

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
WILLIAM BURNS, OFFICER OF : **DECISION**
BURNS BROS. INDUSTRIES, INC. : **DTA No. 807410**
AND BURNS BROS. EXPRESS, INC. :
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 of the Administrative Law Judge issued on July 18, 1991 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 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 appeared by William F. Collins, Esq. (Robert Jarvis, Esq., of counsel). Petitioner appeared by Robert A. Wagner, Esq.

The Division of Taxation did not file a brief on exception. Petitioner filed a letter in lieu of a brief in response to the Division of Taxation's exception. The Division of Taxation's request for oral argument was denied.

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

ISSUE

Whether the Administrative Law Judge erred in determining that the Division of Taxation failed to establish a rational basis for the sales tax asserted due on the truck purchases of the two corporations and/or on certain diesel fuel purchases made by Burns Bros. Express, Inc.

FINDINGS OF FACT

In light of our decision in this matter (see, Opinion, infra), we decline at this time to accept or reject the Administrative Law Judge's findings of fact, reserving our opportunity to do so should there be an exception to the amended determination.

OPINION

The Administrative Law Judge determined that the Division of Taxation (hereinafter the "Division") was required, in response to petitioner's challenge, to establish a rational basis for the sales tax assessments against petitioner, as an officer, but that the Division failed to do so with respect to the tax asserted due on the truck purchases of both corporations. The Administrative Law Judge also disallowed the Division's assessment of sales tax on certain diesel fuel purchases which the Division claimed were made by Burns Bros. Express, Inc. (hereinafter "BB Express") through Amacot Trucking Corporation (hereinafter "Amacot") from December 1985 through November 1986. The Administrative Law Judge concluded that although Amacot eventually began to do business as BB Express (see, Determination, findings of fact, footnote "3"; conclusion of law "B"), it did not begin to do so until March 31, 1987, and the tax in question was assessed on purchases made by Amacot prior to this time. Therefore, the Administrative Law Judge directed the Division to modify the notices of determination to reflect these rulings.

However, finding that the Division was able to establish a rational basis for the additional sales tax asserted due on certain other diesel fuel purchases made by BB Express and by Burns Bros. Industries, Inc. (hereinafter "BB Industries"), the Administrative Law Judge upheld the remainder of the assessments against petitioner, namely, the tax asserted due on the purchases of diesel fuel by BB Industries and by BB Express from December 1, 1986 through November 30, 1987.

Finally, because the Administrative Law Judge was not persuaded that petitioner established reasonable cause for underreporting and underpaying the sales tax due, the Administrative Law Judge sustained the penalties asserted against petitioner.

On exception, the Division contests both the Administrative Law Judge's assertion that the Division carries the burden of proving that a rational basis exists for the assessment and the Administrative Law Judge's determination that the Division did not establish a rational basis for portions of the assessment.

Regarding the first point, the Division insists that "a presumption of correctness is attached to sales tax assessments," and that to challenge an assessment, the taxpayer carries the burden of establishing through clear and convincing evidence that the determination has been issued in error (Division's exception, attached rider, p. 1, citing 20 NYCRR 3000.10[d][4]; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451).

In regard to the second point, the Division argues that the audit method used to ascertain the sales tax owed by petitioner was reasonably calculated to reflect the tax due. Specifically, the Division disagrees with the Administrative Law Judge's conclusions that the value placed on the new and used tractors by the auditor for sales tax purposes was not rationally derived. In addition, the Division takes exception to the Administrative Law Judge's decision to disallow, as not rationally based, the sales tax assessed on diesel fuel purchases of BB Express during the period December 1985 through November 1986 (see, Determination, conclusion of law "B"). The Division asserts that the letter establishing the connection between Amacot and BB Express (see, Exhibit "O") does not, contrary to what the Administrative Law Judge states, confirm that Amacot began conducting business as BB Express on March 31, 1987. Rather, claims the Division, the letter establishes that a change of name had already occurred as of the date of the letter. Thus, the Division insinuates that it was not arbitrary to treat the December 1985 through November 1986 fuel purchases of Amacot as those of BB Express. The Division stresses that the record supports the "inference that th[e] two names refer to the same business" (Division's exception, attached rider, p. 1).

In all other respects, the Division asks that the Administrative Law Judge's determination be upheld.

In response, petitioner requests that the Division's notice of exception be dismissed and the determination affirmed.

Based on certain inconsistencies in the Administrative Law Judge's determination, we are unable to fully and fairly analyze the determination to render a just decision. Therefore, we remand the case to the Administrative Law Judge to issue a new determination based on the previously established record, which takes into account the following matters.

Firstly, despite his recognition (see, Determination, finding of fact "4") of the conciliation orders dated July 14, 1989 which cancelled the assessment issued to BB Industries for the period December 1, 1986 through November 30, 1987, it does not appear that the Administrative Law Judge integrated the orders into his analysis of the evidence submitted -- such as by discussing how the auditor's schedules reflected the exhibits and how the conciliation orders interpreted these schedules to modify the assessment (see, Determination, findings of fact "6," "7" and "8") -- or into his ultimate conclusions (see, Determination, conclusions of law "B" and "C").

Secondly, in the Administrative Law Judge's finding of fact "6," he discusses certain gallonage attributed to BB Express from Exhibit "L," yet, in conclusion of law "C," he attributes this gallonage to BB Industries and then discusses BB Express' gallonage as if it came solely from the auditor's schedule rather than from Exhibit "L" as he had stated in finding of fact "6."

Thirdly, the Administrative Law Judge mentions in conclusion of law "C" that Exhibit "M" supports the gallonage attributed to BB Express when it does not appear from our review of the record that the assessment as issued or as modified by the conciliation conferee took Exhibit "M" into consideration in calculating the sales tax assessment for BB Express.

In light of these inconsistencies which preclude our full and fair review of the matter, we remand this case to the Administrative Law Judge and direct him to execute a new determination on this matter as quickly as possible. If the parties wish to take exception to the

new determination of the Administrative Law Judge, they may do so by filing a timely exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded for the issuance of a new determination by the Administrative Law Judge.

DATED: Troy, New York
August 27, 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