STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HERSHEY ENTERPRISES, INC.	:	DECISION
d/b/a HERSHEY ENERGY SYSTEMS	:	
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 December 1, 1981 through November 30, 1984.	:	

Petitioner, Hershey Enterprises, Inc. d/b/a Hershey Energy Systems, 642 Kreag Road, Pittsford, New York 14534, filed an exception to the determination of the Administrative Law Judge issued on September 15, 1988 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 December 1, 1981 through November 30, 1984 (File No. 801921). Petitioner appeared by D. Alan Hershey, President. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel.)

Both parties submitted letter briefs. Petitioner withdrew its granted request for oral argument.

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

ISSUES

I. Whether petitioner has shown any error in the Division's calculation of petitioner's sales and purchases.

II. Whether petitioner has established that it is entitled to a reduction in the assessment or to certain tax credits for merchandise allegedly returned to its suppliers or from allegedly uncollectible debts due from its customers.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such relevant facts are stated below, except that we modify finding of fact "1."

> Petitioner, Hershey Enterprises, Inc. d/b/a Hershey Energy Systems ("Hershey"), sold and installed computerized energy conservation systems. These itemswere installed on and became an integral part of its customers' heating and cooling systems.[1]
>
> As the result of an audit, the Division of Taxation ("Division"), on March 20, 1985, issued to Hershey a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1981 through November 30, 1984, assessing taxes of $38,294.21 plus minimum interest.
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> Following a Tax Appeals Bureau conference and several meetings between Hershey and the auditor at which Hershey provided additional information, the Division agreed to reduce the assessment to $7,289.66.
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> The revised assessment resulted from an auditor's analysis of Hershey's sales and purchases. The auditor reviewed Hershey's sales invoices to determine whether sales tax had been charged and collected on all taxable items. Sales constituting capital improvements and substantiated sales to tax exempt organizations were deemed nontaxable. All other sales were deemed taxable. This analysis disclosed unreported taxable sales of $12,932.47 with a tax due on that amount of $905.27.
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> The auditor examined sales and purchase invoices to determine whether Hershey had paid sales tax on its purchases of taxable items. In the auditor's report and in later references to this portion of the audit, the tax assessed as a result of this review was denominated as "use" tax.
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> The auditor determined that Hershey failed to pay sales tax on its purchase of computer equipment used by Hershey in the operation

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[1] Finding of Fact "1" stated, "Petitioner, Hershey Energy Systems ("Hershey"), sold and installed computerized energy conservation systems. These items were installed on and became an integral part of its customers' heating and cooling systems."

While petitioner is named "Hershey Energy Systems" in its perfected petition (Division's Exhibit "D") and in the "Final Notice of Hearing" (Division's Exhibit "A"), petitioner is otherwise referred to as "Hershey Enterprises, Inc." in the Notice of Determination and Demand (Division's Exhibit "B"), the Field Audit Report (Division's Exhibit "F"), and the auditor's workpapers (Division's Exhibit "G"). Inasmuch as petitioner refers to itself as "Hershey Enterprises, Inc. d/b/a Hershey Energy Systems" (Petitioner's Letter, p. 1) and the Division acknowledged the same in its answer to the perfected petition (Division's Exhibit "E"), we find the later to be most accurate.

of its own business. This equipment was purchased from Detection Systems, Inc. ("DSI"). Tax determined to be due on this purchase was $472.40.

DSI was one of Hershey's major suppliers of equipment and materials for installation in Hershey's energy conservation systems. A review of all DSI sales invoices disclosed purchases by Hershey from DSI totaling
$209,433.41. From this amount, the auditor subtracted $71,890.50, representing nontaxable purchases of equipment to be incorporated into capital improvements sold to tax exempt organizations.

The remainder was further reduced by $5,966.00, representing purchases used on the Borden Can project. These purchases were considered nontaxable because Hershey collected sales tax on the entire charge to Borden Can; therefore, Hershey's purchases were treated as purchases for resale. Finally, a reduction of $16,900.00 was allowed for purchased equipment later returned to DSI. The remaining purchases subject to sales tax amounted to $114,676.91 with a tax due on that amount of $8,027.38.

The auditor determined that Hershey's taxable purchases from all other suppliers amounted to $56,009.54 with a tax due on that amount of $3,920.67.

The auditor aggregated tax owed by Hershey on its own purchases, arriving at a total "use" tax due of $12,420.45. From this, she subtracted "use" tax paid by Hershey of $8,150.73, obtaining an additional tax due of $4,269.72.

By its perfected petition, Hershey claimed that it was entitled to a tax credit in the aggregate amount of $2,247.99. The claim for credit was based primarily on two grounds. First, Hershey claimed a credit of $2,905.00 for tax due on purchases of $41,500.00 from DSI (although Hershey paid neither the purchase price nor the tax due). Second, Hershey claimed a credit of $968.26 on the basis of an unsatisfied debt owed to Hershey by one of its customers, Batavia Industrial Center. As a contractor, Hershey paid sales tax upon its purchase of equipment which was installed as a capital improvement to property owned by Batavia Industrial Center.

By a letter to the administrative law judge following the hearing, Hershey claimed an additional tax credit of $789.46. This was based upon Hershey's claim that it purchased equipment from a supplier named Tour and Andersson, paying a sales tax of $789.46, and later returned that equipment. The invoice submitted in support of this claim shows a credit to Hershey from Tour and Andersson of $11,277.93. On its face, the invoice does not appear to represent a credit for returned merchandise; rather, it appears to show a customer discount of $11,277.93. Hershey presented no evidence to establish that a tax was paid on this purchase. The Tour and Andersson invoice was not included in the audit; therefore, it did not form a part of the basis for the Division's determination of additional tax due.

OPINION

The Administrative Law Judge held that petitioner: (1) was not liable for payment of sales tax concerning certain repair billings to DSI, (2) owed additional tax on certain purchases by petitioner for which no tax had been paid, and (3) was not entitled to certain credits against the assessment herein. Petitioner excepts to all findings of fact and conclusions of law that conclude there is sales and use tax due. In the event we affirm the determination below, petitioner also seeks to have stayed the collection of that portion of the assessment pertaining to allegedly defective equipment purchased from DSI. In response, the Division chose not to except to the conclusion below that repairs made by Hershey and billed to DSI were not sales, despite alleging that "the vendor's records indicated to the contrary" (Division's letter, p. 1).[2] The Division claims that petitioner has not proved facts which would permit a refund of sales tax paid and collected for the allegedly defective equipment sold by DSI to petitioner, has not demonstrated good cause for the suspension of collection of the tax, and otherwise relies upon the determination below.

We affirm the determination of the Administrative Law Judge.

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[2]The Division correctly noted that it would have had to have filed its own Notice of Exception to properly except to this conclusion and that a "cross-exception" in the pleadings, such as this, does not form a basis upon which we will necessarily review a claim (see, Joseph Caleri d/b/a Villa Capri Restaurant, Tax Appeals Tribunal, August 11, 1988).

Tax Law section 1105(a) imposes a sales tax on the receipts from every retail sale of tangible personal property. Petitioner, as a vendor, was a "person required to collect tax" (Tax Law §1131[1], see also, Tax Law § 1133[a]). Despite having broadly excepted to the determination below, petitioner later conceded $905.27 of sales tax liability for having failed to collect sales tax with regard to certain unreported taxable sales (Petitioner's letter dated January 20, 1989, submitted in lieu of oral argument).

As to that equipment purchased from DSI and used internally, petitioner indicated it was "prepared to pay" a portion of the tax denominated "use" tax,[3] in the amount of $474.40, notwithstanding DSI's alleged failure to collect the same (Petitioner's letter dated January 20, 1989). Since petitioner became the "ultimate consumer" of these goods (Matter of Burger King, Inc. v. State Tax Commn., 51 NY2d 624, 435 NYS2d 689, 693; 20 NYCRR 525.2[a][4]), we conclude that petitioner was properly assessed this amount (Tax Law § 1133[b]).

We next address whether sales tax is due on transactions concerning certain allegedly defective equipment sent to petitioner from DSI for which petitioner has not paid either the purchase price or any sales tax. We conclude that it is.

Petitioner argues that it has never purchased this equipment and that, unless pending litigation surrounding these materials proves that it is legally indebted for them, the assessment should be reduced accordingly by $2,905.00. This claim lacks merit.

Purchasers of tangible personal property at retail are required to pay sales tax on their transactions (Tax Law § 1105[a]; 20 NYCRR 526.3). The words "sale," "selling," or "purchase" include "any transfer of title or possession or both, . . . in any manner or by any means whatsoever for a consideration, or any agreement therefor" (Tax Law § 1101[b][5]; see also, 20 NYCRR 525.2[a][2]).

Here, petitioner alleges that the equipment was transferred to petitioner without any monetary consideration. However, the absence of monetary consideration at the time of the

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[3]Any tangible personal property purchased at retail and used within New York State is subject to use tax, "except to the extent that [such] property or services have already been or will be subject to the sales tax . . . ." (Tax Law § 1110.) As all the property at issue herein was apparently subject to the sales tax under Tax Law section 1105(a) at the time of its purchase, the auditor's use of the term "use tax" was not accurate.

transfer does not establish a lack of consideration. Petitioner has received possession of the property and has not asserted, let alone met its burden of proving (Matter of Allied New York Services v. Tully, 83 AD2d 727, 442 NYS2d 624, 626; 20 NYCRR 3000.10[d][4]), that it returned or received credit for the contested $41,500 worth of merchandise, that the sale had been otherwise cancelled, or that it was a gift.

Finally, as the collection of taxes remains the responsibility of the Division of Taxation, the Tax Appeals Tribunal is without authority to grant petitioner a "stay" on the collection of this portion of the assessment (see, Tax Law § 2006.7; 20 NYCRR 3000.11).

We next address whether the auditor overstated the amount of purchases petitioner made from DSI. We conclude that she did not.

Petitioner claims that it was improperly assessed $878.21 of the amount denominated "use" tax, based upon what it claims is its accurate purchase order system. Although this part of petitioner's exception is somewhat unclear, petitioner appears to assert that this figure is part of the $25,470.90 difference between the amount the auditor calculated as reflecting petitioner's purchases during the audit period and petitioner's analagous figure. At the same time, petitioner concedes that in many instances the documents to support its contention were missing or inadequate (Petitioner's letter dated January 20, 1989).

Petitioner has not described its "purchase order system" at all. Furthermore, petitioner has admitted on exception that this same system would have been useless for audit purposes since the applicable supporting documents were in many instances missing or inadequate.

We next address whether petitioner is entitled to a credit herein for sales taxes it paid on equipment installed, but never paid for, as part of a capital improvement for the Batavia Industrial Center ("Batavia"). Petitioner asserts that because it was never paid by its customer, Batavia, for the service of installing a capital improvement, petitioner is owed a credit on the amount of sales tax paid. The claim lacks merit for several independent reasons.

The Administrative Law Judge correctly held that petitioner, as the "ultimate consumer" (20 NYCRR 527.7[b][5]), is liable for the tax imposed by section 1105(a)(1) of the Tax Law,

notwithstanding its customer's failure to in turn pay petitioner. The sales tax is a "consumer tax," which means that "the consumer cannot shift the liability for payment of the tax to another person" (20 NYCRR 525.2[a][4]). If petitioner was not paid for its services, petitioner's remedy is against its customer.

A contractor may be entitled to a credit against tax paid on certain purchases when he uses the property in a taxable service and otherwise meets the requirements of Tax Law section 1119(c) (see, 20 NYCRR 541.5[d][3]). Since the service of performing a capital improvement is not subject to sales tax (Tax Law §§ 1105[c][3][iii], 1105[c][5]; see also, 20 NYCRR 527.7[b][4]), materials incorporated into capital improvements, such as those provided to petitioner's customer, Batavia, do not establish an entitlement to this credit (Tax Law § 1119[c]; 20 NYCRR 534.5; 20 NYCRR 541.5[d][3]).

Finally with respect to petitioner's claim that it is entitled to an additional credit for defective equipment purchased from DSI, as pointed out by the Administrative Law Judge, petitioner's submitted invoices establish only that DSI replaced certain defective equipment, not that petitioner received a refund for returned goods or an allowance for defective merchandise (Tax Law §§ 1132[e], 1139[e]; 20 NYCRR 534.6[a], [b]).

We last address the alleged return of equipment to Tour and Andersson, Inc.[4] If merchandise is returned, the original payment is excluded from being a "taxable receipt" (Tax Law § 1132[e], 20 NYCRR 534.6[a][2]). The purchaser may be entitled to receive a refund of sales tax he has paid, provided a properly completed application therefore is timely filed (Tax Law § 1139[a][i]). As pointed out by the Administrative Law Judge, the submitted invoice is irrelevant. It pertains to a customer discount of $11,277.93 granted to petitioner by Tour and Andersson. The invoice does not indicate that tax on such amount was paid or that any merchandise was returned.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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[4]Petitioner also excepted to the Administrative Law Judge's finding of facts "4c" and "5e." These findings pertained to the conclusion that petitioner's repairs billed to DSI were non-taxable. We assume that petitioner did not mean to except to a holding found in its favor and, accordingly, disregard this portion of petitioner's exception.

1. The exception of the petitioner, Hershey Enterprises Inc., d/b/a Hershey Energy Systems, is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Hershey Enterprises Inc., d/b/a Hershey Energy Systems is granted to the extent indicated in conclusions of law "E", "H" and "I" of the Administrative Law Judge's determination, but except as so granted is denied; and

4. The Division of Taxation shall modify the Notice of Determination issued on March 20, 1985 accordingly, but the Notice is otherwise sustained.

DATED: Troy, New York
July 27, 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