

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| AVERY'S MARKET, 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, 1983 | : | |
| through May 31, 1986. | : | |

Petitioner, Avery's Market, Inc., 10833 Main Street, North Collins, New York 14111, filed an exception to the determination of the Administrative Law Judge issued on December 15, 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, 1983 through May 31, 1986 (File No. 804343). Petitioner appeared by Martin Sanders, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

Petitioner did not file a brief on exception. The Division submitted a letter in lieu of a brief.

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

ISSUES

I. Whether the denial of exemption from imposition of sales and use taxes with respect to certain purchases of electricity and natural gas consumed in the operation of petitioner's supermarket was proper.

II. Whether petitioner was properly given credit for sales taxes that it paid.

FINDINGS OF FACT

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

On December 31, 1986, the Division issued to petitioner, Avery's Market, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed \$1,566.47 in tax due, plus interest, for the period December 1, 1983 through May 31, 1986. The notice of determination was issued following a review of petitioner's sales tax returns on which petitioner claimed a credit for sales tax paid on certain purchases of electricity and natural gas during the period covered by the notice.

The claimed credit was premised upon petitioner's contention that certain of its purchases of electricity and natural gas were consumed directly in production and were therefore exempt from sales tax.

Petitioner claimed a total of \$3,660.00 in sales tax credits on its returns for the period at issue. Based on a review of information submitted by petitioner in connection with its claim for credit, the Division determined that \$2,093.53 of such credit was properly taken and issued the notice of determination herein for the improperly claimed difference of \$1,566.47.

Petitioner owns and operates a supermarket in North Collins, New York. During the period at issue, petitioner's store was open six days a week from 8:00 A.M. to 9:00 P.M. and on Sundays from 8:00 A.M. to 5:00 P.M. On its sales tax returns petitioner claimed exemption for purchases of electricity and natural gas consumed in the operation of equipment in use throughout its store. The Division granted exemption with respect to 25 of the items. The remaining items which were denied the utilities exemption, together with each item's use, were as follows:

| <u>Equipment</u> | <u>Use</u> |
|------------------|---|
| scale/pricer | Used in produce department to weigh customer purchases of produce and to produce a printed tag listing price and product. |
| wrapper | Packaged various products before such products were placed in open cases for sale. |

| | |
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| meat prep room | Room wherein meats were cut and prepared prior to being placed out for sale. |
| meat cooler | Storage area for meat. |
| produce prep room | Room wherein produce was prepared prior to being placed out for sale. |
| produce cooler | Storage area for produce. |

The items set forth above as "meat prep room", "meat cooler", "produce prep room", and "produce cooler" were described in information submitted by petitioner to the Division as "meat prep & cooler/produce cooler", a single unit. At hearing, petitioner established that its information submitted was in error in this respect, but petitioner did not submit evidence of the amount of electricity consumed by these items.

Petitioner also claimed exemption for purchases of natural gas consumed in the operation of equipment in its store. The Division denied exemption with respect to natural gas consumed in heating petitioner's hot water tank. Hot water from the tank was used to produce steam for proofers in petitioner's bakery. A proofer is a machine which raises dough for bakery products. Petitioner was uncertain as to what percentage of its total hot water use was consumed in the proofers.

In making its determinations, the Division accepted as correct the hours of average daily usage for each item as submitted by petitioner.

At hearing, petitioner established that its bakery department operated about 15 hours per day and that its meat department operated about 9 hours per day. Petitioner presented no evidence of any changes in the hours of operation of specific pieces of equipment in these departments from that set forth on the information submitted in support of its claim for credit.

After making its determination as to which equipment consumed electricity directly in production, the Division sought to determine the proportion of petitioner's purchases of electricity which qualified for exemption from sales tax. To make this determination, the Division first calculated kilowatt-hours for each piece of equipment which it had determined was

used in production. With respect to each of the items for which petitioner's survey (see, Finding of Fact "14", infra) listed a horsepower figure, the Division used that horsepower figure to calculate kilowatt-hours by the following formula:

$$\frac{\text{Horsepower} \times 746}{1,000} = \text{Kilowatt-hours}$$

With respect to the single exempt item for which a horsepower figure was not set forth in the survey, but for which voltage and amperage figures were set forth, the Division used such figures to determine kilowatt-hours by the following formula:

$$\frac{\text{Volts} \times \text{Amperes}}{1,000} = \text{Kilowatt-hours}$$

With respect to the remaining 13 items for which neither horsepower nor amperage figures were provided, the Division accepted the kilowatt-hours figures set forth in the survey in making its determinations.

Application of these two formulas to the same equipment would have resulted in significantly differing kilowatt-hours figures for the same piece of equipment.

Having made its determination as to kilowatt-hours of exempt usage consumed by petitioner's equipment and the hours per day of such exempt usage, the Division then calculated the ratio of kilowatt-hours of exempt usage to total kilowatt-hours of usage. This ratio was then applied to the total amount of petitioner's purchases of electricity to determine the amount of such purchases qualifying for exemption. The Division then used petitioner's utility bills to determine petitioner's total kilowatt-hours of usage and its total purchases of electricity.

In support of its claim for credit, petitioner submitted to the Division a survey of the electricity consumption of each of the pieces of machinery and equipment for which petitioner claimed exemption with respect to its purchases of electricity. The surveys submitted were prepared on petitioner's behalf by Energy & Value Consultants, Inc., a corporation serving as technical consulting engineers to industries, commercial and private businesses, and governments and municipalities. The firm provides technical consultation on, among other things, energy

conservation, energy usage and utilization analysis and planning, air conditioning electrical systems, heating and ventilation systems, and refrigeration systems.

The surveys of the equipment at issue, prepared by Energy & Value Consultants, Inc., were based upon field investigations conducted at petitioner's store and interviews with managerial employees at the store. Each piece of equipment for which a utilities exemption was claimed was physically examined by employees of Energy & Value Consultants, Inc. for data with respect to make and electrical specifications. Energy & Value Consultants, Inc. also conducted interviews with managerial employees to determine the working hours per item.

Energy & Value Consultants, Inc. computed the hourly kilowatt usage for each piece of equipment herein by using tables and data published by the National Electrical Manufacturers Association ("N.E.M.A."), an association which publishes information and data accepted and relied upon by electrical engineers and persons within the electrical manufacturing industry. The N.E.M.A. tables relied upon in the survey reflect a common, accepted engineering approach to the computation of kilowatt usage.

The surveys conducted by Energy & Value Consultants, Inc. were done under the direction of a qualified engineer, and the results were certified by a professional engineer.

With respect to the claimed exemption for purchases of natural gas used in production, the Division determined that gas consumed in the operation of two fryers was consumed in production and accepted petitioner's calculations of the amount of daily consumption by these two items. The Division also accepted petitioner's calculations of its cost of natural gas per day and, based on these calculations, determined that petitioner was entitled to an exemption of \$31.96 per quarter with respect to its natural gas consumption.

Petitioner's produce department had a salad bar and also sold prepared salads during the period at issue. Petitioner presented no evidence to show how its produce equipment was used in the making of such salads or the preparation of the salad bar for customer use.

OPINION

In the determination below the Administrative Law Judge decided that petitioner had qualified for certain exemptions from sales and use tax but had not proved its entitlement to certain other exemptions from sales and use tax.

On exception petitioner argues that certain of the exemptions that it was denied should have been granted. Specifically, petitioner contends that: (1) sufficient evidence has been presented to substantiate the amount of electricity consumed by its meat prep room and meat cooler, (2) the record contains invoices which justify an increase in the exemption allowed for natural gas consumed in production, (3) proof has been submitted which shows the portion of hot water used by petitioner in production such that the portion of utilities consumed in heating the water can be determined and consequently exempted, (4) the Division did not properly include specific payments of sales tax by petitioner in its calculations and (5) testimony was presented at the hearing that is sufficient to prove that the hours of operation of certain equipment in the bakery department should be increased along with the corresponding exemption for utilities consumed.

In response the Division contends that: (1) petitioner did not submit evidence of the amount of electricity consumed by the meat prep room and meat cooler, (2) petitioner failed to show an increase in the cost of natural fuel such that the daily cost and the exemption amount of fuel should be adjusted, (3) petitioner did not present evidence from which the percentage of its total water use that was consumed in its bakery proofer could be ascertained and the resulting exemption with respect to the natural gas used in heating the hot water tank calculated, (4) the Division did not improperly exclude sales tax paid from their calculations as petitioner was given credit for all credits that petitioner was actually entitled to and (5) the facts clearly state the hours that the store was open such that there should be no confusion over the store's hours of operation.

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 subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten."

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).

With regard to the exemption sought for the electricity consumed by petitioner's meat prep room, meat cooler, produce prep room and produce cooler, petitioner has the burden of proving the amount of electricity consumed by each in its exempt capacity if the exemption is to be granted. Normally such calculations are accepted by the Division of Taxation when performed as an electrical engineer's survey (see, 20 NYCRR 528.22[c][3][v]; Grand Union Co. v. Tully, 94 AD2d 509, 466 NYS2d 492; TSB-M-82[25]S). In the present case petitioner did submit such a survey, however, the survey calculated the electricity for the meat prep room, meat cooler, produce prep room and produce cooler as though they were one unit. This error was confirmed at the hearing by testimony of an officer of petitioner who explained that the meat prep room and meat cooler were a separate unit from the produce prep room and the produce cooler. Further, petitioner did not offer any other computations in support of the appropriate amount of electricity consumed by the items at issue. Additionally, the nature of the error was not clarified as petitioner failed to explain the source of the calculation entered on the survey. As a result, we cannot determine whether the amount entered is a total for one or both units or an amount from some unknown source. Thus, we conclude that petitioner has not met its burden of proving its entitlement to the Tax Law § 1115(c) exemption for electricity consumed by its meat prep room and meat cooler or its produce prep room and produce cooler.

The next issue which we will address concerns petitioner's claim that the record contains invoices which demonstrate an increase in the cost of fuel such that the daily fuel cost and the

corresponding exemption amount should be adjusted. We agree with the Administrative Law Judge that petitioner has failed to show where the Division's computations of petitioner's exemption for natural gas consumed in production was improper. The Division accepted petitioner's calculations of its cost of natural gas per day and, based on these calculations, determined petitioner's quarterly exemption with respect to its natural gas consumption. While it is true that the cost of gas may have risen following the submission by petitioner of its costs, it is petitioner's failure to provide additional information at the hearing pertaining to fuel cost increases that prevents the granting of any further increase. Petitioner's attempt to insert new figures concerning fuel cost increases on exception must be rejected. We cannot allow new evidence to be admitted into the record at this point in the proceedings (Matter of Anagnostakos, Tax Appeals Tribunal, June 8, 1989; 20 NYCRR 3000.13[a][3]; 20 NYCRR 3000.11[e][1]). As a result, we conclude that the exemption for natural gas consumed in production was properly granted as calculated by the Division.

Petitioner's next item of exception concerns the Division's denial of an exemption for a portion of the natural gas consumed in petitioner's hot water tank. The facts indicate that petitioner's hot water tank was used in part to produce steam which was utilized by petitioner's "proofers" in the production of certain bakery products; however, petitioner must also establish the percentage of its total hot water use which was consumed by the proofers (20 NYCRR 528.22[c][3][iv]). 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.

The next issue to be addressed is petitioner's contention that the Division excluded certain sales taxes paid from its calculations when determining petitioner's liability. The record indicates that petitioner did not submit any information with regard to sales taxes paid on 5/8/86 and from 12/7/83 through 4/7/84. As a result petitioner was not given any credit for sales tax paid for those periods. On exception petitioner has attempted to support its claim that it should receive

the credit for sales taxes paid by submitting information which it failed to make part of the record at the hearing level. We cannot allow new evidence to be admitted into the record at this point in the proceedings (Matter of Anagnostakos, supra; 20 NYCRR 3000.13[a][3]; 20 NYCRR 3000.11[e][1]). Accordingly, we conclude that the record does not support an increase in credit for sales taxes paid by petitioner.

The last issue which we will address is petitioner's claim that the hours that certain bakery department equipment were in operation was incorrectly calculated. Specifically, petitioner argues that it presented testimony at the hearing which supports an increase in the hours of daily oven usage by four hours per day.

As noted earlier, 20 NYCRR 528.22(c)(3)(v) requires one seeking the Tax Law § 1115(c) exemption to submit an engineering survey or a formula in support of the amount of exempt use claimed. In the instant case petitioner submitted an engineering survey in support of its claimed exemptions, which was accompanied by a statement signed by George Avery, Jr., as president of petitioner, stating that the average daily operating hours of the equipment listed in the survey were accurate. The amount claimed in the survey for the ovens, based on 11 average daily hours of use, was granted by the Division. Since the testimony at the hearing from George Avery, Jr. that ovens operated for 15 to 16 hours a day is obviously inconsistent with the survey, we see no reason to disturb the Administrative Law Judge's conclusion to disregard this testimony.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Avery's Markets, Inc., is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Avery's Markets, Inc. is granted to the extent indicated in conclusions of law "E" and "H" of the determination of the Administrative Law Judge and is in all other respects denied; and

4. The Division of Taxation is directed to modify the Notice of Determination and Demand accordingly, but the Notice is in all other respects 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