

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

January 18, 1984

B & K Garage, Inc.
3901 16th Ave.
Brooklyn, NY 11218

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Isaac Sternheim
Turetzky, Sternheim & Co.
114 Liberty St., Suite 204
New York, NY 10006
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
B & K Garage, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 3/1/77-11/30/79. :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon B & K Garage, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

B & K Garage, Inc.
3901 16th Ave.
Brooklyn, NY 11218

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
18th day of January, 1984.

Daniel Parchuck

[Signature]
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
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Period 3/1/77-11/30/79. :
:

AFFIDAVIT OF MAILING

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon Isaac Sternheim, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Isaac Sternheim
Turetzky, Sternheim & Co.
114 Liberty St., Suite 204
New York, NY 10006

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
18th day of January, 1984.

David Parchuck

James P. Chaffin
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK

STATE TAX COMMISSION

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.	:	

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.

DATED: Albany, New York
JAN 18 1984

STATE TAX COMMISSION

Rodwin C. Allen
PRESIDENT

Francis R. Koening
COMMISSIONER

[Signature]
COMMISSIONER

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

January 18, 1984

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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.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984

Roderick W. Chin
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Miller
COMMISSIONER

P 440 976 669

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
B & K Garage - Inc	
Street and No.	
3901 16 Ave	
P.O., State and ZIP Code	
Brooklyn NY 11218	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 440 976 670

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Isaac Sternheim	
Street and No.	
114 Liberty St #204	
P.O., State and ZIP Code	
NY NY 10006	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

B & K Garage, Inc.
3901 16th Ave.
Brooklyn, NY 11218

CERTIFIED
P 440 976 669
MAIL

