STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **S. D. SCOTT PRINTING CO., INC.** | : | DECISION |
| for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1975 through May 31, 1980. | : | |

Petitioner S. D. Scott Printing Co., Inc., 145 Hudson Street, New York, New York 10013 filed an exception to the determination of the Administrative Law Judge issued on December 31, 1987, with respect to its petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1975 through May 31, 1980 (File No. 800180). Petitioner appeared by Hutton & Solomon, Esqs. (Stephen L. Solomon, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter in opposition. Oral argument, at the request of petitioner, was heard on October 17, 1990.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.[1]

[1]The following petitioners, Balan Printing, Inc. (DTA #800161), Tanagraphics, Inc. (DTA #800174), Randall Press, Inc. (DTA #800186), Sterling Roman Press, Inc. and Kenneth Roman, as officer (DTA #800181 and #800184), Prompt Printing Press, Inc. (DTA #800143), and Nicholas Seybert Printing Corp. (DTA #800043), while not formally consolidated for purpose of proceedings before the Division of Tax Appeals, were treated identically by the Administrative Law Judge. All petitioners appeared by the same representative and submitted exceptions containing identical issues and arguments. One brief and oral argument was made on behalf of all petitioners. The decision of the Tribunal for each petitioner is identical except as to details of each petitioner's audit and assessment.

## *ISSUES*

I. Whether the Division of Taxation's failure to treat petitioner's purchases of certain machinery and equipment used in its printing business in the same manner as another taxpayer's purchases were treated was a violation of the equal protection clauses of the New York State and United States Constitutions.

II. Was the Division of Taxation's treatment of petitioner an impermissible retroactive application of a change in interpretation?

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge except for findings of fact "5", "6" and "7" which have been modified.[2] We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

Petitioner, S. D. Scott Printing Co., Inc., was engaged in a printing business located at 145 Hudson Street, New York, New York.

On July 20, 1981, as the result of an audit, the Division of Taxation issued two notices of determination and demand for payment of sales and use taxes due against petitioner covering the period December 1, 1975 through May 31, 1980 for taxes due totalling $95,788.56, plus minimum interest of $23,338.71, for a total amount due of $119,127.27.

Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period December 1, 1975 through May 31, 1980 to September 20, 1981.

The audit disclosed additional sales and use taxes due of $95,788.56 as follows:

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[2]The Administrative Law Judge's original findings "5", "6" and "7" related to various policy statements and decisions issued by the State Tax Commission. For the purpose of clarity, the contents of these findings have been incorporated into the modified and additional findings and the opinion below.

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| (a) Plates and color separations | $102,081.64 |
| (b) Expense purchases | 1,706.56 |
| Total Tax Due | $103,788.20 |
| Less: Credits | 7,999.64 |
| Net Tax Due | $ 95,788.56 |

The plates, color separations and items included under expense purchases were considered production equipment and were held subject to the four percent New York City tax imposed under § 1107 of the Tax Law.

We have made the following modified and additional findings:

> On January 18, 1979, the State Tax Commission adopted a policy limiting the assessment periods for audits of taxpayers in the printing industry for New York City sales and use tax on certain items used in production to periods beginning on or after December 1, 1975. The Commission's statement of its policy was contained in TSB-M-79(7)S issued on March 10, 1979.
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> On May 15, 1980, the State Tax Commission issued an additional policy statement (TSB-M-79[7.1]S) clarifying its position with respect to the sales and use tax on production equipment purchased for use by the printing industry.
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> Matter of B & B Enterprises was issued by the State Tax Commission on February 6, 1985 and published as TSB-H-85(114)S on August 7, 1985.
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> Matter of Martin Lithographers and Cosmos Communications was issued by the State Tax Commission on December 2, 1985 and published as TSB-H-87(1)S in April, 1987. The decision in Matter of Martin Lithographers indicated that it expressed the existing audit policy of the Division of Taxation.

## *OPINION*

The Administrative Law Judge determined that because administrative agencies are free to correct a prior erroneous interpretation of law by overruling a past decision, petitioner was not subjected to unjust and unlawful discrimination in violation of the New York State and United States Constitutions, when it was not accorded the same tax treatment as the taxpayer in Matter of B & B Enterprises.

On exception, petitioner alleges that it received inequitable and unequal treatment compared to that given a similarly situated taxpayer because it is being held liable for sales taxes

and interest charges not borne by the other taxpayer. Petitioner argues that failure to afford equal treatment for similarly situated taxpayers is unlawful discrimination, violative of the New York State and United States Constitutions, regardless of whether the treatment of the other taxpayer was based on an erroneous ruling. Further, petitioner asserts that while an administrative agency may change its interpretation of the law by overruling a past decision, such change should operate prospectively only, and that the Division of Taxation's treatment of petitioner was an impermissible retroactive application of a change in interpretation.

In response, the Division of Taxation relies upon the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge for the reasons stated below.

We find it helpful to first review the applicable provisions of the law, State Tax Commission decisions, and documents containing statements of policy relevant to this matter.[3]

Tax Law § 1107 imposes a New York City sales and use tax of four percent on purchases of machinery and equipment used in the production of property for sale.[4]

On January 18, 1979, the State Tax Commission adopted a policy limiting the assessment periods for audits of taxpayers in the printing industry for New York City sales and use tax as it applied to certain items used in the production of printed and lithographed matter for sale. The Commission's statement of its policy was contained in TSB-M-79(7)S dated March 10, 1979.

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[3]Prior to September 1, 1987, the State Tax Commission headed the Department of Taxation and Finance and was empowered to assess tax, as well as rule on protests to assessments. Pursuant to Chapter 282 of the Laws of 1986, the State Tax Commission was abolished and replaced by separate and independent divisions performing these functions within the Department of Taxation and Finance: the Division of Taxation and the Division of Tax Appeals. The Division of Tax Appeals adjudicates disputes arising from assessments issued by the Division of Taxation. The Division of Taxation performs all other activities associated with tax administration including the administration of statewide and local sales and use taxes. In this decision, we will refer to the "Commission" when discussing an act of the former State Tax Commission and to the Division of Taxation as the "Division" when appropriate to the context.

[4]Such "production equipment" is exempt from New York State sales and use tax pursuant to Tax Law § 1115(a)(12).

The policy limited the assessment of the City sales tax on these items to periods beginning on or after December 1, 1975.

An opinion of the Commissioner of Taxation dated December 15, 1969 was attached to this TSB. This opinion held that finished photographic positives, negatives, plates (metal or otherwise), unexposed plates purchased by a printer or lithographer, and unexposed film, were items used directly and exclusively in the production of tangible personal property for sale by manufacturing, and were therefore exempt from New York State sales and use taxes by Tax Law § 1115(a)(12). However, pursuant to Tax Law § 1210(a), the exemption provided by § 1115(a)(12) did not apply to the New York City sales and use tax. The opinion holds that printers could purchase the above referenced equipment without payment of the statewide sales or use tax but the equipment would be subject to the New York City tax.

Pursuant to New York City Administrative Code §§ 11-604.12 and 11-503(d), respectively, a credit was allowed on a taxpayer's New York City corporation tax or unincorporated business tax for City sales tax paid on purchases of machinery and equipment not subject to New York State sales tax as production equipment pursuant to Tax Law § 1115(a)(12).[5] The New York City corporation and unincorporated business taxes are not administered by the Division.

The effect of the credit mechanism was that printers were required to pay the New York City sales tax on their purchases of production machinery and equipment to the State, and then apply to the City for a refundable credit on their corporate or unincorporated business tax returns.

In TSB-M-79(7.1)S dated May 15, 1980, the State Tax Commission issued a statement supplementing and clarifying its position "with respect to the sales and use tax on machinery, equipment, utilities and labor purchases for use by the Printing Industry." This TSB contained a list of various items of machinery and equipment used in the printing industry categorized by

[5]Tax Law § 1107 was amended to permit the production exemption for New York City sales and use tax effective December 1, 1989 (L 1989, ch 376).

whether the item was taxable or exempt, statewide, in New York City, or locally, other than in New York City.

In addition, certain types of equipment ("composition, typography and progressive proofs"), which prior to June 1, 1980 had been excluded from tax (for all locations) as purchases for resale, were reclassified as exempt from tax as production equipment. As a result, as of June 1, 1980, this type of equipment became subject to the New York City sales tax, although a credit on New York City business taxes would be available for sales tax paid.

In Matter of B & B Enterprises (State Tax Commn., February 6, 1985), the Division of Taxation had assessed use tax on a printer's purchases of "production elements, such as printing, paper, typography, etc." In determining the amount of the assessment, the Division of Taxation used the petitioner's expenses for "engraving, printing, paper, typography/ typesetting, color separations, and artwork." The Commission held, in conclusion of law "A" that sales and use tax could not be imposed on the petitioner's purchases of "printing, paper, typography, etc.", if such purchases were for purposes of resale, and that if the petitioner sold the item it was printing to its customers, it would be entitled to the resale exclusion (Tax Law § 1101[b][4][i][A]).

The decision goes on to hold that the theater programs being produced by the petitioner were being produced for sale and therefore the petitioner was entitled to the resale exclusion for the production elements.

Thereafter, in Matter of Martin Lithographers and Cosmos Communications (State Tax Commn., December 2, 1985 [published in TSB-H-87(1)S in April, 1987]), which also involved 10 other petitioners, the Commission considered two issues:

> "1. Whether artwork, illustration, layouts and similar equipment used in the printing industry should be given the same sales tax treatment as offset plates, lithographic positives and negatives and other similar printing equipment when all of the aforementioned equipment is considered to be machinery and equipment for purposes of the exemption provided for in § 1115(a)(12).

> "2. Whether a waiver of interest should be allowed for late payment of the New York City sales tax on this equipment where a credit for such tax was allowed against the City business taxes."

In its decision, the Commission stated that the artwork and other items, although not listed in the March 10, 1979 TSB, were intended to be covered by the Commission policy limiting the assessment periods for City sales tax on these items to periods beginning on or after December 1, 1975. Some of the items which were the subject of the decision were also the subject of the decision in Matter of B & B Enterprises. As a result, some of the items which were treated as purchases for resale in Matter of B & B Enterprises were treated as production equipment in Matter of Martin Lithographers, specifically: "artwork" and "color separations." The decision states:

> "That Conclusion of Law 'A' in Matter of B & B Enterprises, Inc., State Tax Commission, February 6, 1985, is overruled to the extent that it may be inconsistent with this decision."

Waiver of interest was not allowed because of the lack of statutory authority to do so. In addition, the Commission stated: "Petitioners' argument that they were given no opportunity to avoid the interest imposed is without merit in that had petitioners properly paid the tax in the first instance, there would have been no interest charged."

We deal first with petitioner's assertion that it received inequitable treatment compared to that given a similarly situated taxpayer.

In our view, petitioner has not established that it is similarly situated to the taxpayer in Matter of B & B Enterprises. First of all, one essential element of similarity is whether the taxpayers have been assessed for the same thing. Here, the particular items assessed in each case are not identical. In Matter of B & B Enterprises, finding of fact "2" states that tax was assessed on "all production elements, such as printing, paper, typography, etc." In addition, the finding indicates that the Division of Taxation used the petitioner's "'cost of sales' (including expenses for engraving, printing, paper, typography/typesetting, color separations, and artwork)" to calculate the amount of tax. The audit report for petitioner here indicates that the tax was assessed on

petitioner's purchases of plates and color separations. Petitioner has presented no evidence to support its allegation that the audit in its case is identical in content to that in Matter of B & B Enterprises, and that all the items on which petitioner has been assessed tax were the subject of the decision in Matter of B & B Enterprises. As the sales tax is assessed on an item by item basis, we lack the factual record to conclusively determine whether the taxpayers were similarly situated in this regard.

However, even if petitioner can be considered a taxpayer similarly situated to B & B Enterprises, we do not agree that petitioner must receive the same result received by the taxpayer in Matter of B & B Enterprises, i.e., the cancelation of its assessment. Petitioner contends that it would be against the principles of equitable tax administration for it not to be treated similarly regardless of whether or not the treatment of B & B Enterprises was based on an erroneous ruling. Petitioner relies on Exxon Corp. v. Board of Standards & Appeals (128 AD2d 289, 515 NYS2d 768, lv denied 70 NY2d 614, 524 NYS2d 676) and Deutsche Lufthansa AG v. City of New York (85 Misc2d 719, 379 NYS2d 635, affd 57 AD2d 533, 393 NYS2d 683, lv denied 42 NY2d 805, 398 NYS2d 1026) for its assertion that an administrative agency may not treat similarly situated parties inconsistently whether or not the treatment of the other party was based on an erroneous ruling (Petitioner's Brief to the Tribunal, p. 8).[6]

While petitioner correctly asserts that in general, fairness and policy considerations embodied in administrative law demand that agencies treat similarly situated parties consistently, this principle does not apply where a reasonable explanation for disparate treatment is stated by the reviewing agency (Matter of Field Delivery Serv., 66 NY2d 516, 498 NYS2d 111, 114;

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[6]It should be noted that the facts in Exxon and Deutsche Lufthansa are inapposite to the situation at issue here. Exxon and Deutsche Lufthansa were denied a particular treatment which was generally afforded to other similarly situated parties. Here, petitioner and all the other petitioners in this proceeding have been afforded the same tax treatment. In addition, we have no evidence that all other similarly situated taxpayers were not treated in the same manner. (See Footnote 10 concerning statements made by petitioner's representative in this regard.) Rather than seeking to be treated as all others had been treated, as was the case in Exxon and Deutsche Lufthansa, petitioner seeks the tax treatment erroneously granted to one isolated taxpayer.

Exxon Corp. v. Board of Standards & Appeals, supra; see also, Zelenak, Should Courts Require the Internal Revenue Service to be Consistent?, 40 Tax L Rev 411, 413). Additionally, although nondiscriminatory treatment of similarly situated taxpayers is the model for administrative procedure, it should not be applied so rigidly as to prevent an agency from remedying a mistake (Sirbo Holdings v. Commissioner, 509 F2d 1220, 1222 [2nd Cir]). An administrative agency, like a court, is free to correct a prior erroneous interpretation of the law or to change its policy by overruling a past decision (Matter of Pascual v. State Bd. of Law Examiners, 79 AD2d 1054, 435 NYS2d 387, 388, lv denied 54 NY2d 601, 442 NYS2d 1027; Matter of Leap v. Levitt, 57 AD2d 1021, 395 NYS2d 515, 517, lv denied 42 NY2d 807, 398 NYS2d 1029). However, it must clearly indicate that the standard is being changed and its reasons for doing so (Matter of Field Delivery Serv., supra).

Applying these criteria to the circumstances at issue here, we find that the State Tax Commission was not required to provide petitioner with the same tax treatment afforded the taxpayer in Matter of B & B Enterprises. The actions taken by the Commission met the legal standards required for it to change a previous administrative determination. The Commission explained in Matter of Martin Lithographers, that it was clarifying the policies previously articulated in TSB-M-79(7)S and TSB-M-79(7.1)S so as to prevent inconsistency in tax treatment within the printing industry with respect to items used in production. It clearly stated that it was overruling its decision in Matter of B & B Enterprises, to the extent that the previous decision was inconsistent with these policies. As the Commission's policies on the tax treatment of these production items had been in effect prior to its decision in Matter of B & B Enterprises, it is clear

that the Commission was overruling an erroneous conclusion in an individual case.[7] As the court stated in Sirbo Holdings v. Commissioner (supra, at 1222):

> "While even-handed treatment should be the Commissioner's goal, cf. International Business Machines Corp. v. United States, 343 F.2d 914, 170 Ct.Cl. 357 (1965), cert. denied, 382 U.S. 1028, 86 S.Ct. 647, 15 L.Ed.2d 540 (1966), perfection in the administration of such vast responsibilities cannot be expected. See Davis, Administrative Law Treatise s 17.07, at 600 (1970 Supp.). The making of an error in one case, if error it was, gives other taxpayers no right to its perpetuation. See Wagner v. United States, 387 F.2d 966, 968, 181 Ct.Cl. 807 (1967). Cf. Snowden v. Hughes, 321 U.S. 1, 15, 64 S.Ct 397, 88 L.Ed. 497 (1944) (concurring opinion of Mr. Justice Frankfurter)."

We deal next with petitioner's assertion that while the Division could change its interpretation by overruling its prior decision, the Division retroactively changed its policy in an unlawful manner because it affected some parties adversely.

Petitioner's argument concerning retroactivity is simply not applicable as the Commission decision in Matter of Martin Lithographers was not a retroactive change in interpretation.[8] The decision in Matter of B & B Enterprises was contrary to the State Tax Commission's previously enunciated position. The decision in Matter of Martin Lithographers clarified and reiterated the Commission's policies previously articulated in its TSBs, and additionally, acknowledged an error made by the Commission in the Matter of B & B Enterprises.

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[7]The State Tax Commission's decision in Matter of Harrison Servs. (State Tax Commn., January 16, 1981 [published in TSB-H-81(31)S], affd Matter of Harrison Servs. v. State Tax Commn., 124 AD2d 251, 508 NYS2d 63) is indicative of the Commission's policy regarding the tax treatment of production items not used primarily for resale and is consistent with its policies as articulated in the TSBs and Matter of Martin Lithographers. This decision provides further support for a conclusion that the decision in Matter of B & B Enterprises was an isolated error.

[8]In any case a retroactive change in the Division's interpretation of the Tax Law would not be per se invalid if not carried so far back as to be "palpably unjust", (Matter of American Tel. & Tel. Co. v. State Tax Commn., 61 NY2d 393, 474 NYS2d 434, 439). This is not a case in which petitioner can argue that it is entitled to rely on an interpretation which has been consistent over an extended period of time (cf., Matter of Howard Johnson Co. v. State Tax Commn., 65 NY2d 726, 492 NYS2d 11, revg, 105 AD2d 948, 481 NYS2d 909 [where the Court held that the petitioner was entitled to rely on the Commission's policy which had been in effect for approximately twenty years including during the tax years in question, notwithstanding the literal language of its regulation to the contrary]).

Additionally, we do not see that petitioner has been subjected to an impermissible retroactive application of an administrative change in interpretation, even if Matter of Martin Lithographers could be characterized as such a change. In 1981, as a result of an audit, petitioner was issued two notices of determination and demand for payment of sales and use tax for the taxable periods 1975 through 1980. Petitioner failed to pay all the sales tax and interest charges due either at the time these amounts originally became due during the years 1975 to 1980, or at the time the notices of determination were issued.[9] Clearly petitioner did not rely to its detriment on the decision in Matter of B & B Enterprises issued in 1985, as a basis for failing to carry out its statutory duty to pay sales and use tax on purchases made more than five years prior to that decision (see, Matter of ADT Co. v. New York State Tax Commn., 113 AD2d 140, 495 NYS2d 274, 276-277). Nor did the Commission apply the Matter of Martin Lithographers decision retroactively to petitioner as petitioner was already being treated consistently with its decision in Matter of Martin Lithographers (supra) at the time the notices were issued.

As petitioner failed to timely remit the sales and use tax due, the Division cannot be estopped from collecting taxes lawfully imposed and remaining unpaid where the State is acting in its governmental capacity (Matter of Manhattan Cable Tel. v. State Tax Commn., 137 AD2d 925, 524 NYS2d 889, 891, lv denied 72 NY2d 808, 534 NYS2d 666; Turner Constr. Co. v. State Tax Commn. 57 AD2d 201, 394 NYS2d 78, 80; see also, National Elevator Indus. v. State Tax Commn., 49 NY2d 538, 427 NYS2d 586, 591), unless to prevent some manifest injustice (Matter of Wolfram v. Abbey, 55 AD2d 700, 388 NYS2d 952, 954; Matter of Maximilian Fur Co., Tax Appeals Tribunal, August 9, 1990). No such injustice is apparent here.

Finally, petitioner alleges that since B & B Enterprises received a beneficial tax determination, the failure to afford equal treatment to similarly situated taxpayers is unjust

[9]It should be noted that the taxability of "plates" for which petitioner was assessed was specifically discussed in the Commissioner's opinion issued in 1969. Under those circumstances, petitioner's failure to pay the tax on this item when originally due is inexplicable, and certainly, not excusable.

discrimination in violation of the equal protection clauses of both the New York State and United States Constitutions. We disagree.

Administrative actions and classifications are subject to equal protection review (see, Matter of Doe v. Coughlin, 71 NY2d 48, 523 NYS2d 782, 787) under both the United States Constitution (US Const 14th amend) and the New York State Constitution (NY Const, art I, § 11). However, "the prohibition of the Equal Protection Clause goes no further than the invidious discrimination" (Williamson v. Lee Optical of Okla., 348 US 483, 489). Thus, unless the State draws distinctions between similarly situated taxpayers whereby it classifies on the basis of a suspect class or impairs a fundamental right, equal protection only requires that such uneven treatment be rationally related to the achievement of a legitimate governmental purpose and not be palpably arbitrary (see, Town of Tonawanda v. Ayler, 68 NY2d 836, 508 NYS2d 171; Trump v. Chu, 65 NY2d 20, 489 NYS2d 455). In addition, within the field of taxation more than in other fields, governmental authorities possess even more flexibility in making classifications and drawing lines which in their judgment produce reasonable systems of taxation (see, Krugman v. Board of Assessors, 141 AD2d 175, 533 NYSd 495, 501; Shapiro v. City of New York, 32 NY2d 96, 343 NYS2d 323, 329, appeal dismissed for want of a substantial fed. question 414 US 804, pet for rehr denied, 414 US 1087; see also, Madden v. Kentucky, 309 US 83, 87-88). A denial of equal protection will arise only where a purposeful, invidious and intentionally unfair discrimination in the enforcement of a statute is present (Di Maggio v. Brown, 19 NY2d 283, 279 NYS2d 161, 166-167; People v. Friedman, 302 NY 75, appeal dismissed for want of a substantial fed. question 341 US 907; Matter of Doe v. Coughlin, supra). Equal protection does not require identity of treatment. It only requires that classification rest on some real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary (Walters v. St. Louis, 347 US 231, 237).

Petitioner alleges that it should not be required to pay sales and use taxes since a similarly situated taxpayer was not required to pay such tax.[10] Here, the Division has not disputed that B & B Enterprises was treated differently. However, the Division contends that by its decision in Matter of Martin Lithographers it was overruling an erroneous decision in conflict with its prior interpretation of the law and clarifying its previously articulated policies. The Division's determination not to perpetuate its mistakes by treating petitioner (and other similarly situated taxpayers) as it treated B & B Enterprises does not amount to invidious and purposeful discrimination. As such, the Division's treatment of petitioner was rationally related to the achievement of a legitimate governmental purpose and therefore within the parameters of the constitutional requirements of equal protection.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner S. D. Scott Printing Co., Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of S. D. Scott Printing Co., Inc. is denied; and

[10]Petitioner's representative has made allegations concerning the tax treatment of B & B Enterprises for years other than those which were the subject of the decision in Matter of B & B Enterprises. (See, Petitioner's Brief to the Tribunal, p. 4; Petitioner's Written Statement submitted at Oral Argument, p. 2.) Such statements are improper as petitioner has presented no evidence in support of these allegations. Petitioner waived a hearing before the Administrative Law Judge and submitted this matter for determination based on the Division of Taxation's file and memorandum of law. No request to reopen the record for submission of additional or newly discovered evidence was made. As such contentions require for their consideration facts not in the record, statements and arguments concerning the treatment of B & B Enterprises for years not covered by the State Tax Commission's decision and all other factual allegations made by petitioner for which no proof has been presented (see, e.g., Petitioner's Written Statement submitted at Oral Argument, pp. 3, 5 and 6) have not been considered by the Tribunal.

4. The notices of determination dated July 20, 1981 are sustained.

DATED: Troy, New York
April 17, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Maria T. Jones
Maria T. Jones
Commissioner