STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **SPANCRETE NORTHEAST, 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 December 1, 1980 through August 31, 1984. | : | |
| | : | |

Petitioner, Spancrete Northeast, Inc., South Bethlehem, New York 12161, filed an exception to the determination of the Administrative Law Judge issued on October 20, 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 December 1, 1980 through August 31, 1984 (File No. 802323). Petitioner appeared by Dow, Lohnes and Albertson, Esqs. (Charles A. Simmons, Esq., of counsel) and Hayes and Hayes, Esqs. (Harry R. Hayes, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew Zalewski, Esq., of counsel).

Both petitioner and the Division filed briefs on exception. Oral argument was heard on September 26, 1989 at the request of petitioner.

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

***ISSUE***

Whether the Division properly disallowed the exemptions from sales and use tax which petitioner claimed on its purchases of machinery, equipment and fuel pursuant to, respectively, Tax Law § 1115(a)(12) and (c) on the ground that the items were not used in the production of tangible personal property for sale.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

On May 20, 1985, the Division issued two notices of determination and demands for payment of sales and use taxes due to petitioner, Spancrete Northeast, Inc. The first notice assessed sales and use taxes for the period December 1, 1980 through May 31, 1984 in the amount of $187,530.67, plus interest of $67,879.92, for a total amount due of $255,410.59. The second notice assessed sales and use taxes for the period June 1, 1984through August 31, 1984 in the amount of $10,524.45, plus interest of $871.39, for a total amount due of $11,395.84. The notices issued by the Division were based on the disallowance of the manufacturer's exemption which petitioner had claimed pursuant to Tax Law § 1115(a)(12) on its purchases of machinery and equipment. The Division also disallowed an exemption which petitioner had claimed for purchases of fuel pursuant to Tax Law § 1115(c).

Upon the submission, the parties entered into a stipulation which provides, in part, as follows:

(a) During the periods at issue, petitioner was both a manufacturer and an installer of prestressed, precast concrete hollow core slabs, structured beams, columns, tees and panels known in the industry as "Spancrete".

(b) Each of petitioner's plants consists of a large building with an enclosed gantry and beds 600 feet long. Reinforcing cables are strung the length of the beds and tensioned. Concrete is then poured for the entire length of the bed from the gantry. Once the concrete has cured, it is cut to lengths determined by customer specifications. Typical sections are 12 feet to 40 feet in length, weigh from 1 ton to 20 tons and are 4 inches, 6 inches or 8 inches thick.

(c) Spancrete Northeast manufactures and installs precast, prestressed concrete structural panels. Spancrete Northeast's manufacturing is done at three locations: the company's

original plant in South Bethlehem, New York, established in 1963; a plant in Rochester, New York, established in 1970; and a third plant in Aurora, Ohio, established in 1971.

(d) Petitioner pays sales tax on the materials used in the production of the product known as Spancrete.

(e) The concrete panels that petitioner manufactures are manufactured pursuant to its customers' specifications.

(f) Petitioner has title to and possession of the completed manufactured product during the time the product remains in petitioner's stockyard.

(g) The purchaser, a general contractor, has title to and possession of the completed manufactured product once the product is delivered to the job site.

(h) Petitioner installs more than 90 percent of the concrete panels it manufactures. These installations are accomplished pursuant to petitioner's contractual obligations with the general contractor.

(i) Unrelated third parties install less than 10 percent of the concrete panels petitioner manufactures.

(j) After installation, the manufactured panels constitute capital improvements to real property.

(k) During the period in issue, all of the machinery, fuel and equipment at issue were purchased by petitioner for use in its manufacture and production of Spancrete.

Petitioner is in the business of manufacturing tangible personal property and the machinery, equipment and fuel were purchased by petitioner for use in the manufacture and production of tangible personal property. Petitioner filed sales tax returns throughout the period in issue and paid sales tax on the materials used in the production of Spancrete.

In accordance with New York State Administrative Procedure Act § 307(1), petitioner's proposed findings of fact have been generally accepted and incorporated herein. It is noted that proposed findings of fact "3", "4" and "5" were rejected as being unnecessary for the

determination. Proposed findings of fact "14", "18" and "19" were rejected as being in the nature of conclusions of law.

***OPINION***

Tax Law § 1115(c) provides that:

> "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 . . . for sale, by manufacturing . . . shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten." (Emphasis added.)

Also exempt pursuant to Tax Law § 1115 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]). Tax Law § 1101(5) defines the terms sale, selling and purchase, for purpose of the sales tax, as "Any transfer of title or possession or both . . . in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under [Article 28], for a consideration or any agreement therefor." As emphasized, the foregoing sections require that the machinery, equipment or fuel at issue be used or consumed in the production of tangible personal property "for sale". The crux of the instant matter concerns whether the Spancrete was manufactured for sale within the meaning of Tax Law § 1115(a)(12) and (c).

The Administrative Law Judge decided that the Division properly disallowed the exemptions from sales and use tax which petitioner claimed on its purchases of machinery, equipment and fuel pursuant to Tax Law § 1115(a)(12) and (c) because the petitioner did not produce Spancrete for sale within the meaning of Tax Law §§ 1115(a)(12), (c) and 1101(b)(5). The fact that petitioner installed more than 90 percent of the Spancrete panels which it manufactured compelled the Administrative Law Judge to conclude that the exemption was not

to be allowed as the Spancrete was not sold separately from the installation service provided by petitioner.

On exception petitioner argues that it does qualify for the Tax Law § 1115(a)(12) and (c) exemptions because it manufactures tangible personal property for sale. Specifically, petitioner asserts that it is engaged in the manufacture of tangible personal property for sale within the meaning of Tax Law § 1101(b)(5) and that the transfer of title from petitioner to a purchaser/general contractor, pursuant to certain contracts, qualifies as a sale within the meaning of Tax Law § 1101(b)(5). In addition, petitioner claims that its purchases of machinery and equipment were made for use directly and predominantly in the production of tangible personal property and its purchases of fuel were made for use directly and exclusively in the production of tangible personal property. As a result, petitioner concludes that the statutory exemptions provided for by the operation of Tax Law §§ 1115(a)(12), (c) and 1101(b)(5) are applicable to the purchases of machinery, equipment and fuel at issue. Lastly, petitioner asserts that the decision in Matter of Willets Point Contracting Corp. (Tax Appeals Tribunal, September 14, 1989) is in error as neither the Tax Law nor the regulations thereunder state that if a manufacturer installs the manufactured product it is not manufacturing for sale.

In response, the Division argues that petitioner is not entitled to the subject exemptions since petitioner produces tangible personal property for installation as it is a manufacturer which installs over 90 percent of the property it manufactures. The Division contends further that such extensive involvement in the installation of the product it manufactures prevents petitioner from being merely a seller of concrete panels. Rather, the Division asserts that such involvement compels the conclusion that petitioner produces its product for its own use in providing a service rather than making a sale.

We affirm the determination of the Administrative Law Judge.

In so doing, we are guided by the test which the courts of New York have developed with respect to the exemptions at hand. The machinery, equipment and fuel will not be considered as used in the production of tangible personal property "for sale" for purposes of the manufacturing

exemption when the facts indicate that the product is being manufactured primarily for use in services provided by the producer (see, Matter of Midland Asphalt v. Chu, 136 AD2d 851, 523 NYS2d 697, 699; Matter of Southern Tier Iron Works v. Tully, 66 AD2d 921, 410 NYS2d 711, 713; see also, Burger King, Inc. v. State Tax Commn., 51 NY2d 614, 435 NYS2d 689 [with respect to the sale of restaurant food]). Further, when making a determination as to whether items of machinery and equipment qualify for the Tax Law § 1115(a)(12) exemption at issue, such entitlement turns on the purpose of the acquisition at the time of the sale (D.J.H. Construction, Inc. v. Chu, 145 AD2d 716, 535 NYS2d 249, 251).

The record here indicates that petitioner installs more than 90 percent of the Spancrete panels which it manufactures and thus falls within the rule of the above cases concerning the "for sale" language of § 1115(a)(12) and (c). Petitioner's attempts to dismiss this fact are not persuasive. Specifically, petitioner contends that it should qualify for the subject exemptions because it meets the definition of sale as set forth in Tax Law § 1101(b)(5) since its contracts provide that both title to and possession of the Spancrete is transferred to the purchaser, usually a general contractor, for consideration after the product is delivered to a job site.

The fact that the contracts provide for the passage of title prior to the installation of the materials does not negate the underlying purpose of petitioner's operation as indicated by the facts (see, Matter of Willets Point Contracting Corp., supra). It is the substance rather than the form of petitioner's operation that controls the characterization of its business for purposes of qualifying for the subject exemptions (see, Matter of Midland Asphalt v. Chu, supra; Matter of Southern Tier Iron Works v. Tully, supra; Matter of Willets Point Contracting Corp., supra). Further, the burden is upon petitioner to prove its entitlement to the exemption (Matter of Grace v. State Tax Commn., 37 NY2d 193, 371 NYS2d 715). Here the evidence indicates that at the time of the subject purchases petitioner was installing over 90 percent of the Spancrete which it produced. Further, no evidence was introduced to indicate that petitioner intended to vary from this manner of business.

In addition, we find petitioner's attempt to distinguish Midland and Willets from the present case unpersuasive. Petitioner contends that in both Midland and Willets the product being transferred was necessarily tied to the service involved since the asphalt would be rendered useless if it was not applied before it was allowed to cool and harden. This difference, petitioner claims, allows for a different result when the transfer of the product is not dependent upon such an immediate service. Petitioner's argument misses the rationale behind the decisions in both Midland and Willets, i.e., that the characterization of the taxpayer's business as a whole is the critical factor. This reasoning was similarly applied by the court in Matter of Southern Tier Iron Works v. Tully (supra) wherein it was determined that the taxpayer, a fabricator of structural steel which both supplied and erected the steel beams it fabricated, was not entitled to the Tax Law § 1115(a)(12) exemption as the "whole package" provided by the taxpayer indicated that it was fabricating steel for its own purposes and not "for sale". The rationale applied in Southern Tier indicates that the concern of the courts in making such a determination does not center upon whether the product manufactured is dependent upon an imminent service that the manufacturer must perform with respect to the product. Rather, the basis for the court's decision in Southern Tier was that the fabrication and the subsequent erection of the steel beams by the taxpayer were each a component of the overall package provided by the taxpayer. A reading of the statute as petitioner would have us construe it would only be possible if the interpretation provided by the numerous court decisions is disregarded. As a result, we conclude that petitioner was manufacturing the Spancrete panels for its own use and was not primarily in the business of selling the panels separately from the services which it provided (see, Matter of Midland Asphalt v. Chu, supra, 523 NYS2d 697, 699; Matter of Southern Tier Iron Works v. Tully, supra, 410 NYS2d 711, 713).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

4. The notices of determination and demand issued on May 20, 1985 are sustained.

DATED: Troy, New York
March 8, 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