

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
AIRPORT INDUSTRIAL PARK	:	DETERMINATION
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 September 1, 1972	:	
through November 30, 1982.	:	

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Petitioner, Airport Industrial Park, P.O. Box 1011, Buffalo, New York 14240-1011, 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 September 1, 1972 through November 30, 1982 (File No. 800714).

A hearing was commenced before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 18, 1986 at 10:45 A.M., continued before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 65 Court Street, Buffalo, New York, on November 20, 1987 at 9:00 A.M., continued before the same Administrative Law Judge at the same location on June 27, 1988 at 1:15 P.M., and concluded before the same Administrative Law Judge at the same location on December 15, 1988 at 1:15 P.M., with all briefs to be submitted by April 17, 1989. Petitioner appeared by Mattar, D'Agostino, Kogler & Runfola (Joseph F. Reina and Lawrence J. Mattar, Esqs., of counsel). The Division of Taxation appeared at the September 18, 1986 hearing by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel) and at the November 20, 1987, June 27, 1988 and December 15, 1988 hearings by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether certain purchases made by petitioner during the period December 1, 1979 through November 30, 1982 constituted purchases of services of installing property which, when installed, constituted a capital improvement to petitioner's property, thereby exempting said purchases from the imposition of sales tax.

II. Whether certain purchases made by petitioner during the period December 1, 1979 through November 30, 1982 constituted purchases of secretarial services not subject to tax.

III. Whether the period September 1, 1972 through November 30, 1979 was within the period of limitation for audit and assessment.

IV. If so, whether the audit method employed by the Division of Taxation with respect to the period September 1, 1972 through November 30, 1979 has been shown to be unreasonable or the result erroneous.

## FINDINGS OF FACT

Petitioner, Airport Industrial Park, is a partnership which, on November 10, 1972, acquired a 20-acre parcel of land in Cheektowaga, New York. The property, vacant at the time of petitioner's acquisition, was improved by a primary structure of approximately 200,000 square feet and auxiliary structures totalling 75,000 square feet. The primary structure, which was originally an airplane hangar, was built in the 1940's.

Petitioner acquired the property in question for the purpose of creating an industrial park. Petitioner solicited commercial tenants by advertising space for rental and by offering to subdivide and construct space to suit the needs of the particular tenant. For example, petitioner erected walls, dropped ceilings, installed plumbing, installed doors, segregated utilities and, in some cases, installed loading docks and separate heating systems.

As noted, when petitioner acquired the property in question it was vacant. Between the time of acquisition and approximately September of 1979, it was about 60% vacant. In September 1979, petitioner acquired its biggest tenant, Arcadia Graphics, Inc., which leased 135,000 square feet of space in the main building. From this point through the end of the audit period (November 30, 1982) petitioner's property was approximately 95% to 100% occupied. Except for Arcadia Graphics, petitioner's tenants generally rented about 5,000 to 15,000 square feet.

Petitioner contracted with two affiliated corporations, Buffalo Metals Recycling Co. and Industrial Refining Corp., to provide some portion of the labor for the construction work on the premises which was required to meet tenant specifications. These two corporations were owned, in whole or in part, by a partner or partners in petitioner. Petitioner made all purchases of materials with respect to such construction. Industrial Refining Corp. employees also performed some repair and maintenance services for petitioner.

Petitioner had a minimal number of employees. It employed a janitor, an individual to oversee the operation of the boiler system, and some part-time summer employees. Petitioner contracted with Industrial Refining Corp. for secretarial/clerical services.

Petitioner generally leased space to its tenants for terms of 3 to 5 years with renewal options. The leases provided for the lessees to pay rent based upon square footage rental, and the lessee's pro rata share of taxes and insurance. Lessees paid their own utilities.

Petitioner sold the property in question in 1986. Over its 14-year period of ownership, petitioner redeveloped the entire property to suit the needs of its various tenants.

The audit herein was triggered by the Division's discovery, on separate audit, that petitioner had issued a resale certificate to a vendor<sup>1</sup> in order to purchase tangible personal property or services without paying sales tax. The Division obtained a copy of a resale certificate dated December 23, 1976 which listed petitioner as purchaser and was signed on petitioner's behalf by "Linda Rudnick, Secretary". Moreover, the resale certificate indicated that it was a "blanket certificate". Attached to the resale certificate when it came into the possession of the Division's auditor was an invoice dated March 28, 1979, issued by the same vendor to petitioner. The amount of the invoice was \$1,540.00 and the description set forth thereon was as follows: "CREDIT MEMO -- To relieve accounts receivable to Airport Park for work

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<sup>1</sup>The name of the vendor is not disclosed herein in accordance with the secrecy requirements of Tax Law § 1146(a).

performed in lieu of rent."

Having come into possession of the resale certificate, the Division next determined from a review of its own records that petitioner was not registered pursuant to Tax Law § 1134(a) as a "person purchasing or selling tangible personal property for resale" or as a "person required to collect any tax imposed by [Article 28]".

The Division subsequently contacted petitioner by a standard appointment letter which advised petitioner of the audit and requested access to "all books and records pertaining to your Sales Tax liability for the period under audit." The letter also indicated that the "period under audit" was "unlimited".

On audit, the Division's auditor reviewed petitioner's cash receipts journal, purchases journal, check disbursements journal, purchase invoices and sales invoices with respect to the period December 1, 1979 through November 30, 1982. The auditor also reviewed petitioner's State and Federal income tax returns for the years 1980 and 1981.

Upon review of the records noted above, the Division's auditor concluded that petitioner was not in the business of selling tangible personal property nor was petitioner in the business of providing services subject to sales tax.

In his review of petitioner's purchase invoices, the Division's auditor noted that no sales tax was charged on many of such invoices. Petitioner's representatives advised the Division's auditor that petitioner was engaged in substantial construction and rehabilitation of its property during the period under review (December 1, 1979 - November 30, 1982) and that many of its purchases of material and labor resulted in capital improvements to petitioner's real property. None of the invoices reviewed by the auditor had any notation specifically stating that the labor listed thereon resulted in a capital improvement.

The Division's auditor subsequently totaled invoices for material and labor for the period December 1, 1979 through November 30, 1982 upon which sales tax had not been paid. Material invoices totaled in this manner amounted to \$152,671.42. Labor invoices totaled \$149,051.01. The Division's auditor determined that said purchases, totaling \$301,722.43, were properly subject to sales tax.

The \$149,051.01 in labor purchases (noted above) determined taxable on audit were provided to petitioner by three entities: Bundy Real Estate (\$1,300.00 in services provided); Buffalo Metals Recycling Co. (\$28,723.00 in services provided); and Industrial Refining Corp. (\$119,028.01 in services provided). The Division's auditor was aware that these three entities were owned in whole or in part by a partner or partners of petitioner.

The Division's auditor saw no resale certificates (other than the certificate referred to in Finding of Fact "8") or certificates of capital improvement during the course of the audit. He did not contact any of the vendors that sold petitioner material or services to determine if petitioner had issued resale certificates or capital improvement certificates to such vendors to enable petitioner to make such purchases tax-free.

The auditor also reviewed petitioner's Federal income tax returns for the years 1980 and 1981. The 1980 return claimed \$318,299.00 in leasehold improvements and \$123,772.00 in repairs. The 1981 return claimed \$114,133.00 in repairs. The amount of petitioner's claimed leasehold improvements for 1981, if any, was not made part of the record herein.

The Division's auditor also reviewed petitioner's check disbursements journal for the

period January 1980 through August 1982. Included in petitioner's check disbursements journal was a "Repair and Maintenance" account which totaled \$105,416.00 in check disbursements during the January 1980 through August 1982 period.

During the course of the audit, the Division's auditor requested access to petitioner's records dating back to its formation in 1972. Petitioner refused to provide such access.

Having determined that petitioner had made taxable purchases of \$301,722.43 during the period December 1, 1979 through November 30, 1982, the Division's auditor determined that similar purchases were made by petitioner from the time of its formation through November 30, 1979 (see Finding of Fact "24", *infra*). In the absence of any records from which he could determine the precise amount of such purchases, the auditor determined the quarterly average of audited taxable purchases during the period December 1, 1979 through November 30, 1982 and projected that average over each quarter to petitioner's formation. Specifically, the Division took the \$301,722.43 in taxable purchases found upon review of petitioner's records for the December 1, 1979 through November 30, 1982 period and divided that total by the 12 sales tax quarters which comprise that period to reach average taxable purchases per sales tax quarter of \$25,143.00. From this purchase figure, the Division determined tax due per quarter of \$1,760.01. The notices herein assessed \$1,760.01 per quarter for the periods ended November 30, 1972 through November 30, 1979. The amounts assessed with respect to the periods ended February 28, 1980 through November 30, 1982 were premised upon actual purchases made (and determined subject to tax) during each of the respective periods as determined from the invoices.

On June 27, 1983, following the audit, the Division of Taxation issued to petitioner three notices of determination and demands for payment of sales and use taxes due which together assessed \$72,160.76 in sales and use taxes due, plus penalty and interest, for the period September 1, 1972 through November 30, 1982.

During the course of the audit, the auditor was aware that petitioner was having capital improvement work done to its property. The auditor was aware that petitioner's property consisted primarily of an old airplane hangar and that petitioner was converting the interior of this structure into rental space for its tenants. In the auditor's opinion, his own general knowledge and petitioner's representation that capital improvement work was ongoing at petitioner's facility was insufficient, in light of the absence of documentation of such capital improvements, to justify the exemption of specific purchases from tax as work performed which resulted in a capital improvement.

Petitioner did not dispute that it made purchases of tangible personal property totaling \$152,671.42 and labor totaling \$149,051.01 during the period December 1, 1979 through November 30, 1982. Petitioner conceded that it did not pay sales tax on these purchases.

Petitioner also made purchases of materials and labor during the period September 1, 1972 through November 30, 1979. Petitioner also did not pay sales tax on these purchases. On audit, petitioner's representatives advised the Division's auditor that it had made such purchases.

Petitioner filed no sales tax returns with respect to the period September 1, 1972 through November 30, 1982.

Petitioner was advised by its attorney/accountant during the audit period that purchases of labor and materials which resulted in capital improvements were not subject to sales tax. Petitioner's attorney/accountant also advised that payments for labor between affiliated entities were not subject to sales tax. On audit, petitioner advised the auditor that it had made the tax-free purchases as noted above (Findings of Fact "22" and "23") upon this advice.

Petitioner issued the resale certificate referred to in Finding of Fact "8". Linda Rudnick, whose signature appears on the resale certificate, was an employee of petitioner at that time.

As noted above (Finding of Fact "15"), Buffalo Metals Recycling Co. provided petitioner with \$28,723.00 in services during the December 1, 1979 through November 30, 1982 period. These services consisted, in part, of trash removal services, including both routine trash removal and removal of construction debris. Buffalo Metals Recycling Co. also provided these services to petitioner during the September 1, 1972 through November 30, 1979 period.

Included among the \$119,078.01 in services purchased by petitioner from Industrial Refining Corp. during the December 1, 1979 through November 30, 1982 period was \$6,040.00 in clerical/secretarial services. Said services were performed by one Kathleen Swiatek. Industrial Refining Corp. charged petitioner \$80.00 per week for these services through December 1981 and \$100.00 per week thereafter.

The \$152,671.42 in purchases other than from the affiliated companies consisted of electrical parts, hardware, building materials, tools, equipment rental, fittings, automotive parts and repairs, cement, and office supplies.

At hearing, petitioner introduced evidence to establish that many of the labor purchases deemed by the Division to be subject to tax were actually purchases of services which resulted in capital improvements to petitioner's property. In order to prove its contention, petitioner's controller reviewed the same labor and materials invoices reviewed by the Division's auditor and determined by the auditor to be subject to tax. The controller then apparently matched up materials purchases and labor purchases on a month-by-month basis and concluded that purchases of construction materials which he determined had been used on particular projects coincided with labor expenditures. The controller then reviewed all leases between petitioner and its tenants which took effect during the December 1979 through November 1982 period to review specific modifications or renovations required for particular tenants. In some cases, the leases had specific lists of requirements. The controller also reviewed the individual laborer's time cards (contained in the records of Industrial Refining Corp.). These time cards gave some indication of where the individuals were working on a given date. The controller also spoke with certain of the individuals named in the labor invoices. Finally, the controller physically walked through the premises to determine the nature of specific projects. At hearing, petitioner introduced into evidence a summary of the controller's review (petitioner's Exhibit "3"). This summary sets forth, with brief descriptions of the particular project, labor invoices representing work performed during the December 1979 through November 1982 period determined by petitioner to have resulted in capital improvements.

The controller was hired by petitioner in 1983, following the completion of the audit herein.

#### SUMMARY OF PURPORTED CAPITAL IMPROVEMENTS PROJECTS

As noted, petitioner sought to establish that many of its labor purchases were made in connection with capital improvement work (Finding of Fact "31"). Petitioner contended that the following capital improvement projects were undertaken and completed during the period under detailed review (December 1, 1979 through November 30, 1982) and contended that the following labor costs, determined on audit to be subject to tax, were associated with such capital improvements:

(a) In or about February 1980, petitioner contended that it performed work to "make ready" premises leased by Arcadia Graphics, Inc. Included in this work was work performed on

the roof of the primary structure, which purportedly involved, in certain areas, removal of the old roof, including subdecking, and replacement with new materials. In other areas, replacement of the subdecking was not required. Also as part of this "make ready" work, petitioner contended that it replaced large sections of floor, made additions to electrical services, and installed new light fixtures and a new parking area. Petitioner contended that its cost for labor in these projects was \$7,254.00. Included in that amount was a \$350.00 charge by Buffalo Metals Recycling which, petitioner contended, was for removal of old, discarded roofing material.

(b) Petitioner contended that in April 1980, it replaced one-third of a 5,000 square foot roof on an auxiliary building on the premises which had collapsed under a snow load. The purported labor cost for this job was \$4,008.62, which included a \$350.00 charge by Buffalo Metals Recycling for waste removal. Among the invoices purportedly representing these labor costs is an Industrial Refining Corp. invoice (No. 10079) which bears a description "Labor Charges for...G & A Electric."

(c) Petitioner contended that in or about June 1980 it constructed new restrooms and additional offices for a new tenant. Petitioner's purported labor cost for this job was \$4,096.26. Included in this amount were Buffalo Metals Recycling invoices totaling \$1,185.00 representing charges for refuse removal and use of dump trucks. Also included among these invoices was a charge described as "Clean and remove debris off roof @ service systems."

(d) Petitioner contended that in or about September 1980, it installed aluminum siding and overhead doors on a section of its main facility. Total labor costs were purportedly \$1,492.00, including \$350.00 to Buffalo Metals Recycling for refuse removal.

(e) Petitioner contended that in or about September 1980 it installed a new waterline at a purported cost for labor of \$2,250.00. The purported invoice in respect of this cost described the services as "Robert Sauter, Truck and Equipment, Scheiber Sub-Contractor, Including Dresser Coupling pipe back filling, etc."

(f) Petitioner contended that in October 1980 it had work done which involved the removal of wooden frame glass windows which were located in petitioner's facility. The work purportedly involved the removal of the windows and replacement with some type of support. In some cases, the windows were replaced by sheets of plywood. This work also involved painting the supports or plywood after the removal of the windows. The purported cost of such work was \$10,438.56.

(g) Petitioner contended that between October and December 1980 it replaced 10,000 square feet of roof on "Plant #1", (apparently) one of the buildings on the property. The asserted cost of this work was \$8,900.40, including \$350.00 charged by Buffalo Metals Recycling for refuse removal. The balance of the invoices purportedly representing the balance of this job refer to unspecified labor performed by one Mike Kifner.

(h) Petitioner also contended that in November 1980 and January 1981 it replaced 12,000 square feet of roof on "Plant #1". The cost of this work was assertedly \$8,425.00. The invoices purportedly representing this work were not introduced into evidence. The auditor's workpapers describe two of the invoices in question as "kettle and roof edger" and "refuse disposal". The other invoices are not specifically described in the auditor's workpapers.

(i) Petitioner contended that in February 1981 it performed work in an auxiliary structure pursuant to a lease agreement. Included in this work was the installation of an electrical system, new overhead doors, a concrete floor, and new offices (including construction and painting). The purported cost of this work was \$16,934.73. Included in this amount was an invoice from a

Steve Hoffman, described in the auditor's workpapers as "Labor charges for painting." The invoice was not introduced into the record. The balance of the invoices purportedly in respect of this job provided no specifics as to the work performed.

(j) Petitioner contended that in June 1981 it constructed a 2,500 square foot building on its property. The purported cost of labor for this construction was \$7,564.01. This amount included \$700.00 charged by Buffalo Metals Recycling for refuse removal. The balance of the invoices made no reference to the labor performed.

(k) Petitioner contended that between May and October 1981 it replaced an 8,000 square foot section of the roof of its main structure. The total cost for this work as asserted by petitioner was \$9,370.00. Included in this amount was \$700.00 for refuse removal. The balance of the invoices made no reference to the work performed.

(l) Petitioner contended that between October 1981 and May 1982 it replaced an old boiler in the heating system of the main building and replaced all of the pipes in the building's heating system. The purported cost of this work was \$38,905.30. None of the invoices purportedly in respect of these expenditures made any reference to the work performed.

(m) Petitioner contended that in June 1982 it installed a 150-foot waterline to connect its property with the Erie County Water or Cheektowaga Sewer System. The purported cost of this work was \$3,180.00. The specific invoices related to this work were not introduced into the record. Nor were such invoices specifically listed in the auditor's workpapers; rather, such invoices were apparently grouped with other Industrial Refining Corp. invoices under the heading "various".

(n) Petitioner contended that in July and August 1982 it replaced a 5,000 square foot roof on a Quonset hut located on the property. The purported cost of labor for this work was \$4,341.00.

### CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1105(c)(3), the installation and maintenance of tangible personal property not held for sale in the regular course of business are services generally subject to sales tax. An exception to this rule is set forth in Tax Law § 1105(c)(3)(iii). This section excepts from the imposition of sales tax the installation of tangible personal property which, when installed, constitutes a capital improvement to real property. As noted in paragraph "33", petitioner claims that, during the period December 1, 1979 through November 30, 1982, it purchased \$127,160.00 worth of services for the installation of property which, when installed, constituted a capital improvement. Such purchases, petitioner claims, were therefore not subject to tax. On audit, the Division determined that sales tax was due on such purchases.<sup>2</sup>

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<sup>2</sup>As noted previously, the Division also assessed sales tax on petitioner's purchases of \$152,671.42 of materials during the December 1, 1979 - November 30, 1980 period. Petitioner conceded its liability with respect to such purchases. Additionally, it should be noted that petitioner offered no evidence to contest the taxability of purchases of services totaling \$15,851.01 from the related entities (i.e., tax assessed on \$149,051.01 of services less \$127,160.00 in services claimed to be in connection with capital improvements and less \$6,040.00 in claimed secretarial services).

B. Tax Law § 1132(c) presumes that all of petitioner's purchases are subject to tax until the contrary is established, and the burden of proving otherwise is upon petitioner (see Matter of Gem Stores, Inc., Tax Appeals Tribunal, October 14, 1988; see also 20 NYCRR 3000.10[d][4]).

C. Based upon the evidence presented, it is concluded that petitioner has failed to establish that the \$127,160.00 in disputed labor purchases outlined in paragraph "33" resulted in capital improvements. The Division's assessment with respect to such purchases was therefore proper pursuant to Tax Law § 1132(c). Petitioner's proof offered to show that the purchases in question were exempt from tax pursuant to Tax Law § 1105(c)(3)(iii) fails because such proof, consisting of petitioner's controller's testimony and the invoices and workpapers comprising Exhibit "3", fails to establish a connection between specific purchases of services and specific (purported) capital improvements. Petitioner's proof to show that the disputed purchases constituted capital improvements labor rests upon its controller's review of certain information and his resulting conclusions that the disputed purchases constituted services performed on specific capital improvements projects. In reaching his conclusions, the controller reviewed purchase invoices, time cards, and leases and interviewed certain of the individuals who purportedly provided the services in question. He also physically walked through the premises. Many of the sources from which the controller drew his conclusions, however, are not present in the record. Significant by their absence are the leases, time cards and (with respect to Buffalo Metals Recycling invoices) dump tickets which, according to the controller, would have provided specific documentary support as to when purported capital improvements projects were undertaken, the nature of such projects, and the amount of labor involved in such projects. Also, testimony from the individuals who purportedly performed the capital improvements work might have provided the record with more direct evidence as to the time, duration, nature, and amount of labor involved in the projects. Also, although some of the invoices for the disputed purchases are present in the record, these invoices contain no information to tie them into specific projects. The Buffalo Metals Recycling invoices indicate only that the services performed involved trash removal. It is therefore impossible to determine, without more, whether the services represented by the invoices constituted the removal of construction debris (associated with capital improvements [20 NYCRR 541.7]) or were routine waste removal services (taxable pursuant to Tax Law § 1105[c][3]). It is noted that Buffalo Metals Recycling provided routine waste removal services to petitioner (Finding of Fact "27") during this period. Similarly, the Industrial Refining Corp. invoices introduced into the record provide no information with respect to the disputed purchases. These invoices list only the IRC employee's name and hours worked. Even though the IRC employees performed a variety of jobs for petitioner, the IRC invoices make no reference to any specific jobs performed. Moreover, notwithstanding petitioner's contention that IRC employees performed no repair or maintenance services on its behalf, it must be concluded that IRC employees did perform repair and maintenance services for petitioner. This conclusion is premised upon petitioner's claimed repair expenses on its income tax returns for 1980 (\$123,772.00 in claimed expenses) and 1981 (\$114,133.00 in claimed repair expenses), petitioner's check disbursements journal's "Repair and Maintenance" account (\$105,416.00 in disbursements between January 1980 and August 1982), petitioner's own minimal payroll, and petitioner's failure to contest the taxability of \$15,851.01 in services provided by the related entities during the detailed audit period.

As the above discussion makes clear, the evidence presented to show that the \$127,160.00 in disputed purchases resulted in capital improvements fails because such evidence fails to establish an audit trail to test the validity of petitioner's conclusions that such expenditures constituted labor performed on capital improvements projects. Direct evidence supporting petitioner's position, e.g., invoices referenced to specific projects, is simply not in the record, and neither is the indirect evidence upon which petitioner's controller apparently relied (e.g., time cards, leases, dump tickets). Moreover, an ability to test and evaluate petitioner's controller's conclusions is of particular importance here, where the individual reaching the conclusions has no personal knowledge of the purported capital improvements



since he was not hired by petitioner until after the completion of the audit herein.

The conclusion reached above may appear, at first, to be inconsistent with the undisputed fact that petitioner undertook extensive capital improvements to its property and that such work was performed, to some extent, by IRC employees. Pursuant to Tax Law § 1132(c), however, petitioner must show that the receipts in question were not subject to tax. In order to make such a showing, petitioner must establish that the disputed purchases were made in connection with specific projects. As discussed, petitioner has failed to make this connection. In this regard, the matter at hand is strikingly similar to the difficult situation that was addressed by the Tax Appeals Tribunal in Matter of Reference Library Guild, Inc. (Tax Appeals Tribunal, August 4, 1988). In that matter, the Tribunal conceded it was obvious that the taxpayer had substantial nontaxable out-of-state sales, but "(t)he inability of the petitioner to submit direct documentary evidence to prove any out-of-state sales placed the Division in a position on audit of not being able to identify any individual exempt sales."

Petitioner's evidence, at best, constitutes an estimate as to which of the many Industrial Refining Corp. and Buffalo Metals Recycling invoices represent purchases of labor on specific capital improvements projects. In the absence of direct documentary evidence, petitioner has attempted to estimate its sales tax liability. The Tax Law, however, does not provide taxpayers who fail to maintain complete records with the benefit of estimating their sales tax liability (see Matter of Hoffinger Industries, Inc., Tax Appeals Tribunal, July 20, 1989). Petitioner's position must, therefore, be rejected.<sup>3</sup>

D. As noted in Finding of Fact "29", petitioner has established that it purchased \$6,080.00 in secretarial/clerical services from Industrial Refining Corp. during the period under detailed review. Since such services are not specifically enumerated as taxable services under Tax Law § 1105(c), and since the service of providing personnel is also not so enumerated, the Division improperly assessed tax herein upon petitioner's purchases of secretarial/clerical services totalling \$6,040.00. Petitioner succeeded in meeting its burden with respect to these services because the record established that Industrial Refining Corp. consistently charged petitioner a regular weekly rate for the services in question (\$80.00 per week until December 1981; \$100.00 per week thereafter). Moreover it appears that the same individual provided the services in question throughout the period in question and that this individual performed only secretarial services and was not involved in any other projects.

E. With respect to petitioner's contention that the Division improperly expanded the audit herein to cover the period September 1, 1972 through November 30, 1979, all of the transactions upon which the Division has assessed tax herein are transactions in which

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<sup>3</sup>It should be noted that, in light of Conclusion of Law "C", this determination does not reach the issue of whether the specific projects discussed herein constitute capital improvements within the meaning of Tax Law § 1101(b)(9). It should be further noted, however, that the same problems of proof which befell petitioner in its efforts to establish a connection between the expenditures at issue and specific projects are also present with respect to petitioner's burden to establish that specific projects constituted capital improvements. The absence of the leases (which purportedly set forth specific modifications or renovations for specific tenants), and the absence of testimony by individuals with direct knowledge of projects once again force petitioner's proof to rest upon the testimony of petitioner's controller, who, as stated above, was not hired by petitioner until after the period at issue herein.

petitioner, as a "purchaser" under Tax Law § 1101(b)(2), purportedly made taxable purchases. If petitioner made such purchases, Tax Law § 1132(c) presumes that such purchases are taxable until proven otherwise. Petitioner has the burden of proving that such purchases are not subject to tax (Tax Law § 1132[c]; 20 NYCRR 3000.10[d][4]). Further, if petitioner made such taxable purchases without paying sales tax to "the person required to collect the same", then, pursuant to Tax Law § 1133(b), such tax was payable by petitioner directly to the Commissioner of Taxation. Moreover, under such circumstances, section 1133(b) imposes a duty upon "customers" to "file a sales tax return with the commission[er] and to pay the tax to [him] within twenty days of the date the tax was required to be paid." Petitioner filed no such returns. Tax Law § 1147(b) provides that "where no return has been filed as provided by law, the tax may be assessed at any time." Since petitioner filed no sales tax returns, the entire period of assessment herein was properly open for assessment.

In reaching this conclusion, it is noted that petitioner's contention that the Division failed to "justify" its decision to expand the audit beyond the initial three-year period is without merit. While the rationality and methodology of assessment for the extension period is obviously subject to scrutiny pursuant to Tax Law § 1138(a) and case law developed thereunder (see Conclusions of Law "F" and "G", infra), the Tax Law makes no requirement of the Division to establish its "right" to audit any particular period. Rather, the Division's "right" to assess tax with respect to any particular period is set forth in the statute of limitations provisions of Tax Law § 1147.

F. With respect to the audit methodology employed by the Division on the expanded portion of the audit, it is noted that the Division's right to use indirect methods to estimate tax due is founded on the taxpayer's failure to maintain and/or make available records such that it is virtually impossible to determine the taxpayer's exact tax liability (Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41). The Division must make an actual request for books and records (Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858) which is for the entire period of assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109). Once this procedure is followed and the records are not made available, the Division may resort to an indirect methodology to estimate tax (Continental Arms Corp. v. State Tax Commn., 72 NY2d 976, 534 NYS2d 362, rev'd 130 AD2d 929, 516 NYS2d 338). The estimate methodology used must be reasonably calculated to reflect taxes due, but exactness is not required from such a method (Matter of Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, 157, cert denied 355 US 869; Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, 177). Petitioner has the burden of proving by clear and convincing evidence that the audit methodology was unreasonable or the amount of assessment was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858, 446 NYS2d 451).

Here, the record is clear that the Division requested access to petitioner's records dating back to its acquisition of the 20-acre parcel of land in 1972. The record is also clear that, notwithstanding the fact that petitioner had records dating back to 1972, petitioner did not make such records available to the Division. Accordingly, the Division was authorized to resort to an indirect audit method to estimate tax due for the extended audit period (Continental Arms Corp. v. State Tax Commn., supra).

G. The next issue to be discussed is whether the estimate method used was reasonably calculated to reflect taxes due or whether the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, supra). Since petitioner's representative advised the Division that, during the period September 1, 1972 through November 30, 1979, petitioner had made purchases of labor and materials without paying sales tax on such purchases and since petitioner had improperly issued a resale certificate in 1976, the Division quite obviously and rationally concluded that petitioner had incurred sales tax liability

from the time of its acquisition of the 20-acre parcel of land in 1972. As to the method of estimating such liability, the auditor made a detailed review of petitioner's purchases for the initial audit period and determined that tax was due on \$149,051.01 of materials purchases and \$152,671.42 in labor purchases. The auditor then calculated the quarterly average of purchases determined to be taxable during the initial audit period and projected that quarterly average over the period September 1, 1972 through October 31, 1979. The auditor thus took the average quarterly assessment for the detailed audit period and assessed this average assessment for each of the sales tax quarters encompassing the expanded audit period. Given petitioner's failure to make its records available pursuant to Division request, the existence of the improperly issued resale certificate, and petitioner's statement to the auditor during the audit that it had made tax-free purchases of materials and labor, the method employed by the Division herein to estimate petitioner's taxable purchases during the expanded audit period was reasonable (Matter of Grant Co. v. Joseph, *supra*; see also Matter of Duplad Copier Corp., State Tax Commn., May 29, 1985).

Petitioner argues that the Division's estimate methodology was unreasonable because, petitioner contends, it had far fewer tenants during the expanded audit period and therefore made far fewer purchases of materials and labor during the expanded period than it made during the detailed audit period. Petitioner contends that it advised the Division's auditor of this contention and that, consequently, the auditor should have made further inquiries as to the extent of petitioner's activities during the extended period (e.g., square footage available for rental and square footage actually rented at various points in time). Petitioner, however, apparently overlooks the fact that the Division's auditor, by his request for petitioner's records encompassing the extension period, did make inquiry as to petitioner's activities during the audit period. Petitioner's purchase records for the extended audit period would certainly appear to be the best available evidence of petitioner's purchases during the extended period. Given petitioner's failure to provide the Division with such purchase records, or any other documentation pertaining to the extended period for that matter, it cannot be concluded that the estimate method employed by the Division was "unreasonably inaccurate" (see Meskouris Brothers, Inc. v. Chu, 139 AD2d 813, 526 NYS2d 679, 681). Moreover, it is noted that petitioner had the opportunity to submit into evidence herein its records and any other relevant documentation pertaining to the extended period, but did not do so (see Matter of Sol Wahba, Inc. v. State Tax Commn., 127 AD2d 943, 944). Except as noted below, the evidence presented by petitioner with respect to the extension period (see Finding of Fact "3") may, at best, call into question the precision of this portion of the assessment. Such evidence, however, falls well short of establishing that the audit method herein was unreasonable. As noted previously, exactness is not required (see Matter of Markowitz Co., *supra*), especially where, as here, it is the petitioner's own failure to produce relevant documentation which compels the Division to resort to an estimate methodology (see Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, *lydenied* 44 NY2d 645, 406 NYS2d 1025).

H. Petitioner has established that it acquired the 20-acre parcel of land in Cheektowaga on November 10, 1972. All of the tax consequences discussed herein flow from this acquisition. The Division's assessment of sales tax for the period September 1, 1972 through November 10, 1972 was therefore improper and is hereby cancelled. Petitioner has also established that the assessment for the extended period was erroneous to the extent of the adjustments to the initial audit period assessment determined herein (Conclusion of Law "D"). The Division is directed to recalculate the quarterly assessments for the extended period in accordance with this adjustment. Except for these adjustments, and pursuant to the discussion set forth in Conclusions of Law "F" and "G", petitioner has failed to show that the assessment for the extended period was in any other way erroneous.

I. The petition of Airport Industrial Park is granted to the extent indicated in Conclusions of Law "D" and "H"; the Division of Taxation is directed to adjust the notices of determination

and demands for payment of sales and use taxes due issued June 27, 1983 in accordance therewith; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York  
December 7, 1989

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE