

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Burkhard Bros., Inc. & Carl, John & Robert :
Burkhard & Jeremiah McRedmond, Ind. & as Officers :
: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Sales & Use Tax :
under Article 28 & 29 of the Tax Law :
for the Period 3/1/73 - 11/30/75. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 1st day of May, 1981, he served the within notice of Decision by mail upon Burkhard Bros., Inc. & Carl, John & Robert, Burkhard & Jeremiah McRedmond, Ind. & as Officers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Burkhard Bros., Inc. & Carl, John & Robert
Burkhard & Jeremiah McRedmond, Ind. & as Officers
203 Wavel St.
Syracuse, NY 13206

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
1st day of May, 1981.

James A. Highland

In the Matter of the Petition :
of :
Burkhard Bros., Inc. & Carl, John & Robert :
Burkhard & Jermiah McRedmond, Ind. & as Officers :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Sales & Use Tax :
under Article 28 & 29 of the Tax Law :
for the Period 3/1/73 - 11/30/75. :

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 1st day of May, 1981, he served the within notice of Decision by mail upon Michael Canestrano the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
1st day of May, 1981.

Amie P. Haglund

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

May 1, 1981

Burkhard Bros., Inc. & Carl, John & Robert
Burkhard & Jeremiah McRedmond, Ind. & as Officers
203 Wavel St.
Syracuse, NY 13206

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Michael Canestrano
1303 State Tower Bldg.
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BURKHARD BROS., INC. and	:	
CARL L. BURKHARD, JOHN D. BURKHARD,	:	
ROBERT T. BURKHARD and	:	DECISION
JERMLAH McREDMOND, INDIVIDUALLY	:	
AND AS OFFICERS	:	
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, 1973	:	
through November 30, 1975.	:	

Petitioners, Burkhard Bros., Inc., Carl L. Burkhard, John D. Burkhard, Robert T. Burkhard and Jeremiah R. McRedmond, 203 Wavel Street, 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 March 1, 1973 through November 30, 1975 (File No. 15860).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on May 12, 1980 at 1:15 P.M. Petitioners appeared by Michael Canestrano, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly disallowed certain nontaxable sales reported by petitioner Burkhard Bros., Inc.

II. Whether the Audit Division properly determined petitioners' sales tax liability for the period March 1, 1973 through November 30, 1975 based on its findings from a three-month test period.

FINDINGS OF FACT

1. Petitioner, Burkhard Bros., Inc. (hereinafter petitioner), is engaged in the sale of South Bend lathes and Wysong presses. Additionally, petitioner repairs and rebuilds such machinery.

2. On April 23, 1976, 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 and Carl L. Burkhard, John D. Burkhard, Robert T. Burkhard, and Jeremiah R. McRedmond, individually and as officers, for the period March 1, 1973 through November 30, 1975 for taxes due of \$19,686.43, plus penalty and interest of \$7,009.51, for a total of \$26,695.94.

3. On audit, the Audit Division examined sales invoices for the period March 1, 1975 through May 31, 1975. Petitioner reported nontaxable sales of \$394,342.00 for said period of which \$36,962.15 were disallowed by the Audit Division on the basis that an exemption certificate was not on file or the certificate issued was improper. Such sales represented labor charges for repairs to parts and machinery and rebuilding machinery furnished to petitioner by its customers. The Audit Division computed a margin of error for the additional taxable sales determined for the various taxing jurisdictions in the test period. The error rates were applied to gross sales for the audit period resulting in total additional taxable sales of \$306,975.00 and tax due thereon of \$19,686.43.

4. The petitioner's process consisted of stripping a machine to the casting, checking all machine parts, replacing damaged parts with a new part or restoring the original part to a usable condition, reassembling and repainting the machine.

5. Petitioner had exempt use certificates on file for many of the sales at issue. The Audit Division accepted such certificates for parts or materials separately stated on petitioner's sales invoices.

6. Petitioner argued that machinery, upon completion of its rebuilding process, constituted new machinery and was guaranteed for one year. Petitioner further argued that it was not under a duty to police exemption certificates issued by its customers and as such, any taxes due should be collected from the customer.

7. Petitioner contended that the Audit Division's use of a test period to determine taxes for the other periods under audit was improper.

8. Petitioner maintained and provided the Audit Division complete and adequate books and records.

9. Reasonable cause existed for petitioner's failure to pay over the taxes at issue.

CONCLUSIONS OF LAW

A. That the work performed by petitioner on machinery and parts furnished by customers constituted producing or fabricating within the meaning and intent of section 1105(c) (2) of the Tax Law and servicing or repairing tangible personal property pursuant to section 1105(c) (3) of the Tax Law and, therefore, is subject to the imposition of sales tax. Matter of Great Lakes Color Printing Corp., Tax Commission decision, June 27, 1980.

B. That section 1132(c) of the Tax Law provides, in part, that it shall be presumed that all receipts for property or services...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. Unless a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe...to the effect that the property was purchased for resale or some use by reason of which the sale is exempt from tax under section 1115. Where such a certificate has been furnished to the vendor the burden of proving that the receipt...is not taxable shall be solely upon the customer.

That section 1115 of the Tax Law does not provide an exemption for the services performed by petitioner on machinery and parts furnished by its customers; therefore, petitioner erroneously accepted exempt use certificates in lieu of collecting sales tax. Accordingly, petitioner is liable for the taxes imposed on such sales pursuant to section 1133(a) of the Tax Law. Petitioner also failed to sustain the burden of proof required by section 1132(c) of the Tax Law with respect to those sales for which no exemption certificate was on file.

C. That, although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of recordkeeping 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, 411 N.Y.S. 2d 41.

That petitioner maintained complete and adequate books and records from which the Audit Division could have determined the exact amount of tax due on disallowed nontaxable sales. Accordingly, the tax due is reduced to the actual tax found due for the period March 1, 1975 through May 31, 1975 of \$2,370.39.

D. That the penalty is abated and the interest shall be computed at the minimum statutory rate.

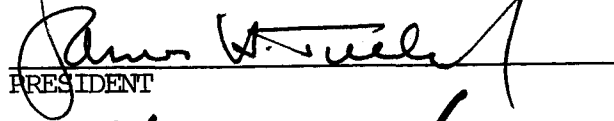
E. That the petition of Burkhard Bros., Inc., Carl L. Burkhard, Robert T. Burkhard, John D. Burkhard and Jeremiah R. McRedmond, individually and as officers, is granted to the extent indicated in Conclusions of Law "C" and "D"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 23,

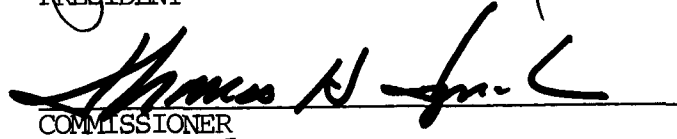
1976; and that, except as so granted, the petition is in all other respects denied.

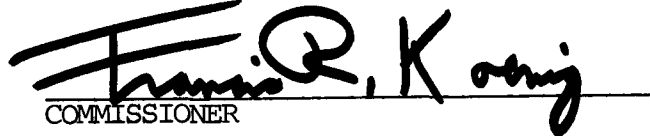
DATED: Albany, New York

MAY 01 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER