

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition

of

BROWN'S HEAT SERVICE, 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,  
1979 through February 28, 1983.

---

Petitioner, Brown's Heat Service, Inc., 545 Greenwich Street, Hempstead, New York 11550, 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, 1979 through February 28, 1983 (File No. 51743).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 2, 1986 at 1:15 P.M. Petitioner appeared by Joel S. Zuller, C.P.A. The Audit Division appeared by John P. Dugan, **Esq.** (Gary Palmer, **Esq.**, of counsel).

#### ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner for the period December 1, 1979 through February 28, 1983.

#### FINDINGS OF FACT

1. Petitioner, Brown's Heat Service, Inc., was an electrical contractor.
2. On September 20, 1983, 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, 1979 through February 28, 1983 for taxes due of \$16,654.65, plus penalty and interest of \$8,062.42, for a total of \$24,717.07.

3. By letter dated December 10, 1982, the Central Sales Tax Section of the Audit Division advised petitioner that its sales tax returns were being reviewed and enclosed two forms, "Analysis of Non-Taxable Sales" and "Business Summary Sheet", to be completed and returned in order to assist in the review.

4. In response to the Audit Division's request, petitioner submitted sales and purchase information for periods ended May 31, 1980, November 30, 1980, February 28, 1981, May 31, 1981, August 31, 1981 and November 30, 1981. Additionally, petitioner furnished gross sales and cost of goods sold reported on Federal income tax returns for the fiscal years ending March 31, 1981 and March 31, 1982. A review of the information disclosed that petitioner was liable for additional taxes of \$16,654.65. The Audit Division determined that petitioner paid sales tax to its suppliers on all materials purchased for use in its construction business and then claimed a credit for the same amount on sales tax returns filed. The Audit Division disallowed the credits claimed on the returns and held petitioner liable for tax on the material used in capital improvement work for all customers except exempt organizations.

5. Petitioner protested the results of the desk audit and the Audit Division held a conference on November 17, 1983. Additional books and records were reviewed which revealed that the tax paid by petitioner on material purchases of \$452,733.23 for the audit period amounted to \$29,268.20 as compared to credits claimed for the same period of \$32,581.00. Because of this discrepancy the Audit Division conducted a field audit of petitioner's books and records.

6. Petitioner maintained adequate and complete books and records. In lieu of an examination of all books and records, petitioner executed an "Audit Method Election" form wherein it agreed to a test period audit method. On

audit, the Audit Division reconciled gross sales from the books and records with the sales tax returns filed. It was also verified that petitioner paid sales tax to its suppliers on purchases of materials. The Audit Division analyzed petitioner's sales in detail for the period December 1, 1979 through May 31, 1980 and determined taxable sales of \$107,467.55 (\$80,923.00 - repair and labor and \$26,544.50 - cost of materials used in capital improvements performed for customers other than exempt organizations).<sup>1</sup> The audited taxable sales were 96.46 percent of reported taxable sales for the same period. This percentage was applied to reported taxable sales for the audit period which resulted in total taxable sales of \$441,567.76 and tax due thereon of \$32,294.90. From the analysis of sales, the Audit Division found that the cost of materials used in repairs and capital improvements work for exempt organizations amounted to \$25,685.54 for the period December 1, 1979 through May 31, 1980 or 23.90 percent of audited taxable sales determined for said period. Based on this percentage, the Audit Division computed a credit due on materials of \$7,479.49. The net result of the foregoing audit procedures was a deficiency of \$23,815.41. The tax paid with sales tax returns filed of \$5,855.79 was deducted, leaving a balance due of \$17,959.62.

7. The tax due for each quarterly period was compared with the tax assessed on the notice of determination referred to in Finding of Fact "2" which resulted in a revised liability of \$15,768.79. On September 20, 1984, the Audit Division issued a Notice of Assessment Review which revised the tax due on the notice dated September 20, 1983 to \$14,713.51. On June 20, 1984 the Audit Division issued a Notice of Determination and Demand for Payment of

---

<sup>1</sup> Petitioner erroneously reported the cost of materials as taxable sales on sales tax returns filed.

Sales and Use Taxes Due for the periods ending May 31, 1981, August 31, 1981 and August 31, 1982 amounting to \$1,055.28, plus penalty and interest.

8. Petitioner did not show sales tax separately on the invoice issued to the customer for capital improvement jobs. The sales tax did appear separately on work orders which were merely internal records used by petitioner for accounting purposes.

9. Petitioner took the position that the Audit Division is collecting the sales tax twice on the same materials unless the credits claimed on the sales tax returns are allowed.

10. Petitioner in good faith attempted to pay the actual tax liability when preparing sales tax returns.

#### CONCLUSIONS OF LAW

A. That the Audit Division properly determined petitioner's tax liability in accordance with the provisions of section 1138(a) of the Tax Law. However, since petitioner did not collect sales tax from customers on materials used in the performance of capital improvement work, the Audit Division overstated taxable sales to the extent that it included \$26,544.50 in material purchases as taxable sales in the analysis of the period December 1, 1979 through May 31, 1980. The audited taxable sales shall be adjusted to 72.63 percent of reported taxable sales and the percentage of credit due on materials adjusted to 31.74 percent of audited taxable sales. Petitioner was required to collect tax on repairs from nonexempt customers (labor and material); pay sales tax on all materials at the time of purchase; and is entitled to a credit on that portion of the materials used in repairs and in capital improvement work for exempt organizations. Petitioner is not

entitled to any credit for materials used in capital improvement work for other customers.

B. That the penalty is cancelled and interest shall be reduced to the minimum amount prescribed by law (Tax law § 1145[a][1][iii]; 20 NYCRR 536.5[b]),

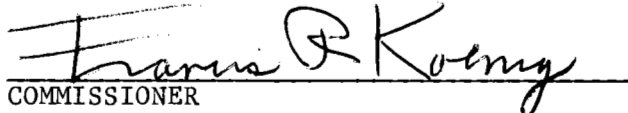
C. That the petition of Brown's Heat Service, Inc. is granted to the extent indicated in Conclusions of Law "A" and "B"; the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued September 20, 1983 (as revised on September 20, 1984 and June 20, 1984; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

UL 0 11987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER