

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
B & K GARAGE, INC. : 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 March 1, 1977 :  
through November 30, 1979.

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Petitioner, B & K Garage, Inc., 3901 16th Avenue, Brooklyn, New York 11218, 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 March 1, 1977 through November 30, 1979. (File No. 35390)

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 April 20, 1983 at 1:15 P.M. Petitioner appeared by Issac Sternheim, CPA. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

- I. Whether the Audit Division properly estimated petitioner's tax liability on the basis of external indices.
- II. Whether penalty and that portion of interest exceeding the minimum statutory rate asserted against petitioner on additional taxable sales determined due on audit should be cancelled.

FINDINGS OF FACT

1. Petitioner, B & K Garage, Inc., operated a Texaco gasoline and service station located at 3901 16th Avenue, Brooklyn, New York.

2. On June 19, 1981, 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 petitioner covering the period March 1, 1977 through November 30, 1979 for taxes due of \$64,945.86, plus penalty and interest of \$37,641.30, for a total of \$102,587.16.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period at issue, to December 20, 1981.

4. Petitioner's books and records were incomplete and inadequate for audit purposes. Consequently, it was necessary for the Audit Division to use external indices as a basis for determining petitioner's tax liability.

The Audit Division contacted Texaco, Inc., by letter, requesting the number of gallons of gasoline by grade and information as to other products such as oil, filters, etc. it sold to petitioner during the period March 1, 1977 through November 30, 1979. Texaco, Inc. replied that petitioner purchased 817,996 gallons of gasoline and 3,623 gallons of motor oil. Petitioner reported gross sales of \$320,990.83 for the same period which indicated to the auditor there was a significant underreporting of sales.

Markup percentages were computed for each grade of gasoline using costs and selling prices in effect at the time of the audit. The resultant markups were applied to the gasoline purchases to determine taxable sales of \$552,644.93 (state and federal excise taxes excluded).

The auditor visited petitioner's premises on April 3, 1980 and observed two persons (one employee and one of the principals of the corporation) performing repair work. Petitioner's available records did not reflect any purchases of repair parts nor indicate any repair sales. The auditor estimated that repair

work and sales of accessories were 72 percent of taxable gasoline sales or \$397,904.25. This estimate was based on audits of similar businesses in the same geographical location. The auditor also observed that tax exempt organizations purchased gasoline and paid the same price as all other purchasers.

The total taxable sales determined above amounted to \$950,549.28 as compared to reported taxable sales of \$138,631.00, leaving additional taxable sales of \$811,918.28 and tax due thereon of \$64,945.86.

5. Petitioner estimated the taxable sales reported on sales tax returns filed for the period at issue.

6. Petitioner made the following arguments:

(1) the markup and observation tests were invalid since they were conducted outside the audit period.

(2) the sales tax collected from exempt organizations was refunded monthly.

(3) the estimate for repairs and accessory sales was excessive due to the competition in the immediate vicinity.

The foregoing arguments were not supported by any substantial evidence.

With respect to the penalties asserted, petitioner argued that it relied on the accountant who prepared the returns and therefore it did not willfully attempt to evade the taxes at issue.

#### CONCLUSIONS OF LAW

A. That petitioner failed to maintain books and records as required by section 1135 of the Tax Law; moreover, the Audit Division's independent verification of gasoline purchases established that petitioner's sales tax returns were insufficient and that available records were unreliable.

That 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). The selection of a test period not within the audit period was not unreasonable (Matter of Murray's Wines and Liquors v. State Tax Commission, 78 A.D. 2d 947).

Accordingly, the Audit Division properly determined petitioner's tax liability as provided in section 1138(a) of the Tax Law.

B. That the Audit Division reasonably calculated the taxes due and that petitioner failed to overcome its burden to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 A.D. 2d 858).

C. That petitioner failed to establish that the substantial underreporting of taxable sales was due to reasonable cause and not willful neglect. Therefore, the Audit Division properly assessed penalty and interest pursuant to section 1145(a) of the Tax Law.

D. That the petition of B & K Garage, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 19, 1981 is sustained.

DATE: Albany New York  
JAN 18 1984

STATE TAX COMMISSION

Rodwin A. Cline  
PRESIDENT

Francis R. Koehn  
COMMISSIONER

[Signature]  
COMMISSIONER