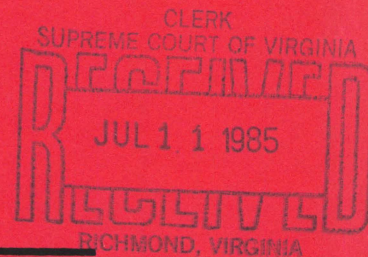


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APR 15 1988

IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 841195

KNOPP BROTHERS, INC.,

Appellant,

v.

DEPARTMENT OF TAXATION
COMMONWEALTH OF VIRGINIA,

Appellee.

JOINT APPENDIX

Peter D. Menk
LOTZ, BLACK & MENK
Barristers Row
Staunton, Virginia 24401-0099

Counsel for Appellant

Gerald L. Baliles
Attorney General of Virginia
Kenneth W. Thorson
Senior Assistant Attorney General
Supreme Court Building
Richmond, Virginia 23219

Counsel for Appellee

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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF STAUNTON

KNOPP BROTHERS, INC.,
Plaintiff

v.

PETITION PURSUANT TO VIRGINIA
CODE SECTION 58-1130

DEPARTMENT OF TAXATION
COMMONWEALTH OF VIRGINIA,
SERVE: W.H. Forst,
State Tax Commissioner
Department of Taxation
Commonwealth of Virginia
Richmond, VA 23282,
Defendant

TO: THE HONORABLE RUDOLPH BUMGARDNER, III, JUDGE OF SAID COURT:

Your Petitioner, Knopp Brothers, Inc., respectfully represents unto the Court as follows:

1. The Petitioner, Knopp Brothers, Inc., has been charged with a sales and use tax assessment for the period December, 1973, through June, 1977, on April 12, 1983, and is aggrieved by such assessment. A copy of the notice of assessment is attached hereto, together with the letter of Edward W. Crutchfield, Audit Supervisor, dated August 24, 1983, and marked Exhibit "A" and "B", respectively.

2. The Petitioner has paid the assessment as is evidenced by the cancelled check of Knopp Brothers, Inc. in the sum of Twenty-one Thousand Nine Hundred Sixty-three Dollars and Ninety-nine Cents (\$21,963.99), a copy of which is attached hereto and marked Exhibit "C".

3. Venue for this proceeding is properly before this Court pursuant to Subdivision 13B of Section 8.01-261 of the Code of Virginia, as amended, the City of Staunton, Virginia, being the place wherein your Petitioner has a registered office and regularly and systematically conducts its business.

4. That by notice of assessment dated April 12, 1983, but not mailed to the Petitioner until August 24, 1983, a copy of which is attached hereto and marked Exhibit "A", your Petitioner was advised that it was assessed the principal sum of Eleven Thousand Eight Hundred and Sixty-one Dollars and Fifty-one Cents (\$11,861.51), together with penalty and interest making a total balance due of Twenty-one Thousand Nine Hundred and Sixty-three Dollars and Ninety-nine Cents (\$21,963.99).

5. That the assessment is erroneous or otherwise improper for the following reasons:

A. Section 58-441.38 of the Code of Virginia, as amended, bars the assessment of any taxes after a period of three (3) years from the date on which such tax is become due and payable and therefore, the Department of Taxation may not assess for taxes alleged to be due between December, 1973, through June, 1977, by assessment dated April 12, 1983.

B. The Department of Taxation has erroneously and improperly assessed a tax deficit of the principal sum of Eleven Thousand Eight Hundred and Sixty-one Dollars and Fifty-one Cents (\$11,861.51) whereas, in fact, the taxpayer, your Petitioner, has over paid said taxes for that period in the amount of Two Thousand Seven Hundred and Thirteen Dollars (\$2,713.00) and therefore, resulting in over payment of taxes for that period under protest of Twenty-four Thousand Six Hundred and Seventy-six Dollars and Ninety-nine Cents (\$24,676.99).

6. The Department of Taxation has abused its discretion and acted in an arbitrary, unreasonable and capricious manner and in support thereof, your Petitioner represents as follows:

A. That previous audits of your Petitioner found your Petitioner's books in order and that the method by which it was collecting sales tax was proper, as is evidenced by letter dated March 8, 1973, of Edward C. Yancey, Auditor, approved by Harry B. Price, Supervisor, attached hereto and marked Exhibit "D".

B. That thereafter a field audit was conducted for the period of December 1, 1973, through June 30, 1977, wherein the Department of Taxation field auditors unilaterally and retroactively ignored and attempted to reverse the previous characterizations of the Petitioner's business.

C. By letter dated July 18, 1978, a copy of which is attached hereto and marked Exhibit "E", the Petitioner was advised by the sales and use tax division of the Department of Taxation of the Commonwealth of Virginia that a field audit had recently been completed of the records and the accounts of Knopp Brothers, Inc. for the period of December 1, 1973, through June 30, 1977, with respect to liability under Virginia Retail Sales and Use Tax Act. According to this field audit, Knopp Brothers, Inc. was found to be in deficit in the amount of Forty Thousand Two Hundred and Twenty-four Dollars and Thirty-seven Cents (\$40,224.37), together with penalty and interest added, amounted to Forty-seven Thousand Four Hundred and Nine Dollars and Ninety-four Cents (\$47,409.94).

D. Knopp Brothers, Inc. in a timely manner objected to the results of the field audit, requested a hearing and pursuant to that request a representative of the sales and use tax division met with the tax payer on January 25, 1979, in Richmond, Virginia.

E. As a result of said meeting, the same field auditors again examined the records of the taxpayer and met with the taxpayer requesting additional written information on February 15, 1979.

F. That by letter dated July 11, 1979, a copy of which is attached hereto and marked Exhibit "F", the field audit unit of the Department of Taxation advised Knopp Brothers, Inc. that the audit had been revised and notified the taxpayer that the tax now due was Thirty-eight Thousand Three Hundred and Thirty-four Dollars and Forty-one Cents (\$38,331.41), which together with penalty and interest added, amounted to Forty-seven Thousand Seven Hundred and Twenty-two Dollars and Seventy-five Cents (\$47,722.75).

G. That Knopp Brothers, Inc. again timely filed an application for correction of the erroneous field audit to the Tax Commissioner for the Commonwealth of Virginia and a hearing was conducted on said application for correction of error on October 18, 1979.

H. That by letter dated November 21, 1979, the State Tax Commissioner issued his letter of opinion, a copy of which is attached hereto and marked Exhibit "G", determining that the taxpayer as to certain contested matters should be considered as a contractor as set forth in Virginia Code Section 58.441.15(a), as it had been prior to the attempted unilateral and retroactive reclassification by the field auditors. The Petitioner was then advised that an auditor of the Department of Taxation would contact him to adjust the audit deficiency accordingly.

I. That on March 4, 1980, at the request of the same field auditors of the Department of Taxation, a meeting was held during which said meeting these same field auditors, in direct contradiction to the decision of the State Tax Commissioner, continued to insist taxation on your Petitioner was as

a fabricator under Section 58-441.15(e) instead of as a contractor under Section 58-441.15(a) as determined by the State Tax Commissioner. The said assigned field auditors then worked and re-worked several additional field audits of the taxpayer's books, at the conclusion of each such audit the taxpayer objected and the auditors returned again to re-audit.

J. That by a purported notice of assessment dated 04-01-81, but not mailed to the taxpayer until October 27, 1981, the taxpayer was then advised that his assessment had been adjusted to Seventeen Thousand Four Hundred Seventy-two Dollars and Sixty-six Cents (\$17,472.66), which together with penalty and interest added, amounts to Twenty-four Thousand Six Hundred and Forty Eight Dollars and Twenty-seven Cents (\$24,648.27). Copies of the work sheets used by the field auditors in determining said assessment are attached hereto and marked Exhibit 'H'.

K. That your Petitioner again objected and again was audited and thereafter received a notice by letter dated August 24, 1983, designated as a notice of corrective assessment being dated April 12, 1983, that the principal amount now due was Eleven Thousand Eight Hundred and Sixty-one Dollars and Fifty-one Cents (\$11,861.51), which together with interest and penalty added, amounted to a tax of Twenty-one Thousand Nine Hundred and Sixty-three Dollars and Ninety-nine Cents (\$21,963.99).

L. That your Petitioner has now elected to pay said amount under protest and to petition this Court for the correction of the erroneous and improper assessments.

M. That the taxpayer has now been advised on four (4) separate occasions of four (4) separate principal figures alleged to be deficit of sales tax not collected at the time of sales by the taxpayer.

N. That each of said field audits were made without adherence to proper accounting procedures, basis in fact, and erroneously applying the applicable law.

O. That Knopp Brothers, Inc. has, despite the repeated and unwarranted field audits requiring the diversion of its personnel from its business pursuits, promptly and properly provided the field auditors with all proper information, including information summarized on the attached Schedules marked Exhibit "I" showing the over payment of taxes for the period.

WHEREFORE, your Petitioner prays that the Court be satisfied that the Petitioner has been erroneously or improperly assessed with taxes, that an Order be entered that the assessment be corrected, and that the amount of Twenty-four Thousand Six Hundred and Seventy-six Dollars and Ninety-nine Cents (\$24,676.99) be refunded to the Petitioner and that a copy of the Order of this Court correcting the erroneous or improper assessment be certified by the Clerk of this Court to the State Tax Commissioner.

Respectfully submitted,

KNOPP BROTHERS, INC.

BY COUNSEL

LOTZ, BLACK & MENK

BY: 

Peter D. Menk

P. O. Box 1206
Staunton, VA 24401
Counsel for Petitioner

NOTICE OF CORRECTED ASSESSMENT OF

Tax Period 12/73 - 6/30/77

Date 4/12/83

Name and Address

I.D. Number 59-6

Bill Number 211

Loc. Code 22

Knapp Brothers, Inc.
P.O. Box 2218
Staunton, Va. 24401

		TAXES	PENALTIES	INTEREST	TOTALS
ORIGINAL ASSESS- MENT AND ACCRUED INTEREST	STATE	30,168.28	458.42		30,168.28
					458.42
	LOCAL	10,056.09	152.81	6481.40	6481.40
					10,056.09
				2160.47	152.81
					2160.47
	TOTALS	40,224.37	611.23	8641.57	49,477.47
BATEMENT	STATE	21,272.14	243.47		21,272.14
					243.47
	LOCAL	7090.72			7090.72
					81.16
	TOTALS	28362.86	324.63	-0-	28,687.49
CORRECTED ASSESS- MENT	STATE	8896.14	214.95		8896.14
					214.95
	LOCAL	1965.37	71.65	6481.40	6481.40
					1965.37
				2160.47	71.65
					2160.47
	TOTALS	11,861.51	286.60	8641.57	20,789.98

AUTHENTICATED BY

(TITLE)

E. J. [Signature]
Tax Examiner

MANDATORY ACCRUED INTEREST COMPUTED THROUGH 3/31/82.
PAY THIS AMOUNT

Accrued interest through 3/31/82 1,174.01

Balance due 21,963.99

COMMONWEALTH of VIRGINIA

Department of Taxation
Richmond, Virginia 23282

August 24, 1983

Mr. Hiram Knopp, President
Knopp Brothers, Inc.
P.O. Box 2218
Staunton, Virginia 24401

VIRGINIA DEPARTMENT OF TAXATION
VALLEY DISTRICT STATE TAX OFFICE
350 NORTH MAIN STREET
P. O. BOX 341
HARRISONBURG, VIRGINIA 22801-0311
TELEPHONE: 703-434-1751

RE: OUTSTANDING AUDIT ASSESSMENT

Our records indicate that payment has not been made on sales and use tax audit assessment for the period December 1973 through June 1977. The audit was revised in accordance with final determination letter of April 12, 1983, issued by the State Tax Commissioner. You were mailed revised assessment (Form 70) on or about April 25, 1983 reflecting balance due of \$20,789.98, including interest through March 31, 1983.

Interest continues to accrue on the unpaid assessment. Balance due with interest updated through this date is \$21,963.99.

Please forward payment promptly to avoid additional interest and the possibility of additional collection measures available to us under the law. A return envelope is enclosed for your convenience.

Sincerely,



Edward W. Crutchfield
Audit Supervisor
Valley District State Tax Office

cam

Enclosure

8489170

PLANTERS BANK & TRUST CO. OF VA.
STAUNTON, VA.

KNOPP BROS., INC.

P.O. BOX 2218
STAUNTON, VA. 24401
(703) 885-8881

CHECK 5014

68-121
-514

8/26/83

\$21,963.99
AMOUNT

PAY
TO THE
ORDER OF

KNOPP BROS. INC. 21963 DOLLARS 99 CTS

CONTROL NO.

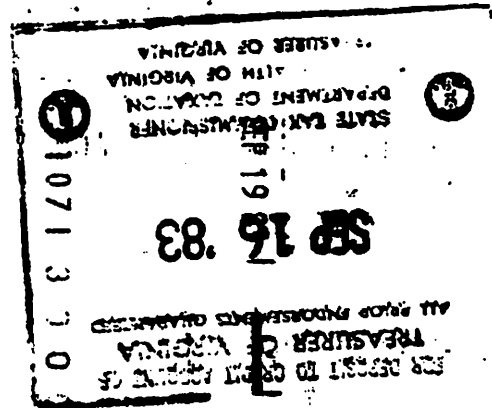
Va Dept of Taxation

[Signature]
AUTHORIZED SIGNATURE

Tax Per. 12/1/73 thru 6/30/77—PAID IN FULL

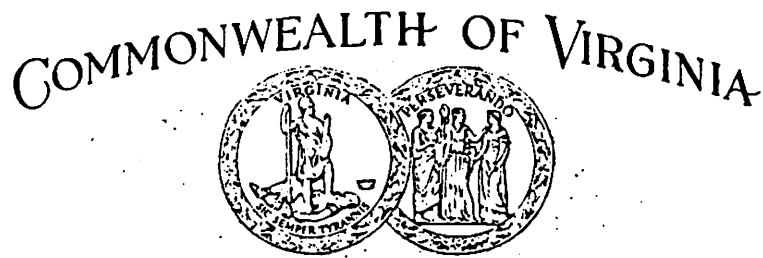
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PAID
16 SEP 83
VIRGINIA
BANK
RICHMOND
VIRGINIA

0000 19981



SALES AND USE TAX DIVISION
DEPARTMENT OF TAXATION

RICHMOND 23215

March 8, 1973

Virginia Department of Taxation
Valley District Field Service Division
P. O. Box 311
361 N. Main Street
Harrisonburg, Virginia 22801

Mr. Hiram Knopp, Pres.
Knopp Bros., Inc.
867 Middlebrook Road
Staunton, Va. 24401

RE: Registration #219-003989-6

Dear Mr. Knopp:

In reference to a recent audit of your records, it was revealed that more than half of your business is to the retail trade. You also manufacture trusses and wall panels for sale and for use in performance of real estate construction.

Under these circumstances, you will not be entitled to the manufacturing exemption for machinery and supplies used to manufacture the trusses and wall panels.

In regard to the purchase of materials for your contracting use, if you are unable to identify at the time of purchase which is used in the contracting department or to be sold at retail, I would suggest you purchase everything tax exempt and remove from inventory when used in the contracting department and pay tax at that time.

And consequently, don't show tax to the customer when performing real estate construction and so mark invoices to this effect.

If at a later date you sell at retail and collect tax on the retail selling price of some trusses and wall panels, and the tax has been paid also on the cost of the materials, you must remit the tax directly to the state and are not entitled to any exemption for tax paid on the cost of materials used since both are a separate and distinct transaction.

March 8, 1973

If you need any additional information, please call our District Office in Harrisonburg, Virginia, 434-1768.

Very truly yours,


Edward C. Yancey
Auditor

Approved: 
Harry B. Price
Audit Supervisor

COMMONWEALTH of VIRGINIA

DEPARTMENT OF TAXATION

RICHMOND 23282

CERTIFIED MAIL #860258
RECEIPT REQUESTED

July 18, 1978

Mr. Hiram Knopp, President
Knopp Brothers, Inc.
P. O. Box 2218
Staunton, Virginia 24401

Re: Certificate of Registration Number 219-003989-6
Consumer's Use Tax Audit

Dear Mr. Knopp:

Enclosed are copies of each Report of Field Audit recently completed of the records and accounts of Knopp Brothers, Inc. with respect to liability under the Virginia Retail Sales and Use Tax Act for the period December 1, 1973 through June 30, 1977. The aggregate deficiency for tax, penalty and interest is \$47,409.94.

As a precautionary measure, we would like to point out that subsequent audit deficiencies will be subject to the 25% penalty where it is revealed that compliance with the Act has been inadequate. Virginia Code Section 58-441.27 also provides that a 50% penalty shall be assessed where the tax reported by the dealer is found to be less than one-half the amount actually due. Moreover, Section 58-1160 of the Virginia Code requires that a mandatory annual interest charge be applied to audit deficiencies at a rate equal to the rate of interest established under Section 6621 of the Internal Revenue Code of 1954, as amended. The foregoing is provided solely for your information and guidance so that there will be no misunderstanding regarding the legal application of penalty and interest should there be another audit of your records and accounts in the future.

Comments by our auditor indicate that you are contesting the audit, in that you were instructed by Richmond and the last auditor that you should act as a contractor for the trusses, packages and middle shop sales.

A thorough search of your file revealed no correspondence relating to instructions by the department for you to be a contractor. Without such evidence as a letter, we cannot in good conscience treat you as a contractor. Moreover, under the Doctrine of Equitable Estoppel, which states that no individual shall rise above the state,¹ it is difficult to

Mr. Hiram Knopp, Preside

July 18, 1978

Page 2

grant relief, especially without such evidence. In addition, you were told by the auditors that the amount of materials furnished which are erected or installed by the home owner is a taxable sale, and that you could figure in your contract price the tax on the cost price of materials which you would erect, and the tax on the selling price of the materials which you would furnish but not erect. Thus you were told not to treat yourself as a contractor. In order to be a contractor in Virginia, one must file a return of Capital Not Otherwise Taxed, and obtain a contractor's license. Our records indicate that neither were done during the audit.

Therefore, it is the department's position that you were advised not to treat yourself as a contractor; thus you should pay the applicable tax penalty and interest.

We should be pleased to meet with you; however, unless you have additional information that would change our position, we cannot abate any of the assessment. Please state in a letter to this office the areas of contention of any specific evidence.

As I understand your business, you are operating in a dual capacity, namely as a manufacturer, and as a fabricator-retailer. When operating as a manufacturer, you are governed by Section 58-441.6 of the Code of Virginia and Section 1-63 of the Virginia Retail Sales and Use Tax Rules and Regulations in which you purchased all raw materials and equipment exempt, by issuing your supplier a completed ST-11 exemption certificate. Any sales made of your finished manufactured products would be subject to the tax unless you take a completed certificate to the effect that the property is exempt. Of course, there is no manufacturing exemption available when you are acting as the contractor installing what you have manufactured. In such case, you should accrue tax on the fabricated cost (raw materials and labor).

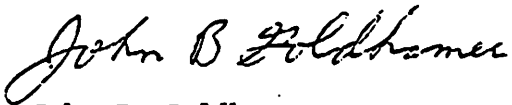
When operating as a fabricator-retailer, you should purchase all raw materials and equipment exempt, and at the time of sale, tax is charged on the total selling price less any separately stated charges for freight, delivery charge, interest charge, installation charges, unless as in the previous situation, you have on file a completed exemption certificate to the effect that the property is exempt. A retail packaged home sale is treated the same way as the fabricator-retailer sale is treated. All purchases of raw materials and equipment are exempt and the tax applying to the retail selling price, less any separately stated charges for freight, delivery charges, interest or installation charges, unless you have on file an exempt certificate to the effect that a property is exempt.

Mr. Hiram Knopp, Preside
July 18, 1978
Page 3

Copies one and two of our assessments totaling \$47,409.94 are enclosed. Please return copy one with your check in full payment within thirty days from the date shown on this letter. A self-addressed envelope is enclosed for your convenience. If the assessment is not paid before the expiration of the thirty day grace period, interest shall accrue thereon from the date of such assessment until it is paid. (Reference, Section 58-1160, Code of Virginia).

Thank you for the courtesy and cooperation extended to the auditors during the period the audit was in progress. Should you have any questions, comments, or suggestions concerning the application of the sales and use tax, or the manner in which the audit was conducted, do not hesitate to call us at (804) 786-3971, or write this office.

Sincerely,



John B. Goldhamer
Field Audit Unit
Sales and Use Tax Division

JBG/gl

Enclosure

cc: Valley District Office.

TAXPAYER'S COPY

NAME OF DEALER	Knopp Bros., Inc.
TRADING AS	same
BUSINESS ADDRESS	867 Middlebrook Ave., Staunton, Va. 24401
MAILING ADDRESS	P O Box 2218, Staunton, Va. 24401

REGISTRATION NUMBER
219 | 003989 |

BUSINESS CODE
50

LIABILITY FOR CREDIT DISCLOSED BY AUDIT

PERIOD OF AUDIT TO		MEASURE OF TAX		TAX		PENALTY *		INTEREST TO		TOTAL	
STATE TAX	12/01/73 - 06/30/77	1,005,609	29	30,168	28	458	42	4,577	17	35,203	87
LOCAL TAX	12/01/73 - 06/30/77	1,005,609	29	10,056	09	152	81	1,525	73	11,734	63
TOTAL				40,224	37	611	23	6,102	90	46,938	50
LESS:											
BALANCE				40,224	37	611	23	6,102	90	46,938	50

ANALYSIS OF MEASURE OF TAX BY CLASS OF TRANSACTION

[illegible]



Exhibit "E"

COMMONWEALTH of VIRGINIA

CERTIFIED MAIL #605505 DEPARTMENT OF TAXATION
RETURN RECEIPT REQUESTED RICHMOND 23282

June 11, 1979

Mr. Peter D. Menk
Lotz, Black, and Menk
P.O. Box 1206
Staunton, Virginia 24401

Re: Knopp Brothers, Inc. and Knopp Millworks, Inc.
Certificate of Registration #219-003989-6

Dear Mr. Menk:

Reference is made to your original letter dated March 26, 1979, the attached affidavit from Mr. Roby, and my letter dated March 30, 1979, indicating that we were waiting for our auditors, Mr. Nelson Liskey and Mr. Roscoe Miller, to comment on the above and revise the audit of Knopp Brothers, Inc.

As you know, the audit of registration number 219-003989-6 was revised dropping the total of tax from \$40,224.37 to \$38,334.41; however, the total of tax, penalty, and interest is now \$47,722.75.

In reference to the affidavit by Mr. Roby, Knopp Brothers' foreman in which he stated:

"All other compensation received for jobs or contracts was received for those jobs or contracts where there was delivery and in addition employees of Knopp Brothers, Inc., participated in affixing those trusses to the real estate. This participation consisted of those situations where Knopp Brothers, Inc., crane was on the job, operating the crane, guiding the trusses to the roof and holding the trusses in place until they were secured by nailing or otherwise to the structure. Those situations where there was no crane it consisted of physically lifting the trusses to the roof putting the trusses in place, and holding in place until secured by nailing or otherwise to the structure."

Mr. Peter D. Menk
Page -2-
June 11, 1979

We feel Mr. Roby did not extend his description far enough. We must question who "secured by nailing or otherwise to the structure." It is our understanding, and we have depositions from customers to the effect, that Knopp Brothers did not generally secure the trusses; but only held the trustees in place by crane or by hand while the contractor or subcontractor who was building the structure fastened them in place. In addition, comments by our auditors Messers. Liskey and Miller indicate that Mr. Roby's affidavit disagrees with what he stated in the audit conference, in that he never stated that Knopp Brothers generally fastened the trusses; but that the contractor or subcontractors do the work.

Moreover, the data given in your March 26, 1979 letter conflicts with Mr. Roby's statement in the audit conference. There, Mr. Roby stated that 40 percent of Knopp Brothers' trusses are delivered and placed on the ground, while the remaining 60 percent of the trusses are delivered to the job cite and either Knopp Brothers' employees or crane hold the trusses in place while the contractor or subcontractors fasten them in place.

It may be that you are counting the delivery on the structure as contracting; however, as mentioned below, we do not believe that this is contracting. Otherwise, kindly explain the conflict.

As to whether Knopp Brothers should be classified as a contractor or a seller of tangible personal property for sales and use tax purposes, we must insist that the placing of trusses on a structure is merely a delivery, just as transporting plywood to the eighth floor of a new structure by crane by the seller is delivering. In both instances, individuals who operate the seller's crane are not contractors in that they do not fasten the tangible personal property to real estate in a permanent manner. Thus for sales and use tax purposes, and we have a concurrence of the Assistant Attorney General's Office, Knopp Brothers is not a contractor.

Moreover, Words and Phrases describes that in Madden v. Hughs, the court ruled that "the carrying of planks from which another constructed a contrivance did not constitute the erection of the contrivance itself within the labor law."

As you know Mr. Menk, the sales and use tax law falls under a different section of the Code of Virginia than that of licensing tax and they may conflict just as laws of different States and counties may conflict.

For licensing tax Section 58-297 defines a contractor as:

"Any person, firm or corporation:

- (1) Accepting or offering to accept orders or contracts for doing any work on or in any building or structure, requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead, or other metal or any other building materials;
- (2) Who shall accept or offer to accept contracts to do any paving, curbing or other work on sidewalks, streets, alleys, or highway, or public or private property, using asphalt, brick, stone, cement, concrete, wood or any composition;
- (3) Who shall accept or offer to accept an order for a contract to excavate earth, rock, or other material for a foundation or any other purpose or for cutting, trimming, or maintaining right-of-way; or
- (4) Who shall accept or offer to accept any order or contract to construct any sewer of stone, brick, terra cotta, or other material;

shall be deemed a contractor."

The statute specifically states "accepting or offering to accept orders or contracts for doing any work on or in any building or structure." (Emphasis added.) In addition, Words and Phrases defines contractor as "One who undertakes to, or does construct, alter, repair, add to, subtract from, improve, move, wreck or demolished a building is a contractor or a builder within meaning of the contractors' license law."

Webster's Third New International Dictionary (unabridged) defines a contractor as:

"One who contracts on predetermined terms to provide labor and materials to be responsible for the performance of a construction job in accordance with established specifications or plans.
Called also a building contractor."

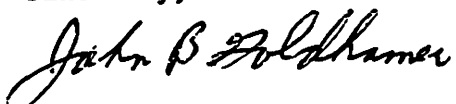
In conclusion, we are not able to agree that Knopp Brothers, Inc., is generally a contractor for sales and use tax purposes; however,

Mr. Peter D. Menk
Page -4-
June 11, 1979

for licensing tax, Knopp Brothers is a contractor since they have contracted to do work on or in any building at least once.

Therefore, may we have your client's check for \$47,722.75 to pay the audit in full in the enclosed self-addressed envelope. Should you wish to file a petition to the Courts under 58-1130 of the Virginia Code, we still must insist on full payment of the audit before your petition to the Courts. This administrative ruling of the Department was upheld by the United States Supreme Court in the Stuart McQuire Company, Inc. v. W. H. Forst, State Tax Commissioner, Commonwealth of Virginia (Case D-8359-S Circuit Court, City of Richmond, Division I, July 24, 1975, Writ of Error denied, 216 Va CXVII, Appeal Dismissed, 97 S.Ct. 40 (1976)).

Sincerely,



John B. Goldhamer
Field Audit Unit
Sales and Use Tax Division

dpw

Enclosure

cc: Mr. Hiram Knopp, President
Mrs. Anna Lee Pullin,
Staunton Commissioner of Revenue

Valley District Office



COMMONWEALTH of VIRGINIA

Department of Taxation

Richmond, Virginia 23282

November 21, 1979

Mr. Peter D. Menk
Lotz, Black & Menk
P. O. Box 1206
Staunton, Virginia 24401

Re: Section 58-1118 Application/Sales and Use Tax
Knopp Brothers, Incorporated

Dear Mr. Menk:

Reference is made to the August 7, 1979 application for correction filed on behalf of your client, Knopp Brothers, Incorporated, and the subsequent hearing regarding the sales and use audit assessment for the period December 1, 1973 through June 30, 1977.

The issues as set forth in your application are restated below and will be followed by the department's determination to each.

Issue 1. That a ruling be entered that Knopp Brothers, Incorporated comes within the definition of contractor as contained in Section 58-441.15 of the Code of Virginia of 1950, as amended, and within the definition of contractor as contained in Section 1-27(a) of the Virginia Retail Sales and Use Tax Rules and Regulations with respect to building components.

Determination. The facts as provided in your application and stated at the hearing on October 18, 1979 indicate that Knopp Brothers, Incorporated constructs house components per specifications of its customer (a builder). These house components in question (namely roof trusses, wall panels and gable ends) are those which Knopp Brothers transports to the job, lifts by crane, guides into place and holds on the structure until it is secured to the structure by nailing by the builder's employees. The question to be resolved is whether Knopp Brothers is a contractor or a retailer with respect to transactions of this nature.

Knopp Brothers, Incorporated is not merely selling and delivering the house components in question, but as the facts state, it is assisting the contractor in the installation when it lifts the gable ends, wall panels or roof trusses by its crane, guides them into place and holds them until secured to the structure. It is the department's position that Knopp Brothers, Incorporated is providing "other service with respect to real estate" as set forth in Virginia Code Section 58-441.15(a) and would therefore be considered a contractor with respect to these

Mr. Peter D. Menk
November 21, 1979
Page 2

transactions. However, when Knopp Brothers, Incorporated delivers these components to the job site and does not perform "any other service with respect to real estate", it is a retailer.

Issue 2. That, whatever category Knopp Brothers, Inc. is entitled to, the Department of Taxation is estopped from collecting any sales taxes found due as a result of the 1978 field audit unit with respect to roofing trusses by virtue of the taxpayer's good faith reliance on the Department's repeated allegations of Knopp Brothers, Inc.'s status as a contractor.

Determination. The department has not been able to find evidence to indicate that it advised Knopp Brothers, Incorporated that it was a contractor with respect to roof trusses. Apparently, you feel that the March 8, 1973 letter from Edward C. Yancy, Auditor, states just that; however, in reviewing the letter, we find that it merely points out the sales and use tax policy of the department when Knopp Brothers, Incorporated sells trusses at retail and when it uses them in the performance of real estate construction.

Issue 3. That Section 58-441.38 of the Code of Virginia bars the assessment of any taxes which became due and payable before January 1, 1975.

Determination. The assessment for your client's audit deficiency is represented by bill number 023611, dated December 20, 1977. Under the established procedures of the department, a bill dated 1977 would never be printed in 1978. The date shown on a bill is the date on which the assessment was entered on the department's computer. Since the assessment was made prior to January 1, 1978, it was assessed within the statute of limitations provided in Virginia Code Section 58-441.38. The department's methodology for making assessments has been approved in the Circuit Court of the City of Hampton in Chisman Co. v. Virginia Department of Taxation, and the Circuit Court of the County of Roanoke in Rental Uniform Services of Roanoke v. Commonwealth of Virginia.

The department therefore grants relief to Issue 1 and hereby denies any relief to Issues 2 and 3. Our auditor will contact you to adjust the audit deficiency accordingly.

Sincerely,


W. H. Forst
State Tax Commissioner

baj

NOTICE OF ASSESSMENT
COMMONWEALTH OF VIRGINIA DEPARTMENT OF TAXATION
P.O. BOX 1777, RICHMOND, VA. 23214

FORM NO. ASD 80

1

RETURN THIS COPY ALONG WITH YOUR REMITTANCE MADE PAYABLE TO THE DEPARTMENT OF TAXATION IN ENCLOSED SELF-ADDRESSED ENVELOPE.

ACCOUNT NUMBER

003989-6

G

BILL NUMBER

49298

ITEM NO.

DO NOT USE THIS SPACE

IF NOT PAID WITHIN 30 DAYS FROM DATE OF ASSESSMENT, INTEREST WILL ACCRUE AT THE APPLICABLE STATUTORY RATE FROM DATE OF ASSESSMENT.

DATE OF ASSESSMENT

04-01-81

776 A 8

KNOPP BR

FOR DEPT. OF TAXATION USE	PERIOD OF AUDIT	REASON (SEE BACK)	TAX	AMOUNT
219D311P	DECEMBER 1973	G	STATE SALES TAX	\$ 13,104.50
219D312P	THRU	G	STATE SALES TAX PENALTY	214.96
219D313P	JUNE 1977	G	STATE SALES TAX INTEREST	5,166.75
219D341P		G	LOCAL SALES TAX	4,368.16
219D342P		G	LOCAL SALES TAX PENALTY	71.66
219D343P		G	LOCAL SALES TAX INTEREST	1,722.24

NAME AND ADDRESS OF TAXPAYER

KNAPP BROTHERS INC
FOR KNOPP BROTHERS INC
P O BOX 2218
STAUNTON VA 24401

TOTAL AMOUNT DUE & PAYABLE. →

\$ 24,648.27

IF THIS ASSESSMENT IS INCORRECT OR YOU WISH TO PROTEST THE ABOVE ASSESSMENT, YOU MUST DO SO IN WRITING WITHIN 90 DAYS FROM DATE OF ASSESSMENT.
THIS STATEMENT DOES NOT INCLUDE ANY ASSESSMENT OF TAX, PENALTY, OR INTEREST FOR ANY REPORTING PERIOD OTHER THAN SHOWN ABOVE. IF PAYMENT HAS BEEN MADE, DISREGARD THIS NOTICE. STAMPS CANNOT BE ACCEPTED IN PAYMENT OF TAXES.

1005015 (REV. 12-78)

103197

04/01/81

KNOFF BROS., INC.
867 MIDDLEBROOK AVE.
P. O. BOX 2218
STAUNTON, VIRGINIA 24401

MAY 12, 1983

MR. W. H. FORST
STATE TAX COMMISSIONER
DEPARTMENT OF TAXATION
COMMONWEALTH OF VIRGINIA
RICHMOND, VIRGINIA 23282

RE: SALES TAX AUDIT - FILE #10,657
CERTIFICATE OF REGISTRATION NO. 219-003989-6

DEAR MR. FORST:

YOUR DEPARTMENT HAS ISSUED TWO DETERMINATION LETTERS IN RESPECT TO THE AUDIT ASSESMENT OF KNOFF BROS., INC. FOR WHICH WE THANK YOU. A THIRD ISSUE WHICH WE ARE CONTESTING HAS NEVER BEEN ADDRESSED FROM THE BEGINNING. AN ERROR IN OUR COMPUTER PROGRAM WHICH MONTHLY SUMMARIZED THE TAX EXEMPT SALES WAS FOUND BY US DURING THE TIME OF THE AUDIT. THIS AMOUNTED TO A SIZEABLE DIFFERENCE IN THE AMOUNT OF EXEMPT SALES WHEN COMPARED TO GROSS SALES. ONE YEAR IMMEDIATELY FOLLOWING THE AUDIT PERIOD, WE FOUND THE EXEMPT SALES TO BE 10% OF GROSS SALES. IN APPLYING A 10% EXEMPT SALES TO GROSS SALES FOR THE ENTIRE AUDIT PERIOD, AS PER SHEET ATTACHED, OUR FIGURES SHOW WE HAVE ACTUALLY OVERPAID SALES TAX IN THE AMOUNT OF \$2,713.00

IN LIGHT OF THE ABOVE AND IN VIEW OF THE FACT THAT THE ASSESSMENT SEEMS TO BE BASED ON THE DEPARTMENTAL BREAKDOWN FOUND IN OUR GENERAL LEDGER, WE FEEL THE ASSESSMENT IS ERRONEOUS. WE BELIEVE TOTAL SALES AND TOTAL COSTS TO BE ACCURATE AND DEPARTMENTAL FIGURES WERE USED FOR INTERNAL PURPOSES ONLY. AT BEST THE DEPARTMENTAL FIGURES ARE AMBIGUOUS. THE ISSUE APPEARS BASED ON THE USE OF GENERAL LEDGER BREAKDOWN SINCE NOT A SINGLE TRACEABLE DISCREPENCY HAS BEEN BROUGHT TO OUR ATTENTION.

IN AS MUCH AS WE WOULD LIKE TO RESOLVE THIS ISSUE AND NOT WISHING TO APPLY TO THE COURT FOR RELIEF, WE OFFER TO SETTLE THE MATTER WITH A PAYMENT OF 50% OF THE DIFFERENCE BETWEEN THE TWO FIGURES. ONE HALF OF THE DIFFERENCE BETWEEN \$20,789.98 MINUS \$2,713.00. THIS AMOUNTS TO \$9,038.49

YOUR CONSIDERATION TO THIS MATTER IS APPRECIATED.

BT DEEPLY

HIRSH M. KNOFF, PRESIDENT
KNOFF BROS., INC.

ENCLOSURES

23

CC: MR. PETER D. NENK

24

Exempt sales compared to total sales
for period from Oct 1977 thru Sept 1978

		Total Sales	Exempt Sales
1	10/77	19257800	1376000
2	11/77	15043000	911300
3	12/77	13645300	933700
4	1/78	7000200	559600
5	2/78	8170300	1469900
6	3/78	9228500	12700000
7	4/78	17434200	818900
8	5/78	19604700	1523900
9	6/78	25648100	2066600
10	7/78	23162500	2136100
11	8/78	23894900	2794400
12	9/78	20006100	3173300
13		202095600	20423700
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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF STAUNTON

KNOPP BROTHERS, INC.

Plaintiff,

v.

AT LAW. NO. _____

DEPARTMENT OF TAXATION,
COMMONWEALTH OF VIRGINIA

Defendant.

MOTION TO DISMISS

The Department of Taxation, Commonwealth of Virginia,
by counsel, hereby moves this Honorable Court to dismiss the
Petition Pursuant to Virginia Code Section 58-1130 of the
Plaintiff for correction of an erroneous tax assessment on
the ground that the Petition is barred by the statute of
limitations as more fully appears in the accompanying
memorandum in support of this motion.

DEPARTMENT OF TAXATION,
COMMONWEALTH OF VIRGINIA

By: 

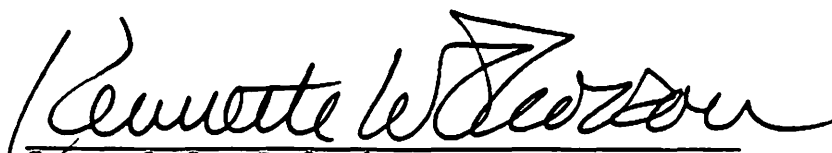
Counsel

Gerald L. Baliles
Attorney General

Kenneth W. Thorson
Senior Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-0080

CERTIFICATE

I certify that on the 24th day of February, 1984, I mailed a true copy of the foregoing Motion to Dismiss to Peter D. Menk, Esquire, Post Office Box 1206, Staunton, Virginia 24401 pursuant to the provisions of Rule 1:12 of the Rules of the Supreme Court of Virginia.

A handwritten signature in black ink, reading "Kenneth W. Johnson". The signature is written in a cursive style with a large, stylized "K" and "J".

Counsel for Defendant
Department of Taxation
Commonwealth of Virginia

TWENTY-FIFTH JUDICIAL CIRCUIT
OF VIRGINIA

RUDOLPH BUMGARDNER, III
CITY HALL
P. O. Box 58
STAUNTON, VIRGINIA 24401



STAUNTON
(703) 886-5421
(703) 885-5178, EXT. 51
WAYNEBORO
(703) 949-6561

COUNTIES
ALLEGHANY, AUGUSTA, BATH,
BOTETOURT, CRAIG, HIGHLAND, ROCKBRIDGE
CITIES
BUENA VISTA, CLIFTON FORGE, COVINGTON,
LEXINGTON, STAUNTON AND WAYNEBORO

May 7, 1984

Peter D. Menk, Esquire
Lotz, Black & Menk
P. O. Box 1208
Staunton, Virginia 24401

Kenneth W. Thorson, Esquire
Senior Assistant Attorney General
Commonwealth of Virginia
101 North Eighth Street
Richmond, Virginia 23219

RE: Knopp Brothers, Inc. v. Department of
Taxation, Commonwealth of Virginia

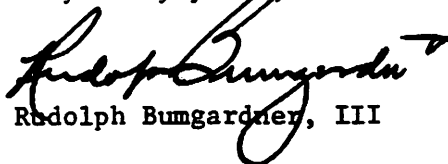
Gentlemen:

Enclosed please find my opinion which grants the motion
to dismiss filed by the Department of Taxation.

I would ask that Mr. Thorson as attorney for the prevailing
party prepare an Order incorporating this and forward it to Mr.
Menk. When the Order has been seen and initialed by counsel it
will enter.

With best regards, I am,

Very truly yours,


Rudolph Bumgardner, III

RBIII:pms
Enclosure

VIRGINIA: IN THE CIRCUIT COURT OF AUGUSTA COUNTY

KNOPP BROTHERS, INC.

v.

DEPARTMENT OF TAXATION,
COMMONWEALTH OF VIRGINIA

O P I N I O N

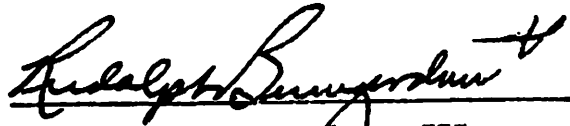
Knopp Brothers, Inc. filed a Petition to correct an assessment of Virginia Retail Sales Tax pursuant to Code of Virginia §58-1130. The Department of Taxation filed a Motion to Dismiss which asserts that the relief sought is barred by the statute of limitations. The parties filed memoranda and argued orally.

The defendant concedes that there is no requirement to exhaust administrative remedies before filing for relief from the Circuit Court under §58-1130 and that the administrative appeal remedies provided by §58-1118 do not toll the statute of limitations for the court proceedings under §1130. The single issue that evolved during argument is whether each subsequent assessment of a tax due was an adjustment of the original assessment or whether they were themselves original assessments which would generate a new period for filing suit.

The taxpayer was notified by letter July 18, 1978 that an assessment of \$47,409.05 was due. This was an assessment for retail sales and use tax due for the period December 1, 1973 to June 30, 1977. The taxpayer exercised the administrative appeal procedures and the original assessment of taxes was adjusted and revised through that process. The tax due was determined finally by the administrative appeal process on August 24, 1983.

The assessment dated August 24, 1983 was not a new assessment but the date the original assessment was finally determined. The sales and

use tax due for the period December 1, 1973 to June 30, 1977 was always the subject of these administrative proceedings. The statute of limitations began to run on the date of the original assessment July 18, 1978. The three-year period established in §58-1130 ran before the filing of this Petition. The Motion to dismiss is granted.


Rudolph Bumgardner, III
Judge



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Gerald L. Baliles
Attorney General

William G. Broaddus
Chief Deputy Attorney General

Donald C. J. Gehring
Deputy Attorney General
Criminal Law Enforcement Division

Maston T. Jacks
Deputy Attorney General
Human & Natural Resources Division

Elizabeth B. Lacy
Deputy Attorney General
Judicial Affairs Division

Walter A. McFarlane
Deputy Attorney General
Finance & Transportation Division

Karl E. Bren
Director of Administration

May 14, 1984

Peter D. Menk, Esquire
Lotz, Black & Menk
Post Office Box 1206
Staunton, Virginia 24401-0099

Re: Knopp Brothers, Inc. v. Department of
Taxation, Commonwealth of Virginia


Dear Mr. Menk:

At the request of the Court, I have prepared a sketch Order in accordance with the Opinion of the Court forwarded by letter dated May 7, 1984. Please endorse the original of the Order and return it to me so that I may present it for entry.

You will note that I have proposed that the Final Order make two minor amendments in the Opinion of the Court in order to remove any potential ambiguity should your client decide to appeal the decision. I believe you will agree that the amendments are in order. The use of the word "defendant" in the first sentence of the second paragraph of the Opinion is an appropriate reference in the context of the Court's action on the Motion to Dismiss. That is to say, your client was in the posture of defending against the Motion to Dismiss. Nevertheless, it is possible that some ambiguity could be created and I would prefer to have the record made clear by these simple amendments.

With kindest regards, I remain

Sincerely yours,


Kenneth W. Thorson
Senior Assistant Attorney General

5:2/203
Enclosure

cc: The Honorable Rudolph Bumgardner, III, Judge
Twenty-fifth Judicial Circuit

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF STAUNTON

KNOPP BROTHERS, INC.,

Plaintiff,

v.

DEPARTMENT OF TAXATION,
COMMONWEALTH OF VIRGINIA,

Defendant.

F I N A L O R D E R

This cause came to be heard on April 10, 1984 upon the plaintiff's Petition Pursuant to Virginia Code Section 58-1130 with exhibits thereto filed February 1, 1984, the defendant's Motion to Dismiss, the memoranda of law filed by both parties, and upon argument of counsel.

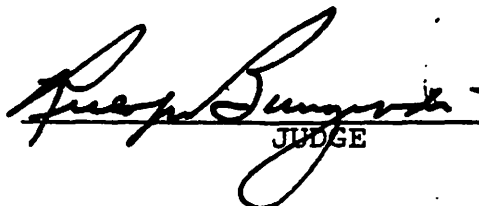
It is hereby ORDERED that the Court's Opinion forwarded to counsel by letter dated May 7, 1984 be amended to reflect that this cause was heard in the Circuit Court for the City of Staunton and that the word "defendant" appearing in the first sentence of the second paragraph of the Opinion be stricken and the word "taxpayer" be inserted in lieu thereof.

For the reasons given in the Opinion of the Court forwarded to counsel by letter dated May 7, 1984, as amended, which is incorporated by reference and made a part of the record herein, it appears to the satisfaction of the Court that the Motion to Dismiss of the defendant asserting the defense of the statute of limitations should be granted.

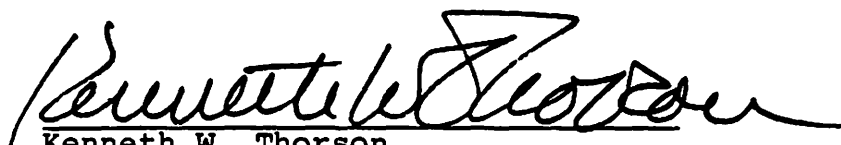
Now, therefore, it is ORDERED that the defendant's Motion to Dismiss be, and the same is hereby granted, and the plaintiff's Petition Pursuant to Virginia Code Section 58-1130 is hereby DISMISSED, with costs to be taxed against the plaintiff.

The Clerk is ORDERED to remove this case from the docket and to certify a copy of this FINAL ORDER to counsel of record.

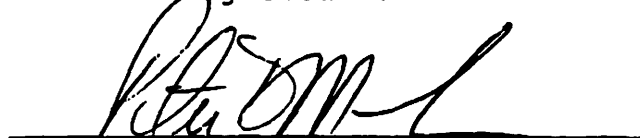
ENTER: 29 May 1984


JUDGE

I Ask For This:


Kenneth W. Thorson
Senior Assistant Attorney General
Counsel for defendant

Seen And Objected to:


Peter D. Menk, Esquire
Counsel for plaintiff

12775  & COPY
CIRCUIT COURT, STAUNTON, VA.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF STAUNTON

KNOPP BROTHERS, INC.,
Plaintiff

v.

NOTICE OF APPEAL

DEPARTMENT OF TAXATION,
COMMONWEALTH OF VIRGINIA,
Defendant

The Plaintiff, Knopp Brothers, Inc., hereby gives notice of appeal from the Decree of this Court entered on May 29, 1984, and further gives notice that there having been no trial, this matter having been determined on a Motion to Dismiss, there will be no transcript or statement of facts, testimony or other incidents of case to hereafter be filed, all in compliance with Rule 5:6 of the Rules of the Supreme Court of Virginia.

KNOPP BROTHERS, INC.

BY COUNSEL

LOTZ, BLACK & MENK

BY:

Peter D. Menk
Peter D. Menk
P. O. Box 1206
Staunton, VA 24401
Counsel for Plaintiff

CERTIFICATE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed, regular mail, postage prepaid, to Kenneth W. Thorson, Senior Assistant Attorney General, Commonwealth of Virginia, Supreme Court Building, 101 North Eighth Street, Richmond, VA 23219, counsel for Defendant, this 30th day of May, 1984.

Peter D. Menk

ASSIGNMENTS OF ERROR

The trial court erred in determining that the three year period established in Virginia Code Section 58-1130 ran before the filing of the Petition because:

1. The trial court erroneously determined the date of the assessment.