

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JAMRON DRUG CO., INC.,	:	DECISION
RONALD JAMRON AND BRIDIE JAMRON,	:	
Individually and as Officers	:	
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, 1973	:	
through March 31, 1975.	:	

In the Matter of the Petition	:	
of	:	
BEN G. BUDGET STORES, 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 March 1, 1973	:	
through March 31, 1975.	:	

In the Matter of the Petition	:	
of	:	
BEN G. BUDGET STORES, INC.	:	
and Ronald Jamron, Individually and as Officer	:	
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, 1973	:	
through November 30, 1976.	:	

Petitioners, Jamron Drug Co., Inc., Ronald Jamron and Bridie Jamron, Individually and as Officers, 110-11 Queens Boulevard, Forest Hills, New York 11375, Ben G. Budget Stores, Inc., and Ben G. Budget Stores, Inc. and Ronald Jamron, Individually and as Officer, 118-05 Metropolitan Avenue, Kew Gardens, New York 11415, filed 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 periods March 1, 1973 through March 31, 1975 and June 1, 1973 through November 30, 1976 (File Nos. 20780, 20781, 20782, 31217, 31218 and 32158).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 15, 1983 at 9:15 A.M. and continued to conclusion on March 1, 1984 at 10:30 A.M., with all briefs to be submitted by May 10, 1984. Petitioners appeared by Neal M. Goldman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Arnold Glass, Esq., of counsel on June 15, 1983 and Irwin Levy, Esq., of counsel on March 1, 1984).

ISSUES

I. Whether the Audit Division's use of a "test period" audit as a basis for determining taxable sales was proper.

II. Whether the additional taxable sales resulting from the use of such procedure were correct.

III. Whether Ronald Jamron was personally liable for sales and use taxes due from Jamron Drug Co., Inc. and Ben G. Budget Stores, Inc.

IV. Whether Bridie Jamron was personally liable for sales and use taxes due from Jamron Drug Co., Inc.

FINDINGS OF FACT

1. Petitioner Jamron Drug Co., Inc. (Jamron) operated a discount pharmacy located at 74-08 Metropolitan Avenue, Middle Village, New York until March 31, 1975. At such time, Jamron sold the business and all of its assets to Ben G. Budget Stores, Inc. ("Budget").

Petitioner Budget, when it acquired the Jamron store, operated three discount health and beauty aid stores at the following locations: 60-15

Woodside Avenue, Woodside, N.Y., 66-10 Grand Avenue, Maspeth, N.Y. and 118-07 Metropolitan Avenue, Kew Gardens, N.Y. Budget also operated a card and gift shop at the latter location.

2. Ronald Jamron, as president of Jamron and Budget, executed consents extending the period of limitation for assessment of sales and use taxes for the periods March 1, 1973 through February 29, 1976 to September 20, 1977.

3. On August 23, 1977, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Jamron and Ronald Jamron and "Birdie" (sic) Jamron, individually and as officers, covering the period March 1, 1973 through March 31, 1975 for taxes due of \$60,168.47, plus penalty and interest of \$35,951.23, for a total of \$96,119.82.

On the same date, an identical notice was issued to Budget and Ronald Jamron. The notice indicated that the taxes were determined from Jamron and represented Budget's liability as purchaser under section 1141(c) of the Tax Law.

On August 12, 1977, a second notice was issued to Budget and Ronald Jamron, individually and as an officer, which assessment resulted from an audit of Budget's books and records for the period June 1, 1973 through November 30, 1976. This notice assessed additional taxes due of \$86,901.37, plus penalty and interest of \$39,181.15, for a total of \$126,082.52.

4. On the audit of Jamron's books and records, the Audit Division analyzed purchase invoices for the months of May and November, 1974. The purchases were categorized as listed below with the percentage that the category of purchases represented to the total purchases for the two months.

<u>Category</u>	<u>%</u>
nontaxable	37
miscellaneous taxable	20
perfume and cosmetics	10
candy	1
books	.5
Pampers	7
cards	3
cigarettes	21.5

The foregoing percentages, were applied to total purchases for the audit period after adjustments¹ to determine taxable purchases by category. A markup was computed for each category using the cost of selected items obtained from current invoices and the selling price obtained from the items on display. The individual markups were applied to the purchases by category to determine taxable sales of \$1,435,874.00. Jamron reported taxable sales of \$622,540.00, leaving additional taxable sales of \$813,334.00 and tax due thereon of \$59,716.63.

The Audit Division also determined that the value of the fixtures and equipment transferred in the bulk sale was \$5,648.00. Jamron was assessed \$451.84 for the bulk sales tax which it did not collect from Budget. This amount is not in dispute.

5. The Audit Division followed the same audit procedures as described above for the audit of Budget's books and records. The months analyzed to determine the taxable purchases were September 1975 and February 1976 with the following results:

¹ Jamron made wholesale sales to Claridge Distributing Co., Inc. in Worcester, Massachusetts and to Budget stores. The Audit Division adjusted total purchases to account for these transactions before applying markup percentages to determine taxable retail sales. Jamron was unable to substantiate that purchases of \$149,000 were actually sold to Claridge and therefore such purchases were included by the auditor as part of the purchases.

<u>Category</u>	<u>%</u>
nontaxable	25
miscellaneous taxable	29
perfume and cosmetics	5
candy	3
Pampers	2
cigarettes	36

The Audit Division determined taxable sales of \$2,811,498.00 as compared to reported sales of \$1,700,159.00 which resulted in the sales tax deficiency of \$86,804.80. The purchases used to determine taxable sales included those purchases from Jamron referred to in Finding of Fact "4".² Use taxes found due of \$96.57 on equipment purchases are not at issue.

Budget conceded that a bulk sale took place between Jamron and itself and that as the purchaser, it was liable for any taxes determined due from Jamron.

6. Jamron and Budget provided the Audit Division with the following books and records: general ledger, cash disbursements, purchase invoices, sales tax returns and federal income tax returns. Jamron and Budget maintained cash register tapes, however, they were not requested by the auditor. The available cash register tapes were summary tapes that showed total receipts and sales tax charged. The tapes did not show individual transactions, the sales tax charged on each transaction or identify the item sold. The cashier had the responsibility of segregating the taxable items, computing the total taxable sales price and charging the applicable sales tax. The customer was furnished with a sales receipt. The general ledger showed only total sales. It did not break down sales by store location or record taxable sales separately.

² The auditor did not find these purchases recorded on Budget's books and records.

7. In determining cigarette sales, the auditor estimated that 90 percent of cigarettes were sold by the individual pack at a markup of 20.82% for Jamron and 14.45% for Ben G. and that 10 percent were sold by the carton at markups of 12.3% and 6.36%, respectively.

Petitioners had a system to determine the quantity of cigarettes sold by the carton. This system was used primarily for inventory control purposes. No evidence was offered by petitioners to establish that the percentages estimated by the Audit Division were incorrect.

8. Jamron and Budget distributed advertising flyers on a regular basis advertising special sale merchandise. The advertised items were sold for cost or at a minimal markup. The markup tests included some sale items, however, the test did not consider a sufficient variety nor did it give sufficient weight to the sales volume of such items. The sale merchandise was included in the purchases category of "miscellaneous taxable". The Audit Division computed markups in this category of 36.7 percent (Jamron) and 50.96 percent (Budget).

9. The audit did not give an allowance for pilferage. Petitioners claimed that pilferage and employee theft amounted to \$60,000.00 a year. The guidelines established by the Audit Division show that pilferage for the size of petitioners' operation is 2½ percent of purchases.

10. During June 1974, a delicatessen next to Budget's Woodside store had an electrical fire. Budget had an inventory loss of \$25,000.00 because of smoke and water damage.

11. Petitioners argued that the Audit Division had the burden of proving the books and records were inadequate before it could utilize a test period method of audit and that in the instant audit, the Audit Division failed to establish such a foundation. Petitioners argued further that the decision to

use a test period was made prior to examining any records and it is arbitrary and capricious to permit the Audit Division to establish the required foundation after the fact.

12. Petitioners also argued that the sales price of cigarettes, candy and gum included sales tax and signs to that effect were displayed in the stores.

13. Ronald Jamron was the president and general manager of both Jamron and Budget. He did not contest his personal liability for the taxes determined due from either corporation. Bridie Jamron, the wife of Ronald Jamron, was a corporate officer. However, she was not involved in the business operations.

CONCLUSIONS OF LAW

A. That the cash register tapes maintained by petitioners (Finding of Fact "6") were useless for verifying taxable sales reported in that it could not be determined if sales tax was charged on all taxable items. Moreover, the general ledger did not show actual taxable sales. Under such circumstances, the alternative was to determine taxable sales from external indices such as purchases in accordance with section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

Petitioners were not prejudiced by the auditor's failure to examine cash register tapes at the time the audit was commenced; the same audit procedures would have been employed because the tapes were inadequate for audit purposes.

When books and records are insufficient, "test period" and percentage markup audits are permissible (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44; Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

B. That the audit procedures described in Finding of Fact "4" are generally accepted procedures established by the Audit Division which are used to determine the accuracy of books and records. These procedures disclosed a significant

variance with taxable sales reported (an increase of 130 percent for Jamron and 65 percent for Budget) to conclude that sales tax was not properly charged on all taxable items. Such a discrepancy further established the inadequacy and unreliability of petitioners' books and records (Matter of George Korba v. State Tax Commission, 84 A.D.2d 655).

C. That the markup test performed by the Audit Division did not give adequate consideration to the discount nature of the business operation and thereby overstated the markup on the category "miscellaneous taxable". Accordingly, the markups for this category are reduced to 30 percent for Jamron and 40 percent for Budget.

In addition, total purchases shall be adjusted to reflect a pilferage allowance of $2\frac{1}{2}$ percent and the \$25,000.00 inventory loss (Findings of Fact "9" and "10").

Except for the revisions indicated above, the Audit Division properly calculated the tax liability of Jamron and Budget and the petitioners have not overcome their burden of showing that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization v. State Tax Commission, 85 A.D.2d 858).

D. That section 1132(a) of the Tax Law requires that petitioners charge and show separately the sales tax on the receipt given to the customer. Therefore, a sign displayed by petitioners stating that sales tax was included in the price does not comply with the statute.

E. That petitioner Ronald Jamron was a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law and, therefore, is personally liable for the taxes due from Jamron and Budget in accordance with section 1133(a) of the Tax Law.

Petitioner Bridie Jamron was not a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law and thus bears no personal liability for the taxes due from Jamron.

F. That the petitions of Jamron Drug Co., Inc. and Ben G. Budget Stores, Inc. and Ronald Jamron are granted to the extent indicated in Conclusion of Law "C". The Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued August 23, 1977, and August 12, 1977; and that, except as so granted, the petitions are in all other respects denied.


The petition of Bridie Jamron is granted and the notice issued August 23, 1977 as it pertains to said petitioner is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 20 1985


PRESIDENT


COMMISSIONER


COMMISSIONER