

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

BROWN-STORIE, INC.

DECISION

for Revision of a Determination or for Refund  
of Sales and Use Taxes under Articles 28 and 29  
of the Tax Law for the Period December 1, 1976  
through August 31, 1979.

Petitioner, Brown-Storie, Inc., 280 East Main Street, Gouverneur, New York 13642, 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 December 1, 1976 through August 31, 1979 (File No. 29680).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on March 8, 1983 at 9:15 A.M., with additional evidence to be submitted by April 30, 1983. Petitioner appeared by Robert Leader, Esq. The Audit Division appeared by John P. Dugan, Esq. (Alexander Weiss, Esq., of counsel).

#### ISSUES

I. Whether the work performed by petitioner pursuant to certain contracts constituted repairs or capital improvements to real property.

II. Whether certain supplies purchased by petitioner for use in performing repair work are subject to tax.

#### FINDINGS OF FACT

1. Petitioner, Brown-Storie, Inc., is an industrial contractor primarily performing work for paper manufacturers.

2. On January 25, 1980, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period December 1, 1976 through August 31, 1979 for taxes due of \$5,951.24, plus interest of \$631.16, for a total of \$6,582.40.

3. On audit, the Audit Division analyzed petitioner's contracts in detail for the audit period and categorized them as capital improvements, repairs and machinery installation. Purchase invoices and job cost records related to the contracts were reviewed and errors were found in the following areas:

(1) Petitioner failed to pay a sales or use tax on materials purchased for certain jobs which the Audit Division determined were capital improvements. Petitioner did not pay a tax because the customer issued a direct pay permit. The tax due in this area was \$3,220.84.

(2) Petitioner failed to pay sales or use tax on equipment rentals and supplies purchased and used in certain repair work. These customers also issued a direct pay permit. The additional taxes amounted to \$898.87.

(3) Petitioner failed to pay sales or use tax on small tools and vehicles rented from a subsidiary corporation which produced a deficiency of \$1,831.53.

4. At the hearing, petitioner agreed to a liability of \$2,327.45 [item (3) plus \$495.92 of item (1)].

5. The additional taxes of \$2,724.92 determined in Finding of Fact "3(1)" involve materials purchased for use in performing the following contracts:

<u>CUSTOMER</u>	<u>CONTRACT AMOUNT</u>	<u>TAXABLE MATERIALS</u>	<u>TYPE OF CONTRACT</u>
(a) Boise Cascade	\$ 36,345.00	\$16,323.00	Cost Plus
(b) Boise Cascade	1,834.61	1,658.00	Cost Plus
(c) St. Regis Paper	101,061.00	27,942.00	Cost Plus

The contract for (a) provided that petitioner supply labor, supervision, tools, supplies, materials, equipment and insurance for the resurfacing of a dam. Petitioner placed 3,000 PSI concrete, 8 inches thick on the up stream and down stream side of the dam. Four inches of concrete was placed on the top section of the dam. Petitioner cleaned all loose concrete and debris from the existing dam surface, down to solid concrete to allow the concrete facing to bond to the existing concrete. The work also included placing rerods on 12 inch centers each way in all concrete areas. Petitioner resurfaced 127 feet.

Contract (b) involved replacing a concrete floor in the beater room.

Contract (c) was for the construction of a coal conveyor tunnel and coal pit dump. Petitioner was required to cast in place 3,000# concrete with rerod. Tunnel walls, base and top slab were 12 inches thick. The tunnel dimensions were 8' x 8' x 162'. The coal dump area was 15' x 15' x 17' and also required a 12 inch concrete base.

Petitioner argued that the work it performed pursuant to the foregoing contracts was in the nature of repairs and since a direct pay permit was furnished by the customer, it was not liable for tax on the materials purchased nor was it required to collect tax from the customer.

The Audit Division took the position that the work performed by petitioner constituted a capital improvement and, as such, petitioner was liable for tax on the materials, regardless of the direct pay permits.

6. The supplies referred to in Finding of Fact "3(2)" included such items as dynamite, small tools, safety devices, oxygen, acetylene and the like. The Audit Division did not consider the materials actually transferred to the customer as part of the repair as being taxable.

Petitioner argued that the materials and supplies purchased for repair jobs were delivered directly to the job location and upon delivery were under the custody and control of the customer. Petitioner concluded that since the materials and supplies were delivered to the customer and the customer was charged for such items under cost plus contracts, the purchases it made were resold to the customer.

#### CONCLUSIONS OF LAW

A. That section 1101(b)(4) of the Tax Law defines "retail sale" as:

"...(i) a sale of tangible personal property to any person for any purpose, other than (A) for resale of such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3) and (5) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor...for use or consumption in erecting structures or buildings...or otherwise adding to, altering, improving, maintaining, servicing or repairing real property... is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed."

B. That the work performed by petitioner pursuant to contract (a) under Finding of Fact "5" constituted "maintaining, servicing or repairing" real property within the meaning and intent of sections 1105(c)(3) and 1105(c)(5) of the Tax Law. [Matter of Climax Manufacturing Company, State Tax Commission, October 16, 1974]. Therefore, petitioner is not liable for tax on the materials which became a physical component part of the dam in accordance with section 1101(b)(4)(i)(B) of the Tax Law.<sup>1</sup>

---

<sup>1</sup> Section 1101(b)(4) requires that a contractor pay sales tax on purchases of materials used in performing services under sections 1105(c)(3) and (5) of the Tax Law. However, section 1119(c) of the Tax Law provides for a refund of such taxes when used in the manner herein.

Petitioner was not required to collect sales tax from the customer on said transaction since it was furnished with a direct pay permit.

C. That the work performed by petitioner pursuant to contracts (b) and (c) constituted capital improvements to real property within the meaning and intent of sections 1105(c)(3) and 1105(c)(5) of the Tax Law. Therefore, petitioner was liable for tax on purchases of tangible personal property consumed in the performance of such work in accordance with section 1101(b)(4) of the Tax Law.

D. That the equipment rentals and supplies used or consumed by petitioner in performing repair work are subject to tax regardless of whether they were sold to the customer prior to use by petitioner pursuant to section 1101(b)(4) of the Tax Law.

E. That the petition of Brown-Storie, Inc. is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 25, 1980; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

FEB 29 1984

STATE TAX COMMISSION

Edwina W. Chen  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

Mark J. O'Connell  
COMMISSIONER