

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

BOCCARD INDUSTRIES, 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 June 1, 1980
through August 31, 1980.

Petitioner, Boccard Industries, Inc., 45 South 4th Street, Bayshore, New York 11706, 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 June 1, 1980 through August 31, 1980 (File No. 47962).

On November 22, 1986, petitioner's representative, Bower & Gardner, Esqs. (Theodore F. Dickson, Esq., of counsel), executed **on** petitioner's behalf a waiver of hearing and submitted its case for decision based upon the existing record, together with briefs to be submitted by the parties **on or** before January 5, 1987. After due consideration, the State Tax Commission hereby renders the following decision.

ISSUE

Whether the Audit Division properly assessed sales tax on petitioner's acquisition of certain non-manufacturing assets from W. D. Boccard & **Sons**, Inc. in consideration for petitioner's transfer of 375 shares of its voting stock to the said W. D. Boccard & Sons, Inc.

FINDINGS OF FACT

1. In February of 1982, the Audit Division commenced an audit of Boccard Industries, Inc. (hereinafter "petitioner"). On November 9, 1982, petitioner,

by its vice-president, Richard T. Boccard, executed a consent whereby it agreed that sales and use taxes due from petitioner for the period September 1, 1979 through May 31, 1980 could be assessed at any time on or before June 20, 1983. On November 24, 1982, petitioner, by its president, William D. Boccard, executed a Partial Consent to Fixing of Tax Not Previously Determined and Assessed, agreeing to the final and irrevocable assessment of tax in the amount of \$31,618.75, plus interest, for the period September 1, 1979 through May 31, 1982. Petitioner did not agree to the assessment of tax on certain assets acquired from **W.** D. Boccard & Sons, Inc. (hereinafter "the transferor").

2. On August 19, 1983, the Audit Division issued to petitioner a Notice and Demand for Payment of Sales and Use Taxes Due in the amount of \$31,618.75, plus interest, for a total amount due of \$42,949.44 for the period September 1, 1979 through May 31, 1982. The notice and demand explained that the tax due was computed as a result of a recent audit of petitioner's records and that the tax was being assessed in accordance with the signed Consent to Fixing of Tax Not Previously Determined and Assessed. On the same date (August 19, 1983), the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$2,539.07, plus interest, for a total amount due of \$3,378.25 for the period June 1, 1980 through August 31, 1980.

3. At a special joint meeting of the directors and shareholders of the transferor on July 29, 1980, a resolution to liquidate the transferor pursuant to the provisions of section 368(a)(1)(C) of the Internal Revenue Code was adopted. Pursuant to the plan of liquidation, the transferor agreed to transfer all of its business assets to petitioner in consideration of its receiving 375 shares of petitioner's voting stock, said shares to be distributed to the

transferor's shareholders in proportion to their holdings in the transferor. The transferor's property was transferred to petitioner subject to the liabilities of the transferor which were to be assumed by petitioner.

4. Prior to the adoption of the plan of liquidation, both the transferor and petitioner maintained offices at 45 South 4th Street, Bayshore, New York. Both corporations had identical shareholders and directors.

5. On August 1, 1980, petitioner acquired certain non-manufacturing assets from the transferor pursuant to the transferor's liquidation plan. The Audit Division, during the course of its audit of petitioner, determined that the book value of such assets was \$36,272.49 and that sales tax was due thereon in the amount of \$2,539.07 (7 percent of \$36,272.49). After the transfer of the non-manufacturing assets to petitioner, the transferor dissolved and petitioner remained as the surviving corporate entity. The transferor thereupon filed with the Internal Revenue Service, Form 966, Corporate Dissolution or Liquidation, citing section 368(a)(1)(C) of the Internal Revenue Code as the section under which it was to be dissolved or liquidated. Petitioner filed with the Internal Revenue Service a Notice of Reorganization under section 368(a)(1)(C) of the Internal Revenue Code.

6. Petitioner contends that the transaction herein qualifies for an exemption from the imposition of sales tax by virtue of the provisions of section 1101(b)(4)(ii)(A) of the Tax Law as said statute was constituted for the period at issue.

CONCLUSIONS OF LAW

A. That section 1105 of the Tax Law imposes sales tax upon the receipts from every retail sale of tangible personal property, except as otherwise provided in Article 28 of the Tax Law.

B. That section 1101(b)(4)(ii)(A) of the Tax Law, in effect for the period at issue, provided that the term "retail sale" does not include "[t]he transfer of tangible personal property to a corporation, solely in consideration for the issuance of its stock, pursuant to a merger or consolidation effected under the law of New York or any other jurisdiction".

C. That 20 NYCRR 526.6(d)(6)(iv) provides as follows:

"Where a corporation purchases another corporation's assets in consideration of issuance of stock of the purchasing corporation, or the parent of the purchasing corporation, such as under section 368(a)(1)(C) of the Internal Revenue Code, the transaction does not qualify as a merger or consolidation, even if the selling corporation is subsequently liquidated.

Example 9: Corporation A will transfer its assets to Corporation B in consideration for B's issuance of shares of its stock. Corporation A will continue to exist for discharging its expenses, and then will be dissolved. The transfer of tangible personal property will be subject to tax, as it is carried out under a plan of reorganization but is not a statutory merger or consolidation."

D. That a distinction between a statutory merger or consolidation and an acquisition by one corporation of substantially all of the properties of another corporation in exchange for all or a part of the voting stock of the other corporation is clearly drawn by section 368(a)(1) of the Internal Revenue Code which provides, in pertinent part, as follows:

"IN GENERAL. -- For purposes of parts I and II and this part, the term 'reorganization' means --

(A) a statutory merger or consolidation;

* * *

(C) the acquisition by one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or a part of the voting stock of a corporation which is in control of the acquiring corporation), of substantially all of the properties of another corporation, but in determining whether the exchange is solely for stock the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, shall be disregarded;"

E. That both the transferor and petitioner filed documents with the Internal Revenue Service which indicated that a dissolution or liquidation and a reorganization, respectively, were effectuated pursuant to the provisions of section 368(a)(1)(C) of the Internal Revenue Code.

F. That while a transfer of tangible personal property to a corporation, solely in consideration for the issuance of its stock, pursuant to a merger or consolidation effected under the law of New York or any other jurisdiction is specifically excluded from the definition of "retail sale" and is, therefore, not subject to the imposition of sales tax, 20 NYCRR 526.6(d)(6)(iv) specifically excludes from the definition of merger or consolidation a transaction such as the one at issue herein which was carried out pursuant to the provisions of section 368(a)(1)(C) of the Internal Revenue Code. The acquisition, by petitioner, of the non-manufacturing business assets of the transferor in exchange for shares of petitioner's voting stock was, therefore, subject to the imposition of sales tax.

G. That the petition of Boccard Industries, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, issued August 19, 1983, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1987

PRESIDENT



COMMISSIONER



COMMISSIONER