

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

BHI, INC.  
D/B/A THE AUTOMOBILE SHOP :

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 Periods Ended :  
February 28, 1974 and November 30, 1974, and :  
the Period June 1, 1977 through June 27, 1980. :

Petitioner, BHI, Inc. d/b/a The Automobile Shop, c/o Vivian Olesker, 100 Greenridge Avenue, White Plains, New York 10605, 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 periods ended February 28, 1974 and November 30, 1974, and the period June 1, 1977 through June 27, 1980 (File No. 32136).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 17, 1983 at 1:15 P.M. with all evidence to be submitted by February 28, 1983. Petitioner appeared by Vivian Olesker, secretary-treasurer. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

#### ISSUES

I. Whether the result of a field audit conducted by the Audit Division upon the available books and records of petitioner properly reflected its taxable sales and the additional tax determined due thereon.

II. Whether penalty and interest in excess of the minimum statutory rate were properly imposed by the Audit Division.

FINDINGS OF FACT

1. On October 2, 1980, the Audit Division issued two notices of determination and demand for payment of sales and use taxes due against The Automobile Shop - BHI, Inc. [sic] as a result of a field audit. The first notice covered the period June 1, 1977 through June 27, 1980 and asserted tax due of \$7,950.46, plus interest of \$1,197.08, for a total due of \$9,147.54.

The second notice covered the periods December 1, 1973 through February 28, 1974 and September 1, 1974 through November 30, 1974. This notice was issued in the amount of \$3,154.60 tax, plus interest of \$1,623.59, for a total of \$4,778.19.

2. Petitioner, by signature of its secretary-treasurer, Vivian N. Olesker, executed a consent to extend the period of limitation for the issuance of an assessment for the period June 1, 1977 through June 27, 1980 to December 20, 1980.

3. Upon contact to perform its field audit, the Audit Division found that the business operation had been sold as of June 27, 1980. It also learned that the sole shareholder, Manuel N. Olesker, purchased the stock sometime during 1977. In its review of the filing history of sales and use tax returns, the Audit Division found that sales and use tax returns filed by the corporation for the periods December 1, 1973 through February 28, 1974 and September 1, 1974 through November 30, 1974 were filed on February 20, 1978. It was the Audit Division's position that these periods were therefore within the statute of limitations as set forth under section 1147(b) of the Tax Law and included these periods in its audit findings.

4. On audit, the Audit Division reviewed petitioner's available books and records which consisted mainly of a general ledger for the period January, 1978

through February, 1980. From this the Audit Division obtained the recorded figures for bank deposits, accounts receivable, sales tax accrual and purchases. Although some sales invoices were available for June, 1979 and part of May, 1979, petitioner's markup on its purchases could not be determined to verify sales recorded since no purchase invoices were available.

The Audit Division estimated petitioner's markup based on similar businesses. It marked up petitioner's store purchases for the period March 1, 1978 through February, 1980 by 50 percent and shop purchases for the same period by 250 percent. The Audit Division determined that petitioner's taxable sales were \$332,797.88 for this period. Petitioner reported taxable sales of \$236,825.00 for the same period on sales and use tax returns filed. The Audit Division thereby determined additional taxable sales of \$95,972.88, a 40.5 percent error factor in reporting its sales.

The error factor determined by the Audit Division was applied to the taxable sales reported for the period June 1, 1977 through May 31, 1980. No sales and use tax return was filed by petitioner for the period June 1, 1980 through June 27, 1980, the date of sale; therefore, the Audit Division estimated the sales made for that period and applied the error percentage thereon. The Audit Division determined the taxable sales for the periods ended February 28, 1974 and November 30, 1974 based on the taxable sales it determined for the periods February 28, 1978 and May 31, 1978. The Audit Division then computed the tax due on the taxable sales it determined and deducted therefrom the sales tax paid or previously assessed. The Audit Division thereby determined the total tax deficiency for both notices issued of \$11,105.06 with minimum interest thereon.

5. As a result of a conference later held, the Audit Division reduced the markup applied to shop purchases from 250 percent to 200 percent. This reduction

also reduced the error percentage in reporting taxable sales from 40.5 percent to 33.309 percent. The Audit Division redetermined the additional tax due for the period June 1, 1977 through June 27, 1980 to \$6,625.41 and the tax due for the periods ended February 28, 1974 and November 30, 1974 to \$2,931.75.

The Audit Division recommended, however, that full penalties and interest be assessed because petitioner was a late filer and filed several returns without remittance thereon.

On February 4, 1982, the Audit Division issued a Notice of Assessment Review revising the Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the periods ended February 28, 1974 and November 30, 1974 to \$2,931.75 in tax due plus full penalty and interest. It is not known whether the Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1977 through June 27, 1980 was likewise revised.

6. Petitioner's secretary-treasurer, Vivian Olesker, admitted that no additional records were available other than those examined by the Audit Division. All records left on the business premises had been destroyed by the new owners.

Mrs. Olesker argued, however, that the markup of 200 percent applied to the shop purchases was too high in that the selling prices were kept low in order to build up the business. Due to the gas shortage, business had declined in the area of servicing and repairing high performance vehicles such as racing cars.

Petitioner also argued that a large amount of personal funds were deposited into the business account to keep it going; therefore, its bank deposits did not accurately reflect receipts from the business operation. The

Audit Division, however, did not consider bank deposits as a basis for the determination of sales.

7. Petitioner submitted some sales invoices available showing sales made through the shop. Although an actual markup on parts could not be determined from such invoices submitted, they did show that approximately 40 percent of shop sales constituted parts and 60 percent constituted labor. In keeping with the markup applied by the Audit Division to store parts to which petitioner found no disagreement, a deduction from shop sales of the cost of parts presumed marked up at 50 percent would yield a markup on parts sold through the shop of 267.6 percent. This markup considers the fact that charges are made for labor.

8. All the shares of capital stock of petitioner corporation were transferred to Manuel N. Olesker on October 8, 1977. Although the officer assessments are not at issue herein, the principals of petitioner corporation filed a petition for bankruptcy on August 25, 1982.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that if a return when filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices such as purchases or other factors.

B. That the Audit Division, lacking source documents to determine sales for the audit period, marked up the purchases made by petitioner based on similar businesses. That the markups used by the Audit Division to determine sales made were not unreasonable based on the sales invoices submitted (Finding of Fact "7"). That petitioner has failed to show any error in the determination. (Matter of Meyer v. State Tax Commission, 61 A.D.2d 223, 402 N.Y.S.2d 74.)

That the determination of tax due as revised in Finding of Fact "5" was therefore proper and in accordance with the provisions of section 1138(a) of the Tax Law.

C. That section 1147(b) of the Tax Law provides that, except in the case of a willfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return. The Audit Division properly included the periods ended February 28, 1974 and November 30, 1974 in the notices issued October 2, 1980 since the returns for said period were not filed until February 20, 1978.

That section 1145(a)(3) provides that penalties and interest may be determined, assessed, collected and enforced in the same manner as the tax. That the penalties and interest in excess of the minimum statutory rate for the periods ended February 28, 1974 and November 30, 1974 were not included in the original notices of October 2, 1980. Said penalties and interest were determined and were assessed in the Notice of Assessment Review issued February 4, 1982 which is beyond the statute of limitations as set forth by section 1147(b) of the Tax Law. That accordingly, penalty and interest in excess of the minimum statutory rate is cancelled as well as any other that might have been determined and assessed beyond three years of the returns filed for the period June 1, 1977 through June 27, 1980.

D. That the petition of BHI, Inc. d/b/a The Automobile Shop is granted to the extent indicated in Conclusion of Law "C" above; that the Audit Division is directed to further modify the notices of determination and demand for payment of sales and use taxes due issued on October 2, 1980 and later reduced as a

result of the conference held; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JAN 20 1984

STATE TAX COMMISSION

Frederick W. Cline  
PRESIDENT

Francis R. Koemig  
COMMISSIONER

Mark J. Smith  
COMMISSIONER