

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

---

In the Matter of the Petition :  
of :  
**WILLETS POINT CONTRACTING CORP.** :  
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, 1979 through February 28, 1983. :

---

DECISION

In the Matter of the Petition :  
of :  
**WILLETS POINT CONTRACTING CORP.** :  
**AND K. TULLY, AS OFFICER** :  
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 March 1, 1983 through May 31, 1986. :

---

Petitioner, Willets Point Contracting Corp., 127-50 Northern Boulevard, Flushing, New York 11368 filed an exception to the determination of the Administrative Law Judge issued on September 29, 1988 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1979 through February 28, 1983 (File No. 801023).

Petitioners, Willets Point Contracting Corp. and K. Tully, as officer, 127-50 Northern Boulevard, Flushing, New York 11268, filed an exception to the determination of the Administrative Law Judge issued on September 29, 1988 with respect to their 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 March 1, 1983 through May 31, 1986 (File No. 804320).

Petitioners appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq.

(Lawrence A. Newman, Esq., of counsel). Oral argument was heard at petitioners' request on March 21, 1989.

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

***ISSUE***

Whether petitioner Willets Point Contracting Corp.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge and such facts are stated below except that we modify finding of fact "9" as indicated.

Petitioner Willets Point Contracting Corp. ("the corporation") is a general contractor performing paving work for governmental agencies such as the City of New York Department of Highways, The Port Authority of New York and New Jersey, the Triborough Bridge and Tunnel Authority and the New York State Department of Transportation.

The corporation owns and operates an asphalt plant which produces asphalt used by the corporation in fulfilling its obligations under paving contracts.

On March 9, 1984 the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to the corporation for \$53,859.70 in tax, plus interest, for the period September 1, 1979 through February 28, 1983.

On December 17, 1986 the Division of Taxation issued notices of determination and demands for payment of sales and use taxes due to the corporation and "Mr. K. Tully, President" for \$75,917.33 in tax, plus interest, for the period March 1, 1983 through May 31, 1986.

Petitioners have raised no issue with respect to any liability on the part of Mr. K. Tully, as officer of the corporation. In fact, Mr. Tully's full name does not appear in the record.

The assessments were based on purchases of equipment, tools, replacement parts, fuel and electricity used by the corporation in the operation of the asphalt plant.

The corporation paid the 4% portion of the tax applicable to New York City under Article 29 of the Tax Law but did not pay the 4¼% due to the State and Metropolitan Transportation

District under Article 28 on the basis that said purchases were used or consumed in the production of "tangible personal property for sale" and thus exempt.

The Bids and Specifications

Approximately 96% of the corporation's sales volume consists of paving contracts with the governmental agencies noted above. The majority of its sales volume is with the City of New York Department of Highways.

The City of New York Department of Highways' standard Proposal For Bids requires the price for each particular item to be set forth in the bid and the total for all items to be set forth.

The bid form reads as follows:

---

"BID"

---

The total of the foregoing bid based on the Engineer's Estimate of Quantities given hereinabove is:

(A) Total bid for all consumable materials which will become a permanent part of the finished structure .....\$\_\_\_\_\_

(B) Total bid for all other costs of installation, including consumable supplies which will not become a permanent part of the finished structure.....\$\_\_\_\_\_

(C) Total aggregate bid (In Words)\_\_\_\_\_

---

Dollars (\$\_\_\_\_\_).\*

---

\*Note: Bidders shall insert the prices bid for each of the classifications and the above totals both in words and figures. In case of any discrepancy between the price in words and that in figures, the price in words will be considered binding."

The proposal for bids and bid for contract number THW-111-R, which is in evidence, states that it is for:

"Repaving With 3-Inch Asphaltic Concrete On A New 6-Inch  
Concrete Base And Laying Of Water Mains  
BROADWAY-ROEBLING ST. TO MARCY AVE.  
BROADWAY-RODNEY ST. TO DEKALB AVE.  
Together With All Work Incidental Thereto  
BROOKLYN"

The bid format established by the City of New York Department of Highways breaks the bid into six classifications and indicates the engineer's estimate of quantities for comparing bids. The quantities and classifications with respect to the above-mentioned contract are as follows:

<u>Quantity</u>	<u>CLASSIFICATION</u>
50,500 square yards	Asphaltic Concrete Wearing Course, 3"
300 tons	Binder Mixture
400 tons	Asphaltic Concrete Mixture
8,400 cubic yards	6" Concrete Base, Class C-25
75 linear feet	Reset Granite Curb
360 linear feet	Concrete Curb

We modify the first sentence of finding of fact "9" of the Administrative Law Judge's determination to read as follows:

The City of New York Department of Highways' Standard Specifications provide, in section 1.01.5(B) that the contractor, when bidding, should not include an amount to cover New York State or New York City Sales and Use Taxes on the materials and supplies sold to the City.<sup>1</sup>

Said section provides in pertinent part, as follows:

"(B) Sales and Use Taxes. The following text is inserted for the purpose of complying with and obtaining the exemption provided by Section 1115(a)(15) of the New York State Tax Law, as added

---

<sup>1</sup>The first sentence of finding of fact "9" of the Administrative Law Judge read as follows:

"The City of New York Department of Highways' Standard Specifications provide, in section 1.01.5(B) that the contractor, when bidding, should not include an amount to cover New York State or New York City Sales and Use Taxes."

We modify this sentence to indicate that the sales tax excluded from the bid amount was limited to the materials and supplies sold to the City and did not extend to supplies consumed by petitioner, nor to tools, machinery, equipment used by petitioner.

by Laws of 1969, Chapter 473, from New York State Sales Tax and Compensating Use Tax, for the purchase of materials required by this contract, except materials consumed by the Contractor in the performance thereof. The Contractor, when bidding, should not include an amount to cover such New York State or New York City taxes.

(a) The City of New York (City) is exempt from payment of Federal, State, local taxes and Sales and Compensating Use Taxes of the State of New York and of cities and counties on all materials and supplies sold to the City pursuant to the provisions of this contract. These taxes are not to be included in bids. However, this exemption does not apply to tools, machinery, equipment or other property leased by or to the Contractor or a subcontractor, or to supplies and materials which, even though they are consumed, are not incorporated into the completed work (consumable supplies), and the Contractor and his subcontractors shall be responsible for and pay any and all applicable taxes, including Sales and Compensating Use Taxes, on such leased tools, machinery, equipment or other property and upon all such unincorporated supplies and materials.

(b) The Contractor agrees to sell and the City agrees to purchase all supplies and materials, other than consumable supplies, required, necessary or proper for or incidental to the construction of the project covered by the Agreement. The sum paid under the Agreement for such supplies and materials shall be in full payment and consideration for the sale of such supplies and materials under the Agreement.

\* \* \*

(c) The purchase by the Contractor of the supplies and materials sold hereunder shall be a purchase or procurement for resale and therefore not subject to the New York State or New York City Sales or Compensating Use Taxes or any such taxes of cities or counties. The sale of such supplies and materials by the Contractor to the City is exempt from the aforesaid sales or compensating use taxes. With respect to such supplies and materials, the Contractor, at the request of the City, shall furnish to the City such bills of sale and other instruments as may be required by it, properly executed, acknowledged and delivered assuring the City title to such supplies and materials, free of liens or encumbrances, and the Contractor shall mark or otherwise identify all such materials as the property of the City.

(d) Title to all materials to be sold by the Contractor to the City pursuant to the provisions of the contract shall immediately vest in and become the sole property of the City upon delivery of such supplies and materials to the site and prior to its becoming a part of the permanent structure. Notwithstanding such transfer of title, the Contractor shall have full and continuing responsibility to install such materials and supplies in accordance with the provisions of the Agreement, protect them, maintain them in a proper

condition and forthwith repair, replace and make good any damage thereto, theft or disappearance thereof, and furnish additional materials in place of any that may be lost, stolen or rendered unusable, without cost to the City, until such time as the work covered by the contract is fully accepted by the City. Such transfer of title shall in no way affect any of the Contractor's obligations hereunder. In the event that, after title has passed to the City, any of such supplies and materials are rejected as being defective or otherwise unsatisfactory, title to all such supplies and materials shall be deemed to have been transferred back to the Contractor."

#### Production of Asphalt

The asphalt used in paving by the corporation is manufactured at the corporation's asphalt plant.

The proposal for bids establishes general specifications for the type of material needed for a particular job. The corporation submits a mix design depending on the use and purpose and on the type and quality of ingredients available. The ingredients consist of stone, sand and asphalt cement. The stone and sand are unloaded from barges or taken from stockpiles brought into the corporation's plant by truck. The stone and sand are stored in hoppers, then fed onto conveyer belts for transfer to a dryer where moisture is removed. Hot asphalt cement is then added to the mixed stone and sand. The mixture is either dumped directly onto a truck for delivery to a job site or conveyed to a hot storage silo where it can be kept from 24 to 36 hours and then placed in trucks for delivery to a job site. All trucks are weighed before leaving the plant.

#### Street Paving

When the corporation delivers the asphalt to the job site, the material is inspected and tested by the engineer in charge or his representative. When accepted, it is placed in the corporation's paving machine and applied to the street by employees of the corporation, under the direction of the engineer in charge for the City of New York.

The tax at issue herein is that claimed to be due on the purchase of equipment and parts and also fuel and electricity used in the asphalt plant. There is no issue as to any tax on ingredients, labor or paving equipment. We find in addition to the facts found by the Administrative Law Judge that the items at issue were used to produce asphalt.

**OPINION**

The Administrative Law Judge held that the corporation's purchases of equipment, parts, fuel and electricity used by its asphalt plant were not exempt from taxation because the asphalt produced was not "for sale" as that term is used within Tax Law sections 1115(a)(12) and 1115(c).

We affirm the determination of the Administrative Law Judge.

Electricity used or consumed "directly and exclusively in the production of tangible personal property . . . for sale, by manufacturing" is exempt from tax (Tax Law §1115[c]) (emphasis added). Also exempt is machinery and equipment used or consumed, "directly and predominantly in the production of tangible personal property . . . for sale, by manufacturing . . . but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment or apparatus" (Tax Law §1115[a][12]) (emphasis added).

On exception, petitioners argue that the machinery, equipment and electricity at issue are exempt from tax under these sections of the Tax Law because the corporation sold the asphalt to the City of New York. To support their claim that the asphalt was sold as a separate product, petitioners point to the contract provision set forth in the facts which states that title to all materials sold by the corporation vests in the City upon delivery to the site and prior to its becoming a part of the permanent structure. Petitioners also urge that Matter of Sweet Associates v. Gallman (36 AD2d 95, 318 NYS2d 528, affd 29 NY2d 902, 328 NYS2d 857) supports the conclusion that the asphalt was sold to the City of New York within the meaning of Tax Law sections 1115(a)(12) and 1115(c).

We disagree. The test with respect to the exemptions at hand is set forth in Matter of Midland Asphalt Corp. v. Chu (136 AD2d 851, 523 NYS2d 697), namely, whether the corporation produced the asphalt primarily for sale as a separate product or in connection with its paving services. In Midland, the court held that purchases of electricity and equipment used to produce asphalt, 90% of which was needed by the taxpayer in order to meet its contractual obligations to provide and apply the asphalt emulsion, were not exempt from tax under Tax Law

section 1115(a)(12) & (c) because the taxpayer was found to be manufacturing the asphalt for its contracting business and not primarily for selling the material separately from its construction services (Midland Asphalt, supra, at 523 NYS2d 699; citing, Matter of Southern Tier Iron Works v. Tully, 66 AD2d 921, 410 NYS2d 711, lv denied, 46 NY2d 713, 416 NYS2d 1027). Here, the facts are similar. At least 96% of the corporation's business was performing paving contracts. The asphalt the corporation produced was delivered to the job site, and after inspection, was placed in the corporation's paving machine and applied to the street surface by employees of the petitioners. We find Midland dispositive of the issue in this case.

We note that Midland was refined by the Appellate Division in DJH Construction, Inc. v. Chu (145 AD2d 716, 535 NYS2d 249, 251) to hold that it is the contemplated use of the equipment at the time it is acquired which determines the application of the production exemptions. Thus, the equipment in Midland was not exempt because at the time of its acquisition its contemplated use was in connection with the business of paving road surfaces rather than selling asphalt as a separate product (DJH Construction, Inc. v. Chu, supra, 535 NYS2d 252). Nowhere do these decisions suggest that the time at which title to the asphalt passes to the customer in a paving contract is relevant to determining if the production exemptions apply. Since petitioners have not demonstrated that the corporation intended to sell, or ever did sell, asphalt without applying it, we conclude that the production exemptions are not applicable.

Petitioners' attempt to use Matter of Sweet Associates v. Gallman (supra) to bolster their argument is not persuasive. In Sweet Associates the purchase by a contractor of building materials to be incorporated in the real property of a school district was held to be a purchase for resale and thus, excluded from tax. The basis for this conclusion was that the contract between the contractor and the school district was a time and materials contract and pursuant to this contract the contractor sold the materials to the school district prior to their incorporation in the real property. The decision of the Appellate Division, finding a sale to the school district and thus, a purchase for resale by the contractor, was clearly motivated by the court's conclusion that



the contractor did not include sales tax on the materials in its bid and that the school district was the real beneficiary of the tax exemption (Matter of Sweet Associates v. Gallman, *supra*, 318 NYS2d 528, 533).

We find Sweet Associates inapplicable here for two reasons. First, because we conclude, as stated above, that the sale of the asphalt as an incident of the paving contract does not determine the application of the production exemptions. In contrast, in Sweet Associates the sale of building materials to the school district clearly determined whether the contractor bought the materials for resale. Secondly, the record indicates that the City of New York would not be the real beneficiary of the tax exemption extended to the corporation on the purchase of the equipment and electricity. The corporation's "Standard Proposal for Bids" at paragraph (a) provides that the City is exempt from sales tax on all materials and supplies sold to the City and that taxes on these items are not to be included in the bid. This provision goes on to state:

"However, this exemption does not apply to tools, machinery, equipment or other property leased by or to the Contractor or a subcontractor, or to supplies and materials which, even though they are consumed, are not incorporated into the completed work (consumable supplies), and the Contractor and his subcontractors shall be responsible for and pay any and all applicable taxes, including Sales and Compensating Use Taxes, on such leased tools, machinery, equipment or other property and upon all such unincorporated supplies and materials."

This provision, in sharp contrast to the facts of Sweet Associates, indicates that the parties anticipated that tax on the items at issue here would be included as a cost in the corporation's bid. Accordingly, a tax exemption granted herein would not benefit the City of New York but instead only petitioners.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioners, Willets Point Contracting Corp. and K. Tully, as officer, is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Willets Point Contracting Corp. and K. Tully, as officer, are denied; and

4. The notices of determination and demands issued on March 9, 1984 and December 17, 1986 are sustained.

DATED: Troy, New York  
September 14, 1989

/s/John P. Dugan

John P. Dugan  
President

/s/Francis R. Koenig

Francis R. Koenig  
Commissioner

/s/Maria T. Jones

Maria T. Jones  
Commissioner