
Klein's Bailey Foods, Inc.	9/1/77-11/30/80 \$ 990.00	12/1/80-8/31/83 \$2,270.00	\$1,347.75
Klein's Elmwood Foods, Inc.	9/1/77-11/30/80 \$4,110.00	12/1/80-8/31/83 \$9,390.00	\$3,132.67
Klein's Plaza Foods, Inc.	9/1/77-11/30/80 \$2,355.00	12/1/80-8/31/83 \$5,355.00	\$ 649.31
Klein's Foods, Inc. - Genesee	9/1/77-11/30/80 \$1,065.00	12/1/80-11/30/83 \$2,570.00	\$ 960.89

3. The amounts designated above as "Amount Remaining at Issue" were determined by the Audit Division following a review of each refund application and documentation submitted by each petitioner in support thereof. The "amount remaining at issue" constituted the amount of credit determined to be due petitioners for the entire period covered by the refund/credit claims. The Audit Division then deducted this "amount remaining at issue" from the amount of credit for sales tax paid on utilities actually taken by each of the petitioners on their sales tax returns for the period December 1, 1980 through August 31, 1983 (the amount designated above as "amount of claimed credit"). This resulted in an assertion of additional sales tax due as follows:

<u>Petitioner</u>	<u>Additional Sales Tax Due</u>
Klein's Bailey	\$ 922.25
Klein's Elmwood	\$6,257.39

²Petitioner Klein's Foods, Inc. - Delaware's claim received different treatment from the Audit Division than that accorded the four other stores herein. The procedural aspects of the Delaware Avenue store will therefore be discussed separately infra.

Klein's Plaza	\$3,033.80
Klein's Foods - Genesee	\$1,609.11

4. On February 2, 1984, the Audit Division issued notices of determination and demands for payment of sales and use taxes due to each of the four petitioners listed in Finding of Fact "3". The notices assessed each petitioner in the respective amounts set forth above, plus interest.³

Klein's Bailey Foods, Inc.

5. Petitioner Klein's Bailey Foods, Inc.'s supermarket is and was located at 1439 Kensington Avenue, Buffalo, New York, and was open daily during the relevant period from 8:00 A.M. until 10:00 P.M. (7:00 P.M. on Sunday). Petitioner's claimed exemptions were premised upon purchases of electricity used to operate some 23 separate pieces of machinery and equipment in use throughout the store. The Audit Division granted exemption from imposition of sales tax for purchases of electricity with respect to 16 of the items in question. The Audit Division disallowed, in full, exemption from sales tax with respect to electricity purchases for three pieces of equipment in petitioner's produce department and two pieces of equipment in petitioner's deli/bakery department. The Audit Division disallowed, in part, exemption for electricity purchases for two items in petitioner's meat department. The Audit Division's denial of petitioner's claimed credit with respect to its purchases of electricity for the equipment was premised upon the Audit Division's position that such electricity was not consumed directly in the production process.

6. The specific items with respect to which the Audit Division denied the utilities exemption, together with each item's use, were as follows:

³One of the notices of determination (Notice #S840202510C) issued to Klein's Foods, Inc. - Genesee incorrectly set forth the periods covered by said notice. At hearing, both parties agreed that said notice covered the periods ended May 31, 1981 through November 30, 1983 and not November 30, 1980 through May 31, 1983 as originally set forth on the notice.

<u>Equipment</u>	<u>Use</u>
scale/pricer	Used in produce department to weigh customer purchases of produce and to produce a printed tag listing price and product.
wrapper	Packaged various products before such products were placed in open cases for sale.
produce cooler	A sealed area used to store produce at proper temperatures prior to placing such produce out for sale.
bug killer	Used in deli/bakery to kill insects.
cash register	Used in deli/bakery to ring up customer purchases.

7. The Audit Division also reduced as unreasonable the average daily exempt usage of petitioner's meat cooler and meat preparation room from petitioner's claimed 20 hours per day of usage to the Audit Division's assertion of 18 hours per day of exempt usage. Petitioner's meat cooler was used to store meat prior to placing such meat out for sale. Petitioner's meat preparation room was used to prepare meats to be placed out for sale. Both the meat cooler and the meat preparation room were cooled to temperatures necessary to preserve the meat purchased by petitioner until such time as it was sold to customers.

Klein's Elmwood Foods, Inc.

8. Petitioner Klein's Elmwood Foods, Inc.'s supermarket is and was located at 2050 Elmwood Avenue, Buffalo, New York, and was open daily during the relevant period from 8:00 A.M. until 10:00 P.M. (5:00 P.M. on Sunday). This petitioner's claimed exemptions were premised upon purchases of electricity used to operate some 45 separate pieces of machinery and equipment in use throughout the store. The Audit Division granted exemption from imposition of sales tax for purchases of electricity with respect to 36 of the items in question. The Audit Division disallowed, in full, exemption from sales tax with respect to electricity purchases for six

pieces of equipment in petitioner's produce department and one item in petitioner's meat department. The Audit Division disallowed, in part, exemption for electricity purchases for one item in petitioner's meat department and one item in petitioner's deli/bakery department. The Audit Division's denial of this petitioner's claimed credit with respect to its purchases of electricity for the equipment was also premised upon the Audit Division's position that such electricity was not consumed directly in the production process.

9. The specific items in question, together with their respective uses, were as follows:

<u>Equipment</u>	<u>Use</u>
scale/pricer (4)	Identical to the use for scale/pricer set forth in Finding of Fact "6".
wrapper (2)	Identical to the use for wrapper set forth in Finding of Fact "6".
meat cut room	Room wherein meats were prepared prior to placing them out for sale.

10. The item set forth above as "meat cut room" was described in petitioner's refund application as "produce cooler and meat cut room". At hearing, petitioner established that this item was actually the meat cut room as described above. This item consumed 16.5 kilowatt-hours of electricity over the course of 20 hours per day.

11. Petitioner's store also had a produce cooler, but petitioner failed to submit any evidence as to the specifics vis-a-vis electricity consumption with respect to this item.

12. The Audit Division also reduced the length of average daily exempt usage for two items as follows:

<u>Equipment</u>	<u>Claimed Daily Exempt Use</u>	<u>Determined Exempt Use</u>	<u>Use of Equipment</u>
meat cooler	20 hours	18 hours	Identical use as for meat cooler in Finding of Fact "7". Used for this purpose at all times.

refrigerator	24 hours	18 hours	Stored goods sold in deli/bakery department. Operated 24 hours per day.
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Klein's Plaza Foods, Inc.

13. This petitioner's supermarket is and was located at Central Park Plaza, Buffalo, New York, and was open during the relevant period daily from 8:00 A.M. until 10:00 P.M. (8:00 P.M. on Sunday). This petitioner's claimed exemptions were premised upon purchases of electricity used to operate some 34 separate pieces of equipment in use throughout the store. The Audit Division granted exemption from imposition of sales tax for purchases of electricity with respect to 21 of the items in question. The Audit Division disallowed, in full, exemption from sales tax with respect to electricity purchases for seven pieces of equipment in petitioner's produce department, four items in the deli/bakery department and one item in the meat department. The Audit Division disallowed, in part, exemption for electricity purchases for one item in petitioner's meat department.

14. As with the other petitioners herein, the Audit Division's denial of this petitioner's claimed credit was premised upon its position that such electricity was not consumed directly in the production process. The specific items, with respect to which exemption was denied in full, are set forth below:

<u>Equipment</u>	<u>Use</u>
scale/pricer (2) (produce department)	Identical to the use for scale/pricer set forth in Finding of Fact "6".
wrapper (2) (produce department)	Identical to the use for wrapper set forth in Finding of Fact "6".
shrink tunnel conveyor rotary bin	Used in conjunction with the wrappers in the produce packaging process.
scale/pricer (2) (deli/bakery)	Weighed customer purchases of deli products and produced a printed

	tag listing price and product.
wrapper (2) (deli/bakery)	Packaged various deli/bakery products for sale.
meat/produce prep	Compressor used in the cooling of both petitioner's meat cut room and produce prep room.

15. With respect to the item designated "meat/produce prep", 80 percent of its output cooled the meat cut room while 20 percent cooled the produce prep room.

16. The Audit Division also reduced the length of average daily exempt usage of petitioner's meat cooler from 20 hours of claimed daily exempt usage to 18 hours. This meat cooler was used in the same manner as that described in Finding of Fact "12" and was operated at all times.

Klein's Foods, Inc. - Genesee

17. This petitioner owned and operated a supermarket located at 2160 Genesee Street in Buffalo, New York. Its hours of operation during the period at issue were from 8:00 A.M. until 10:00 P.M. daily. Petitioner's claimed exemptions were premised upon purchases of electricity used to operate some 20 separate pieces of equipment in use throughout the store. The Audit Division granted exemption from imposition of sales tax for purchases of electricity with respect to 13 of the items in question. The Audit Division disallowed, in full, exemption from sales tax with respect to electricity purchases for three pieces of equipment in petitioner's produce department and two items in petitioner's deli/bakery department. The Audit Division also disallowed, in part, an exemption for electricity purchases for two items in petitioner's meat department. The Audit Division's denial of this petitioner's claimed credit with respect to its purchases of electricity for the equipment was also premised upon the Audit Division's position that such electricity was not consumed directly in the production process.

18. The specific items with respect to which the Audit Division denied exemption in full were as follows:

<u>Equipment</u>	<u>Use</u>
scale/pricer wrapper produce cooler	Identical to the uses for scale/pricer, wrapper and produce cooler as described in Finding of Fact "6".
revolving oven	Used in deli/bakery department to cook pre-made pies and to cook chickens.
range	A "stove top" used in deli/bakery department in preparing salads.

19. The Audit Division also reduced the length of average daily exempt usage for two items as follows:

<u>Equipment</u>	<u>Claimed Daily Exempt Use</u>	<u>Determined Exempt Use</u>	<u>Use of Equipment</u>
meat cooler	20 hours	18 hours	Identical use as for meat cooler in Finding of Fact "7". Used for this purpose at all times.
meat prep room	20 hours	18 hours	Identical use as for meat prep room in Finding of Fact "7". Used for this purpose at all times.

Klein's Foods, Inc. - Delaware

20. Petitioner Klein's Foods, Inc. also owned and operated a supermarket located at 1430 Delaware Avenue, Buffalo, New York. Petitioner claimed \$1,233.00 in credit on its sales tax returns filed with respect to its Delaware Avenue store for the period September 1, 1980 through August 31, 1982. This credit was claimed for sales tax paid on certain purchases of electricity used in this store. Petitioner contended that this electricity was consumed in production and therefore exempt from tax.

21. The Audit Division subsequently conducted an audit of petitioner's operations with respect to this store's operations. On audit, the Audit Division disallowed in full petitioner's

claimed credit for sales tax paid on electricity purchases and, on March 16, 1984, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to this petitioner in respect of this store. The notice assessed \$1,742.42 in tax due, plus penalty of \$427.57 and interest of \$593.56.

22. Included in the tax assessed in this notice was \$509.40 in additional tax due on certain fixed asset acquisitions and leasehold improvements. Petitioner did not take issue with this portion of the assessment.

23. This petitioner had claimed exemption on its sales tax returns for purchases of electricity to operate eight pieces of equipment used in its meat department. Although the Audit Division denied the claimed exemption with respect to meat department equipment in full, it did not dispute that such equipment was used in production. Rather, the Audit Division maintained that petitioner had failed to substantiate the claimed hours of average daily usage for the equipment in question. Specifically, the meat department equipment at issue, along with each item's claimed average daily exempt use, was as follows:

<u>Equipment</u>	<u>Claimed Average Daily Use</u>
bandsaw	12 hours
cuber	12 hours
slicer	12 hours
conveyor	12 hours
scale/pricer	12 hours
rotary bin	12 hours
grinder	12 hours
meat prep room	20 hours

24. Petitioner's Delaware Avenue store was a small, older store in a relatively wealthy neighborhood, which sold a significant amount of beef on a cut-to-order basis. Meat sales at this store were greater per square foot of sales space than at the Klein's group's main store on Elmwood Avenue (Klein's Elmwood Foods, Inc.). Furthermore, this store dealt only with whole sides of beef, while the Elmwood store dealt primarily with boxed, semi-cut beef which required less work to prepare than whole sides of beef. Also, the equipment in the Delaware Avenue store

was older, and therefore less efficient, than the Elmwood Avenue store's equipment.

Additionally, it was the practice of the personnel in the meat department to leave equipment on even at times when they were not actually using such equipment.

25. The Audit Division also denied exemption in full with respect to electricity purchases for three items in petitioner's produce department. These items, together with their respective use, were as follows:

<u>Equipment</u>	<u>Use</u>
wrapper	Identical to Finding of Fact "6"
scale/pricer	Identical to Finding of Fact "6"
produce cooler	Identical to Finding of Fact "6"

Methodology to Determine Amount of Exempt Kilowatt-Hours

26. After making its determination as to which equipment consumed electricity directly in production, the Audit Division sought to determine the proportion of each petitioner's purchases of electricity which qualified for exemption from sales tax. To make this determination, the Audit Division first calculated kilowatt-hours for each piece of equipment which it had determined was used in production. With respect to each of the items for which each petitioner's survey (see Finding of Fact "31", infra) listed a horsepower figure, the Audit Division used that horsepower figure to calculate kilowatt-hours by the following formula:

$$\text{Horsepower} \times \frac{746}{1,000} = \text{Kilowatt-hours}$$

27. With respect to those items for which horsepower figures were not set forth in the survey, but for which voltage and amperage figures were set forth, the Audit Division used such voltage and amperage figures to determine kilowatt-hours by the following formula:

$$\text{Volts} \times \frac{\text{Amperes}}{1,000} = \text{Kilowatt-hours}$$

28. With respect to the allowed items for which neither horsepower nor amperage figures

were provided, the Audit Division accepted the kilowatt-hours figure set forth in the survey in making its determinations.

29. Application of these two formulae to the same equipment would have resulted in significantly differing kilowatt-hours figures for the same piece of equipment.

30. Having made its determination as to kilowatt-hours of exempt usage consumed by each petitioner's equipment and the hours per day of such exempt usage, the Audit Division then calculated the ratio of kilowatt-hours of exempt usage to total kilowatt-hours of usage. This ratio was then applied to the total amount of each petitioner's purchases of electricity to determine the amount of such purchases qualifying for exemption. The Audit Division then used each petitioner's utility bills to determine petitioner's total kilowatt-hours of usage and its total purchases of electricity.

31. In support of their respective credit and refund claims, each of the petitioners herein submitted to the Audit Division a survey of the electricity consumption of each of the pieces of machinery and equipment for which each petitioner claimed exemption with respect to its purchases of electricity. Each of the surveys submitted was prepared on each petitioner's behalf by Energy & Value Consultants, Inc., a corporation serving as technical consulting engineers to industries, commercial and private businesses, and governments and municipalities. The firm provides technical consultation on, among other things, energy conservation, energy usage and utilization analysis and planning, air conditioning electrical systems, heating and ventilation systems, and refrigeration systems.

32. The surveys of the equipment at issue, prepared by Energy & Value Consultants, Inc., were based upon field investigations conducted at each store's location and interviews with managerial employees at each store. Each piece of equipment for which a utilities exemption was claimed was physically examined by employees of Energy & Value Consultants, Inc. for data with respect to make and electrical specifications. Energy & Value Consultants, Inc. also conducted interviews with managerial employees of each store to determine the working hours

per item.

33. Energy & Value Consultants, Inc. computed the hourly kilowatt usage for each piece of equipment herein by using tables and data published by the National Electrical Manufacturers Association ("N.E.M.A."), an association which publishes information and data accepted and relied upon by electrical engineers and persons within the electrical manufacturing industry. The N.E.M.A. tables relied upon in the survey reflect a common, accepted engineering approach to the computation of kilowatt usage.

34. The surveys conducted by Energy & Value Consultants, Inc. were done under the direction of a qualified engineer, and the results were certified by a professional engineer.

35. The Audit Division asserted penalty against petitioner Klein's Foods - Delaware. Petitioner had applied for amnesty, but its application was denied. At hearing, this petitioner claimed that its application was wrongly denied. Petitioner introduced no evidence to show that said amnesty application was wrongly denied.

CONCLUSIONS OF LAW

A. Tax Law § 1115(c) provides for an exemption from the sales and use taxes imposed under Tax Law §§ 1105 and 1110 as follows:

"Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing, processing, assembling, generating, refining, mining, extracting, farming, agriculture, horticulture or floriculture, shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten."

B. With respect to Tax Law § 1115(c)20 NYCRR 528.22(c) provides the following:

"(c) Directly and exclusively. (1) Directly means the fuel, gas, electricity, refrigeration and steam and like services, and must during the production phase of a process, either:

- (i) operate exempt production machinery or equipment, or
- (ii) create conditions necessary for production, or
- (iii) perform an actual part of the production process.

(2) Usage in activities collateral to the actual production process is not deemed to be use directly in production.

* * *

(3)(i) Exclusively means that the fuel, gas, electricity, refrigeration and steam and like services are used in total (100%) in the production process.

(ii) Because fuel, gas, electricity, refrigeration and steam when purchased by the user are normally received in bulk or in a continuous flow and a portion thereof is used for purposes which would make the exemption inapplicable to such purchases, the user may claim a refund or credit for the tax paid only on that portion used or consumed directly and exclusively in production."

C. In view of the afocited statute and regulations, the Audit Division properly denied exemption from sales tax with respect to the electricity consumed by the following machinery and equipment:

<u>Petitioner</u>	<u>Equipment</u>
Klein's Bailey Foods, Inc.	scale/pricer wrapper produce cooler bug killer cash register
Klein's Elmwood Foods, Inc.	scale/pricer (4) wrapper (2)
Klein's Plaza Foods, Inc.	scale/pricer (2) (produce dep't.) wrapper (2) (produce dep't.) shrink tunnel conveyor rotary bin scale/pricer (2) (deli/bakery) wrapper (2) (deli/bakery) meat/produce prep
Klein's Foods, Inc. - Genesee	scale/pricer wrapper produce cooler revolving oven range
Klein's Foods, Inc. - Delaware	wrapper scale/pricer produce cooler

D. With respect to the items listed above which were located in and a part of each

respective petitioner's produce departments, the denial of exemption herein is proper for the reasons set forth in Matter of APOG Foods, Inc., Matter of Josal Foods, Inc., Matter of D & H Meyers, Inc. (State Tax Commission, October 15, 1986). Similarly, petitioner Klein's Plaza Foods, Inc.'s wrappers and scale/pricers used in its deli/bakery department were properly denied exemption. These items were in no way involved in the production of products sold in the deli/bakery department. Rather, these items merely aided this petitioner in the selling of its products.

E. With respect to Klein's Plaza Foods, Inc.'s meat/produce prep, petitioner established that 80 percent of the electricity consumed in the operation of this item was consumed in the cooling of the meat prep room. The Audit Division did not dispute that the meat prep rooms for which the respective petitioners claimed exemption were entitled to the utilities exemption. Consequently, pursuant to 20 NYCRR 528.22(c)(3)(ii), 80 percent of the electricity consumed by this equipment was properly entitled to the utilities exemption claimed herein.

F. With respect to Klein's Foods, Inc. - Genesee's revolving oven and range, the heating of pre-made pies and the preparation of salads does not constitute production within the meaning of Tax Law § 1115(c). The Audit Division therefore properly denied the utilities exemption with respect to these two items.

G. The claimed average daily exempt usage of the equipment set forth in Findings of Fact "7", "12", "16", "19" and "23" was in all respects proper. The Audit Division thus improperly reduced the average daily usage of these items. The respective petitioners sustained their burdens of proof with respect to the hours of usage for these items. With respect to the meat department equipment of Klein's Foods - Delaware, this petitioner established that, given the circumstances under which this store operated, the claimed average daily exempt usage was proper.

H. Inasmuch as petitioner Klein's Elmwood established at hearing that its item listed in its application as "produce cooler and meat cut room" was actually a "meat cut room", said item is properly entitled to the utilities exemption.

I. The Audit Division improperly rejected petitioners' kilowatt-hours figures set forth in their respective surveys. In light of the professional expertise of Energy & Value Consultants, Inc. (Finding of Fact "31"), and the basis for the figures set forth in the survey (Findings of Fact "32" and "33"), petitioners have established that their kilowatt-hours figures were more accurate than those arrived at via the formulae employed by the Audit Division. In addition to the accuracy of petitioners' figures and the inconsistency of the Audit Division's figures, the well-established preference for using calculations prepared by an engineering professional rather than the formulae utilized by the Audit Division herein is noted. In fact, the Audit Division's own Technical Services Bureau Memorandum (TSB-M-82[25]S) expresses this preference as follows:

"When claiming a refund or credit of sales taxes paid on exempt purchases, an electrical engineer's survey, showing computations, must be submitted in substantiation of the allocation made for use of electricity for both exempt and taxable purposes. In lieu of an electrical engineer's survey, computations using the guidelines that follow may be submitted." (Emphasis supplied)

It is further noted that this preference was affirmed in *Grand Union Co. v. Tully* (94 AD2d 509).

J. The Audit Division improperly asserted penalty against petitioner Klein's Foods - Delaware. Under the circumstances presented herein, cancellation of such penalty is proper pursuant to 20 NYCRR 536.5(b)(5). While the record does not indicate that Klein's Foods - Delaware had filed a refund application in the manner of the other petitioners herein, the principals of this petitioner were identical to the principals of the other four petitioners herein. Consequently, this petitioner was aware of the ongoing utilities exemption dispute which existed between the Audit Division and the other petitioners herein. Under such circumstances, cancellation of penalty is proper.

K. The petitions of Klein's Bailey Foods, Inc., Klein's Elmwood Foods, Inc., Klein's Plaza Foods, Inc. and Klein's Foods, Inc. are granted to the extent indicated in Conclusions of Law "E", "G", "H", "I" and "J"; the Audit Division is hereby directed to recompute each such petitioner's

sales tax liability in accordance therewith; and, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York
November 13, 1987

ADMINISTRATIVE LAW JUDGE