STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LAKE CITY MANUFACTURED HOUSING, INC., AND ARTHUR E. BUDZOWSKI AND GERALD R. GARITY, AS OFFICERS	:	DECISION DTA No. 805999
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1984 through May 31, 1987.	:	

Petitioners Lake City Manufactured Housing, Inc., and Arthur E. Budzowski and Gerald R. Garity, as officers, 10068 Keystone Drive, Lake City, Pennsylvania 16423 filed an exception to the determination of the Administrative Law Judge issued on December 13, 1990 with respect to their petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1984 through May 31, 1987. Petitioners appeared by Joseph F. Saeli, Jr., Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioners filed a brief in support. The Division of Taxation filed a letter in lieu of a brief. Oral argument was not requested.

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

ISSUE

Whether petitioners have shown that they sold the homes at issue as part of petitioners' performance of a capital improvement.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "8" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On June 2, 1988, following an audit, the Division of Taxation (hereinafter the "Division") issued to petitioner Lake City Manufactured Housing, Inc. ("Lake City") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed $104,629.40 in tax due, plus minimum interest, for the period September 1, 1984 through May 31, 1987.

Also on June 2, 1988, the Division issued to petitioners Arthur E. Budzowski and Gerald R. Garity, as officers of Lake City Manufactured Housing, Inc., notices of determination and demands for payment of sales and use taxes due which assessed identical amounts of tax and interest as the notice issued to Lake City.

The status of petitioners Budzowski and Garity as persons responsible to collect tax on behalf of Lake City is not at issue herein.

Petitioner Lake City Manufactured Housing, Inc.[1] has been in the business of manufacturing modular, or manufactured, homes since 1973. Petitioner's manufacturing facility is located in Lake City, Pennsylvania.

The modular homes which are the subject of this matter were all manufactured by Lake City at its Lake City, Pennsylvania facility. The raw materials from which these modular homes were built, such as lumber, plywood, roofing, drywall, windows and siding, were all purchased from sources outside of New York. All these raw materials were stored at Lake City's factory, and no materials were stored in New York State. Lake City paid Pennsylvania sales or use tax on its purchases of raw materials.

On audit, the Division reviewed invoices which detailed petitioner's sales to New York customers. There were 85 such sales during the audit period. Petitioner had been remitting sales and use tax to New York based upon an amount equal to 60% of the invoice amount of each modular home sold in New York. Petitioner had charged and collected from each of its New York customers a tax listed on the invoice as "use tax" which was based on 60% of the invoice amount. Following its initial review of petitioner's invoices, the Division concluded that

[1]All references to "petitioner" shall refer to the corporate petitioner unless otherwise indicated.

petitioner should have paid sales or use tax based upon 70% of the invoice amount. The Division issued to petitioner a Statement of Proposed Audit Adjustment in accordance with this conclusion, which was based upon the Division's mistaken impression that petitioner's modular homes should be taxed in a manner consistent with the sales and use taxation of mobile homes. Petitioner subsequently tendered payment of the proposed adjustment. The Division, however, returned petitioner's check and issued the assessment at issue which was based upon 100% of the invoice amount of the 85 New York sales made by petitioner during the audit period.

The assessment, as set forth in the notice of determination, had two components: a use tax component of $52,131.14 which was based on 100% of the sales price of the 23 homes that the Division determined petitioner sold and installed, and a sales tax component of $52,498.26 which was based on 100% of the invoice amount of the 62 homes with respect to which the Division determined that petitioner sold but did not install.

We modify finding of fact "8" to read as follows:

> With respect to the use tax component, the Division conceded that the installation of modular homes constituted a capital improvement, but took the position that, in bringing the component parts of the homes into New York, petitioner used these materials in New York and thereby triggered the imposition of use tax. Since the Division concluded that petitioner had erroneously collected sales tax from its customers based upon 60% of the invoice and remitted such tax to the Division, the Division determined that no use tax credit was allowed with respect to such erroneously collected sales tax.[2]

With respect to the sales tax component of the assessment, the Division concluded that 62 of petitioner's New York sales consisted of sales of modular home sections or components

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[2]The Administrative Law Judge's finding of fact "8" read as follows:

> "With respect to the use tax component, the Division conceded that the installation of the modular homes constituted a capital improvement, but took the position that, in bringing the component parts of the homes into New York, petitioner used these materials in New York and thereby triggered the imposition of the use tax. Since petitioner had collected tax from its customers based upon 60% of the invoice and remitted such tax to the Division, no credit was allowed with respect to such erroneously collected tax."

This fact was modified to clarify that the finding of fact was intended to state what the Division did on audit with respect to the use tax component and its rationale for this action.

without installation. The Division took the position that such sales were retail sales of tangible personal property subject to sales tax. Petitioner's receipts in respect of the 62 such sales during the audit period totaled $1,915,273.00. The Division determined that sales tax due on these sales totaled $130,753.00. The Division allowed petitioner credit for $78,254.74 in tax which petitioner had collected and remitted in respect of these sales (based upon 60% of the invoice price), and determined petitioner to be liable for the difference of $52,498.26.

The Division's conclusion as to whether a particular modular home was sold on an installed or uninstalled basis was based solely upon information contained on the invoice. Where an invoice included a charge designated "roll-on", the Division determined that the home in question was installed by petitioner. Where an invoice did not set forth such a "roll-on" charge, the Division concluded that the home in question was sold uninstalled.

At the commencement of the hearing in the instant matter, the Division conceded that the use tax component of its assessment was improper. Remaining at issue, therefore, is an assessment of $52,498.26, plus interest, which results from the sales tax component of the assessment.

Also at the hearing, petitioner conceded its liability with respect to one sale determined by the Division to be subject to sales tax. Specifically, petitioner conceded it owed sales tax on its sale of a modular home, sold uninstalled, to Cairo Homes pursuant to an invoice dated January 24, 1986. Petitioner collected and remitted $1,504.56 in tax on this sale, and conceded it owed an additional $1,065.98 with respect to this sale.

Petitioner sells most of its homes in Pennsylvania, Ohio and New York. Most of the sales remaining at issue were made through a real estate agent, or through a dealer whose function is similar to that of a real estate agent. In every one of these cases, the customer had identified a specific piece of land on which the home was to be installed before an order was placed with Lake City.

The dealer or realtor accompanied the customer to the site to ascertain whether a modular home could be installed at the site. The dealer or realtor then prepared a diagram of the

customer's proposed floor plan for the modular home. Modifications were sometimes necessary to the customer's original design before a feasible final design could be prepared. Lake City then prepared a blueprint which was forwarded to the customer for final approval.

Petitioner's modular homes were custom built, and the company did not maintain any inventory of standard home designs. Its customers chose such things as linoleum patterns, wallpaper patterns, roofing and siding from a collection of samples petitioner provided to its dealers.

Petitioner sent each of its customers a certificate of capital improvement form to be signed by the customer before production began. On each of these forms, Lake City was identified on the certificate as the contractor. Petitioner obtained a certificate of capital improvement for each of the sales which are the subject of this proceeding. Petitioner was unable to produce five of these certificates at the hearing.

Modular homes typically consist of two or four sections. These sections are manufactured at Lake City's factory and are shipped by truck to the installation site. Petitioner made all arrangements for the shipping of the houses. When the sections arrived at the site, they were unloaded from the truck either by electric jacks or a crane, and were assembled and permanently installed on a foundation. The "roll-on" crew which performed the installation work for each of the homes in questions was W. D. Construction. In every instance, petitioner contacted the "roll-on" crew to arrange for the installation and to advise the installer when the sections of the house would be on-site and ready for installation. Since the same installer was used in each of the sales at issue, this installer was aware of the particular manner in which petitioner's homes should be installed.

As noted previously, certain of petitioner's invoices listed a "roll-on" charge representing the cost of installation work and certain of these invoices did not list such a charge. A "roll-on" charge was listed on the customer invoice in instances where the installer had inspected the site and advised petitioner what the "roll-on" charge would be. The "roll-on" charge was not listed on the customer invoice in those instances where either the installer had not inspected the site or

where the conditions at the site indicated that additional work might be necessary for proper installation. Under such circumstances, since petitioner shipped the invoice along with the house, the "roll-on" charge could not be listed on the invoice. Where the "roll-on" charge was not listed on petitioner's invoice, the installer billed the dealer. The dealer, in turn, would either pay the installer (and thereby absorb the "roll-on" charge) or pass the charge along to the customer.

The installation of a modular manufactured home on its foundation is permanent; a home cannot be moved once it has been installed.

Petitioner maintained insurance on each home until it was permanently installed on its foundation. At that point, the home was covered by the customer's homeowners insurance. Also at that point, title to the home passed from petitioner to the customer. At no point did the dealer maintain any insurance on the home. Also, in the event a customer cancelled an order after production commenced, petitioner did not have any claim against the dealer.

For purposes of granting mortgage loans, banks treated petitioner's modular homes the same as other homes. Banks established draw schedules, and any final release of funds would not be made until the home had been permanently installed on its foundation and inspected by the bank.

Petitioner provided a one-year warranty on each home. Petitioner, and not the dealer, was responsible for performing any work under the warranty.

OPINION

The Administrative Law Judge held that retail sales of tangible personal property are generally subject to sales tax, although such property may be exempt from sales tax if it was sold by a contractor to a person for whom the contractor is performing a capital improvement to real property, and the tangible personal property was an integral part of that capital improvement. Further, the Administrative Law Judge determined that petitioner had failed to demonstrate that all the modular homes it sold in New York State were capital improvements performed by petitioner, deeming sixty-two of petitioner's sales of modular homes to be retail sales of tangible

personal property and, as such, subject to sales tax. Therefore, the Administrative Law Judge denied the petition of petitioner and sustained the notices of determination and demands for payment.

On exception, petitioner makes several assertions. First, it argues that the Administrative Law Judge exceeded his authority by addressing the issue of whether petitioner is entitled to a credit or refund for erroneously collected use tax. Second, it asserts that the Administrative Law Judge improperly ignored 20 NYCRR 544.3(b).[3] Finally, it contends that petitioner successfully demonstrated at the hearing that it was responsible for all installations of the homes and, therefore, had performed capital improvements in every instance at issue.

In opposition, the Division makes several assertions. First, it contends that the question of whether the Administrative Law Judge had exceeded his authority regarding the use tax is moot because the Division conceded that point at hearing. Second, it asserts that 20 NYCRR 544.3(b) was properly ignored because it does not address the situation at hand. Finally, it argues that the Administrative Law Judge properly framed the issue as whether petitioner contracted to install the homes.

We affirm the determination of the Administrative Law Judge.

Every retail sale of tangible personal property is subject to sales tax unless otherwise exempted or excluded from tax (Tax Law § 1105[a]). Tangible personal property sold by a contractor to a person for whom it is making a capital improvement to real property, where the tangible personal property is to become an integral part of the improvement, is exempt from sales tax (Tax Law § 1115[a][17]). A capital improvement is defined at Tax Law § 1101(b)(9)(i) as:

> "(i) An addition or alteration to real property which:
>
> "(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
>
> "(B) Becomes part of the real property or is

[3]The Administrative Law Judge framed the issue as whether petitioner contracted to install the homes. Petitioner asserts that the fundamental question presented, pursuant to the regulation, is whether the manufacturer sold the home directly to the customer, rather than to a contractor, subcontractor, or repairman who then installed it.

> permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
>
> "(C) Is intended to become a permanent installation."

The fundamental issue in this case is whether petitioner, as a contractor, performed a capital improvement on the real property of its customers with respect to the sixty-two sales at issue. Failure to show that a capital improvement was made by petitioner results in the imposition of sales tax. To determine if a capital improvement was made, we must look at the transaction as it occurred.

The retail sale of a modular home from one party to another is the sale of tangible personal property, and is therefore subject to sales tax under Tax Law § 1105(a). To qualify for an exemption from sales tax based upon the performance of a capital improvement in conjunction with the sale of the tangible personal property, the applicability of the exemption must be affirmatively shown (Tax Law § 1132[c]). The contractor must demonstrate that it sold the home to the customer and that it installed the home as part of the sale (Tax Law § 1115[a][17]). Just because a capital improvement is ultimately made to property, it does not necessarily follow that an exemption from sales tax is available. The burden is on the contractor to demonstrate that it made the capital improvement in conjunction with the sale. If this showing is not made, the sale of the home is a sale of tangible personal property which is subject to sales tax.

Based upon this analysis, petitioner has failed to demonstrate that all the sales of modular homes were in conjunction with the making of capital improvements by petitioner on the real property of its customers. At issue are sixty-two modular homes sold by petitioner. For these sales to qualify for an exemption from sales tax, petitioner must affirmatively demonstrate that it was the contractor who installed the homes. Petitioner has not done this. The sales of the homes to customers are well documented. However, proof regarding the installation of these homes is lacking.

In its audit, the Division relied on sales invoices to determine whether a modular home was sold on an installed or uninstalled basis, as shown by the presence or absence, respectively, of a

roll-on charge. The sales invoices for the sixty-two homes at issue did not include a roll-on charge. This led the auditor and the Administrative Law Judge to conclude that the sales of those sixty-two modular homes did not qualify for an exemption from sales tax under Tax Law § 1115(a)(17). We agree.

Petitioner has offered no documentation to show the existence of a contractor-subcontractor relationship with W. D. Construction, the installer. Although Lake City's president, Mr. Budzowski, testified that Lake City was subcontracting to W. D. Construction, the Administrative Law Judge found this oral testimony of petitioner's president to be insufficient in the absence of supporting documentation. We agree with this finding.

Further, the assertion of a contractor-subcontractor relationship is contradicted by the fact that, with respect to the sales at issue, petitioner was not billed for the installation and did not pay for it.

Petitioner has produced all but five of the certificates of capital improvement for the sales at issue. However, certificates of capital improvement are irrelevant to the threshold issue, i.e., whether petitioner was the contractor that made the installation. If this showing is made, the certificates would then become relevant. But, since petitioner has not shown that it was the contractor-installer, the capital improvement certificates are simply not applicable.[4]

For this reason, petitioner's reliance on Matter of Saf-Tee Plumbing Corp. v. Tully (77 AD2d 1, 432 NYS2d 409) is misplaced. Saf-Tee Plumbing addressed the issue of whether work done by a contractor for a customer constitutes a repair or a capital improvement in regard to the good faith receipt of a certificate of capital improvement by the contractor. The issue in the present case is whether the seller of a product which might qualify as a capital improvement has

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[4]The capital improvement certificate, in accordance with Tax Law § 1115(a)(17), makes it quite clear on its face that it only applies to a contractor making capital improvements to real property. At the top of the form it states "[t]o be completed by customer and given to, signed by and retained by contractor making capital improvement to the real property." Further, in bold print the form states that "THIS CERTIFICATE MAY NOT BE USED TO PURCHASE BUILDING MATERIALS OR OTHER TANGIBLE PERSONAL PROPERTY TAX FREE" (see, Exhibit 11).

The capital improvement form was modified in April, 1982, to make it clear that it could not be accepted by a vendor who was not a contractor with respect to that sale (see, Matter of Neal Andrews, Ltd., Tax Appeals Tribunal, October 6, 1988).

demonstrated that it installed the product and was the contractor, thereby triggering the capital improvement exemption.

Further, petitioner's reliance on Matter of Morton Bldgs. v. Chu (126 AD2d 828, 510 NYS2d 320, affd 70 NY2d 725, 519 NYS2d 643) is incorrect. Morton Bldgs. addressed the issue of applying a use tax to the manufacture, sale, and erection of pre-engineered buildings in New York State using building components manufactured outside the State. The weight given to the certificates of capital improvement was not an issue in Morton Bldgs., as they were accepted without discussion in the undisputed facts of the case. In contrast, the weight given to the certificates of capital improvement in the present case is an issue. We agree with the Administrative Law Judge in determining that the certificates of capital construction are inconclusive. Morton Bldgs. is, therefore, inapplicable to the case at hand.

This is not, as petitioner alleges, a matter of form over substance. Absent additional evidence conclusively showing that petitioner made capital improvements in conjunction with each sale of a modular home, we cannot draw the conclusions which petitioner advances. The sales of the sixty-two modular homes are, therefore, subject to sales tax pursuant to Tax Law § 1105(a).

Petitioner has made several assertions on exception. First, petitioner maintains that the Administrative Law Judge exceeded his authority by addressing the issue of whether petitioner is entitled to a credit or refund for erroneously collected use tax. This is in regard to the modified fact set forth above. We believe the fact, as modified, is responsive to petitioner's objection.

Second, petitioner states that, as a general matter, the Division of Tax Appeals is bound by the regulations set forth by the Department of Taxation and Finance and that, based upon this principle, the Administrative Law Judge improperly ignored 20 NYCRR 544.3(b). Regarding the authority of the Division of Tax Appeals, it is an independent entity which is specifically authorized to rule on the validity of the regulations promulgated by the Division (see, Tax Law §§ 2002, 2006[7]). Given this fact, petitioner's reliance on Matter of Duflo Spray-Chemical v.

Jorling (153 AD2d 244, 550 NYS2d 497), Matter of Sinclair v. Smith (97 AD2d 953, 468 NYS2d 749), and Matter of Chambers v. Coughlin (76 AD2d 980, 429 NYS2d 74) is misplaced.

The regulation in question, 20 NYCRR 544.3(b), states:

> "(b) Sales of factory manufactured homes. (1) The sale of a factory manufactured home which has not been installed on real property as a capital improvement is subject to the sales and compensating use taxes as the sale of tangible personal property. Upon a retail sale, tax is computed on the total sales price. The '70 percent rule' described in subparagraph (a)(2)(i) of this section does not apply to the sale or use of a factory manufactured home.
>
> "(2) The sale of a factory manufactured home to a contractor, subcontractor or repairman to be installed as a capital improvement by such contractor, subcontractor or repairman is subject to sales and compensating use tax as a retail sale of tangible personal property."

Petitioner interprets the regulation to mean that if a factory manufactured home is sold directly to the customer (not a middleman) and is installed on real property, it is not a sale of tangible personal property and is, therefore, not subject to sales tax (Petitioner's brief on exception, p. 7). In opposition, the Division states that the regulation is not on point because it does not address the factual issue here -- whether petitioner sold and installed the homes by its employees or a subcontractor. The Division asserts that this is a scenario not addressed in the regulation, since 20 NYCRR 544.3(b)(1) addresses uninstalled sales and 20 NYCRR 544.3(b)(2) addresses sales to contractors and subcontractors (Division's reply letter, pp. 2-3). Both interpretations are incorrect.

The critical portion of the regulation for purposes of this issue is the first line of 20 NYCRR 544.3(b)(1) which states, in sum, that regardless of who the buyer is, a sale of an uninstalled factory manufactured home is subject to sales tax. Conversely, the sale of an installed factory manufactured home, i.e., sale of an uninstalled home where installation is a component of the sales transaction, is not subject to sales tax.

It is possible for a buyer to purchase a factory manufactured home from the manufacturer but to make arrangements to have it installed by another party. Petitioner has failed to establish that the sales at issue were not completed in this manner. In this scenario, the sale of the home

would be subject to sales tax because the home was purchased on an uninstalled basis. Though the home will ultimately be installed on the real property of the buyer, thereby constituting a capital improvement, the steps taken to reach this point do not trigger the exemption from sales tax because installation was secured independent of the sale of the home. This is a subtlety that petitioner needs to appreciate, as this subtlety is the basis of the Administrative Law Judge's determination and our affirmation on exception.

Thus, the Administrative Law Judge did not err by not addressing regulation 20 NYCRR 544.3(b)(1) in his determination because this regulation does not alter the result here. Under the regulation, petitioner sold the homes on an uninstalled basis and is subject to tax on these sales.

To summarize, the timing and nature of the transactions which result in a factory manufactured home being installed on the real property of a customer, dictates whether an exemption from sales tax is available. The making of a capital improvement does not automatically allow for an exemption. Rather, the making of a capital improvement must be in conjunction with the sale of the tangible personal property which is integrated in the improvement. Any discrepancy in the timing or control of the transaction may result in the unavailability of the exemption. As stated previously, petitioner has failed to demonstrate that it was responsible for the installation of the modular homes at issue. Absent this proof, petitioner does not qualify for an exemption from sales tax on the transactions.

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

1. The exception of Lake City Manufactured Housing, Inc., and Arthur E. Budzowski and Gerald R. Garity, as officers, is denied;

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

3. The petition of Lake City Manufactured Housing, Inc., and Arthur E. Budzowski and Gerald R. Garity, as officers, is denied; and

4. The notices of determination and demand for payment of sales and use taxes due, as adjusted in the Administrative Law Judge's determination, are sustained.

DATED: Troy, New York
November 14, 1991

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

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

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