

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

KING BEAR 46-16 KISSENA BLVD. CORP.

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, 1979
through February 28, 1981.

DECISION

In the Matter of the Petition :

of :

PHILIP IOVINO

OFFICER OF KING BEAR 46-16 KISSENA BLVD. CORP.

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, 1979
through February 28, 1981.

Petitioners, King Bear 46-16 Kissena Blvd. Corp., 46-16 Kissena Boulevard, Flushing, New York 11355 and Philip Iovino, Officer of King Bear 46-16 Kissena Blvd. Corp., 63 Wilson Street, Massapequa Park, New York 11762, filed petitions for revision of determinations or for refund **of** sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1979 through February 28, 1981 (File **Nos.** 44850 and 44851).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 29, 1986 at 1:15 P.M. Petitioners appeared by Robert V. Ferrari, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., **of** counsel).

ISSUES

I. Whether the Audit Division properly determined the number of gallons of gasoline purchased and subsequently sold by petitioner King Bear 46-16 Kissena Blvd. Corp. ("King Bear") during the audit period.

II. Whether the Audit Division properly determined taxable repair sales made by King Bear during the audit period.

III. Whether the Audit Division properly determined use tax due of \$4,885.52 on King Bear's acquisition of fixed assets.

IV. Whether the Audit Division properly determined tax due of \$4,396.96 on the value of furniture, fixtures and equipment transferred as the result of King Bears' bulk sale of its business.

V. Whether reasonable cause existed for King Bear's failure to pay the proper sales tax due, thereby warranting cancellation of both the penalty imposed under Tax Law § 1145(a)(1) and those interest charges in excess of minimum interest.

FINDINGS OF FACT

1. On June 18, 1982 and February 25, 1983, the Audit Division, as the result of a field examination, issued notices of determination and demands for payment of sales and use taxes due to King Bear 46-16 Kissena Blvd. Corp. The notice dated June 18, 1982, which encompassed the period March 1, 1979 through May 31, 1979, assessed tax due of \$5,489.36, plus penalty of \$1,372.34 and interest of \$2,061.53, for a total amount due of \$8,923.23. The notice dated February 25, 1983, which included the period June 1, 1979 through February 28, 1981, assessed tax due of \$22,205.68, plus penalty of \$5,551.42 and interest of \$7,292.90, for a total amount due of \$35,050.00. Notices, also dated June 18, 1982 and February 25, 1983, were issued against Philip Iavino

[sic] individually as an officer of King Bear. The notices issued to Mr. Iovino assessed amounts slightly less than those assessed against King Bear since it was determined that Mr. Iovino was not liable for the use tax allegedly due from King Bear. Mr. Iovino does not contest his individual liability for any taxes due and owing from King Bear.

2. On February 25, 1983, the Audit Division issued notices of assessment review to both King Bear and Philip Iavino [sic] indicating that the tax asserted due had been reduced. The tax asserted due from King Bear in the notice dated June 18, 1982 was reduced from \$5,489.36 to \$5,026.00; while the tax assessed against Mr. Iovino pursuant to the June 18, 1982 notice was reduced from \$3,080.96 to \$2,614.48.

3. On September 1, 1982, King Bear executed a consent extending the period of limitation for assessment for the period June 1, 1979 through August 31, 1979 to December 20, 1982. King Bear executed a second consent, dated December 14, 1982, extending the period of limitation for assessment for the period June 1, 1979 through November 30, 1979 to March 20, 1983.

4. During the period at issue, King Bear operated a gasoline service station and automotive repair shop as a "King Bear Service Center" franchisee. Upon examination, the Audit Division determined that King Bear's books and records were incomplete and inadequate. King Bear did not maintain daily records of the number of gallons of gasoline sold or the selling price and did not provide the auditor with a complete set of purchase invoices or sales invoices. Also, deposits per bank statements exceeded reported taxable sales by \$126,711.00, while purchases per King Bear's books exceeded purchases claimed on Federal tax returns by \$45,182.00.

5. In order to verify the accuracy of reported taxable gasoline sales, the Audit Division obtained information from Alcor Petroleum Corporation

(hereinafter "Alcor") regarding the number of gallons of gasoline purchased by King Bear during the audit period. The information supplied by Alcor was in the form of a handwritten, unsigned summary of the gallons of gasoline purchased by King Bear on a monthly basis. Said summary indicated that King Bear had purchased a total of 197,000 gallons of gasoline from March of 1979 through February of 1981 and, through the use of average selling prices, the Audit Division computed taxable gasoline sales of \$197,492.00.

6. King Bear's purchases were recorded in a disbursements journal without separation as to nature of each expenditure (e.g. purchases of gasoline, repair parts, capital assets or supply items). The auditor reviewed the disbursements journal and determined that \$44,681.00 was spent for repair parts; that \$61,069.00 was spent for capital assets; and that \$268.00 was spent for supply items. Since the auditor was not furnished with purchase invoices or sales invoices she, based on experience and industry average, used an estimated markup of 250 percent to compute taxable repair sales of \$156,384.00 (\$44,681.00 x 350%). Use tax of \$4,906.96 was also assessed on expenditures for capital assets (\$4,885.52) and supply items (\$21.44) based on King Bear's failure to produce purchase invoices for said items. Finally, a sales tax of \$4,396.96 was assessed based on King Bear's bulk sale of its assets. The value of the assets transferred, i.e., \$54,962.10, was determined by reducing King Bear's acquisition of capital assets of \$61,069.00 by 10 percent for depreciation.

7. At the hearing held herein a number of adjustments were conceded by the Audit Division and said adjustments are summarized as follows:

- (a) that King Bear is entitled to a credit of \$400.00 for the bulk sales tax remitted by its escrow agent;

- (b) that purchases of repair parts subject to markup are reduced by \$5,000.00, from \$44,681.00 to \$39,681.00, to allow for an increase in inventory;
- (c) that King Bear's acquisition of fixed assets subject to use tax is reduced from \$61,069.00 to \$16,069.00 to allow for a nontaxable \$10,000.00 franchise fee and a nontaxable \$35,000.00 leasehold improvement. Although not specifically conceded, it is presumed that the Audit Division would also agree to reduce the value of these assets to \$14,462.10 (\$16,069.00 less 10 percent for depreciation) for the purpose of computing the bulk sales tax due on the sale of said assets.

8. On November 21, 1980, King Bear sold its business to Rabal Auto Repair, Inc., an unrelated third party. The sales agreement accurately placed a value of \$5,000.00, out of a total purchase price of \$60,000.00, on the furniture, fixtures and equipment transferred. Attached to the sales agreement was a complete list of all furniture, fixtures and equipment sold.

9. King Bear maintains that the information received by the Audit Division from Alcor concerning the volume of gasoline purchased was incorrect. King Bear's disbursements journal reported total gasoline purchases of \$32,230.00, while the data supplied by Alcor indicated that 197,000 gallons of gasoline was purchased at a cost of \$191,633.00. King Bear submitted in evidence a total of 29 sales invoices which indicated that it purchased 86,000 gallons of gasoline from Alcor at a cost of \$84,187.00. Said invoices were allegedly found just two weeks prior to the hearing held herein and allegedly represent all of King Bear's gasoline purchases for the audit period. These invoices were submitted at face value and were not tied into King Bear's books nor were any corroborating documents or evidence submitted from Alcor.

10. King Bear submitted a group of purchase invoices for repair parts and attached to each purchase invoice was the corresponding sales invoice. Purchases of repair parts in this group totaled \$19,971.52 and sales totaled \$30,697.77,

thus reflecting a markup of 53.717,. Every sales invoice submitted had been altered to the extent that the invoice number had been cut off. Mr. Iovino explained that it was his practice to remove the number from all sales invoices since estimates were given out on sales invoices and it was possible that the customer would not have the repair performed at his place of business. Consequently, even if the numbers had not been removed, King Bear would not have had a complete set of consecutively numbered sales invoices.

11. King Bear also submitted a second group of purchase invoices for repair parts which totaled \$13,330.41, however, this second group was not accompanied by corresponding sales invoices. It is King Bear's position that the \$33,301.93 of purchase invoices for repair parts submitted in evidence (\$19,971.52 and \$13,330.41) represent all of the repair parts purchased during the audit period and not the \$39,681.00 figure computed by the Audit Division. King Bear also maintains that it has established a markup percentage of 53.717, and that this percentage should be applied to parts purchases of \$33,301.93 to determine taxable repair sales. Once again the purchase invoices for repair parts were submitted at face value and were not tied into King Bear's books.

12. After King Bear sold its business to Rabal Auto Repairs, Inc. on November 21, 1980, it was not involved in the sale of gasoline or repair of automobiles. The information received by the Audit Division from Alcor that King Bear purchased gasoline after November 21, 1980 was erroneous.

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 by the tax commission from such information as may be available" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

B. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

C. That King Bear provided inadequate and incomplete books and records for purposes of verifying taxable sales. Accordingly, the Audit Division's use of third party verification of purchases and average selling prices as a basis for determining King Bear's taxable gasoline sales was proper pursuant to section 1138(a) of the Tax Law. The 29 Alcor sales invoices submitted by King Bear as proof of its total purchases of gasoline are insufficient, by themselves, to refute the information received by the Audit Division directly from Alcor. King Bear has, however, proven that it sold its business on November 21, 1980, and that, after said date, it did not purchase or sell gasoline. Accordingly, taxable gasoline sales are to be recomputed, reducing the number of gallons of gasoline sold by 17,000¹ gallons.

D. That King Bear has shown that \$19,971.52 of purchases of repair parts were marked up 53.712 and not 2502 as estimated by the Audit Division. King Bear has failed to show that the remaining purchases of repair parts should not be marked up using the estimated 2502 figure. Furthermore, King Bear has failed to establish that total repair part purchases were \$33,301.93, and not \$39,681.00 as determined by the Audit Division. When a taxpayer's recordkeeping is

1 Since the volume of gasoline sold by Alcor to King Bear was summarized on a monthly basis it was necessary to apportion the 6,000 gallons sold in November 1980 between King Bear and Rabal Auto Repair, Inc. Since King Bear operated the business for two-thirds of the month, a total of 4,000 gallons was apportioned to King Bear (2/3 of 6,000 gallons).

faulty, exactness **is** not required of the examiner's audit (Matter of Meyer v. State Tax Comn., 61 AD2d 223).

E. That King Bear has established that the proper value of the furniture, fixtures and equipment transferred upon the sale of its business was \$5,000.00.

F. That King Bear has failed to establish that reasonable cause existed for its failure to pay the proper sales tax due and, therefore, penalties and interest are sustained. (Tax Law § 1145[a][1][11]•)

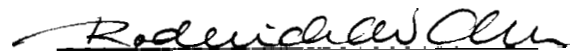
G. That pursuant to Finding of Fact "7", supra, King Bear is entitled to a credit of \$400.00 for the bulk sales tax paid by the escrow agent; that total purchases of repair parts subject to markup are reduced to \$39,681.00 (\$19,971.52 marked up at 53.71% and \$19,709.48 marked up at 250%); and that King Bear's acquisition of fixed assets subject to use tax **is** reduced to \$16,069.00.

H. That the petitions of King Bear 46-16 Kissena Blvd. Corp. and Philip Iovino, Officer of 46-16 Kissena Blvd., Corp. are granted to the extent indicated in Conclusions of Law "C", "D", "E" and "G", supra; that the Audit Division is directed to recompute the notices of determination and demands for payment of sales and use taxes due dated June 18, 1982 and February 25, 1983 consistent with the conclusions rendered herein; and that, except as so granted, the petitions are in all other respects denied.


DATED: Albany, New York

JAN, 16 1987

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER