STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CEDAR BROOK CONTRACTING CORP.	:	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 May 31, 1983.	:	

Petitioner, Cedar Brook Contracting Corp., 13 Rockwood Avenue, Massapequa, New York 11758, filed an exception to the determination of the Administrative Law Judge issued on October 6, 1988 with respect to its 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 May 31, 1983 (File No. 801363). Petitioner appeared by Cunningham & Lee, Esqs. (Gerard Cunningham, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael Gitter, Esq., of counsel).

Petitioner filed a brief on exception; the Division of Taxation filed objections to petitioner's exception. Oral argument was heard at petitioner's request on March 21, 1989.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether taxable rentals of certain heavy equipment took place between petitioner and B.A.H.L. Industries, Inc.

II. Whether the Division's resort to test period auditing methodology was proper in determining petitioner's tax liability.

III. Whether petitioner has established its entitlement to a refund of certain use tax (plus interest) calculated as due upon audit and paid by petitioner on November 29, 1983 prior to issuance of any notice of determination and demand therefor.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are restated below. We also find facts in addition to those found by the Administrative Law Judge as indicated below.

On March 20, 1984, following a field audit, the Division issued to petitioner, Cedar Brook Contracting Corp. ("Cedar Brook"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1979 through May 31, 1983 in the amount of $237,247.71, plus interest. Cedar Brook, by its president, Leon G. DeBremont, had previously executed a consent extending the period of limitation for assessment of sales and use taxes allowing assessment for the period December 1, 1979 through November 30, 1980 to be made at any time on or before March 20, 1984.

Cedar Brook is a contracting firm involved in the demolition of buildings, site excavation, and trucking and hauling of debris, dirt and sand. Its principal business is the excavation and trucking of covering materials to municipal landfill facilities. Cedar Brook owns no heavy equipment of its own.

Upon commencing the audit (in May of 1983), the auditor requested records from Cedar Brook including, specifically, Cedar Brook's general ledger, purchase journal, cash disbursements journal, cash receipts journal, sales tax returns, income tax returns, purchase invoices and sales invoices. In turn, Cedar Brook supplied all of these requested documents, except that Cedar Brook did not produce any rental (purchase) invoices or lease agreements pertaining to its relationship with B.A.H.L. Industries, Inc. ("B.A.H.L."), and its use of certain heavy equipment owned by B.A.H.L., as described hereinafter.

The auditor deemed Cedar Brook's books and records to be inadequate for purposes of verifying its sales tax liability as reported. This determination was based, in part, upon a conclusion that Cedar Brook had no "internal control" over its recordkeeping functions, in that there was "no separation of duties pertaining to recording and depositing of revenues". More

specifically, the auditor asserted that all receipts were handled entirely by one bookkeeper. The auditor's conclusion of recordkeeping inadequacy was also based, in part, upon the noted lack of rental invoices between Cedar Brook and B.A.H.L.

Upon this conclusion that Cedar Brook's books and records were inadequate, the auditor decided to perform a test period audit and requested specific records, including invoices, for the months of June, July and August 1982. Petitioner did not either specifically object or agree to the use of a test period and, via its bookkeepers, provided its records for the noted three-month test period. Gross sales as shown on Cedar Brook's records, and as reported on its Federal (corporation) income tax returns and its sales and use tax returns (Forms ST-100), were reviewed, reconciled and accepted as reported on such returns. Cedar Brook's sales tax accrual account was reviewed and all taxes accrued were deemed properly paid. Fixed asset acquisitions were analyzed and all tax was considered to have been properly paid thereon.

The auditor also reviewed Cedar Brook's maintenance expense account, utilizing its books and related purchase invoices for each of two (separate) three-month test periods. The two test periods here involved were the previously noted June, July and August 1982 period, as well as the months of March, April and May 1983. The result of this testing was the determination of a 22.1% error rate in the payment of tax on maintenance expenses. Applying this error percentage to petitioner's maintenance expense account total for the entire audit period resulted in a finding of use tax due on maintenance expenses in the amount of $1,785.03. Prior to the issuance of any notice of determination, petitioner agreed to this finding of use tax due and, on November 29, 1983 petitioner executed a consent to and paid such amount of tax, plus interest (total payment of $2,383.72). Petitioner alleged, and the auditor admitted at hearing, that invoices in support of petitioner's maintenance expenses were available for the entire audit period.

We find in addition to the facts found by the Administrative Law Judge that petitioner requested a refund of this tax at the hearing held on October 21, 1986.

The auditor also concluded that certain heavy equipment owned by B.A.H.L. and used by petitioner was in fact rented by petitioner from B.A.H.L. The type of equipment involved included dump trucks, tractor trailers, cranes, bulldozers, etc. The auditor calculated tax due on 100 percent of the amount shown as "equipment rental" per petitioner's general ledger, which tax constitutes the entire amount assessed via the March 20, 1984 notice of determination.

In calculating the amount of the March 20, 1984 assessment based on alleged equipment rental, the auditor noted the category "Equipment Rental" in Cedar Brook's general ledger as well as the term "rental expense" on petitioner's Federal (corporation) income tax returns. During the three-month test period spanning June, July and August of 1982, the auditor found no lease or rental agreements, invoices, specific billing documents, or other documents flowing between Cedar Brook and B.A.H.L. with respect to Cedar Brook's use of B.A.H.L.'s heavy equipment. The auditor reviewed petitioner's cash disbursements journal and its purchases journal for this three-month test period spanning June, July and August of 1982. The results of this review may be broken down into two segments as follows:

a) The auditor's review of petitioner's purchases journal for the noted three-month period revealed payments of comparatively small amounts to several named individuals under the heading "equipment rental" in the aggregate amount of $8,853.23. Invoices for each of such payments were available and were examined. Tax was not shown as paid on any of such invoices.

b) The auditor reviewed petitioner's cash disbursements journal for the noted three-month period, finding nine payments under the heading "loans and exchanges" in the aggregate amount of $140,000.00.[1] There were no invoices or other

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[1]The individual dates, amounts and payees are as follows:

Date	Amount	Payee
6/9/82	$ 20,000	(to B.A.H.L.)
6/22/82	20,000	(to B.A.H.L.)
6/26/82	20,000	(to B.A.H.L.)
7/8/82	20,000	(to B.A.H.L.)
7/18/82	20,000	(to B.A.H.L.)
7/28/82	20,000	(to B.A.H.L.)

supporting documents for any of these payments to B.A.H.L. and to DeBremont Industries.

Upon completing the above test period review, the auditor concluded that each of the amounts shown, and the transactions involved, represented payments by Cedar Brook for the rental of heavy equipment upon which no tax had been paid. The auditor used this test period analysis to conclude and establish a 100% disallowance rate (i.e., the auditor disallowed nontaxable status to 100% of the test period payment amounts believed to represent equipment rentals). The auditor then took the dollar amount listed as equipment rental from petitioner's general ledger for the audit period ($3,328,584.19), and subjected the entire amount to tax, thereby calculating the $237,247.71 amount of the assessed deficiency at issue herein.

The payments between Cedar Brook and B.A.H.L. were (as shown) in even dollar amounts (see, footnote "1"). Said payments were made periodically by Cedar Brook in amounts sufficient to cover B.A.H.L.'s expenses including license fees, vehicle registration fees, taxes and, most significantly, the amortization of notes payable covering the purchase costs of the various pieces of heavy equipment owned by B.A.H.L. There was no relationship in the calculation of the amounts paid to B.A.H.L. vis-a-vis the particular pieces of equipment used, the hours or places of such use, or the frequency of use. All of B.A.H.L.'s notes payable financing the heavy equipment were co-signed by Cedar Brook, and also by Leon DeBremont, individually.

The payments made on July 30, 1982 and August 27, 1982 by Cedar Brook to DeBremont Industries (see, Footnote "1") were alleged by petitioner and admitted by the Division at hearing to represent rental payments by Cedar
Brook to DeBremont Industries for Cedar Brook's lease of real estate housing its offices at 13 Rockwood Avenue, Massapequa, New York.

7/30/82	3,000	(To DeBremont Ind.)
8/6/82	15,000	(to B.A.H.L.)
8/27/82	2,000	(to DeBremont Ind.)
Total	$140,000	

Cedar Brook and B.A.H.L. are commonly owned corporations, each of whose sole shareholder and president is Leon DeBremont. It was admitted that B.A.H.L.'s equipment was used by Cedar Brook in carrying out Cedar Brook's contracts, that the specific time, place and manner of such equipment's use was directed and controlled by Cedar Brook and that the equipment was operated (driven) by Cedar Brook's employees.

Cedar Brook utilized a fiscal year ending on November 30, while B.A.H.L. utilized a fiscal year ending August 31. Cedar Brook employed a number of bookkeepers, as well as a head bookkeeper. Combined financial statements for Cedar Brook and B.A.H.L. as submitted in evidence reflect, inter alia, the following information with respect to the category of expense labeled "equipment rental":

FYE	Cedar Brook	B.A.H.L.	Elimination	Net of Elimination
11/30/80	-0-	-0-	-0-	$275,507.00
11/30/81	-0-	-0-	-0-	279,591.00
11/30/82	$ 877,543.00	-0-	$814,900.00	62,643.00
11/30/83	1,152,360.00	-0-	935,029.00	217,331.00

The auditor, as noted, found the heading "equipment rental" in petitioner's general ledger and traced the postings therefrom back to petitioner's purchases journal (payments to various individually named parties under the account heading "equipment rental") and to its cash disbursements journal (payments to B.A.H.L. and to DeBremont Industries under the account heading "loans and exchanges") for the test period. As noted, invoices existed for the former but not for the latter transactions. In fact, there is no dispute that invoices for the entire audit period were maintained and available for all payments to the various individually named parties, but that no invoices were ever created with respect to any payments to B.A.H.L. or to DeBremont Industries.

The loans and exchanges account in petitioner's cash disbursements journal was closed out at year's end to the equipment rental account in the general ledger. Petitioner explained that the payments to B.A.H.L. (and to DeBremont Industries) were not reflected in its purchases journal because such payments were viewed as transfers of funds and not as rentals of equipment. Petitioner also noted that the nature of the payments would not give rise to the submission of a

bill or invoice from B.A.H.L. (or DeBremont Industries) to Cedar Brook, and thus would require no entry in the purchases journal. Petitioner noted that comparable "no bill" examples (situations where no invoices existed and payments were directly recorded in the cash disbursements journal with no entry in the purchases journal) would include, inter alia, donations to charity and rent payments.

B.A.H.L.'s only income was derived from payments received from petitioner, together with a small amount of interest earned on certificates of deposit. According to petitioner's accountant's testimony, B.A.H.L. was formed to "purchase and own equipment", with a second purpose described as "maybe to engage in joint venture activities and/or subcontracting activities". Mr. DeBremont described his view of the two corporate entities as being "one and the same". According to testimony, Cedar Brook used B.A.H.L.'s equipment for "no consideration".

The individuals named in the purchases journal and on the related test period invoices delivered dirt in their own trucks with their own drivers, to various Cedar Brook job sites including, primarily, the Bethpage Municipal Landfill in the Town of Oyster Bay, New York. In essence, each of these transactions represents a payment to an individual trucker or trucking firm for the delivery of dirt. Cedar Brook paid these individuals on the basis of the amount of dirt transported (i.e.____, by the cubic yard).

B.A.H.L. allegedly paid sales tax on its purchases of some but not all of the heavy equipment. No further specifics were provided on this issue. Likewise Mr. DeBremont's reason for using two separate corporate entities in the fashion herein described was not explained at the hearing with any degree of specificity.

OPINION

The Administrative Law Judge concluded that the payments to B.A.H.L. were for the rental of equipment and were subject to tax. The Administrative Law Judge also concluded that the Division's resort to a test period analysis on the ground that a single bookkeeper recorded and deposited petitioner's receipts was not justified. With respect to the lack of invoices between B.A.H.L. and petitioner, the Administrative Law Judge held that this lack did justify the test

period audit of the B.A.H.L. transactions, but that the disallowance factor of 100 percent resulting from the test had to be adjusted. To make this adjustment, the Administrative Law Judge reviewed petitioner's cash disbursement journal and determined that payments to B.A.H.L. during the entire audit period totalled $2,530,000.00. Finally, the Administrative Law Judge held that petitioner was not timely in requesting a refund of the tax consented to and paid at the time of the audit.

On exception, petitioner argues that the Administrative Law Judge erred in upholding the Division of Taxation's resort to a test period analysis, performing his own audit of petitioner's books and records, finding that the rental of equipment occurred and concluding that the refund claim was not timely.

In response, the Division of Taxation argues that the resort to a test period was justified because of the lack of invoices on the B.A.H.L. transactions, the Administrative Law Judge did not perform an audit, he simply reviewed the evidence submitted and the refund claim was not timely made.

We affirm the determination of the Administrative Law Judge in part and reverse in part.

With respect to the taxability of the transactions between petitioner and B.A.H.L., Tax Law section 1105(a) imposes sales tax on the receipts from every retail sale of tangible personal property. Sale is defined at Tax Law, section 1101(b)(5) as "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration . . .". Here the facts are that B.A.H.L. owned the equipment, petitioner used it and made payments to B.A.H.L. that were sufficient to cover the debts arising from the purchase of the equipment. We agree with the Administrative Law Judge that these facts require the conclusion that there was a rental of equipment to petitioner (Matter of Ormsby Haulers, Inc. v. Tully, 72 AD2d 845, 421 NYS2d 701).

Petitioner has not proved that it was a joint venturer with B.A.H.L., thus we do not find the decision in Matter of Great Lakes-Dunbar-Rochester v. State Tax Commn., (102 AD2d 1, 477 NYS2d 461) relevant.

With regard to the test period audit, we find absolutely no evidence in the record to indicate that petitioner's failure to produce invoices with respect to the B.A.H.L. transactions in any way impaired the Division's ability to determine the exact amount of petitioner's taxable purchases. The amounts involved in the disputed B.A.H.L. transactions were clearly set forth in the books and records examined by the auditor and petitioner's records were accepted by the auditor for the purpose of determining the total amount of equipment rentals during the audit period. The only purpose the invoices would have served would have been to confirm the Division's characterization of the transactions as taxable rentals, but the invoices were not necessary to determine the amount paid on these transactions. Resorting to a test period audit is arbitrary and capricious "if records are available from which the exact amount of tax can be determined . . ." (Matter of Chartair, Inc., v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43); therefore, we conclude that the use of a test period to estimate tax in this case was arbitrary and capricious.

Since petitioner has established that the audit methodology used to estimate tax was unreasonable, that portion of the assessment that was estimated must be cancelled and tax may only be assessed on those payments to B.A.H.L. that were actually identified during the audit of the test period (Matter of Mohawk Airlines v. Tully, 75 AD2d 249, 429 NYS2d 759, 760). As set forth in the facts above, these payments totalled $135,000.00.

In view of our conclusion that the Administrative Law Judge erred in sustaining the use of the test period audit, the propriety of the modification made by the Administrative Law Judge to this audit, adjusting the disallowance percentage, is moot and need not be addressed.

Finally, we agree with the Administrative Law Judge that petitioner's claim for a refund was not timely. As found by the Administrative Law Judge, petitioner executed a consent with respect to tax of $1,785.03 on November 29, 1983. Section 1139(c) of the Tax Law provides that where such a consent is made, a claim for a credit or refund must be made within two years of the date

the tax was paid or within three years of the date the tax was due, whichever is later. Under this provision the latest possible date for filing a claim for a refund was June 20, 1986 (three years from the date tax was due for the last quarterly period covered by the audit). Since the refund claim was not made until October 21, 1986, it was not timely.

The petitioner has argued on exception that the consent extending the period of limitation for assessment of sales tax for the period December 1, 1979 through November 30, 1980 to March 20, 1984 made the refund claim timely. We do not agree.

Tax Law section 1147(c) does extend the period for filing a refund, where a consent to extend the period for assessment has been made, to six months after the end of the extended assessment period. Here the extended assessment period ended on March 20, 1984 and the claim for a refund was not made until October 21, 1986, more than six months after March 20, 1984.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Cedar Brook Contracting Corp. is granted to the extent that the assessment is reduced to impose tax only on those payments paid to B.A.H.L. during the test period audit,

2. The determination of the Administrative Law Judge is reversed to the extent indicated in "1" above but is otherwise sustained;

3. The petition of Cedar Brook Contracting Corp. is granted to the extent indicated in conclusion of law "D" of the Administrative Law Judge's determination and in paragraph "1" above but is otherwise denied; and

4. The Division of Taxation shall modify the Notice of Determination issued on March 20, 1984 accordingly, but such Notice is otherwise sustained.

DATED: Troy, New York
September 14, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner