STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **MODERN REFRACTORIES SERVICE CORPORATION** 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, 1980 through November 30, 1982.	:	DECISION DTA NO. 800922
In the Matter of the Petition **MODERN REFRACTORIES SERVICE CORPORATION AND ROBERT KISH, AS OFFICER** 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, 1982 through February 28, 1985.	:	

Petitioner Modern Refractories Service Corporation, ("the corporation"), 747 Erie Avenue, North Tonawanda, New York 14120, filed an exception to the determination of the Administrative Law Judge issued on February 25, 1988 with respect to its 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, 1980 through November 30, 1982 (File No. 800922).

Petitioners Modern Refractories Service Corporation and Robert Kish, as officer, 747 Erie Avenue, North Tonawanda, New York 14120, filed an exception to the determination of the Administrative Law Judge issued on February 25, 1988 with respect to their petitions 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, 1982 through February 28, 1985 (File No. 803011).

Petitioners appeared by Albrecht, Maguire, Heffern & Gregg, P.C. (Arthur A.Russ, Jr., Esq., of counsel). The Division of Taxation appealed by William F.Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioners submitted a brief on exception. The Division filed a letter in response to petitioners' brief. Neither party requested oral argument.

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

ISSUES

I. Whether petitioners failed to substantiate a certain sale they claim is exempt from sales tax.

II. Whether petitioners are liable for tax on certain capital asset purchases.

III. Whether the Administrative Law Judge correctly determined that certain purchases made by petitioner in connection with its "Hot Suit System" did not qualify for the research and development exemption as set forth in Tax Law section 1115(a)(10).

IV. Whether the Administrative Law Judge properly determined that certain other recurring purchases, apart from those related to the "Hot Suit," were subject to sales tax.

FINDINGS OF FACT

We find the facts as stated in the determination of the Administrative Law Judge and such facts are incorporated herein by reference, except that we modify finding of fact "24" as indicated below. We also find certain additional facts as indicated below.

To summarize these facts, petitioner Modern Refractories Service Corporation was incorporated in 1975; its predecessor began doing business in 1973. It is and was at all times

relevant herein engaged in the business of installing and servicing refractory products; that is, gunite work and brick work in heat treat furnaces, forging furnaces, coke ovens and blast furnaces. Petitioner's primary customers are coke companies and utility companies.

The instant matter involves notices of determination and demands for payment of sales and use taxes due issued following two separate audits. The particulars of each audit shall be discussed separately.

FIRST AUDIT

On December 5, 1983, following a detailed audit of the records of petitioner Modern Refractories Service Corporation, the Division of Taxation issued to said petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, asserting $9,566.11 in tax due, plus interest, for the period March 1, 1980 through November 30, 1982. Following a prehearing conference, the Division subsequently adjusted the tax asserted due in respect of said notice to $9,395.36, plus interest. On audit, the Division found tax due in three areas: unsubstantiated exempt sales, capital asset purchases and recurring purchases.

With respect to the unsubstantiated exempt sales, the Division determined that the corporation had $4,137.12 in additional unsubstantiated exempt sales taxable at 7 percent and $290.00 in additional unsubstantiated exempt sales taxable at 3 percent, resulting in additional tax due of $298.30.

With respect to the capital asset purchases, the Division asserted tax due on two such purchases which totaled $19,400.00, with resulting tax due thereon of $1,358.00. Of the $19,400.00 in capital asset purchases, $18,500.00 was spent on the purchase of a compressor. This compressor had been rented by the corporation for a period of time prior to its purchase

thereof. The corporation had paid sales tax on the rental payments of the compressor; it produced no evidence to show that sales tax had been paid on the purchase of the compressor.

The balance of the deficiency found on the first audit, $7,739.06, represented tax asserted due on certain recurring purchases made by petitioner amounting to $110,558.37. These purchases may be further classified as purchases related to the use of the corporation's "Hot Suit System" and purchases not related to the use of the "Hot Suit System".

In or about 1979, petitioner Robert Kish, the president of Modern Refractories, was asked by a customer whether Modern Refractories could develop a system whereby a customer's furnaces or ovens could be serviced while still hot. This led the corporation to begin the development of its "Hot Suit System", a "suit" of protective material which shields and cools the wearer's body, while also providing the wearer with sufficient air to breathe.

The "Hot Suit System" was developed primarily through on-the-job, trial-and-error testing. As to this testing, we find in addition to the facts found by the Administrative Law Judge that petitioner performed cleaning services at the Donner-Hanna Coke plant prior to and during the development of the "Hot Suit." We also find that petitioner developed and experimented with the "Hot Suit" while operating on these same coke ovens.

Petitioner Robert Kish and two other individuals eventually patented the "Hot Suit System" in 1984. Prior to the development of the "Hot Suit System", the standard method of refractory servicing and repair involved the complete shutdown of a customer's facility in order to allow the furnaces or ovens to cool and to enable such servicing to proceed. This cooling down and subsequent start-up required a significant amount of time and therefore caused a significant loss of production. The "Hot Suit System" allowed repairs and servicing to be done

without an extended interruption in the customer's production, thereby saving the customer money. Included among the purchases related to the "Hot Suit System" were hoods, pants, coats, respirators, air intake valves, goggles and air hoses.

Included among the recurring purchases not related to the use of the "Hot Suit System" were rentals of equipment used in performing services and purchases of miscellaneous equipment.

SECOND AUDIT

On February 3, 1986, again following a detailed audit of the records of petitioner Modern Refractories Service Corporation, the Division issued two notices of determination and demands for payment of sales and use taxes due for the period December 1, 1982 through February 28, 1985, with each notice asserting $15,853.43 in tax due, plus penalty and interest. The notices were issued to Modern Refractories and to Robert Kish, as officer of Modern Refractories. Mr. Kish was president of the corporation throughout the period at issue herein, including both the period for which he was issued a notice of determination and the period encompassed by the December 5, 1983 notice. He did not dispute that he was a person responsible to collect tax on behalf of Modern Refractories during the relevant period. On audit, the Division found tax due in the following areas: duplication of a credit taken on sales tax returns, capital asset purchases, unsubstantiated exempt sales and recurring purchases.

The Division asserted tax of $2,039.71 due on certain capital asset purchases. Of this portion of the assessment, $1,040.48 represented tax due on the corporation's purchase of the equipment of another corporation; $685.17 represented tax dqe on the purchase of an

Oldsmobile Delta 88; $273.00 was for tax due on an initial charge on an automobile lease/purchase option; and $41.06 was for tax due on the purchase of a portable heater.

The Division also asserted $5,724.21 in tax due for unsubstantiated exempt sales during the audit period. This portion of the deficiency was based upon petitioners' failure to produce an exemption certificate for certain sales, misapplication of exemption certificates to the labor portion of the charges for certain sales, and the disallowance of an exemption certificate in one case. Petitioners produced exempt use certificates for four of the unsubstantiated exempt sales. The tax asserted due for these transactions, however, was in respect of either installation charges not covered by the exempt use certificate or for local sales and use taxes not covered by the certificate.

Among the sales determined to be "unsubstantiated exempt" was a job performed by the corporation for Taylor Instrument, a division of Combustion Engineering, Inc. The corporation issued an invoice, dated December 31, 1984, to Taylor Instrument in the amount of $64,315.77. The Division asserted $4,502.10 in tax due on this job. At the time of the completion of this job, the customer did not issue a Certificate of Capital Improvement. Subsequently, however, the customer did issue such a certificate to the corporation in respect of the work it performed. Also among the unsubstantiated exempt sales were six invoices issued to BKK Consulting Corporation. These invoices represented payments by the corporation on BKK's behalf for expenses incurred by BKK.

Finding of fact "24" is modified to read as follows:

> Prior to the period at issue, petitioner Robert Kish and two other individuals had formed BKK, a corporation whose primary business was experimental work involving the removal of platinum from catalytic converters and gold from quartz. Petitioner Robert Kish caused Modern Refractories to pay certain expenses incurred by BKK. Some of these expenses included the purchase by the corporation of certain equipment that was ultimately destined for BKK. BKK was sent invoices detailing the type of and price for the equipment (Petitioner's Exhibit 11), BKK paid the corporation on these invoices when money became available, and when BKK dissolved, whatever equipment BKK had was taken by the corporation in satisfaction of unpaid invoices. The Division assessed tax in the amount of $1,404.48 on the acquisition of this equipment by the corporation from BKK, not on the acquisition by BKK.

Finally, the Division asserted $7,070.12 in tax due on recurring purchases made by the corporation. This component of the deficiency was further classified as purchases for self use by the corporation in performing services for customers ($3,741.69 in tax due) and purchases of materials installed as part of capital improvements ($3,328.43 in tax due).

Among the recurring purchases of Modern Refractories upon which the Division asserted tax was a $200.00 payment to the National Industrial Maintenance Union. This payment was a membership fee.

We additionally find that the Administrative Law Judge permitted petitioner to add additional invoices to the record up to May 28, 1987 and that petitioner did so, including an affidavit summarizing their contents. The Division had until June 18, 1987 to comment upon petitioner's affidavit and chose not to.

We find that amongst this later evidence are invoices corresponding to Divisionts Exhibit R, page 1, column 21 (Petitioner's affidavit, Exhibit B; Buffalo Building's Supply Co., Inc., ("Buffalo"), Invoice No. B 11248, and Invoice No. 2571, hereafter "return invoices"). The first invoice, "B-11248," shows the purchase of equipment by petitioner from Buffalo on October 17,

1983 amounting to $102.48 on which no sales tax was paid. Also marked on this invoice is the word "Credit" and the numbers "102.48" and "11-1-83". Invoice "B 11248" does not indicate on its face why a credit was given to petitioner. Invoice "2571" shows a credit given to petitioner for the return of identically described equipment to Buffalo on October 31, 1983, but does not specify the amount of this credit or the date on which the goods returned were originally purchased.

We also find that invoices were submitted corresponding to Division's Exhibit R, page 2, columns 5, 8, 9, 12, 14 and 17 (Petitioner's Affidavit, Exhibit B, Pine Hill Concrete Mix Corp., Invoice C-0037538, Peerless Mill Supply Co., Inc., Invoice P-50700S [Inadvertently marked "Col 9"], Industrial Power and Lighting Corporation, Invoice B-9908AC, John P. O'Leary, Inc., Invoice A-11164, Rupp Rental, Invoice 1060692, Downing Container Service, Invoice dated 05/25/84; together referred to as "sales tax payment invoices") which, on their face indicate both a sales tax amount and the handwritten letters "pd." Next to the letters "pd" for each are what appears to be a handwritten check number. Each of these invoices correspond exactly, with respect to its invoice number, vendor and amount, to the Division's Exhibit R. The auditor assessed tax for each of these purchases on the petitioners' records because the invoice was missing at the time of the audit.

We also find that petitioner submitted four invoices corresponding to Division's Exhibit R, pg. 2, columns 13 and 24, pg. 5, column 6, and pg. 2, column 20 (Petitioner's Affidavit, Exhibit B; International Vermiculite, Invoices 2211 and 1800 [hereinafter "travel invoices"], Glynn Matthews, Invoice dated March 30, 1983 and Yenton Advertising Agency, Invoice 2446). The first two show invoices for service work, part of which were allocated to travel expenses. The

third pertains to a $140.00 charge paid for photographic services rendered to petitioner. The fourth is an invoice for the rough and final versions of an eight (8) page brochure. None of the four indicate that New York sales tax was paid.

We also find that invoices were submitted corresponding to Division's Exhibit R, page 4, columns 6-11; page 5, column 8; page 7, columns 21-26; and page 8, column 16 (Petitioner's Affidavit, Exhibit B; California Contractors Supplies, Inc., Invoices AP 37661, AP 18310, AP 08286, AP 05173, AP 42495, AM 894318, Rupp Rental And Sales Corp., Invoice 1042461, and California Contractors Supplies, Inc., Invoices AT 88102, AT 47051, AT 84576, AT 34944, SA T48161, AT 12456 [hereinafter "transportation invoices"]) and page 4, columns 24-25 (Master Equipment Center, Invoices 20088, 20140 ("Master Equipment invoices"]). We note that the auditor did not assess tax upon the handling charge for the California Contractors Supplies, Inc., Invoice SA T48161 (Division's Exhibit R, page 7, column 25, value of $83.25 versus $95.40 with the handling charge included). Together the "transportation invoices," without Invoice SA T48161, total $3,375.22, of which $411.08 was for transportation and handling charges. The "Master Equipment invoices" total $334.51, of which $44.00 was assigned to labor and clean-up charges.

We also find that on Division's Exhibit R two invoices are duplicated. The first is from IVC, invoice number 2115, for the amount of $550, tax of $38.50. This invoice is listed on Exhibit R at page 2, line 7 and again at page 8, line 23. The second duplicate is from Master Equipment, invoice number 4920 in the amount of $600, tax of $42.00. This invoice is listed on Exhibit R at page 7, line 14 and again on page 8, line 10.

OPINION

The Administrative Law Judge granted the Division's motion to amend the pleadings to conform them to the evidence in respect of its answer to the petition filed for the first of petitioners' audits and held: (1) petitioner was not entitled to the research and development exemption for its "Hot Suit," (2) a customer's submission of a capital improvement certificate at some time after the job's completion qualified petitioner for the capital improvement exemption, (3) the assessment on petitioner's payment of a membership fee for a national union was improper, and (4) petitioners failed to meet their burden of demonstrating that the Division's remaining assessments were improper.

Petitioners' numerous assertions before this Tribunal have been summarized in the statement of the issues for this case. Generally, petitioners assert that they substantiated to the Administrative Law Judge that certain items upon which tax was assessed were either exempt or that tax had already been paid. All of the amounts challenged by petitioners on exception arise from the second audit, except for purchases with respect to the "Hot Suit" which arise in both audits. The petitioners do not challenge the Administrative Law Judge's determination to allow the Division to amend its answer at the hearing, thereby increasing the amount of the deficiency at issue with respect to the first audit. We address petitioners' exception item by item.

We deal first with petitioners' unsubstantiated exempt sales. Petitioners claim that personal property sold to Foster Wheeler Energy Corp. ("FWEC") was an out-of-state sale exempt from taxation. We conclude it was not. Petitioner testified, "We made the brick, and then we shipped them to (FWEC in) New Hampshire." Given that "a sale is taxable at the place where the tangible personal property or service is delivered. (20 NYCRR 526.7[e][1]), petitioner's testimony supports the claim to this exemption. However, no other evidence substantiating this testimony

is in the record. As the witness' credibility is at issue, and since we accord substantial deference to the Administrative Law Judge to assess witness credibility, we decline petitioner's invitation to hold that he has sufficiently met his burden of showing that the transfer of possession did not take place in New York (Tax Law § 1132[c], 20 NYCRR 3000.10[d][4]).

Petitioners also assert that the amount of $483.49 sent to the corporation from BKK in response to invoices sent by the corporation to BKK were non-taxable loan payments and not taxable sales receipts within the meaning of Tax Law section 1105(a) (see also, 20 NYCRR 526.6[a]). Since as found above, the record indicates that the corporation purchased certain equipment and subsequently transferred it to BKK, petitioner has not established that the amount of $483.49 was not payment for the transfer of tangible personal property.

We turn next to the capital asset purchases. Petitioners assert, with respect to tax assessed in the amount of $1,404.48 that this was improperly assessed on the acquisition of property by the corporation from BKK in satisfaction of a debt, for the purpose of resale. Petitioners cite to 20 NYCRR 526.7(a)(3) for the proposition that it exempts from tax the transfer of equipment from BKK, upon its dissolution, to the corporation for the purpose of resale or for the purpose of debt repayment. The resale exclusion, Tax Law section 1105(a), 20 NYCRR 526.6(c)(1), could not be recognized here unless the corporation had given a properly completed resale certificate (20 NYCRR 526.6[c][2], 20 NYCRR 532.4[c]). No evidence that such a certificate was given is in the record, nor is there any other evidence that the transfer was for resale.

As to the petitioners' argument that this transfer was non-taxable debt repayment, the regulation to which petitioners cite, 20 NYCRR 526.7(a)(3), is adverse to them. In a case such

as this, where no resale certificate for the equipment was given to BKK for the equipment transferred co the corporation, the regulation includes within the term "sale" (Tax Law § 1101[b][5]) repossession actions by a mortgagee taken not for the purpose of resale. "Such (a repossession) transfer may be effected in any manner. including, but not limited to voluntary relinquishment, assignment or seizure by the mortgagee" (20 NYCRR 526.7[a][3]). Having found as a fact that the corporation took the goods from BKK upon its dissolution in satisfaction of the outstanding debt due petitioner, we conclude that this transfer was taxable as a sale "under the broader definition of a retail sale" (Goldman v. Chu, 128 AD2d 1014; Tax Law § 1101[b][5]; 20 NYCRR 526.7[a][3]).

Petitioners' final exception concerning capital asset purchases pertains to sales tax assessed on the purchase of an Oldsmobile car. Petitioners submitted a "Receipt for Payment of Sales Tax," Form ST-176 (5/82), within his brief on exception (Petitioner's Brief, Exhibit 0) as evidence that the Department of Taxation and Finance deemed no sales tax to be due upon the Oldsmobile's registration in New York. However, petitioners failed to insert this item into the record as an exhibit (20 NYCRR 3000.13[a][3]) and we cannot now consider it in our determination (20 NYCRR 3000.11[e][1]). In any event, this receipt merely indicates that petitioner paid no tax on the registration of the vehicle, apparently claiming a credit or exemption. Having no basis in the record to conclude otherwise, we hold that petitioners have failed to meet their burden on this assessment.

We turn now to the research and development of petitioner's "Hot Suit." Tax Law section 1115(a)(10) provides an exemption from sales tax for "tangible personal property purchased for

use or consumption directly and predominantly in research and development in the experimental or laboratory sense." To benefit from this exemption, petitioner not only has the burden of proof generally (Tax Law § 1132[c]), but must overcome the exemption's application being construed against him (Matter of Grace v. State Tax Commn., 37 NY2d 193, 196). However, our "interpretation should not be so narrow and literal as to defeat its settled purpose" (Matter of Grace v. State Tax Commn., supra, at 196). In dispute here are the terms "directly," "predominately" and “experimental or laboratory sense" as intended by Tax Law section 1115(a)(10). While petitioner would fail to gain the exemption if any one of these elements were unsatisfied, we conclude that he has failed to meet his burden for each of them.

"Direct use . . . means actual use in the research and development operation. Usage in activities collateral to the actual research and development process is not deemed to be used directly in research and development" (20 NYCRR 528.11[c][1]). Petitioner argues that we should find "direct use" for at least part of the audit period. It asserts that the Administrative Law Judge errantly failed to distinguish the time up until the end of 1981 when the "Hot Suit" was being developed and allegedly no coke oven cleaning services were performed, from the remaining period, when services were admittedly performed but further research and development to counter the Suit's wear from abrasive walls was conducted (Petitioner's Brief, pp. 3-6). Both periods, according to petitioner, fall within the applicable exemption.

The record contradicts this view. Mr. Kish stated that petitioner the corporation had been performing services at Donner-Hanna during the development of the "Hot Suit" and that this work involved experimenting with it. Having admitted that its research of the "Suit" and performance of cleaning services occurred during the same time period, petitioner then had the

added burden to demonstrate at what times research occurred independent of the coke oven cleaning work in order to meet the "direct use" requirement. As between petitioner's brief, through which petitioner attempts to insert facts into the record favorable to its case to meet its burden, and the hearing transcript, only the transcript is a part of the record (20 NYCRR 3000.13[a][2]) under our review upon which our determination can rest (20 NYCRR 3000.11[e)[1]). Petitioner thus failed to establish its "direct use" of the "Hot Suit" materials.

Having established that petitioner's research and development took place jointly with its coke oven cleaning work, the phrases "predominately" and experimental or laboratory sense" are easily dismissed. "Predominately" means use "in research and development . . . over 50 percent of the time" (20 NYCRR 528.11[c][2]). As the record indicates no particular time at which the materials were used solely for research and development, they cannot in any way be said to have been used for that purpose "over 50 percent of the time."

Finally, only research and development "in the experimental or laboratory sense," is exempted. Tax Law section 1115(a)(10) does not expressly state that research and development "in the experimental or laboratory sense" cannot occur simultaneously with production or the furnishing of paid services. However, some practices more akin to research and development than the outright performance of paid services, such as "ordinary testing or inspection of materials or products for quality control" (Tax Law § 1115[a][10]), are without the statutory definition of "research and development." We would turn the statute's plain meaning on its head to hold that petitioner's "Hot Suit research", when done concomittantly with its cleaning service, could possibly be performed "in the experimental or laboratory sense."

Contrary to petitioner's assertion, we do not conclude that there was no research and development phase for the development of the "Hot Suit" but only that petitioner has not proved when this research and development phase occurred.

Last, we address the corporation's recurring purchases for which the Administrative Law Judge determined petitioner failed to meet its burden of proof. Petitioner was allowed until May 28, 1987, to submit additional invoices and an affidavit summarizing those invoices. The Division had until June 18, 1987 to comment upon that evidence. Petitioner did submit an affidavit with numerous invoices, presumably within the time required. Though they have not been marked as exhibits, we find that the invoices are as such within 20 NYCRR 3000.13(a)(3). The Division made no response to this additional evidence.

After examining its affidavit we conclude that, through its "return invoices" previously described, petitioner has met his burden as to the return of two items of merchandise purchased on October 17, 1983 and returned within the same reporting period on or about November 1, 1983. Inasmuch as invoice "Bll248" does not indicate why a credit was given to petitioner and invoice "2571" does not specify the amount of the credit given or the date on which the goods returned were originally purchased, we do not hold that either invoice, when taken alone, would necessarily have been sufficient for petitioner to have met his burden. However, we conclude that these return invoices, when read together, demonstrate that petitioner returned these items within the same reporting period in which they had been purchased. The Division's assessment of $7.17 on this return was therefore improper (Tax Law § 1132[e], see also 20 NYCRR 534.6[a)[1]).

Petitioner was assessed $149.99 on purchases for which the auditor did not find invoices establishing payment of the sales taxes due. Petitioner later supplied its "sales tax payment invoices" already detailed. The information supplied on the face of each sales tax payment invoice, i.e., the sales tax amount, the letters "pd" and check numbers, is all relevant evidence toward proof that the sales taxes were paid. Further, since the auditor originally assessed tax on these purchases only because the invoices were missing and since the invoices now supplied conform in every detail to the auditor's schedules (including vendor, amount and invoice number), we conclude that petitioners were improperly assessed $149.99 in tax on these purchases.

Petitioner next excepts to the assessment for that portion of certain invoices as stated on the "travel invoices" already described pertaining to the cost of paying for a service person to travel to and from the work site. With respect to this assertion, we note that "receipt" is defined to include "the amount of the sale price of any property and the charge for any service . . without any deduction for expenses . . ." (Tax Law § 1101[b][3], 20 NYCRR 526.5[e]). We also note that examples 1 and 2 of 20 NYCRR 526.5(e) both specifically include travel expenses as part of an overall receipt for property or services subject to tax. We concur with the cited regulations and conclude that the petitioner has not satisfied its burden to prove that these receipts were not subject to tax.

As to the Glynn Matthews invoice (Petitioner's Affidavit, Exhibit B, page 5, column 6), in the amount of $140.00 for photographic services, we also conclude that petitioners have not sustained their burden of proving that this amount was not subject to tax as a sale of tangible personal property (photographs) or for the services of processing, printing or imprinting tangible

personal property (Tax Law §1105[c][2]). The submitted receipt, which at best only informs us that photographic services were rendered, does not begin to rebut this assessment.

Next, petitioner excepted to the Division's assessment of tax on the rough and final versions of a brochure for which the typesetting, art and camera work was done by the Yewton Advertising Agency, a Canadian firm (Petitioner's Affidavit, Exhibit B, page 2, column 20). Tax Law section 1105(c)(1) specifically excludes advertising services from tax. The exclusion, however. "is applicable only to sales of information," such as magnetically recorded data versus the actual tape on which the information is stored (Matter of Mertz v. State Tax Commn., 89 AD2d 396, 397-398). "Advertising services consist of consultation and development of advertising campaigns, and placement of advertisements with the media without the transfer of tangible personal property" (20 NYCRR 527.3[b][5]). However, "sales of tangible personal property such as layouts, . . . catalogs..... by an advertising agency for its own account are taxable sales of tangible personal property" (20 NYCRR 527.3[b][5]). The mere submission of this invoice, without more, does not begin to distinguish the brochures as other than tangible personal property sold within New York by an advertising agency for its own account, as part of a retail sale.

Petitioner also excepts to the $420 assessment which petitioner alleges was for the processing of personal property by Gerald Hider furnished by William Gold for whom petitioner apparently performed brokerage services in connecting these parties to this transaction. Petitioner claims it made no payments to Gerald Hider and that it acted only as a "conduit" between Gerald Hider and William Gold, for which it earned a 10 percent commission. First, petitioner apparently did receive $6,666.52 from William Gold from which it did, in fact, make a

payment of $5,999.87 to Gerald Hider, retaining the difference as its commission (Petitioner's Affidavit, Exhibit B, page 2, column 21).

The processing by Hider of tangible personal property furnished to him by Gold, but not purchased by Gold for resale, would be a taxable service (Tax Law § 1105[c][2]). Tax Law section 1101(b)(8)(ii) specifically provides that the tax commission may, in its discretion, treat any representative as the agent of the vendor for whom he solicits business and may, in its discretion, treat such agent as the vendor jointly responsible with his principal for the payment over of the tax. (See, 20 NYCRR 526.10[a][10].) Here, petitioner's own affidavit indicates petitioner collected the entire taxable service charge, seemingly as an agent acting on behalf of its principal Gerald Hider, thereby making it liable for the sales tax due on the transaction. (Names In The News v. State Tax Commn. , 75 AD2d 145, 146; Alan Drey Company, Inc. v. State Tax Commn., 67 AD2d 1055, 1056; In the Matter of Jericho Boats of Smithtown v. State Tax Commn. , October 20, 1988, App. Div. 3rd Dept.) Accordingly, even accepting petitioners' affidavit as an accurate statement of facts, petitioners have not sustained their burden of proving that the tax was improperly assessed on this amount.

Petitioners next assert that they were improperly assessed tax in the amount of $1,050.00 on the rental of equipment used exclusively outside New York State. Since the record does not substantiate this claim, tax on this portion of the assessment is sustained.

Next petitioners claim that they were improperly assessed tax on the transportation of certain rented equipment and on the clean-up and repair of certain rented equipment. The "transportation invoices" described in the facts indicate that tax was assessed on certain separately stated transportation charges totalling $411.08. Since separately charged handling or

transportation charges are excluded from the definition of taxable receipt (Tax Law § 1101[b][3]), 20 NYCRR 526.5[g]), tax was improperly assessed in the amount of $28.78 on the "transportation invoices." On the other hand, the petitioner has not demonstrated that the repair and clean-up charges on "the transportation invoices" were not part of the taxable receipt for the equipment rental.

We have also examined the record to assess petitioners' claim that the recurring purchase schedule (Division's Exhibit R) duplicated three invoices. Our review indicates that only two invoices were duplicated - that to IVC, number 2115 stating tax due in the amount of $38.50 and that to Master Equipment, number 4920 stating tax due in the amount of $42.00. Accordingly, the assessment must be reduced by $80.50 to remove these duplicated invoices.

Finally, we address petitioner's claim that its purchase of fuel for use in an air compressor for the production of air is exe mpt from sales tax under Tax Law section 1115(c). Without implying that petitioner's legal theory would apply to the facts it alleges, inasmuch as both the record and petitioner's supporting evidence (Petitioner's Affidavit, Exhibit B, page 8, column 19) do not begin to substantiate its assertion that the fuel was so used, we conclude that this claim lacks merit.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of petitioners are granted to the extent that the notices of determination and demand issued on February 3, 1986 for the period December 1, 1982 through February 28, 1985, are reduced by the amounts of $7.17, $149.99, $28.78 and $80.50 as specified above and the Division of Taxation is directed to recompute the notices of determination accordingly and that, except as so granted, the exceptions of the petitioners are in all other respects denied;

2. The determination of the Administrative Law Judge dated February 25, 1988 is modified to the extent set forth in paragraph "I" above and except as so modified is in all other respects affirmed;

3. The petition of Modern Refractories Service Corporation with respect to the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 5, 1983 is in all respects denied and said notice of determination, as adjusted pursuant to Finding of Fact "4" of the Administrative Law Judge's determination, is sustained; and

4. The petitions of Modern Refractories Service Corporation and Robert Kish, as officer, with respect to the notices of determination dated February 3, 1986 are granted to the extent provided in paragraph "1" above and in conclusions of law "E" and "H" of the Administrative Law Judge's determination, and except as so granted, the petitions are in all other respects denied.

Dated: Albany, New York
December 15, 1988

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner