

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
BURKHARD BROTHERS, 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 September 1, 1980	:	
through August 31, 1983.	:	

Petitioner, Burkhard Brothers, Inc., 203 Wavel Street, P.O. Box 303, Syracuse, New York 13206, 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, 1980 through August 31, 1983 (File No. 49335).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on April 2, 1986 at 1:15 P.M., with all briefs to be submitted by April 16, 1986. Petitioner appeared by Michael Canestrano, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined petitioner's sales tax liability for the audit period.

II. Whether the Audit Division's assertion of penalty against petitioner pursuant to section 1145(a) of the Tax Law was proper.

FINDINGS OF FACT

1. On December 5, 1983, as the result of an audit, the Audit Division issued to petitioner, Burkhard Brothers, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due asserting additional tax due for

the period September 1, 1980 through August 31, 1983 in the amount of \$18,513.39, together with penalty due of \$3,982.36 and interest of \$4,541.01, for a total amount asserted due of \$27,036.76.

2. Petitioner is and was at all times relevant herein a New York corporation engaged in the rebuilding and reconditioning of machine tools.

3. On audit, the Audit Division claimed additional tax due from petitioner in three areas. First, the Audit Division asserted additional tax due in the amount of \$141.43 on petitioner's acquisition of certain fixtures and equipment during the audit period. Petitioner did not take issue, either in its petition or at hearing, with the additional tax asserted due in this area. Second, the Audit Division asserted additional tax due in the amount of \$1,192.44 with respect to certain of petitioner's invoices for which the Audit Division had determined that proper exemption certificates were not on file or for which such exemption certificates did not apply to the services set forth on the invoice. Third, the Audit Division determined that petitioner had not charged sales tax in all cases on the labor portion of the rebuilding services which it had provided to its customers. The additional tax asserted due in this area amounted to \$17,179.52.

4. With respect to the second area referred to above in which the Audit Division has asserted additional tax due, the Audit Division reviewed certain adjustments made by petitioner in its sales tax worksheets with respect to 20 invoices dated throughout the audit period. Specifically, petitioner, in the course of calculating its sales tax liability on its sales tax worksheets, had adjusted downward the amount of tax due with respect to each of the 20 invoices as set forth in its sales tax accrual account. Petitioner used its sales tax worksheets to calculate its sales tax liability.

5. For 9 of the 20 invoices for which the Audit Division found a discrepancy between sales tax figures set forth in petitioner's accrual account and sales tax figures as set forth on petitioner's worksheets, the Audit Division found a properly completed sales tax exemption certificate on file for the customer in question. Petitioner had, therefore, properly adjusted its sales tax worksheets with respect to these 9 invoices. With respect to 7 of the invoices, the Audit Division found no exemption certificates on file and therefore asserted the sales tax set forth on those invoices as being due from petitioner. Finally, with respect to the remaining 4 invoices for which a discrepancy existed between petitioner's accrual account and its worksheets, the Audit Division also asserted the sales tax set forth on said invoices as being due from petitioner. While the customers listed on these 4 invoices each had exemption certificates on file, the Audit Division contended that said certificates did not apply to the particular services which were rendered to the customer.

Specifically, the 4 invoices in question set forth the following:

<u>DATE</u>	<u>INVOICE NO.</u>	<u>VENDOR</u>	<u>TAX DUE</u>	<u>DESCRIPTION</u>
12/16/80	24486	Felton Machine Co.	\$242.00	Rebuild: 1 each - Bridgeport Vertical Miller; Repair power table feed
2/5/81	24531	American Precision Industries, Inc.	\$241.50	Rebuild: 1 each - Model HCT Hardinge Chuckler
3/16/81	24555	Emery Machine & Tool Co.	\$ 51.80	Rescrape: 1 each - Boyar-Schultz Surface Grinder
5/26/81	24615	General Screw Products Corp.	\$119.00	Recondition 3G Brown & Sharpe Screw Machine

6. With respect to the Audit Division's assertion of additional tax due based upon its contention that petitioner had improperly failed to charge sales

tax due for the labor portion of its charges to its customers, the Audit Division conducted a test period audit in making its determination as to additional tax asserted due in this area. The auditor selected the quarters ended November 30, 1980, February 28, 1981 and November 30, 1982 as the test periods. These periods had the highest, most nearly average, and lowest gross sales, respectively, of all quarters throughout the audit period. All invoices were examined for each of the test periods with respect to amounts charged on labor services provided by petitioner which were subject to tax. The review of such invoices revealed additional labor charges subject to tax in the amount of \$143,924.50 for the test period. This amount was then divided by the total test period gross sales of \$677,283.00 resulting in an additional labor/gross sales ratio of .2125. This factor was multiplied by the total gross sales for the entire audit period of \$2,413,956.00 resulting in additional labor sales on audit of \$512,967.52, and additional tax asserted due thereon in the amount of \$17,179.52.

7. In making its determination as to the taxability of the charges set forth on petitioner's invoices, the Audit Division reviewed the description of work performed on each invoice to determine if labor charges constituted a portion of the total charges set forth on the invoice. For those invoices for which a separate labor charge was listed (and for which no sales tax was charged), the Audit Division included that labor charge as additional taxable labor charges. For those invoices which did not list a separate labor charge, the auditor reviewed petitioner's records to determine the breakdown between charges for labor and charges for materials.

8. Prior to the commencement of the test period audit, petitioner, by its then-president, Carl Burkhard, executed an Audit Method Election form on

July 25, 1983 electing "utilization of a representative test period audit" to determine its sales tax liability in this area.

9. Carl Burkhard died on August 3, 1983 and was succeeded as president of petitioner by John Burkhard.

10. At hearing, petitioner contended that the aforementioned Audit Method Election was invalid due to the death of Carl Burkhard because petitioner had not been able to establish that Carl Burkhard had understood the implications of signing said document.

11. Subsequent to the completion of the test period audit, petitioner conducted its own detailed audit for the period at issue and, based upon the auditor's determinations as to the taxability of the labor charges, determined that \$18,417.30 in additional sales tax was due. Petitioner subsequently made a demand for payment of sales tax from each of its customers based upon its determination of the additional tax due from each such customer. Petitioner remitted \$4,139.08 of additional tax due from payments received from its customers as a result of this demand. Petitioner also received approximately \$12,000.00 in additional payments of sales tax from its customers subsequent to its remittance of the \$4,139.08 payment. Petitioner has not remitted any part of this approximately \$12,000.00 in sales tax collected to the Department.

12. Petitioner contended that it properly relied upon representations by its customers that purchases by such customers were exempt from sales tax based upon such customers' furnishing of exempt use certificates or exemption numbers. Petitioner further contended that its subsequent demand for payment of sales tax from its customers should relieve it of any further liability to collect the tax asserted due.

13. The Audit Division previously conducted an audit of petitioner for the period March 1, 1973 through November 30, 1975. As a result of a hearing held with respect to that audit, the State Tax Commission determined that petitioner's services, which services were substantially similar to the services at issue herein, were properly subject to sales tax.

CONCLUSIONS OF LAW

A. That the services provided by petitioner to its customers constituted producing or fabricating within the meaning of section 1105(c)(2) of the Tax Law and servicing or repairing tangible personal property within the meaning of section 1105(c)(3) of the Tax Law, and were therefore properly subject to sales tax (see Matter of Burkhard Bros., Inc. State Tax Commission, May 1, 1981).

B. That, during the period at issue, section 1132(c) of the Tax Law provided, in pertinent part:

"[I]t shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five... are subject to tax until the contrary is established, and the burden of proving that any receipt...is not taxable hereunder shall be upon the person required to collect tax.... [U]nless... a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe, signed by the purchaser and setting forth his name and address and, except as otherwise provided by regulation of the tax commission, the number of his registration certificate, together with such other information as said commission may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen,... the sale shall be deemed a taxable sale at retail.... Where such a certificate or statement has been furnished to the vendor, the burden of proving that the receipt, amusement charge or rent is not taxable hereunder shall be solely upon the customer."

C. That inasmuch as section 1115 of the Tax Law makes no provision for exemption with respect to the services at issue herein, petitioner improperly failed to collect sales tax from its customers with respect to said services

(see Matter of Burkhard Bros., Inc., supra). Petitioner is therefore liable for such taxes pursuant to section 1133(a) of the Tax Law.

D. That with respect to those sales for which no exemption certificate was discovered, petitioner has failed to sustain the burden of proof imposed upon it by section 1132(c) of the Tax Law.

E. That in view of petitioner's election of the use of a test period audit, the Audit Division's use of such methodology was proper. The death of petitioner's then-president, Carl Burkhard, subsequent to his election of the test period audit does not by itself vitiate petitioner's election of this audit method. It is noted that at no time did petitioner formally make any attempt to revoke its election.

F. That the test periods utilized by the Audit Division in its audit were reasonable and the petitioner has failed to show wherein the use of such test periods was improper. Moreover, it is noted that the results of petitioner's own detailed audit strongly support the results of the test period audit.

G. That in view of the prior audit of petitioner and the State Tax Commission decision resulting therefrom, the Audit Division properly asserted penalty against petitioner. Petitioner made no apparent effort to correct its practices with respect to its collection of sales tax from its customers as evidenced by the results of the audit at issue herein. Accordingly, it is determined that petitioner's failure to properly collect and remit the tax at issue herein was due to willful neglect and not due to reasonable cause (see Tax Law §1145[a]).


H. That the petition of Burkhard Brothers, Inc. is in all respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 5, 1983 is sustained.

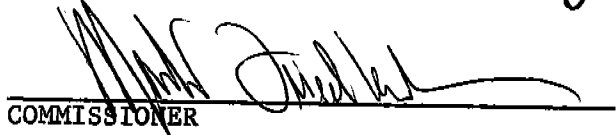
DATED: Albany, New York

STATE TAX COMMISSION

NOV 12 1986


PRESIDENT


COMMISSIONER


COMMISSIONER