

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM BURNS, OFFICER OF	:	
BURNS BROS. INDUSTRIES, INC.	:	DECISION
AND BURNS BROS. EXPRESS, INC.	:	DTA No. 807410
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1985	:	
through November 30, 1987.	:	

The Division of Taxation filed an exception to the determination on remand issued by the Administrative Law Judge on October 22, 1992 with respect to the petition of William Burns, Officer of Burns Bros. Industries, Inc. and Burns Bros. Express, Inc., 290 Bay Drive, Massapequa, New York 11758. Petitioner appeared by Robert A. Wagner, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert Jarvis, Esq., of counsel).

The Division of Taxation was granted until January 20, 1993 to file a brief in support of its exception. During the week of January 20, 1993, the Secretary to the Tax Appeals Tribunal received a call from the Division of Taxation's representative asking to verify January 22, 1993 as the brief due date. The Division of Taxation's representative was informed of the January 20 due date and he requested an extension until January 22, 1993 because of his misunderstanding. As two days is not enough time to receive a letter requesting an extension, the Secretary requested that the Division of Taxation's representative repeat the substance of their telephone conversation in the covering letter submitted with the brief on January 22, 1993. The Division of Taxation's brief was received on February 12, 1993.

In response to the Division of Taxation's late filed brief, petitioner moved to strike the brief. In response to this motion, the Division of Taxation withdrew its brief. In the letter of withdrawal, the Division of Taxation made the following statement:

"By withdrawing my previously filed brief (which primarily sets forth well established principles of law that the Tribunal is well aware of anyway), it is my intention to make petitioner's motion moot and thereby relieve the Tribunal from the need to waste any further resources on such a petty and distasteful matter. I truly regret the amount of consternation that has already been caused by this whole affair, and hope that the exception in this case can now proceed smoothly ahead" (Division's letter of June 14, 1993).

Petitioner filed a letter in lieu of a brief on October 25, 1993. The Division of Taxation filed what was denominated a reply to petitioner's letter on November 15, 1993 which began the six month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Administrative Law Judge erred in cancelling the portions of the assessments that were based on truck purchases.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "11" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

The Tax Appeals Tribunal, by its decision dated August 27, 1992, remanded this matter for further review by the Administrative Law Judge and the issuance of a new determination based on the previously established record. The Tribunal directed that the following three matters be taken into account in order to resolve inconsistencies in the determination of the Administrative Law Judge dated July 18, 1991:

- (a) The integration of the conciliation orders into the analysis of the evidence submitted;
- (b) The attribution of gallonage to BB Express and to BB Industries; and
- (c) The use of Exhibit "M" in calculating the sales tax assessment issued against petitioner as officer of BB Express.

The Division of Taxation issued two notices of determination and demands for payment of sales and use taxes due, both dated May 12, 1988, against petitioner, William Burns, as officer. One asserted tax due in the amount of \$37,539.32, plus penalty and interest, for the period December 1, 1985 through November 30, 1987 against Mr. Burns, as officer of Burns Bros. Industries, Inc. (hereinafter "BB Industries"). The following explanation was provided:

"You are liable individually and as Officer of [BB Industries] under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law:

<u>Period Ending</u>	<u>Period Designation</u>	<u>Tax Due¹</u>
2/28/86	386	\$ 6,897.38
5/31/86	486	13,272.38
8/31/86	187	522.38
11/30/86	287	13,272.38
2/28/87	387	893.70
5/31/87	487	893.70
8/31/87	188	893.70
11/30/87	288	893.70
Total		\$37,539.32"

The second notice asserted tax due in the amount of \$20,074.80, plus penalty and interest, for the period December 1, 1986 through November 30, 1987 against Mr. Burns, as officer of Burns Bros. Express, Inc. (hereinafter "BB Express"). It included an explanation similar to the first notice and provided the following details concerning tax due per sales tax quarter:

<u>Period Ending</u>	<u>Period Designation</u>	<u>Tax Due</u>
2/28/87	387	\$ 893.70
5/31/87	487	893.70
8/31/87	188	17,393.70
11/30/87	288	893.70
Total		\$20,074.80

In his Request for Conciliation Conference dated July 15, 1988, William Burns, as officer of BB Industries and BB Express, stated that he was not a person required to collect tax under Tax Law § 1131(1) and should not be held personally liable for any sales tax due from BB Industries and/or BB Express. However, in his petition dated October 2, 1989, William Burns

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The notices also showed specific amounts for penalty and interest due, which have been omitted.

did not contest his status as a person required to collect sales tax for these two corporations. Furthermore, his representative at the hearing herein noted that Mr. Burns's status as a so-called "responsible officer" was not in dispute and conceded that BB Industries and BB Express were Mr. Burns's companies.

At the hearing, the Division of Taxation presented the testimony of Saturnino Benitez, the sales tax auditor who estimated the tax asserted as due against petitioner. It also introduced portions of the audit report and related schedules into evidence. In contrast, petitioner presented no evidence at the hearing. Petitioner, by his representative, was granted a continuation of the hearing, until September 13, 1990, to present his evidence. However, on September 7, 1990, petitioner provided notice that the continuation of the hearing would not be required. Subsequently, he submitted two so-called "affidavits" (unsworn and not in proper form) and photocopies of documents described as "application and registration title information for five Kenworth Trucks acquired by William Burns". Consequently, the record does not include much information about Mr. Burns's trucking and transportation businesses. Furthermore, since petitioner has conceded that he was a person required to collect sales tax for both corporations, there is little information in the record concerning his specific relationship to these corporations other than the fact that they were "his companies".

A conciliation order dated July 14, 1989 was issued to Mr. Burns, as officer of BB Industries, which reduced the tax asserted as due from \$37,539.32 to \$33,964.52 (plus penalty and interest). According to the Advocate's Comments on Conciliation Conference: "Tax was adjusted to eliminate duplication of tax on diesel fuel." Tax of \$893.70 was cancelled by the conferee for each of the four quarters ending February 28, 1987, May 31, 1987, August 31, 1987 and November 30, 1987, resulting in a reduction in tax asserted as due against petitioner, as officer of BB Industries, of \$3,574.80 (\$893.70 multiplied by four equals \$3,574.80). Consequently, the assessment period, with reference to BB Industries, was a shortened period of December 1, 1985 to November 30, 1986 instead of the longer period originally noticed of

December 1, 1985 to November 30, 1987. A second conciliation order, also dated July 14, 1989, sustained the notice of determination issued against Mr. Burns, as officer of BB Express.

The auditor testified that despite his requests for relevant books and records of BB Industries and BB Express, none were provided. Consequently, the assessments were based upon information the auditor obtained from third parties. Cibro Terminals, Inc. (hereinafter "Cibro") provided information concerning purchases of diesel fuel by the two companies without their payment of sales tax, and the Department of Motor Vehicles (hereinafter "DMV") provided information concerning vehicles registered by the companies with DMV.

The Division of Taxation introduced into evidence computer printouts obtained from Cibro (Exhibits "K", "L" and "M").² These exhibits include the following information concerning the purchase of #2 fuel oil (diesel fuel) without the payment of sales tax:

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Exhibits "K" and "L" are both designated as report #718. However, "K" is format #13, while "L" is format "55". Exhibit "M" is designated report #704 and the printout does not show a particular format number. As noted above, certain duplicate purchases of diesel fuel by BB Industries were eliminated because these reports apparently overlapped to some extent, which was not explained in the record.

<u>Source of Information</u>	<u>Customer</u>	<u>Date</u>	<u>Gallons</u>	<u>Amount</u>
Exhibit "K"	Amacot Trucking Corp. ³	February 10, 1987 ⁴	49,308	\$21,442.14
Exhibit "L"	Amacot/Burns	November 29, 1986	7,001	3,290.47
		December 23, 1986	6,511	3,157.84
		January 17, 1987	8,000	4,600.00
		February 12, 1987	7,932	4,283.28
		March 9, 1987	7,003	3,606.55
		April 1, 1987	7,901	4,246.79
		April 28, 1987	8,003	4,201.58
		May 22, 1987	8,002	4,501.13
		June 24, 1987	8,002	4,501.13
		July 17, 1987	8,000	4,720.00
		August 25, 1987	4,000	2,280.00
		September 15, 1987	7,002	3,921.12
		November 15, 1987	4,000	2,460.00
		Total	91,357	\$49,769.89
Exhibit "M" ⁵ \$50,039.31	BB Express	June 1, 1986 through May 31, 1987	102,660	

Using the information above, the auditor determined that, for the period December 1985 through November 1986, BB Express purchased 4,109 gallons of diesel fuel per month (49,308 gallons divided by 12). However, it is observed that, as noted above, the statutory notice issued against Mr. Burns, as officer of Burns Bros. Express, was for the later period of

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The Division of Taxation introduced into evidence a letter dated March 31, 1987 on the letterhead of Amacot Trucking Corp. from John Beksinski to Cibro (Exhibit "O") which provided as follows:

"Please be advised that Amacot Trucking Corp. has under gone [sic] a name change effective immediately.

All bills, checks and or all correspondence should be addressed to Burns Bros. Express Inc.

Please feel free to contact me if there are any further questions. Also let me assure you that the name has changed but not the service. You will always be our preferred customer."

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Although the computer printout (Exhibit "K") showed a date of February 10, 1987, it apparently represented the total purchases of diesel fuel by Amacot for the period December 1985 through November 1986, dates pencilled in on the document.

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Although Exhibit "M" was submitted into evidence, it does not appear that information contained in it was used in calculating the sales tax assessment issued against BB Express.

December 1, 1986 through November 30, 1987 and did not include this earlier period. This inconsistency was unexplained in the record. In addition, for the period December 1986 through November 1987, the auditor determined that the average purchase per month by BB Express was 7,030 gallons of diesel fuel (84,356 gallons divided by 12). The 84,356 gallons is the total of the amounts shown above, which were taken from Exhibit "L", sold to Amacot/Burns (91,357 minus 7,001, the gallons shown purchased on November 29, 1986). A handwritten schedule prepared by the auditor showing these average monthly calculations was marked into evidence as the Division of Taxation's Exhibit "N". It appears that the auditor treated purchases shown on the computer sheet for Amacot/Burns as purchases of BB Express. It was unexplained why Exhibit "L" was used instead of Exhibit "M", which explicitly designated BB Express as the customer.

A schedule attached to the field audit report for BB Industries shows the following breakdown of the \$37,539.32 asserted as due from BB Industries:

<u>Quarter Ending</u>	<u>Particulars</u>	<u>Gallons</u>	<u>Taxable Amount</u>	<u>Tax Due</u> <u>7½%</u>
2/28/86	Diesel Fuel Tractor	12,321 ⁶	\$ 6,965.00 ⁷ <u>85,000.00</u> \$ 91,965.00	\$ 6,897.38
5/30/86	Diesel Fuel Tractors	12,327 2	\$ 6,965.00 <u>170,000.00</u> \$176,965.00	13,272.38
8/31/86	Diesel Fuel	12,327	\$ 6,965.00	522.38
11/30/86	Diesel Fuel Tractors	12,327 2	\$ 6,965.00 <u>170,000.00</u> \$176,965.00	13,272.38

This quarterly gallonage of 12,327 gallons was apparently calculated by multiplying the average monthly gallonage of 4,109, as noted above, times 3. However, the computer printout (Exhibit "K") showed these purchases as those of Amacot Trucking, which the Division of Taxation contended was one in the same with BB Express. There is no explanation in the record why this average monthly gallonage was therefore utilized for BB Industries.

⁷The auditor used an average price per gallon for diesel fuel of \$0.565.

2/28/87	Diesel Fuel	21,090	\$ 11,916.00	893.70
5/31/87	Diesel Fuel	21,090	\$ 11,916.00	893.70
8/31/87	Diesel Fuel	21,090	\$ 11,916.00	893.70
11/30/87	Diesel Fuel	21,090	11,916.00	<u>893.70</u>
Total				\$37,539.32

The total of the gallons shown above is 133,668 gallons, and the total number of tractors (on whose purchases by BB Industries the Division of Taxation asserts sales tax is due) is 5.

A schedule attached to the field audit report for BB Express shows the following breakdown of the \$20,074.80 asserted as due for BB Express:

<u>Quarter Ending</u>	<u>Particulars</u>	<u>Gallons</u>	<u>Taxable Amount</u>	<u>Tax Due</u>
2/28/87	Diesel Fuel	21,090 ⁸	\$ 11,916.00	\$893.70
5/31/87	Diesel Fuel	21,090	\$ 11,916.00	893.70
8/31/87	Diesel Fuel Tractors	21,090 3	\$ 11,916.00 \$220,000.00 ⁹	17,393.70
11/30/87	Diesel Fuel	21,090	\$ 11,916.00	<u>893.70</u>
Total Gallons: 84,360				\$20,074.80

It appears that petitioner used diesel fuel in his trucking companies' own trucks and should have paid sales tax on his purchases of diesel fuel.

We amend the Administrative Law Judge's finding of fact "11" to read as follows:

A review of the two schedules detailed above shows that the Division of Taxation, in sum, asserts that sales tax is due on the purchase of five new tractors by BB Industries and one new tractor and two used tractors by BB Express. According to the auditor, petitioner failed to provide any documents to show that sales tax was paid on the purchases of these tractors.

The cost of a new tractor was estimated at \$85,000.00. The testimony of the auditor indicates that he could not state how this estimate was made. This topic was initially addressed on direct examination as follows:

This quarterly gallonage was apparently calculated by multiplying the average monthly gallonage of 7,030, as noted above, times 3. However, the computer printout (Exhibit "L") showed these purchases as those of Amacot/Burns.

⁹Two of these three tractors were used tractors, and the auditor used \$135,000.00 as their total selling price.

"Q Let's move on now to the third-party information for the purchase of trucks.

Who did you obtain that information from?

A My supervisor obtained the information from Kenworth dealers in the metro area.

Q This is the Kenworth truck dealers?

A Yes.

Q And they're located in New York?

A Yes, sir.

Q What information did you obtain from those dealers?

A The average price of the particular equipment, the tractor.

Q This would be for new tractors?

A For new, yes" (Tr., pp. 62-63).

On cross examination, the following exchange took place with respect to the new trucks:

"Q Based on what [your supervisor] told you, you determined that a fair value for a new Kenworth tractor would be \$85,000?

A Yes.

Q Did he tell you anything else about the value of a new Kenworth truck or that -- let me just let you answer that one question.

Did he tell you anything else as far as the value?

A No.

Q Did he give you a specific model for a value?

A I believe he asked the dealers, he gave the year of the truck and asked them the fair price of the truck. That's all.

Q He gave them the year of the truck you were talking about?

A Yes.

Q And he came up with the number of \$85,000?

A Yes

Q Isn't it true that the purchase periods of the truck span almost over a year and a half, from early 1986 through, I believe August was the last purchase in 1987; is that accurate?

A There were two '86 models, also '87 models.

Q But you put the same value on the one that was purchased in August of 1987 as was put on the one in February of 1986?

A Yes.

Q Do you know what year or whether Kenworth told your supervisor that \$85,000 was a fair price for a particular year's model?

A I don't know what conversation my supervisor had with the dealer. I just followed -- he said 85. I got this average price of 85,000, so that's what was the basis of my tax.

Q It doesn't sound unusual to you for someone to purchase a truck of this expense in February of 1986 brand-new and then, a year and a half later, purchase a brand-new one for the same exact price?

A No" (Tr., pp. 85-86).

Finally, in redirect examination, the following statements were made:

"Q As far as the prices that were used in calculating the tax due on the vehicles, as I understood your testimony, your supervisor gave you an average price to use for those vehicles in question; is that correct?

A Yes.

Q Would you think, from his indication to you, that there might have been a higher or a lower price that could have occurred for the two different model years?

A I believe the amount, that the price that he based it on is rather a conservative price because tractors of that nature, big tractors, they cost maybe 100,000 or maybe more than that.

Q So it's possible that the figure that your supervisor gave to you was actually below the selling price for either model year then?

A That's my understanding" (Tr., pp.95-96).

According to the auditor's workpapers, the cost of the used trucks was estimated at \$67,500 each (Exhibit "J"). As the following testimony indicates, the auditor did not know the source of this figure.

On direct examination, the auditor testified as follows:

"Q Did [the dealers] also indicate to you what they thought the price would be for a specific year and model of used tractor?

A I was not involved in that."

* * *

"Q How did you determine the purchase price for the used vehicles?

A Since it was transferred, I think after a year, so we deducted, I think, \$20,000 out of the 85,000.

Q So it sounds like you made an estimate of the depreciation that would have occurred during the time the vehicle was -- the intervening time between when the vehicle was new and when it was transferred?

A Yes" (Tr., pp. 63-64).

On cross examination, the testimony was as follows:

"Q Now, in coming up with a fair value for a used truck you told me you deducted \$20,000. How did you come up to that number?

A Again, my supervisor did that computation on the truck.

Q So you didn't do the computation?

A No.

Q Do you know how he came up with it?

A I think he deducted --

Q Do you think or do you know? Do you know how he came up with it?

A I don't know how he came up with it, but he placed some sort of an average price below 85,000. It's about 65,000, 60,000.

Q Did he just pick that number arbitrarily, assuming that the truck was one year old?

MR JARVIS: I'm going to object. We're getting into questions concerning the thought process of the supervisor. The witness has already testified that he didn't come up with the estimate himself. You're now asking him to testify to the thought processes of someone else.

THE COURT: Well, he can respond. If he doesn't know, you should say you don't know.

MR. JARVIS: But the question was, did he arbitrarily pick a number out of the air.

THE COURT: I'll permit the witness to respond, if you know.

A I don't know how he came up with it.

Q Was any explanation given to you by your supervisor as to how he came up with the value?

A He told me he canvassed Kenworth dealers as to the price, and I don't know if he went to canvass about the used ones" (Tr., pp. 87-88).¹⁰

As noted above, petitioner submitted photocopies of "application and registration title information for five Kenworth Trucks acquired by William Burns." A review of the DMV forms, MV-82, shows the following information:

<u>Registrant</u>	<u>Owner</u>	<u>Vehicle ID#</u> ¹¹	<u>Vehicle Year</u>	<u>Make</u>	<u>Body Type</u>	<u>Type of Power</u>	<u>Weight</u>
BB Industries	William Burns	341285	1987	Kenworth	Tractor	Diesel	2,879
William Burns	none shown	333751	1986	Kenworth	Tractor	Diesel	17,888
William Burns	none shown	336371	1986	Kenworth	Tractor	Diesel	17,740
William Burns	none shown	346019	1987	Kenworth	Tractor	Diesel	17,580
William Burns	none shown	341286	1987	Kenworth	Tractor	Diesel	17,520

These documents were submitted without the testimony of Mr. Burns to provide background or explanation.

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The Administrative Law Judge's finding of fact "11" read as follows:

"A review of the two schedules detailed in Findings of Fact "8" and "9" shows that the Division of Taxation, in sum, asserts that sales tax is due on the purchase of five new tractors by BB Industries and one new tractor and two used tractors by BB Express. According to the auditor, petitioner failed to provide any documents to show that sales tax was paid on the purchases of these tractors.

The cost of a new tractor was estimated at \$85,000.00. The auditor testified that his 'supervisor obtained the information from Kenworth dealers in the metro area . . . [t]he average price of the particular equipment, the tractor.' For the two used tractors, the auditor testified that depreciation of \$20,000.00 was estimated and deducted from the \$85,000.00. The auditor testified that his supervisor determined the amount to be used as depreciation and he did not 'know how he [the supervisor] came up with it'"

We modified this fact by quoting the details of the transcript to reveal the discrepancies and ambiguities in the auditor's testimony.

¹¹

For ease of reference only the last six digits are noted.

Two documents, which petitioner submitted and described as "affidavits", are, in fact, not notarized and can be given no weight. They supposedly support an allegation that one of the vehicles listed in Finding of Fact "12", ID# 341285, and another, with an ID# of 333791,¹² were delivered to some unnamed person doing business at 290 Bay Drive, Massapequa, New York at Lawrenceville, Pennsylvania (and not in New York State).

Petitioner did not cooperate with the auditor and provided scant information concerning his business operations.

OPINION

On remand, the Administrative Law Judge held that the Division of Taxation (hereinafter the "Division") was required to establish a rational basis for the assessments against petitioner and that it had failed to do so with respect to the tax asserted on the truck purchases of BB Express and BB Industries. In addition, the Administrative Law Judge noted that the conciliation conferee had cancelled that portion of the assessment that asserted tax based on the purchases of diesel fuel by BB Industries for the quarters ending February 28, 1987, May 31, 1987, August 31, 1987 and November 30, 1987. The Administrative Law Judge cancelled the remaining portion of the assessment that asserted tax due on the purchases of diesel fuel by BB Industries because the Division had arbitrarily treated purchases by Amacot as those of BB Industries. The tax cancelled by the Administrative Law Judge related to purchases attributed to BB Industries of 12,327 gallons for each of the quarters ending February 28, 1986, May 31, 1986, August 31, 1986 and November 30, 1986. Next, the Administrative Law Judge concluded that the Division's assessment of \$3,574.80 asserted as due based on the purchase of 84,360 gallons by BB Express was arbitrary because it was based on Exhibit "M" which showed purchases by BB Express rather than BB Industries. However, the Administrative Law Judge did not cancel this portion of the assessment because petitioner had not filed an exception to the earlier determination of the Administrative Law Judge and the Administrative Law Judge

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Included in the list above is a tractor with an ID# of 333751. Perhaps the so-called "affidavit" has a typographical error and the "9" should be a "5."

determined that our remand had not been intended to revive an issue not preserved by petitioner. Lastly, the Administrative Law Judge refused to abate penalty.

In its exception, the Division challenges only conclusion of law "A" of the Administrative Law Judge where it was decided that the assessment based on the purchase of trucks by BB Express and BB Industries did not have a rational basis. The Division states that it "does not agree that [it] has the burden of initially proving that a rational basis exists for the sales tax assessment at issue" and that "[n]either does [it] agree that the record herein fails to show that the method used for this audit was a rational one" (Division's exception). The Division asserts that petitioner did not provide any testimony or credible evidence to establish that the value of the vehicles was less than the amounts used by the auditor.

As described above, the Division withdrew its brief in support of its exception in response to petitioner's motion to strike.

In opposition to the exception, petitioner filed a two page letter. Two paragraphs of this letter deal with the substantive aspects of this matter and assert that there was no connection between Amacot and BB Express or BB Industries and that the estimated purchase price of the trucks was unreliable and arbitrary.

The Division filed a 19 page brief in "reply" to petitioner's two page letter. This "reply" brief is the same as the Division's "withdrawn" brief in support of its exception, with minor editing changes and the addition of one page of new material (p. 10) discussing the Division's right to estimate the values of the vehicles. Because we agree with the Division that this is a "petty and distasteful matter" and that no further resources should be wasted on it, we will simply say that we have not considered the Division's "reply" brief because it is the brief withdrawn by the Division and we will not allow petitioner's motion to have been circumvented in this manner.

Turning to the merits of the Division's exception, we have rejected the principle that the Division has an affirmative burden to articulate a rational basis for its assessment where the petitioner has failed to make any inquiry into the audit methodology or calculation (Matter of

Atlantic & Hudson Ltd. Partnership, Tax Appeals Tribunal, January 30, 1992). However, where the petitioner has made such an inquiry, we have held that "the Division must at hearing, through witnesses or documents, be able to respond meaningfully to inquiries regarding the nature of the audit performed. Such information is necessary in order to provide petitioner with an opportunity to meet its burden of proving such methodology unreasonable (Matter of Fokos Lounge, Tax Appeals Tribunal, March 7, 1991)" (Matter of Basileo, Tax Appeals Tribunal, May 9, 1991).

As the testimony stated in the facts indicates, the Division's witness in this case initially described the \$85,000.00 amount as an average price for the new trucks that was based on information obtained by his supervisor from Kenworth dealer, but was unable to describe what questions the supervisor asked to obtain this information. On cross examination, the auditor's testimony suggests that \$85,000.00 was the actual price attributed to each truck, not the average price. On redirect examination, the auditor's testimony was that the \$85,000.00 figure was actually below the selling price for either model year "because tractors of that nature, big tractors, they cost maybe 100,000 or maybe more than that" (Tr., p. 96). The discrepancy between these three explanations means that the auditor did not meaningfully describe the audit methodology and that there is no rational basis for this portion of the assessment (Matter of Shop Rite Wines & Ligs., Tax Appeals Tribunal, February 22, 1991).

With respect to the used trucks, the auditor was quite explicit in stating that he did not know how the estimated price, \$67,500.00, was calculated. Although the auditor responded affirmatively to the Division's attorney's information-packed question "[s]o it sounds like you made an estimate of the depreciation that would have occurred during the time the vehicle was - the intervening time between when the vehicle was new and when it was transferred?" (Tr., p. 64), the auditor later stated "I don't know how [the supervisor] came up with it, but he placed some sort of an average price below 85,000. It's about 65,000, 60,000" (Tr., p. 87). Again, we conclude that the failure to meaningfully describe the audit methodology in response to inquiries about it means that this portion of the assessment also lacks a rational basis.

As neither the Division, nor petitioner, have excepted to any other portion of the Administrative Law Judge's determination, we will not address any other aspect of the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of William Burns, Officer of Burns Bros. Industries, Inc. and Burns Bros. Express, Inc. is granted to the extent indicated in conclusion of law "E" of the Administrative Law Judge's determination on remand; and
4. The Division of Taxation is directed to modify the notices of determination dated May 12, 1988 in accordance with paragraph "3" above, but such notices are otherwise sustained.

DATED: Troy, New York
April 28, 1994

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

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