STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PHILIPP BROTHERS, INC.	:	DECISION DTA No. 805485
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 May 31, 1985	:	

Petitioner Philipp Brothers, Inc., 1221 Avenue of the Americas, New York, New York 10020 filed an exception to the determination of the Administrative Law Judge issued on September 12, 1991 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 September 1, 1980 through May 31, 1985. Petitioner appeared by Cunningham & Lee, Esqs. (Gerard W. Cunningham, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter brief in response. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether petitioner was entitled to credit for sales tax already paid on certain purchases and for purchases installed out of state.

II. Whether certain software computer programs were intangible personal property not subject to sales tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Philipp Brothers, Inc., is a commodity brokerage firm in Manhattan involved in the purchase and sale of precious metals and other commodities.

The Division of Taxation ("Division") performed an audit of petitioner's books and records for the period in question. Petitionersigned consent forms extending the period of limitation for assessment for the taxable period September 1, 1980 through August 31, 1982 until December 20, 1985.

The auditor determined that petitioner maintained a complete set of books and records; however, on November 7, 1983, petitioner's vice-president of taxes signed a consent agreement permitting the auditor to use the test period audit method in determining sales and recurring expense purchases. The month of May 1983 was selected as the test period for all sales, operating expenses and certain purchases. The Division performed a full audit with regard to the fixed asset acquisitions.

The auditor disallowed certain purchases with a New York City destination in the amount of $60,589.38, operating expenses in the amount of $999,436.35 and fixed asset acquisitions in the amount of $2,496,534.50.

The Division issued to petitioner two notices and demands for payment of sales and use taxes due, dated October 15, 1985. The notices assessed a use tax liability for the audit period in the amount of $643,391.46, plus interest, for a total due of $907,471.03.

Petitioner executed a "Consent to Fixing of Tax Not Previously Determined and Assessed" and, on October 22, 1985, paid the total amount of $907,471.03 to the Division in satisfaction of the use taxes due.

Petitioner submitted an "Application for Credit or Refund of State and Local Sales or Use Tax", dated November 18, 1985, requesting a refund in the amount of $907,471.03.

After a series of conferences between petitioner and the Division, the Division notified petitioner on January 22, 1988 that it would receive a refund of $537,304.65. The notification letter stated that the determination denying the claim in part would be final and irrevocable unless petitioner completed the attached TA-9.1 (notification of right to protest) and submitted that form within 90 days from the date of the letter.

Thereafter, by letter dated April 21, 1988, petitioner confirmed that it conceded that tax was due in the amount of $299,521.39, but disputed the denial of refund in the amount of $68,118.27. According to an affidavit submitted by Anna Bloodworth, the team leader who supervised the audit unit which conducted the audit,[1] the items remaining in controversy involved taxable expense items and fixed asset acquisitions by petitioner from Cullinane Datable Systems,[2] Raid Systems and DBMS involving total taxable transactions in the amount of $582,348.20. The sales tax generated by these items was $47,403.90, plus interest, which increased the total amount to $68,118.27.

By petition, dated April 20, 1988, petitioner challenged the denial of its refund claim in the amount of $68,118.27 asserting the following errors:

> "1. Improperly conducted a test period audit.
> 2. Improperly assessed sales tax on capital improvement work.
> 3. Improperly assessed sales tax on the purchase of materials, goods and services that were not subject to the sales tax.
> 4. Refused to grant credits against the assessment for taxes previously paid.
> 5. Taxpayer properly paid sales and/or use tax on any transactions that were taxable and is entitled to a refund of the tax improperly assessed and paid, with interest."

A formal hearing was held on November 28, 1990 at which time petitioner's counsel argued that, inasmuch as petitioner was challenging the test period, the amount it was contesting

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[1]According to the Division's counsel and Ms. Bloodworth's affidavit, the auditor who conducted the audit had left the Division's employment and was not available. The information provided in the affidavit was based on Ms. Bloodworth's review of the auditor's workpapers and file concerning the audit in question as well as discussions within the audit unit and with petitioner's representative. Ms. Bloodworth's affidavit was submitted subsequent to the November 28, 1990 hearing with the permission of the Administrative Law Judge.

[2]Although the affidavit refers to taxable fixed asset acquisitions in the amount of $242,800.00 by "Cullimore" Datable Systems, the workpapers attached to the affidavit have the handwritten notation of "Cullinane" Datable Systems next to amounts that total $242,800.00. Therefore, I assume that the affidavit mistakenly referred to Cullinane as Cullimore.

could exceed the $68,118.27 that was initially protested in the petition. Petitioner's counsel initially argued at hearing that the test period agreement was invalid because it was not filled out properly; that the consents to extend the three-year statute of limitations did not cover one of the quarters in question; and that purchases of computer software programs were not subject to sales tax.[3]

At the hearing, petitioner's counsel was advised by the Administrative Law Judge that because the amount contested at hearing exceeded the $68,118.27 contested in the petition, the parties should address whether the statute of limitations barred recovery with regard to issues that were not part of the initial $68,118.27 claim.

At hearing, petitioner's counsel submitted various documents into evidence. Petitioner's Exhibit "1" consisted of invoices and an affidavit by John Gerace, petitioner's employee, concerning petitioner's purchases of computer programs. In the affidavit, Mr. Gerace explained that the invoices attached to the affidavit all involved purchases of computer software. Also attached to the affidavit was an agreement between Cullinane Corporation and petitioner concerning the purchase of computer software products.

Petitioner's Exhibit "2" consisted of an invoice to petitioner from Jackson Communications indicating the purchase of telephones in the amount of $23,890.00 and sales tax of 8% in the amount of $1,911.20. At hearing, petitioner's counsel cross-referenced this amount to the auditor's workpapers wherein there was a handwritten notation "no bill" next to a purchase from Jackson Communications in the amount of $25,801.20. The Division's counsel questioned petitioner's counsel with regard to petitioner's Exhibit "2" as follows:

> "Mr. Martinelli: Was this submitted during the time of negotiations?
>
> Mr. Cunningham: It is very difficult to be certain, and I really cannot say. All of these -- there was meeting after meeting with boxes full of documentation. I just do not know.

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[3]Petitioner's counsel stated that these arguments would be explained in his subsequent brief to the Administrative Law Judge; however, the letter briefs that were subsequently submitted by petitioner did not even mention the statute of limitations argument or explain why software purchases were not subject to sales tax. However, petitioner did state in brief that it withdrew its allegation that the test period audit was improper. Thus, it appears that petitioner also has abandoned its argument that the test period agreement was invalid.

Mr. Martinelli: With the understanding --

Mr. Cunningham: It was not refunded, that we do know."
(Transcript 47.)

Petitioner's Exhibit "3" consisted of invoices from Allwin Office Furniture Co., Inc. totalling $130,672.39 which indicated that an 8% sales tax had been included in that amount. Again, petitioner's counsel cross-referenced this amount with a corresponding entry in the auditor's workpapers that contained the handwritten notation "no bill". The Division's counsel again stated his objection that there was no proof offered as to whether these invoices were presented to the auditor during the course of the refund negotiations.

Petitioner's Exhibit "4" consisted of invoices and a letter from Avanti Communication Corp. to petitioner indicating tax due in the amount of $112.00 with regard to $1,402.76 worth of purchases. Again, petitioner's counsel cross-referenced this amount with a comparable entry in the auditor's workpapers with the handwritten notation "no bill" and, again, the Division's counsel objected that no proof was offered that these invoices were not offered to the auditor for correction during the refund negotiations.

Petitioner's Exhibit "5" consisted of an invoice for the amount of $10,368.00 from C.E.D. Communications to petitioner and attached to the invoice was petitioner's interoffice memo requesting that payment be made in the amount of $10,368.00 for two mobile phones which were "installed for W. Harris and B. Lavinia, both of our Houston office." Petitioner's counsel argued that no tax was due on purchases installed in offices outside of New York State. Petitioner's counsel cross-referenced this amount with a comparable entry in the auditor's workpapers accompanied by the handwritten notation "no tax paid". Again, the Division's counsel objected that there was no proof offered that these documents were not presented to the auditor for consideration in the refund negotiations.

Finally, petitioner's Exhibit "6" consisted of invoices from ABC Trading Co. to petitioner indicating that $96.64 represented an 8% sales tax on purchases that totalled $1,208.00. Petitioner's counsel cross-referenced the total amount of $1,304.64 to a comparable entry in the

auditor's workpapers which also contained the handwritten notation "no bill". Again, the Division's counsel made the same objection as he did with petitioner's Exhibits "2" through "5".

In its letter brief, dated February 7, 1991, petitioner stated that in order to clarify the issue, it "hereby withdraws its allegation that the test period audit was improper" and "requests a decision awarding a refund of the sales tax improperly collected on the items presented at the November 28, 1990 hearing." With regard to the jurisdictional issue, petitioner asserted that it timely filed a petition on April 20, 1988 protesting the denial on January 22, 1988 of that portion of the refund claim in the amount of $68,118.27.

In the Division's letter brief, dated February 27, 1991, it claimed that the 90-day period, within which to file a petition, commenced in June of 1987. In support of its argument, the Division referred to petitioner's letter dated April 21, 1988 which stated that, after a series of conferences, the parties agreed that:

> "1. The taxpayer should receive a refund of $537,304.65;
> 2. The taxpayer conceded tax was due in the amount of $299,521.39; and
> 3. The taxpayer would have a hearing on the balance of the assessment in the sum of $68,118.27."

The letter also stated the following:

> "It took many months from the date of the agreement for the taxpayer to receive payment. In fact, it took from June of 1987 to February of 1988 to receive payment."

Apparently relying on these statements, the Division assumes that an agreement as to the amount owed and the amount in dispute was reached in June 1987 and, therefore, the statute of limitations commenced as of the June 1987 agreement.

Subsequent to the filing of briefs, the Division, by letter dated August 27, 1991, conceded the timeliness of the petition.

OPINION

The Administrative Law Judge determined that petitioner was unable to sustain its burden of proving that it was entitled to a refund of $68,118.27 in addition to the $537,304.65 already refunded by the Division sometime in February 1988 (see, Determination, finding of fact 20, pp. 7-8). The Administrative Law Judge reached this determination based on her conclusion that petitioner had not proven that the purchases of certain software equipment in question were not subject to sales tax.[4]

Further, while the Administrative Law Judge permitted petitioner to amend its petition to include claims not part of the original $68,118.27 in dispute in the petition filed subsequent to the Division's $537,304.65 refund, the Administrative Law Judge found that petitioner was unable to establish that the evidence submitted to support these claims had not already been considered by the Division in issuing the $537,304.65 refund. Therefore, the Administrative Law Judge disallowed these claims as well.

On exception, petitioner challenges the Administrative Law Judge's determination regarding the sufficiency of the evidence submitted. Petitioner claims that it has provided ample evidence that its purchases of computer software were exempt from sales tax, such that a refund is in order, and argues that the Administrative Law Judge, in finding the evidence insufficient, impermissibly "create[d] new law and new tests of qualification for tax exemption" (petitioner's brief, p. 26).

In addition, petitioner asserts that computer software purchases are exempt from sales tax, and exemptions must be "strictly interpreted in favor of the taxpayer" (petitioner's brief, p. 12) and "strictly construed" against the Division of Taxation (petitioner's brief, p. 26). Petitioner stresses that the Division offered no response to petitioner's claim of exemption, i.e., no proof

[4]As the Administrative Law Judge noted in her determination, petitioner's counsel did not articulate below under which provision of the Tax Law petitioner was seeking exemption from sales tax for its purchases of computer software. However, the Administrative Law Judge assumed that petitioner was asserting that the software was intangible personal property not subject to tax under Tax Law § 1105(a), under the criteria established in Technical Services Bureau Bulletin No. 1978-1(S). Before this Tribunal petitioner has, in fact, articulated these very sources.

that the sales were taxable, and that, therefore, it was an error for the Administrative Law Judge to conclude that petitioner had not sustained its burden of proof (see, petitioner's brief, p. 13).

Finally, in regard to the additional refund sought, petitioner contends, in essence, that once it had established by "clear and convincing evidence" that sales tax was previously paid by petitioner on several of the purchases included in the Division's assessment,[5] the burden shifted to the Division to rebut the evidence (petitioner's brief, pp. 22-23). In other words, the Division then had the burden of proving that the refund already issued to petitioner included the tax paid (erroneously) to the Division on these purchases. Petitioner asserts that since the Division "failed to . . . rebut the affirmative evidence of Philipp Brothers," a refund from the Division in the amount of those taxes incorrectly assessed and paid is warranted (petitioner's brief, p. 23).

In response, the Division asks that the Administrative Law Judge's determination be upheld in its entirety.

We affirm the Administrative Law Judge's determination.

First, we turn to the issue of the $68,118.27 refund. We agree with the Administrative Law Judge's ruling that petitioner did not establish that its computer purchases were not subject to sales tax as intangible personal property. Tax Law § 1105(a) subjects "every retail sale of tangible personal property" to sales taxation, "except as otherwise provided in this article." Petitioner claims that its purchases of computer software are not subject to sales tax because the particular software purchased does not fall within the definition of tangible personal property. To address petitioner's claim, we must first determine how to characterize computer software.

The Division, in its Technical Services Bulletin issued February 6, 1978, defined software as:

> "[i]nstructions and routines which, after analysis of the customer's specific data processing requirements, are determined necessary to program the customer's electronic data processing equipment to enable the customer to accomplish specific functions with his EDP system. To be considered exempt 'software' for purposes of this bulletin one of the following elements must be present:

[5]As noted in the findings of fact, petitioner paid this assessment in full on October 22, 1985.

A. Preparation or selection of the program for the customer's use requires an analysis of the customer's requirements by the vendor.

or

B. The program requires adaptation, by the vendor, to be used in a specific environment, i.e., a particular make and model of computer utilizing a specified output device. For example, a software vendor offers for sale a pre-written sort program which can be used in several computer models. Prior to operation, instructions must be added by the vendor which specify the particular computer model in which the program will be utilized.

"The software may be in the form of:

a. System programs (except for those instruction codes which are considered tangible personal property in paragraph 1 above) - programs that control the hardware itself and allow it to compile, assemble and process application programs.

b. Application programs - programs that are created to perform business functions or control or monitor processes.

c. Pre-written programs (canned) - programs that are either systems programs or application programs and are not written specifically for one user.

d. Custom programs - programs created specifically for one user."

On October 21, 1988, the Division issued another opinion which concluded that, for sales tax purposes, software [meeting the criteria of the 1978 Advisory Opinion cited]:

> "whether placed on cards, tape disc pack or other machine readable media or entered into a computer directly, is deemed to be intangible personal property for sales tax purposes, and as such its sale is exempt from New York State and local sales and use taxes. Software or programs which do not meet the criteria are subject to tax" (TSB-A-88[54]S; see, TSB Bulletin 1978-1[S], emphasis added).

We note initially that this is not a question of a statutory exemption, but rather a question of whether the sale of certain computer software is within the imposition of sales tax under Tax Law § 1105(a) as the sale of tangible personal property. We note, further, that petitioner has not taken issue with the Division's interpretation of intangible personal property as it applies to

computer software, but simply contends that its purchases are within the Division's definition of intangible personal property.

While it is true that in analyzing an imposition statute, ambiguities are construed against the Division and in favor of the petitioner (see, Matter of Grace v. New York State Tax Commn., 37 NY2d 193, 371 NYS2d 715, 718, lv denied 37 NY2d 708, 375 NYS2d 1027), this principle does not change the rule that petitioner has the burden of proving that the assessment is erroneous (see, Matter of Petrolane Northeast Gas Serv. v. State Tax Commn., 79 AD2d 1043, 435 NYS2d 187, 189, lv denied 53 NY2d 601, 438 NYS2d 1027). Indeed, the quoted portion of TSB-A-88[54]S correctly states that one who seeks the protection of this definition must be prepared to prove that the software or programs purchased "meet the criteria" outlined; otherwise, the purchases "are subject to tax."

Thus, petitioner must prove that the software it purchased is of the type considered to be intangible personal property within the meaning of Technical Services Bureau Bulletin No. 1978-1(S). Toward this end, petitioner has offered the affidavit of one of its employees, invoices from the purchases of software from several software companies, and a contract for the sale of various software to petitioner from one of the software companies, Cullinane Corporation. Although petitioner maintains that this contract itself was the "best evidence," and was "produced without contradiction" (petitioner's brief, p. 15), we find that the contract appears to be standard in form and is written in general terms. Only the sheet preceding the terms and conditions of the contract refers to petitioner's actual purchase, listing (but not describing) the equipment purchased. The contract does not give any indication that the criteria of the Technical Services Bulletin No. 1978-1(S) were satisfied, i.e., the contract does not indicate that Cullinane performed an analysis of petitioner's needs in order to prepare or select the program or that the software purchased was individualized to suit petitioner's unique needs. Further, no contract or other document was offered to describe the purchases from DBMS or Raid Systems. Thus, the affidavit of Mr. Gerace is the sole evidence in support of petitioner's claims that the computer software purchased may be characterized as intangible personal property. We agree with the evaluation of

the Administrative Law Judge that the bare conclusions of the affidavit, unsupported by any other evidence, are insufficient to establish that the purchases were intangible personal property as defined in the Technical Services Bureau Bulletin. We note that had Mr. Gerace testified below, instead of submitting an affidavit, he would have been subject to cross examination, as well as subject to the credibility determination of the Administrative Law Judge. An affidavit is not somehow entitled to greater deference than a person's live testimony. To bolster its case, petitioner could have had Mr. Gerace and/or representatives from the various companies from which the software was purchased testify at the hearing, or could have presented other documents to establish the nature of the purchases. However, petitioner did none of these things, and, as a result, the proof that has been submitted on behalf of petitioner's claim is simply insufficient to merit a reversal of the Administrative Law Judge's determination on this point.

Petitioner asserts, to the contrary, that it provided adequate proof of entitlement to the "exemption" from sales tax, that the burden of proof, therefore, shifted to the Division to show why sales tax should be imposed, and that since the Division failed to object to or question the veracity of petitioner's claims, the Division has apparently conceded this point (see, petitioner's brief, p. 17). As support for this notion, petitioner points to the Administrative Law Judge's comment that: "[t]he Division has presented no argument at hearing or in its brief in response to petitioner's claim that software was exempt from sales tax" (petitioner's brief, p. 15, citing Determination, p. 11, footnote 5). We believe that petitioner ascribes far too much meaning to this comment of the Administrative Law Judge. The Administrative Law Judge was merely pointing out the fact that the Division did not advance a legal argument; she did not state, as petitioner insinuates, that, therefore, petitioner's proof was deemed sufficient to support its claims. Although it may be true that the Division did not respond below to petitioner's claimed "tax exempt status" (petitioner's brief, p. 15), we remind petitioner that the Division is not required to rebut petitioner's evidence unless and until petitioner has produced sufficient evidence to prove its case. Since petitioner has not produced sufficient evidence, the Division, in

effect, had nothing to rebut. Moreover, the failure of the Division to assert a legal argument does not relieve petitioner of its burden of proving the facts necessary to support its claim.

In regard to the additional refunds sought by petitioner, we note that we are in complete agreement with the Administrative Law Judge's conclusion that petitioner did not sustain its burden of proving that it was entitled to the additional refund.[6]

While it is true that petitioner submitted invoices evidencing that it had, in fact, paid sales taxes to four different companies on purchases made, and that a purchase from another company was exempt from sales taxes because it was an out-of-state purchase (see, petitioner's exhibits "2" - "6"), petitioner could not prove that payments made to the Division for sales tax assessed on these purchases had not already been refunded by the Division in the original $537,304.65 refund. Although petitioner's counsel claimed that the documents evidencing petitioner's payment of sales tax had not been accounted for in the Division's initial refund, as the Administrative Law Judge aptly noted, "no evidence was offered by way of affidavit, testimony or other documentation to support this claim" (Determination, p. 10). In fact, to the contrary, petitioner's counsel even conceded at the hearing below that he could not be sure that the documents in question had not been shown to the Division during refund negotiations (see, Tr., p. 47).

Thus, contrary to petitioner's assertions, petitioner did not satisfy the threshold burden of proof on this issue. Therefore, despite the emphasis petitioner places on the fact that the Division never offered proof that the sales taxes in question were accounted for in the original refund, that issue is not properly before us because petitioner offered nothing that required a response by the Division.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Philipp Brothers, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed; and

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[6]It is important here to stress that the Division is not alleging that petitioner's claims themselves are meritless. Rather, the Division is arguing that petitioner cannot prove that these claims were not already compensated for by the Division in its $537,341.65 refund.

3. The petition of Philipp Brothers, Inc. is denied, and the refund denial is sustained.

DATED: Troy, New York
June 4, 1992

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

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

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