

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

KOREY SALES AND SERVICE, INC. :
D/B/A KOREY ENTERPRISES :

DECISION

for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1974 :
through August 31, 1977. :

Petitioner, Korey Sales and Service, Inc. d/b/a Korey Enterprises, 2343 Union Road, Cheektowaga, New York 14225, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1974 through August 31, 1977 (File No. 22860).

A hearing was commenced before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on April 21, 1982 at 10:45 A.M. and was continued to conclusion at the same offices before James J. Morris, Jr., Hearing Officer, on September 12, 1985 at 1:15 P.M. Petitioner appeared by Joseph John Thomas, Esq. The Audit Division appeared on April 21, 1982 by Paul B. Coburn, Esq. (Patricia L. Brumbaugh, Esq., of counsel) and on September 12, 1985 by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

Whether the Audit Division properly determined additional sales taxes due and owing upon petitioner's sales of tangible personal property through vending machines.

FINDINGS OF FACT

1. On July 17, 1978, the Audit Division issued to Fred Korhumm and Ross Korhummel d/b/a Korey Enterprises a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the periods ended November 30, 1974 through August 31, 1977 asserting tax due of \$38,843.28, penalty of \$9,396.32 and interest to the date of the Notice. The petitioner corporation Korey Sales and Service, Inc. d/b/a Korey Enterprises is the successor to Korey Sales and Service and is carrying on the business formerly conducted by "Korey Sales and Service" and "Korey Enterprises".

2. The Audit Division performed an audit upon the books and records of Korey Enterprises. Said entity was engaged in the sale of coffee, soda, candy, snacks and juices through vending machines. Cigarettes were also sold through vending machines. "Coffee kits" were also sold by petitioner; however, said "kits" were not sold in vending machines.

3. Petitioner alleged that cigarettes were accounted for separate and apart from its other activities and its business operation, insofar as cigarettes were concerned, was segregated from its other activities.

4. Cigarette sales were reported in the same books and records as petitioner reported its other business activities, albeit, listed in a different "column".

5. Only cigarette sales were reported on petitioner's sales tax returns as taxable sales and none of petitioner's other sales (allegedly non-taxable) were reflected on said returns.

6. The audit disclosed that petitioner improperly computed its tax due on cigarette sales in that it overpaid said tax in the amount of \$1,317.00 for the audit period, credit for which was used to lower the amount of tax asserted due on the notice of determination and demand.

7. The auditor sample tested petitioner's purchase invoices in the period January through June, 1975 and found that petitioner's unit cost for various "candy" items ranged from \$.06 to \$.11 each and that 16 of the 24 tested items (allegedly sold at \$.10 or less) had a unit cost to petitioner in excess of \$.10. Twelve months of petitioner's records selected from the years 1975, 1976 and 1977 were then examined. Said sampling revealed sales of \$256,977.58 of candy, soda, coffee and snacks which constitute petitioner's alleged sales of items at a price of \$.10 or less (including all candy items whether or not unit cost appeared in excess of \$.10), \$101,339.00 of cigarettes and \$33,733.71 of coffee kits. For said period, even assuming all candy sales to be at \$.10 or less, petitioner's sales of all \$.10 or less items at best only generated 65.5 percent of petitioner's gross receipts. For the total audit period, sales subject to tax of \$573,730.37 were determined which sales did not include petitioner's sales of (a) cigarettes, upon which tax was charged and paid, (b) coffee kits, which were not sold through vending machines and which the Audit Division considered not subject to tax, and (c) snacks and juices, which items the Audit Division considered to be non-taxable regardless of price or whether petitioner otherwise qualified for the exemptions provided in the Tax Law with respect to sales through vending machines.

Applying the applicable tax rate to the additional sales subject to tax results in \$40,162.12 in tax due for the audit period which, after application of the credit determined due in petitioner's favor (see Finding of Fact "6"), reflects \$38,843.36 in tax due.¹

¹ The \$.08 difference between the \$38,843.36 determined per the audit workpapers and the \$38,843.28 asserted in the notice of determination and demand is unexplained.

8. As concerns petitioner's purchases of candy, as a matter of business routine, specials and promotions were regularly given petitioner in the nature of buying a given number of cartons of a particular candy entitled one to receive one or two extra cartons free. The purchase invoice would only reflect the purchase of the given number of cartons and would not reflect that petitioner had in fact received more candy than was reflected on the purchase invoice.

9. Petitioner did not charge greater than \$.10 an item during the audit period since the vending machines in use by petitioner during the audit period were not capable of accepting greater than \$.10 per item, and that when costs subsequently rose, requiring petitioner to charge in excess of \$.10 an item, petitioner junked its old machines and was required to acquire newer vending machines which petitioner did so acquire through purchase of both new and used machines.

10. During the audit period, petitioner had approximately 125 vending machines of which no more than 20 were used for candy, snacks and the like and no more than 20 were for cigarette sales, leaving no less than 85 machines for coffee and soda sales.

11. Petitioner received a markup in excess of 230 percent over its costs on its sales of coffee and soda through its vending machines. It was these soda and coffee sales that petitioner was "interested in" and it only provided the cigarette and candy machines as an accommodation to its customers and in order to ensure installation of its soda and coffee machines at a customer's premises.

12. Petitioner's candy and snack sales accounted for only 4 to 5 percent of its revenues generated from its vending machine sales exclusive of cigarettes.

CONCLUSIONS OF LAW

A. That section 1105(d)(ii)(C) of the Tax Law provides an exception to the tax imposed by section 1105(d) of the Tax Law upon the sale of food or drink for:

"food or drink sold through coin-operated vending machines at ten cents or less, provided the vendor is primarily engaged in making such sales and maintains records satisfactory to the state tax commission."

B. That section 1115(a)(13) of the Tax Law provides an exemption from the sales taxes imposed by section 1105(a) of the Tax Law and the use taxes imposed by section 1110 of the Tax Law for:

"[t]angible personal property sold through coin operated vending machines at ten cents or less, provided the retailer is primarily engaged in making such sales and maintains records satisfactory to the state tax commission."

C. That for purposes of the exception to the tax on sales of food and drink imposed by section 1105(d) of the Tax Law, the State Tax Commission Regulations had defined the term "primarily" to mean "at least 75 percent of gross receipts from all business operations during a reporting period are attributable to sales of ten cents or less through vending machines" (Reg. §527.8[h][4]) and said term was similarly defined for purposes of the section 1115(a)(13) exemption (see Reg. §528.14[b]).

D. That in response to the decision of the Court in Automatique v. Bouchard, 97 A.D.2d 183, the Commission's regulations were amended in December, 1985 to redefine "primarily", inter alia, for the purposes of the issues herein to mean at least fifty percent of gross receipts from all business operations to be attributable to sales of ten cents or less.

E. That the test to be applied herein, therefore, is whether fifty percent of petitioner's gross receipts from all business operations were attributable to sales of ten cents or less.

F. That petitioner has failed to substantiate its claim that cigarette sales be excluded from the computation of gross receipts from all business operations. Petitioner did not show that its cigarette operation was separate and apart and segregated from its other operations and, in addition, based upon petitioner's bookkeeping operations, the Audit Division was not only justified, but properly included the receipts from said sales in the computation of petitioner's "gross receipts from all business operations".

G. That taking into account cigarette sales and sales of coffee kits, petitioner has proved that greater than fifty percent of its gross receipts from all business operations were from sales at ten cents or less.

H. That petitioner's purchase invoices did not adequately reflect the amount of candy products purchased (Finding of Fact "8") and, thus, the per unit cost for items of candy would be lower than that amount initially determined on audit. Therefore, during the audit period, petitioner was not selling candy at a price in excess of \$.10 per unit (Finding of Facts "8" and "9").

I. That, in accordance with Conclusions of Law "G" and "H", the petition is granted, the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is cancelled in full and the Audit Division is directed to issue a refund in the amount of \$1,317.00, as determined due petitioner on the audit, together with such applicable interest as by law allowed.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 12 1986

PRESIDENT

COMMISSIONER

COMMISSIONER