

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of  
CHAMPLAIN BRICK COMPANY, INC.  
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, 1977  
through November 30, 1979.

DECISION

Petitioner, Champlain Brick Company, Inc., Upper Broad Avenue, Binghamton, New York 13904, 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 March 1, 1977 through November 30, 1979 (File No. 31234).

A small claims hearing was held before John F. Koagel, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on February 10, 1983 at 1:15 P.M., with all briefs to be filed by July 1, 1983. Petitioner appeared by Donald A. Levinger, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (James F. Morris, Esq., of counsel).

ISSUES

I. Whether a field audit of petitioner's books and records utilizing test periods to determine additional sales and use taxes was proper.

II. Whether the Audit Division properly assessed additional sales and use taxes against petitioner with regard to certain transactions.

FINDINGS OF FACT

1. On June 20, 1980, as the result of a field audit, petitioner was issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due. This Notice asserted that additional sales and use taxes were due in the

amount of \$2,687.13, plus interest of \$329.59, for a total of \$3,016.72 and covered the period March 1, 1977 through November 30, 1979.

2. Petitioner is a wholesaler and retailer of building materials.

Records are maintained in Binghamton, New York. The factory and store are located in Rensselaer County even though they have a Mechanicville, Saratoga County, New York address. Products are delivered from the Rensselaer County location to customers; many times these deliveries are to contractors' job sites. Deliveries are made to various local sales taxing jurisdictions. On occasion, customers pick up the products at petitioner's factory and store location.

3. Petitioner's records for the audit period included purchase orders, delivery tickets for each truckload of products showing customer(s) and destination(s), sales invoices, sales journals, customer record cards, general ledgers, sales tax exemption certificates, copies of tax returns, cash receipts journals, cash books, purchase invoices, paid vouchers, purchase journals, cash disbursements journals, cancelled checks and a general journal. In 1978, petitioner switched from handwritten records to computer prepared records.

4. On audit, the auditor reviewed petitioner's sales records in detail for the months of August, 1978 and August, 1979. This review revealed additional sales tax due in two areas, one being the lack of substantiation to support alleged exempt sales, and the other being the collection of local sales and use taxes. The additional taxable sales resulting from disallowed exempt sales for the two months reviewed was projected over the entire audit period, based on total exempt sales, to arrive at additional sales tax due of \$1,089.81 for the entire audit period. The additional tax for the two months reviewed resulting from the erroneous collection and reporting of local sales and use tax was

projected over the entire audit period, based on sales tax paid, to arrive at additional sales tax due of \$391.73.

In the area of purchases, the auditor reviewed in detail petitioner's recurring expense purchase records for the entire year of 1979. The additional taxable purchases found made during 1979 were projected, based on gross purchases made by petitioner, over the entire audit period to arrive at additional tax due on recurring expense purchases of \$851.79. Capital asset purchases were reviewed for the entire audit period and additional tax was determined of \$353.80.

Combining the additional tax due for the four areas described above results in the total additional tax of \$2,687.13 as asserted in the Notice.

5. At the outset of the hearing held herein, it was stipulated that the tax at issue is reduced to \$2,218.07. This reduction took into consideration a reduction of assessed sales tax in the area of disallowed exempt sales based on the presentation of a resale certificate supplied by one of petitioner's customers, Mid Hudson Supply Company, and a reduction of recurring expense purchases subject to use tax (part of which was the reclassification of one item from recurring expense purchases to a capital asset).

As a result of the stipulated reduction, the hearing encompassed the transactions resulting in additional tax due, summarized by category, as follows:

- a) Capital Assets - (audit done in detail) \$503.80 for the entire audit period.
- b) Recurring Expense Purchases - (test period full year of 1979) \$254.86 for the test year of 1979.

c) Incorrect Jurisdictional Reporting - (test period of August, 1978 and August, 1979) \$36.97 for the two test months.

d) Disallowed Exempt Sales - (test period of August, 1978 and August, 1979) \$75.60 for the two test months.

6. Petitioner presented the following, concerning the transactions at issue, in order to refute the additional tax determined by the Audit Division:

a) Capital Assets

1) Petitioner sought to offset the tax liability in this area by \$190.00 in tax (4%) represented by two invoices of Track Works, Inc. Copies of these invoices were presented at the hearing, one for \$3,900.00 and the other for \$850.00. Petitioner testified that these were part of the reconstruction of 400 feet of their railroad siding, and that this was part of a large capital improvement project and should not be subject to tax. The \$850.00 invoice was dated June 23, 1978 and included the description "Labor, materials and equipment to repair railroad siding as per our verbal discussion." The \$3,900.00 invoice was dated May 10, 1979 and included the description "To invoice you for the labor, equipment and materials to refurbish 400' + track. Our cost to you \$3,500.00" (emphasis added) and "To install 10 ea. additional ties @ \$40.00...\$400.00". There was no contract or any other documentation presented showing the description of the overall work done or whether or not Track Works, Inc. was the prime contractor.

2) Petitioner asserted that two invoices of Eugene Borden in the amounts of \$1,800.00 and \$400.00 and one invoice of Frank Marino in the amount of \$500.00, on which no tax was paid, were for portions of the track siding reconstruction job; copies of these invoices were presented at the hearing. Eugene Borden's \$1,800.00 invoice was dated June 29, 1979 and included the description "Labor for repairs to RR siding" and his \$400.00 invoice was dated June 8, 1979 and bore the same description. Frank Marino's invoice for \$500.00 showed a sale of 100 railroad ties at \$5.00 each and was dated June 8, 1979. Again, there was no contract or any other documentation produced to show the overall extent of the siding contract or who the prime contractor was.

3) Petitioner asserted that two invoices of Red Durkee, one dated November 29, 1979 in the amount of \$700.00 and the other dated December 12, 1979 in the amount of \$1,800.00, were for renovation of a kiln shed and should not be taxed as the work constituted a capital improvement; no tax was paid on either invoice. Copies of the invoices were produced at the hearing

and only indicated that the work done was a paint job. No contract or other documentation was presented to reflect a description of the overall job or who the prime contractor was.

b) Recurring Expense Purchases

1) Petitioner addressed two invoices of Red Durkee totalling \$2,500.00 and one invoice of H. L. Gage Sales, Inc. in the amount of \$375.00. However, these transactions were eliminated from the audit findings when the total tax due was reduced to \$2,218.07 (Finding of Fact "5"). Also, the Red Durkee transactions were further addressed under capital assets above, a) 3).

2) Petitioner asserted that six invoices totalling \$130.00 from Motorola, Inc., bearing no tax, were non-taxable. Petitioner testified that he was advised that no tax was due and that the charges were for a repeater antenna service lease. Petitioner asserted that this was a charge for an interstate communication system and cannot be taxed by New York State. Copies of invoices were presented at the hearing, however, there was no further description of the transaction or the charges introduced at the hearing.

3) Petitioner contended that an invoice of B. A. Bove and Sons, Inc. in the amount of \$72.08 actually included sales tax. In support of its position, petitioner submitted a handwritten note signed by John Bove, Manager, dated May 19, 1980 indicating that all prices charged to petitioner included sales tax.

4) At the hearing, petitioner asserted that an invoice for \$73.06, dated October 27, 1979, of H. L. Gage Sales, Inc. was actually a replacement invoice and reflected no breakdown of any charges and thus included tax. Subsequent to the hearing, petitioner asserted that this was a non-taxable delinquency charge. There was no documentary evidence introduced concerning this transaction.

5) Petitioner challenged an \$18.12 charge via periodic statement of Saratoga Racquet Club dated April 20, 1979. A subsequent statement dated June 29, 1979, submitted at the hearing, showed that tax was properly charged on the transactions in question.

c) Incorrect Jurisdictional Reporting

Petitioner produced documentation to show that during the two test months of August, 1978 and August, 1979, two sales transactions totalling \$1,058.15 were sales made in a New York State only taxing jurisdiction (4% rate) rather than in the City of Mechanicville (6% rate), that a \$100.00 sales transaction was made in Rensselaer County (6% rate) rather than in Washington

County (7% rate), and that a \$65.12 sales transaction was made in Rensselaer County (6% rate) rather than in Albany County (7% rate).

d) Disallowed Exempt Sales

Petitioner asserted that the tax due for disallowed exempt sales should be restricted to \$75.60, the amount found due on transactions which occurred within the two test months of August, 1978 and August, 1979 only.

7. The Audit Division asserted that petitioner's records were inadequate because many sales invoices did not show the exact points of delivery in order to determine taxing jurisdictions and that some taxing jurisdictions had to be determined through other means, such as telephone calls, where it was unclear as to exactly which taxing jurisdiction certain points of delivery were located. The Audit Division also asserted that petitioner's general books and records did not tie in and that sales per books, federal tax returns and sales tax returns were not in agreement. At the hearing, the Audit Division introduced schedules to show these alleged discrepancies. In addition, the Audit Division contended that the errors found on some of petitioner's sales and purchase invoices and the fact that some exemption certificates were missing at the time of the audit rendered the records inadequate.

There was no allegation made by the Audit Division that any sales invoices, purchase invoices, delivery tickets or any other records were missing or not presented to the auditor.

8. At the hearing, petitioner submitted schedules prepared by the secretary-treasurer of petitioner which explained the differences in petitioner's general books and records and reconciled the sales per books, sales tax returns and federal tax returns. These schedules had the effect of demonstrating that, in reality, there were no discrepancies with regard to petitioner's books and records.

9. There was no written agreement between petitioner and the Audit Division concerning the use of test periods to determine petitioner's tax liability; there was conflicting testimony concerning whether or not there was a verbal agreement.

CONCLUSIONS OF LAW

A. That although there is statutory authority for use of test periods to determine the amount of tax due, resort to such methods must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

That petitioner's records were adequate in order for the Audit Division to determine petitioner's exact tax liability. Therefore, any tax liability must be confined to the periods actually audited (see Finding of Fact "5", supra).

B. That section 1132(c) of the Tax Law provides that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section 1105 of the Tax Law are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax or the customer.

C. That petitioner has sustained its burden of proof with regard to the transactions described in Finding of Fact "6b) 5)" and "6c)"; that the tax determined as a result of these transactions should be deleted.

D. That petitioner has not sustained its burden of proof with regard to the transactions described in Finding of Fact "6a) 1), 2), 3)" and "6b) 2), 3), and 4)"; that the offset requested in Finding of Fact "6a) 1)" is denied and

the tax determined due on the other transactions is sustained. That no adjustment is warranted on the transactions described in Finding of Fact "6b) 1)", as these were deleted from the assessment by stipulation prior to the hearing held herein.


E. That the petition of Champlain Brick Company, Inc. is granted to the extent indicated in Conclusions of Law "A" and "C"; that in all other respects, the petition is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on June 20, 1980 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

MAR 21 1984

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER