

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM BURNS, OFFICER OF	:	DETERMINATION
BURNS BROS. INDUSTRIES, INC.	:	
AND BURNS BROS. EXPRESS, INC.	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1985	:	
through November 30, 1987.	:	

Petitioner, William Burns, officer of Burns Bros. Industries, Inc. and Burns Bros. Express, Inc., 290 Bay Drive, Massapequa, New York 11758, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1985 through November 30, 1987 (File No. 807410).

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on May 10, 1990 at 1:15 P.M., with all briefs to be submitted by January 11, 1991. Petitioner appeared by Kleinman & Wagner, Esqs. (Robert A. Wagner, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Robert Jarvis, Esq., of counsel).

ISSUES

- I. Whether the Division of Taxation established a rational basis for the assessments.
- II. Whether penalties imposed against petitioner should be abated.

FINDINGS OF FACT

The Division of Taxation issued two notices of determination and demands for payment of sales and use taxes due, both dated May 12, 1988, against petitioner, William Burns, as officer. One asserted tax due in the amount of \$37,539.32, plus penalty and interest, for the period December 1, 1985 through November 30, 1987 against Mr. Burns, as officer of Burns Bros. Industries, Inc. (hereinafter "BB Industries"). The following explanation was provided:

"You are liable individually and as Officer of [BB Industries] under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law:

<u>Period Ending</u>	<u>Period Designation</u>	<u>Tax Due</u> ¹
2/28/86	386	\$ 6,897.38
5/31/86	486	13,272.38
8/31/86	187	522.38
11/30/86	287	13,272.38
2/28/87	387	893.70
5/31/87	487	893.70
8/31/87	188	893.70
11/30/87	288	893.70
Total		\$37,539.32"

The second notice asserted tax due in the amount of \$20,074.80, plus penalty and interest, for the period December 1, 1986 through November 30, 1987 against Mr. Burns, as officer of Burns Bros. Express, Inc. (hereinafter "BB Express"). It included an explanation similar to the one, supra, and provided the following details concerning tax due per sales tax quarter:

<u>Period Ending</u>	<u>Period Designation</u>	<u>Tax Due</u>
2/28/87	387	\$ 893.70
5/31/87	487	893.70
8/31/87	188	17,393.70
11/30/87	288	893.70
Total		\$20,074.80

In his Request for Conciliation Conference dated July 15, 1988, William Burns, as officer of BB Industries and BB Express, stated that he was not a person required to collect tax under Tax Law § 1131(1) and should not be held personally liable for any sales tax due from BB Industries and/or BB Express. However, in his petition dated October 2, 1989, William Burns did not contest his status as a person required to collect sales tax for these two

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The notices also showed specific amounts for penalty and interest due, which have been omitted supra.

corporations. Furthermore, his representative at the hearing herein noted that Mr. Burns's status as a so-called "responsible officer" was not in dispute and conceded that BB Industries and BB Express were Mr. Burns's companies.

At the hearing, the Division of Taxation presented the testimony of Saturnino Benitez, the sales tax auditor who estimated the tax asserted as due against petitioner. It also introduced portions of the audit report and related schedules into evidence. In contrast, petitioner presented no evidence at the hearing. Petitioner, by his representative, was granted a continuation of the hearing, until September 13, 1990, to present his evidence. However, on September 7, 1990, petitioner provided notice that the continuation of the hearing would not be required. Subsequently, he submitted two so-called "affidavits" (unsworn and not in proper form) and photocopies of documents described as "application and registration title information for five Kenworth Trucks acquired by William Burns". Consequently, the record does not include much information about Mr. Burns's trucking and transportation businesses. Furthermore, since petitioner has conceded that he was a person required to collect sales tax for both corporations, there is little information in the record concerning his specific relationship to these corporations other than the fact that they were "his companies".

A conciliation order dated July 14, 1989 was issued to Mr. Burns, as officer of BB Industries, which reduced the tax asserted as due from \$37,539.32 to \$33,964.52 (plus penalty and interest). According to the Advocate's Comments on Conciliation Conference: "Tax was adjusted to eliminate duplication of tax on diesel fuel." A second conciliation order, also dated July 14, 1989, sustained the notice of determination issued against Mr. Burns, as officer of BB Express.

The auditor testified that despite his requests for relevant books and records of BB Industries and BB Express, none were provided. Consequently, the assessments were based upon information the auditor obtained from third parties. Cibro Terminals, Inc. (hereinafter "Cibro") provided information concerning purchases of diesel fuel by the two companies without their payment of sales tax, and the Department of Motor Vehicles (hereinafter "DMV")

provided information concerning vehicles registered by the companies with DMV.

The Division of Taxation introduced into evidence computer printouts obtained from Cibro (Exhibits "K", "L" and "M").² These

exhibits include the following information concerning the purchase of #2 fuel oil (diesel fuel) without the payment of sales tax:

<u>Source of Information</u>	<u>Customer</u>	<u>Date</u>	<u>Gallons</u>	<u>Amount</u>
Exhibit "K" \$21,442.14	Amacot Trucking Corp. ³	February 10, 1987 ⁴	49,308	
Exhibit "L"	Amacot/Burns	November 29, 1986	7,001	3,290.47
		December 23, 1986	6,511	3,157.84
		January 17, 1987	8,000	4,600.00
		February 12, 1987	7,932	4,283.28

²Exhibits "K" and "L" are both designated as report #718. However, "K" is format #13, while "L" is format #55. Exhibit "M" is designated report #704 and the printout does not show a particular format number. As noted in Finding of Fact "4", supra, certain duplicate purchases of diesel fuel by BB Industries were eliminated because these reports appear to overlap to some extent.

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The Division of Taxation introduced into evidence a letter dated March 31, 1987 on the letterhead of Amacot Trucking Corp. from John Beksinski to Cibro (Exhibit "O") which provided as follows:

"Please be advised that Amacot Trucking Corp. has under gone [sic] a name change effective immediately.

All bills, checks and or all correspondence should be addressed to Burn Bros. Express Inc.

Please feel free to contact me if there are any further questions. Also let me assure you that the name has changed but not the service. You will always be our preferred customer."

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Although the computer printout (Exhibit "K") showed a date of February 10, 1987, it apparently represented the total purchases of diesel fuel by Amacot for the period December 1985 through November 1986.

March 9, 1987	7,003	3,606.55
April 1, 1987	7,901	4,246.79
April 28, 1987	8,003	4,201.58
May 22, 1987	8,002	4,501.13
June 24, 1987	8,002	4,501.13
July 17, 1987	8,000	4,720.00
August 25, 1987	4,000	2,280.00
September 15, 1987	7,002	3,921.12
November 15, 1987	<u>4,000</u>	<u>2,460.00</u>
Total	91,357	\$49,769.89

Exhibit "M"	BB Express	June 1, 1986 through May 31, 1987	102,660	\$50,039.31
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Using the information above, the auditor determined that, for the period December 1985 through November 1986, BB Express purchased 4,109 gallons of diesel fuel per month (49,308 gallons divided by 12), and for the

period December 1986 through November 1987, the average purchase per month was 7,030 gallons of diesel fuel (84,356 gallons divided by 12). The 84,356 gallons is the total of the amounts shown above, which were taken from Exhibit "L", sold to Amacot/Burns (91,357 minus 7,001, the gallons shown purchased on November 29, 1986). It appears that petitioner used the diesel fuel in his trucking companies' own trucks and should have paid sales tax on his purchases of diesel fuel.

A schedule attached to the field audit report for BB Industries shows the following breakdown of the \$37,539.32 asserted as due from BB Industries:

Quarter <u>Ending</u>	<u>Particulars</u>	<u>Gallons</u>	Taxable <u>Amount</u>	Tax Due 7½%
2/28/86	Diesel Fuel	12,327	\$ 6,965.00 ⁵	
	Tractor	1	<u>85,000.00</u>	
			\$ 91,965.00	\$ 6,897.38
5/30/86	Diesel Fuel	12,327	\$ 6,965.00	
	Tractors	2	<u>170,000.00</u>	
			\$176,965.00	13,272.38

⁵The auditor used an average price per gallon for diesel fuel of \$0.565.

8/31/86	Diesel Fuel	12,327	\$ 6,965.00	522.38
11/30/86	Diesel Fuel	12,327	\$ 6,965.00	
	Tractors	2	<u>170,000.00</u>	
			\$176,965.00	13,272.38
2/28/87	Diesel Fuel	21,090	\$ 11,916.00	893.70
5/31/87	Diesel Fuel	21,090	\$ 11,916.00	893.70
8/31/87	Diesel Fuel	21,090	\$ 11,916.00	893.70

11/30/87	Diesel Fuel	21,090	11,916.00	<u>893.70</u>
	Total			\$37,539.32

The total of the gallons shown above is 133,668 gallons, and the total number of tractors (on whose purchases by BB Industries the Division of Taxation asserts sales tax is due) is 5.

A schedule attached to the field audit report for BB Express shows the following breakdown of the \$20,074.80 asserted as due for BB Express:

<u>Quarter Ending</u>	<u>Particulars</u>	<u>Gallons</u>	<u>Taxable Amount</u>	<u>Tax Due</u>
2/28/87	Diesel Fuel	21,090	\$ 11,916.00	\$ 893.70
5/31/87	Diesel Fuel	21,090	\$ 11,916.00	893.70
8/31/87	Diesel Fuel	21,090	\$ 11,916.00	
	Tractors	3	\$220,000.00 ⁶	
17,393.70				
11/30/87	Diesel Fuel	21,090	\$ 11,916.00	<u>893.70</u>
	Total Gallons:	84,360 ⁷		
\$20,074.80				

A review of the two schedules detailed in Findings of Fact "8" and "9" shows that the Division of Taxation, in sum, asserts that sales tax is due on the purchase of five new tractors by BB Industries and one new tractor and two used tractors by BB Express. According to the auditor, petitioner failed to provide any documents to show that sales tax was paid on the purchases of these tractors.

The cost of a new tractor was estimated at \$85,000.00. The auditor testified that his "supervisor obtained the information from Kenworth

dealers in the metro area...[t]he average price of the particular equipment, the tractor." For the

⁶Two of these three tractors were used tractors, and the auditor used \$135,000.00 as their total selling price.

⁷It is unknown why this amount does not correspond with the 102,660 gallons shown purchased by BB Express in Finding of Fact "6", supra.

two used tractors, the auditor testified that depreciation of \$20,000.00 was estimated and deducted from the \$85,000.00. The auditor testified that his supervisor determined the amount to be used as depreciation and he did not "know how he [the supervisor] came up with it..."

As noted in Finding of Fact "3", supra, petitioner submitted photocopies of "application and registration title information for five Kenworth Trucks acquired by William Burns". A review of the DMV forms, MV-82, show the following information:

<u>Registrant</u>	<u>Owner</u>	<u>Vehicle ID#⁸</u>	<u>Vehicle Year</u>	<u>Make</u>	<u>Body Type</u>	<u>Type of Power</u>	<u>Weight</u>
BB Industries	William Burns	341285	1987	Kenwood	Tractor	Diesel	2,879
William Burns	none shown	333751	1986	Kenwood	Tractor	Diesel	17,888
William Burns	none shown	336371	1986	Kenwood	Tractor	Diesel	17,740
William Burns	none shown	346019	1987	Kenwood	Tractor	Diesel	17,580
William Burns	none shown	341286	1987	Kenwood	Tractor	Diesel	17,520

These documents were submitted without the testimony of Mr. Burns to provide background or explanation.

Two documents, which petitioner submitted and described as "affidavits", are, in fact, not notarized and can be given no weight. They supposedly support an allegation that one of the vehicles listed in Finding of Fact "10", supra, ID# 341285, and another, with an ID# of 333791,⁹ were delivered to some unnamed person doing business at 290

Bay Drive, Massapequa, New York at Lawrenceville, Pennsylvania (and not in New York State).

Petitioner did not cooperate with the auditor and provided scant information concerning his business operations.

SUMMARY OF THE PARTIES' POSITIONS

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For ease of reference only the last six digits are noted.

⁹Included in the list in Finding of Fact "11" is a tractor with an ID# of 333751. Perhaps the so-called "affidavit" has a typographical error and the "9" should be a "5".

The Division of Taxation contends that it properly estimated the sales tax liabilities of BB Industries and BB Express due to petitioner's failure to maintain and make available adequate books and records.

Petitioner contends that the audit did not reasonably calculate tax due. The auditor used arbitrary purchase prices for the trucks, and some trucks were delivered out of New York State and used for interstate commerce. Furthermore, petitioner argues that no sales tax is owing on the truck purchases because the Department of Motor Vehicles requires proof of sales tax paid before accepting registration applications. Petitioner also asserts that purchases of diesel fuel by an entity named "Amacot" must be ignored because "[n]o connection between Amacot and Mr. Burns has been established."

CONCLUSIONS OF LAW

A. The Division of Taxation was required to establish a rational basis for the sales tax assessments against petitioner, as an officer (see, Matter of Fokos Lounge, Inc., Tax Appeals Tribunal, March 7, 1991; Matter of Shop Rite Wines & Liquors, Inc., Tax Appeals Tribunal, February 22, 1991). It has failed to do so with regard to tax asserted as due on the truck purchases of BB Express and BB Industries. The Division has not established a rational basis for its use of \$85,000.00 as the sales price of each of the five new tractors. The auditor testified that this number was determined by his supervisor. However, the supervisor did not testify to show how he determined such amount nor was any written document submitted to substantiate this number, e.g., a letter from a truck vendor or manufacturer or an excerpt from a price book. Similarly, the Division did not establish a rational basis for the sales price used for each of the two used tractors.

Nonetheless, it is observed that petitioner's argument that the fact that DMV accepted the companies' truck registration applications meant sales tax was paid on their truck purchases is without merit (see, Mendon Leasing Corp. v. State Tax Commission, 135 AD2d 917, 522 NYS2d 315).

B. Whether the Division of Taxation established a rational basis for the

additional sales tax asserted due on the purchases of diesel fuel by BB Express and BB Industries is not as easily resolved. As noted in Footnote "3" of Finding of Fact "6", supra, the Division introduced into evidence a letter from Amacot to Cibro that does provide some basis for concluding that Amacot and BB are related in some way. Based on this letter, there is some support for a finding that, as of March 13, 1987, Amacot began to do business as BB Express. However, as noted in Finding of Fact "6", supra, the purchases of diesel fuel by Amacot, which the Division has deemed were purchases by BB Express, were for the period December 1985 through November 1986, which is prior to the date which the letter states Amacot began to conduct business as BB Express. Consequently, it was arbitrary for the Division to treat such purchases as those of BB Express with nothing more than the letter dated March 13, 1987 to support such treatment.

C. On the other hand, the Division of Taxation has established a rational basis for the additional sales tax asserted as due on the purchase of 91,357 gallons of diesel fuel by BB Industries, as detailed in Finding of Fact "6", supra. Such gallonage is reflected in the Cibro computer printout which was marked into evidence as Exhibit "L". Similarly, additional sales tax asserted as due on the purchase of 84,360 gallons of diesel fuel by BB Express, as noted in Finding of Fact "8", supra, is supported by the Cibro computer printout which was marked into evidence as Exhibit "M" (and showed 102,660 gallons purchased without the payment of sales tax by BB Express).

D. Petitioner failed to meet his burden of proof to establish reasonable cause for the underreporting and underpayment of sales tax (see, Matter of Echo Bay Yacht Club, Tax Appeals Tribunal, December 28, 1990). Consequently, penalties asserted against him are sustained.

E. The petition of William Burns, officer of BB Industries and BB Express, is granted to the extent indicated in Conclusions of Law "A" and "B", supra, and the Division of Taxation is directed to modify the notices of determination and demands for payment of sales and use taxes due to so conform, but, in all other respects, the petition is denied.

DATED: Troy, New York

10/22/92

ADMINISTRATIVE LAW JUDGE