

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JIMSIS, INC. : DECISION
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, 1979 :
through November 30, 1983 :
:

Petitioner, Jimsis, Inc., 246 East Union Street, Newark, New York 14513, filed an exception to the determination of the Administrative Law Judge issued on September 9, 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 March 1, 1979 through November 30, 1983 (File No. 801159). Petitioner appeared by Martin Sanders & Company (Martin Sanders, CPA). The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in response to the petitioner's exception and brief.

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

ISSUES

I. Whether certain purchases of electricity used in the operation of petitioner's supermarket were exempt from sales and use taxes.

II. Whether the Division of Taxation used a proper method to determine the amount of exempt kilowatt-hours of electricity consumed by certain equipment in petitioner's supermarket.

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 "6". We also find additional facts as indicated below.

During the period in issue, petitioner, Jimsis, Inc., owned and operated a grocery store in Newark, New York. The grocery store contained a meat department, produce department, and delicatessen and bakery department.

On or about September 29, 1980, petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax on electricity and natural gas used in production at the grocery store located in Newark, New York during the period September 1, 1977 through September 1, 1980. Petitioner sought a refund of \$4,935.00 on this application, and also explained that it would seek an additional \$255.00 representing the sales tax paid related to the production of hot water if an unnamed pending case was resolved in a manner favorable to petitioner.

On February 21, 1984, the Division of Taxation advised petitioner that it had reviewed petitioner's claim for a refund of \$4,935.00, as well as the credits claimed on petitioner's sales tax returns during the period in issue of \$11,729.00, for a total of \$16,664.00. In the course of this review, the Division of Taxation determined that petitioner was entitled to a credit of 16.28 percent of the amount of tax paid on its utilities. This percentage was computed by dividing total exempt kilowatt usage per year, determined by multiplying kilowatt usage per day per exempt machine by the number of days used per year, by the average total kilowatt-hours consumed per year as determined by available invoices. The Division of Taxation then calculated the amount of credit due by multiplying 16.28 percent by the total amount of tax paid for utility service. This calculation disclosed that petitioner was entitled to a credit during the audit period of \$4,080.65. Since petitioner had claimed credits on its sales tax returns of

\$11,729.00, the Division of Taxation concluded that there was a deficiency of sales and use tax of \$7,648.35.

On February 21, 1984, on the basis of the foregoing calculations, the Division of Taxation issued two notices of determination and demands for payment of sales and use taxes due to petitioner which, in conjunction, assessed a deficiency of sales and use taxes for the period March 1, 1979 through November 30, 1983 in the amount of \$7,648.35, plus interest of \$1,633.62, for a total amount due of \$9,281.97.

At a prehearing conference held after the foregoing notices were issued, the Division of Taxation determined that 18.77 percent of petitioner's electrical consumption was exempt from tax.

We find as an additional fact that petitioner's representative was advised by the Sales Tax-Instructions and Interpretations Unit (see Division Exhibit "G", letter dated 1/16/85) that, "Our formula is offered as an alternative method of determining the amount of electricity used in a tax exempt manner, however, a taxpayer may submit any computation, prepared by a competent person, that accurately reflects this usage."

We modify the Administrative Law Judge's finding of fact "6" to read as follows:

In support of its refund claim, petitioner submitted a document which appears to have been prepared on its behalf by Energy & Value Consultants, Inc., which document divided petitioner's equipment into three departments: meat department, produce department and delicatessen and bakery department. With respect to each department, a chart was prepared showing, among other things, the particular equipment involved, the kilowatts the particular piece of equipment used per hour, the average daily usage and the amount of kilowatts per day that the piece of equipment used. Apparently, Energy & Value Consultants, Inc. computed hourly kilowatt usage using tables and data published by the National Electrical Manufacturers Association. No evidence was presented that Energy & Value Consultants, Inc. tested any of the equipment to independently ascertain the amount of electricity the equipment in question utilized.¹

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The Administrative Law Judge's finding of fact "6" read as follows:

"In support of its refund claim, petitioner submitted a document prepared by Energy & Value Consultants, Inc. which divided petitioner's equipment into three departments: meat department, produce department and delicatessen and bakery department. With respect to each department, a chart was prepared showing, among other things, the particular equipment involved, the kilowatts the particular piece of equipment used per hour, the average daily usage and the amount of kilowatts per day that the piece of equipment used. Energy & Value

We also find as an additional fact that although petitioner's representative alleges there was no challenge to the survey submitted (see tr. p. 58), the Division in its answer to the perfected petition (Division's exhibit H-item 26) " . . . affirmatively states that the electricity use survey submitted by petitioner in conjunction with its refund/credit application does not indicate the manner by which the figures for kilowatts of electricity consumed in the operation of production equipment were determined; therefore, petitioner has not substantiated tax exempt electrical consumption in the amounts claimed."

We further find as an additional fact that while the affidavit attached to the Perfected Petition refers to an in-depth study being conducted for the Peter J. Schmitt Co., Inc. of Buffalo, New York, relative to electrical usage of the various pieces of electrical equipment maintained in grocery stores which were then owned, controlled, franchised or supplied by the Peter J. Schmitt Co., Inc., said affidavit does not specifically refer to Jimsis, Inc; said affidavit refers to the tax period 9/1/77-11/30/83 (see caption) while the period in question on Perfected Petition is 3/1/79-11/30/83; item #3 of the affidavit refers to the Project No. assigned to the store denominated as "3013-685-100/90-80" and not Store No. 4100 (Jimsis, Inc.); and item #12 of deposition refers to a grocery store denominated "4444" containing a Hobart Grinder, Model 4812, a piece of equipment not shown on the schedules for store #4100 (Jimsis, Inc.).

When the Division of Taxation computed the amount of credit due petitioner, the claimed kilowatt usage per day was reduced on many of the pieces of equipment to reflect one of two formulas relied upon by the Division of Taxation depending upon whether the horsepower of the motor was known. If the horsepower of the motor was known, the Division of Taxation determined the kilowatts per hour by multiplying the horsepower by 746 and dividing the product by 1,000. If the horsepower of the motor was not known, the Division of Taxation calculated the kilowatts per hour by multiplying voltage by amperage and dividing by 1,000.

Consultants, Inc. computed hourly kilowatt usage using tables and data published by the National Electrical Manufacturers Association. No evidence was presented that Energy & Value Consultants, Inc. tested any of the equipment to independently ascertain the amount of electricity the equipment in question utilized."

We have modified this finding of fact to more accurately reflect the record before us.

These formulas were derived from information furnished to the Division of Taxation by the New York State Energy Office and the United States Department of Energy.

Petitioner's produce department contained a wrapper, scale/labeler, produce preparer and cooler. The wrapper and scale/labeler were used to package and prepare food for sale to the consumer. The equipment in the produce department was ostensibly used to slice and dice fruits and vegetables in order to prepare salads. The Division of Taxation did not allow an exemption for the power used to operate any of the equipment in the produce department.

The survey by Energy & Value Consultants, Inc. disclosed that petitioner's meat department contained two hot water tanks. The Division of Taxation disallowed a credit for the sales tax paid on the electricity claimed to be necessary to heat the hot water tanks.

At the hearing, petitioner's representative testified that one of petitioner's hot water tanks was used to produce steam for the use of a proofer. A proofer, in turn, is a piece of equipment which is used to reduce the time it takes for dough to rise. Petitioner's representative asserted that an exemption should have been allowed for the gas to heat the hot water tank.

The survey by Energy & Value Consultants, Inc. reported that petitioner's delicatessen and bakery department contained an oven which was used 24 hours a day. The Division of Taxation calculated the credit due petitioner on the premise that the oven was used 15 hours a day. In the meat department, the survey reported that petitioner had two meat preparation machines and a meat cooler which were purportedly used an average of 20 hours a day. On review, the Division of Taxation allowed 18 hours a day for the meat preparation machines and for the meat cooler on the basis that petitioner did not substantiate that the equipment was used for a longer period of time.

OPINION

In the determination below the Administrative Law Judge denied the petition of Jimsis, Inc., the only exception being the agreement by the Division of Taxation that 18.77 percent of petitioner's electrical consumption was exempt from tax.

The Division argues that based upon the facts and circumstances the applicable law has been correctly applied, petitioner has failed to carry its burden of proof and the Notice of Exception should be denied in its entirety.

Petitioner argues on exception that certain of the exemptions that it was denied should have been granted. Specifically, petitioner contends that: (1) the electrical usage survey prepared by an independent engineering firm and relied upon by petitioner should be upheld, (2) the department erred in revising the hours of use of petitioner's refrigeration compressors and oven, (3) the department erred in totally disallowing credit for energy used by certain pieces of production equipment, including that in the produce department, (4) use of hot water in the manufacturing process is an exempt use.

We affirm the determination of the Administrative Law Judge.

Tax Law § 1115(c) provides for an exemption from the sales and use taxes imposed under Tax Law §§ 1105 and 1110 as follows:

"Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing, processing, assembling, generating, refining, mining, extracting, farming, agriculture, horticulture or floriculture, shall be exempt from the taxes imposed under subdivision (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten."

20 NYCRR 528.22(c) provides the following with respect to § 1115(c) of the Tax Law:

"(c) Directly and exclusively. (1) Directly means the fuel, gas, electricity, refrigeration and steam and like services, and must during the production phase of a process, either:

- (i) operate exempt production machinery or equipment, or
- (ii) create conditions necessary for production, or
- (iii) perform an actual part of the production process.

* * *

(2) Usage in activities collateral to the actual production process is not deemed to be used directly in production.

(3)(i) Exclusively means that the fuel, gas, electricity, refrigeration and steam and like services are used in total (100%) in the production process.

(ii) because fuel, gas electricity, refrigeration and steam when purchased by the user are normally received in bulk or in a continuous flow and a portion thereof is used for purposes which would make the exemption inapplicable to such purchases, the user may claim a refund or credit for the tax paid only on that portion used or consumed directly and exclusively in production."

Thus, to qualify for the exemption, petitioner must show that the electricity was used directly and exclusively in the production for sale of tangible personal property by processing. Direct use has been interpreted by regulation to mean electricity must "during the production phase of the process either (i) operate exempt production machinery or equipment or (ii) create conditions necessary for production or (iii) perform an actual part of the production process." (20 NYCRR 528.22[c][1]). Processing has been defined by regulation to mean any service on tangible personal property which effects a change in the nature, shape or form of the property (20 NYCRR 531.2[e]).

In order to qualify for the exemption petitioner bears the burden of clearly proving its entitlement to the exemption sought (see, 20 NYCRR § 3000.10[d][4]; Matter of Grace v. State Tax Commn., 37 NY2d 193, 371 NYS2d 715).

We will first address petitioner's contention that the electrical usage survey prepared by an independent engineering firm and relied upon by petitioner should be upheld.

The Division of Taxation's Technical Services Bureau Memorandum (TSM-M-82[25]S) gives preference to the use of calculations prepared by an engineering professional over formulas utilized by the Division and expresses said preference as follows:

"When claiming a refund or credit of sales taxes paid on exempt purchases, an electrical engineer's survey, showing computations, must be submitted in substantiation of the allocation made for use of electricity for both exempt and taxable purposes. In lieu of an electrical engineer's survey, computations using the guidelines that follow may be submitted." (Emphasis added.)

It is further noted that this preference was affirmed in Grand Union v. Tully (94 AD2d 509, 466 NYS2d 492).

The key words in the memorandum are, ". . . an electrical engineer's survey, showing computations, must be submitted in substantiation of the allocation made for use of electricity for both exempt and taxable purposes." The record before us does not contain an engineer's

survey for the taxpayer in question. While the Perfected Petition in evidence had attached to it as Exhibit A, a six (6) page affidavit and four (4) pages listing Production Equipment Data, nowhere in said affidavit (other than the four [4] pages listing Production Equipment Data) is there any direct reference to an in-depth study being conducted specifically for Jimsis, Inc. relating to the electrical usage of the various pieces of equipment in that store. In fact, petitioner's representative in testifying (tr. p. 20) refers to page 5 of said deposition relating to a Hobart Grinder, Model 4812, which was a piece of equipment in store No. 4444, not store No. 4100 (Jimsis, Inc.). Petitioner has, therefore, failed to establish that an electrical engineer's survey was made of its equipment and in so doing failed to prove its entitlement to the usage of the survey relied upon by it.

We will next address petitioner's contention that the Division erred in revising the hours of use of petitioner's refrigeration compressors and oven. In the record before us, petitioner submitted documentation (see Division of Taxation's Exhibit D - Store Hours Schedule) showing store hours in 1979, 1980, 1981 and 1982 to be 9:00 a.m. to 6:00 p.m. on Sunday and 8:00 a.m. to 10:00 p.m. Monday through Saturday with the year 1983 showing an additional hour being added to Monday through Saturday (8:00 a.m. to 11:00 p.m.). In that same exhibit, the letter of December 27, 1983 has a statement by Mr. James McBride, owner, that "the store hours listed in the schedule submitted and the operating hours of the machinery and equipment listed in the schedule prepared by Energy & Value Consultants, Inc., represents the average daily operating hours . . ." While the store hour schedule shows a nine-hour day on Sunday and a twelve-hour day the remainder of the week for four years, and an additional hour of operation Monday - Saturday in 1983, the Average Daily Usage Schedule in the survey shows twenty hours of use of the refrigeration compressors and twenty-four hours of use of the oven. The Division, in its calculations, used an eighteen-hour average daily usage for the refrigeration compressors and fifteen hours average daily usage for the oven.

Petitioner must establish by competent evidence the hours of usage claimed and has failed in its burden of proof. The record before us lacks substantiation that interviews were conducted with the owner or management-level employees to determine such hours. Credible testimony was not presented which would establish the hours of usage of the equipment for which the exemption was sought, therefore, we see no reason to disturb the Administrative Law Judge's determination that the equipment was not used for a greater period of time than that permitted by the Division of Taxation.

We next address petitioner's contention that the Division erred in totally disallowing credit for energy used by certain pieces of equipment including that in the produce department.

We will first address the produce department equipment which consisted of wrapper, scale/labeler and produce cooler and produce slicer. Petitioner contends that a portion of the electricity used by the wrapper, scale/pricer (labeler) and produce cooler were used in production and the produce slicing equipment was used in the production of food which would render it exempt from sales tax. The Administrative Law Judge denied the exemption for the wrapper, scaler/labeler and cooler citing Matter of APOG Foods (State Tax Commn., October 15, 1986). We sustain the Administrative Law Judge's determination on the basis that petitioner did not demonstrate that this equipment was used within the produce department in the production of tangible personal property. Petitioner did not demonstrate what portion, if any, of the electricity was used to process, i.e., to effect a change in the nature, shape or form of the produce (20 NYCRR 531.2[e]). With respect to the cooler, we agree that petitioner has not established that it was used in production, as opposed to the storage of tangible personal property. Finally, we also agree that petitioner has failed to establish that the slicer was not used to produce food sold subject to tax under Tax Law § 1105(d)(i). Since this use of electricity would not qualify for exemption (see, Matter of Burger King v. State Tax Commn., 51 NY2d 614), petitioner has failed to prove entitlement to the exemption.

Petitioner's final exception is that the use of hot water in the manufacturing process is an exempt use. Here again petitioner fails to prove its entitlement to the exemption sought.

Petitioner's survey shows two (2) hot water tanks in its meat department, one with 120 volts and the other 460 volts. There is no reference to gas consumption in this survey yet in the transcript, page 36, petitioner's representative claims exemption for the gas used to heat the hot water further claiming that one hot water tank was used partially for the production of dough and the rest of the water from that tank was used for sterilization. The hot water was then converted into steam for use in the proofer, a piece of equipment used in the manufacture of dough for bread or cakes. Petitioner has failed to establish the percentage of its total hot water use which was consumed by the proofer (20 NYCRR 528.22[c][3][iv]; see, Matter of Avery's Market, Tax Appeals Tribunal, July 27, 1989). A review of the record indicates that petitioner has not shown what portion of hot water was used for production purposes as opposed to that portion which was used for other purposes (e.g., for sanitation functions). As a result, we sustain the denial of the exemption for gas claimed to be consumed in the heating of hot water for the proofers.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of petitioner, Jimsis, Inc., is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Jimsis, Inc. is denied; and

4. The notices of determination and demand for payment of sales taxes due issued February 21, 1984 as modified (see Finding of Fact "5" of the Administrative Law Judge's determination) are sustained.

DATED: Troy, New York
May 3, 1990

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

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

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