STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
VANGUARD METER SERVICE, INC.	:	DECISION DTA No. 812859
for Revision of a Determination or for Refund of Sales and Use Taxes under Article 28 and 29 of the Tax Law for the Years 1988 through 1991.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on December 14, 1995 with respect to the petition of Vanguard Meter Service, Inc., c/o Asplundh Tree Expert Co., Attn.: Philip Tatoian, Esq., 708 Blair Mill Road, Willow Grove, Pennsylvania 19090. Petitioner appeared by Pryor & Mandelup, LLP (A. Scott Mandelup and Randolph E. White, Esqs., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James Della Porta, Esq., of counsel).

The Division of Taxation filed a brief on exception. Petitioner filed a brief in opposition. The Division of Taxation filed a reply brief. The Division of Taxation's request for oral argument was denied.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioners Jenkins and Pinto concur.

ISSUE

Whether the purchases of materials used in the installation of water meters under contracts with the City of New York are exempt from sales tax under Tax Law § 1115(a)(15).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Vanguard Meter Service, Inc., was in the business of selling, installing and repairing water meter devices until it filed a bankruptcy petition in January of 1992. Its customers were primarily cities and municipalities.

Between 1987 and 1992, petitioner entered into 24 contracts with the City of New York to sell, install, repair and replace water meters and related equipment throughout the City's five boroughs. The City entered into these contracts as part of its Universal Metering Program commenced inJanuary 1986 to promote water conservation in the City of New York. Prior to this program, the City charged residents a flat rate based on property frontage. The purpose of the Universal Metering Program was to change its billing for water from a flat-rate system to a more equitable system based on consumption in order to provide an incentive to conserve water. The metering program also allowed for the improved management of the City's water system during periods of drought and in the detection of leaks.

Under the Universal Metering Program, the Department of Environmental Protection (DEP) was authorized to install water meters on all premises connected to the City's water system. The DEP accepted bids on an area-by-area basis for the installation of water meters. By 1992 its total commitment was for 59 contracts, 24 of which were with petitioner. Other than the work performed under these contracts, petitioner engaged in no other business in New York State during the period in question.

The City required bidders to exclude sales tax from the bids. The contracts also contained in Article 15 the following provision:

> "The purchase by the contractor of the supplies and materials sold hereunder shall be a purchase or procurement for resale and therefore not subject to the New York State or New York City sales or compensating use taxes or any such taxes of cities or counties. The sale of such materials by the contractor to the City, which is a political subdivision of the State of New York, is exempt from the aforesaid sales or compensating use taxes."

Article 15 also required the contractor to pass good title of all supplies and materials to the City:

> "With respect to such materials, the contractor, at the request of the City, shall furnish to the City such bills of sale and other instruments as may be required by it, properly executed, acknowledged and delivered assuring to the City title to such supplies and materials, free of liens or encumbrances, and the contractor shall mark or otherwise identify all such materials as the property of the City.
> "Title to all material to be sold by the contractor to the City pursuant to the provisions of the Contract shall immediately vest in and become to [sic] sole property of the City upon delivery of such supplies and materials. . . ."

Petitioner included as part of its bids the estimated cost of adapting the piping in certain residences to the pipe fittings of the water meters. These adaptations required additional plumbing parts.

Robert Shelton, the controller of Vanguard Meter Service, testified that he noticed that the company had been paying sales tax on the purchases of the plumbing parts used to connect the water meters to the plumbing of the residences. Therefore, Mr. Shelton filed an application for a refund of sales tax, dated June 4, 1991, for $123,918.14 of tax paid on the purchase of the plumbing parts used in the installation of the water meters. As part of the application, he included copies of some of the contracts referring to the Article 15 provision wherein it was stated that the contractor's purchases of supplies and material would be considered a procurement for resale and therefore not subject to New York State or City sales tax. Mr. Shelton also included a summary of all the individual invoices listing the invoice number, date of sale, amount of the purchase, amount of the tax paid, the contract numbers associated with the purchases, and from whom the purchases were made. The purchases were described as "plumbing parts."

By letter dated June 25, 1991, the Division of Taxation ("Division") requested further information concerning a description of the work which petitioner performed and whether the property on which the work was performed was owned by the exempt organization.

In response, petitioner sent a letter, dated July 23, 1991, describing the nature of the work performed and the property on which the work was performed as follows:

> "In ninety percent (90%) of the cases, our work consists of installing New York City-owned water meters in private residences with New York City assuming

> the responsibility for breakage or appurtenant plumbing by virtue of its contracts with Vanguard Meter Service, Inc.
>
> "In ten percent (10%) of the cases, our work consists of installing New York City-owned water meters on New York City-owned property or outside private residences."

By letter dated July 31, 1991, the Division informed petitioner that before it could continue the review of the refund application it required additional information. Specifically, the Division stated the following:

> "In your letter dated July 23, 1991 you state that 10% of your work consists of installing New York City-owned water meters on New York City-owned property or outside private residences.
>
> "In order to process this claim further we need to know the percentage of the water meters which are installed on New York City owned property, and the back-up material to substantiate that figure."

Thereafter, the Division sent a letter, dated September 10, 1991, denying the refund application. In that letter, the Division noted that it had not received a reply to its July 31, 1991 letter. The Division also noted that its denial was in accordance with the provisions of Tax Law section 1132(c) which provided that all receipts from the sale of property or services of any type mentioned in section 1105 are subject to tax until the contrary is established.

Petitioner requested a conciliation conference to review the refund denial. After a conciliation conference was held on June 22, 1993, the conferee issued a conciliation order, dated February 25, 1994, sustaining the statutory notice.

Petitioner filed a petition, dated May 23, 1994, alleging that the Division erred in denying its application for refund. Petitioner asserted that all parties to the contracts intended to exclude taxes on purchases for the performance of the contracts and that all parts purchased constituted procurements for resale to the City.

The Division filed an answer, dated August 15, 1994, affirmatively stating that Tax Law § 1115(a) provides that tangible personal property sold to a contractor for use in adding to, altering or improving real property, property or land of an exempt organization is exempt if the

tangible personal property becomes an integral component part of such structure, building or real property; that the term real property is defined in Real Property Law § 102(12) and includes boilers, heating, ventilating, lighting apparatus and plumbing but does not include water meters; and that Tax Law 1116(a) exempts sales of services to the State of New York or any of its agencies where it is the purchaser, user or consumer and that tangible personal property purchased by a contractor for use in performing a service not subject to tax is itself taxable as it is not purchased for resale.

At the hearing held on February 28, 1995, Pauline Lochner, an employee of the Division, testified that she became involved in petitioner's refund claim after its denial and represented the Division's position before the Bureau of Mediation and Conciliation Services. Ms. Lochner testified that the reason for the refund denial was petitioner's failure to inform the Division what percentage of meters was installed on City-owned property and to provide the invoices, rather than just a summary, to verify that the purchases of plumbing parts did not include items, such as tools, which were not incorporated into the property sold to the City.

Mr. Shelton testified that prior to the refund denial he was not informed that the description of the work performed for the City, which was provided in the July 23, 1991 letter, was inadequate. He also stated that he did not recall the Division's requesting a further description of the plumbing parts listed on the summary of purchases submitted with the refund application. Mr. Shelton testified that he understood the Division's concern to focus on whether the meters were installed on City-owned property because, in the Division's July 31, 1991 letter, it only asked for information concerning the 10% of meters installed on City-owned property and private residences. Mr. Shelton responded under direct examination as follows:

"Q. Did they say there was a deficiency in the summary you sent them?
A. No.
Q. Other than the breakdown, 90/10--
A. 90/10
Q. -- of percentage of work performed on City-owned property versus private residences?
A. Oh, okay, no, they didn't say anything.

Q. They never indicated to you your documents were insufficient other than what you testified?
A. Not that the summary was insufficient, no." (Tr., pp 85-86.)

Mr. Shelton testified that he did not provide the information requested in the July 31,1991 letter concerning 10% of the meters because he determined that the basis for denying a refund on 90% of the meters was incorrect and, therefore, would pursue an appeal challenging the Division's reasoning. Specifically, Mr. Shelton stated that he was aware of only one reason for the Division's denial of the refund -- that only purchases with respect to meters installed on City-owned property were exempt from sales tax.

When questioned by the Administrative Law Judge concerning the purchases listed on the summary submitted with the refund application, Mr. Shelton responded that some of those purchases may have included items such as a drill. During Mr. Shelton's response, David Weiss, petitioner's counsel, interjected the following statement:

"If I could help: I think in the event the refund is granted, we would have to go through and recalculate the amount on that basis. He wasn't familiar with the tax law. He didn't know that tools should be broken out and it should have been done. We would have to amend the claim." (Tr., p. 96.)[1]

At the close of the hearing, the Division's counsel summarized the Division's position. The Division's counsel argued that the hearing record did not establish that the items in question were purchased exclusively for the purpose of filling these contracts. The Division's counsel also argued that the resale exemption did not apply to petitioner's purchases. She summarized the Division's position as follows:

"It's also the Division's contention that in order to qualify as a resale, the purpose of allowing credit or exempting resales is to prevent a pyramiding of tax. And it's the ultimate consumer upon whom the tax burden falls. In the transaction between the taxpayer and the City of New York, the City of New York is an exempt organization. There would be no tax imposed on that transaction so therefore it would not qualify as a resale. So with the contractor being the ultimate

---

[1] During the hearing, petitioner submitted a box containing copies of all the invoices and cancelled checks indicating payment of those invoices to substantiate the amounts listed on the summary provided with the refund application.

consumer, the contractor is obliged to pay for its purchases for materials and supplies." (Tr., p. 108.)

The Division also argued that the purchases did not qualify for the sales tax exemption under Tax Law § 1115(a)(15) or (16) because petitioner did not demonstrate that the items purchased became an integral part of real property owned by the City. The Division's counsel concluded that her closing statement just "highlighted" the Division's position and that she would "further elaborate" the Division's position in a brief. The Division did not file a brief.

After the Division's closing argument, the Administrative Law Judge ruled that based on Mr. Shelton's testimony and the fact that neither the July 31, 1991 letter, refund denial nor the Division's answer stated that petitioner was to provide invoices to substantiate that the purchases listed in its summary of invoices did not include tools but only purchases under the contract, this issue was not preserved for review in this proceeding. Notwithstanding this lack of notice, petitioner submitted, at hearing, a box of invoices and cancelled checks to substantiate the amounts set forth in the summary that it submitted with the refund application. Petitioner's counsel also agreed that if petitioner prevailed on the other legal issues, it would amend its refund claim to delete claims for any sales tax paid with respect to tools which were not consumed or sold to the City in the performance of the contracts.

In brief, petitioner argues that materials furnished by a contractor to a tax-exempt entity are not subject to sales tax if the entity is the beneficiary of the tax exemption; that the City contracts specifically provided that sales tax should not be included in the bid price; that its purchases were tax exempt as sales for resale; that the Division's interpretation of Tax Law § 1115(a)(15) and (16) is overly narrow, contradicts the Division's regulations and is in direct conflict with the judicial interpretations of the tax exempt provisions; and that the appurtenant plumbing parts became an integral part of the real property owned by New York City -- the City water system.

OPINION

In her determination, the Administrative Law Judge considered the statutory definition of a "retail sale" (Tax Law § 1101[b][4][i]) and found that petitioner's purchases of the plumbing parts were retail sales and not sales for resale. Further, the Administrative Law Judge concluded that those purchases were exempt pursuant to Tax Law § 1115(a)(15) because the plumbing supplies purchased were installed as part of the City's water system, which constitutes "real property" as that term is defined in Real Property Tax Law § 102(12)(e).

Tax Law § 1105(a) imposes sales tax on the retail sale of tangible personal property. Tax Law § 1101(b)(4)(i) defines a retail sale, in pertinent part, as follows:

> "a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed. . . ."

Tax Law § 1115(a)(15) exempts from sales tax certain retail sales as follows:

> "[t]angible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering or improving real property, property or land of such an organization, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property."

Real Property Tax Law § 102(12)(e) defines "real property" to include:

> "[m]ains, pipes and tanks permitted or authorized to be made, laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby."

The Administrative Law Judge stated that:

> "[a]s indicated in the record, the plumbing parts were used or consumed in the altering or improving of the City's water system. These plumbing parts were necessary to adapt, in certain cases, the existing piping to the water meter being installed. Although the water meters were installed on private residences, the water meters themselves were the

> property of the City, were an integral part of the City's water system and a necessary component of the Universal Metering Program to promote water conservation. Therefore, under the definition of 'real property, property or land' in the Real Property Tax Law, and the provision of section 1101(a)(4)(i) [sic] of the Tax Law, the purchases of the plumbing parts are retail sales. . . .
>
> "Notwithstanding the fact that petitioner's purchases were retail sales, these retail sales are exempt, in any event, because they were used in the performance of petitioner's work under contract for an exempt organization (see, Matter of Perlstein Builders, Inc. v. New York State Tax Commission, 87 AD2d 906, 449 NYS2d 355; Matter of Sweet Associates, Inc. v. Gallman, 36 AD2d 95, 318 NYS2d 528, affd 29 NY2d 902, 328 NYS2d 857; Matter of Briggs v. Page, 20 AD2d 834, 248 NYS2d 109)" (Determination, conclusion of law "B").

As to the Division's argument that section 1115(a)(15) was not applicable to petitioner's purchases because the water meters were installed on private residences and, therefore, the installation of the meters did not improve real property, property or land of the exempt organization, the Administrative Law Judge stated:

> "[a]s noted above, the real property that was altered or improved was not the individual residences that were serviced by these meters, but the City's water system. The record establishes that title to the water meters and appurtenances passed to the City and that they were an integral part of the water system that constituted real property or property owned by the City. These meters and appurtenances were not owned by the homeowners whose property the water system serviced.
>
> "As noted above, the Division also argued in its answer that section 1115(a) does not apply because water meters are not specifically referred to in the definition of 'real property, property or land' under Real Property Tax Law § 102(12)(e). As indicated above, the real property or property being improved or altered is the City's water system, not the individual water meters themselves" (Determination, conclusion of law "B").

On exception, the Division argues that while the water meters and plumbing parts purchased by petitioner may be part of the City's water system, they are not part of the City's real property and, thus, do not qualify for an exemption. The Division argues that, because section 1101(b)(4) provides that a sale of personal property to a contractor for use in making a capital improvement to real property is a retail sale to such contractor, "by definition it could not be resold" to the City of New York (Division's brief, p. 8). The Division also argues that

petitioner failed to provide the Division with a breakdown of the purchases which it included as the basis for its refund claim. The Division argues that it was inappropriately denied the right to establish at the hearing that some of petitioner's purchases may not have become part of a capital improvement.

The Division argues that:

> "[t]he major error in the ALJ's determination was the conclusion that petitioner's material purchases were exempt from sales tax under Tax Law § 1115(a)(15) because the materials became part of the City's water system. The fact the installed water meters were part of the City's water system is irrelevant. The materials were only exempt from sales tax if the meters were installed on City real property. Stated differently, not all parts of the City's water system are located on City real property. Since materials were used to install water meters on private residences, the refund must be denied as a matter of law in regard to tax paid on these materials" (Division's brief, p. 10).

Petitioner, in opposition, argues that:

1) Materials furnished by a contractor to a tax-exempt entity are not subject to sales tax if that entity is the beneficiary of the tax exemption;

2) Petitioner's purchases were exempt from sales tax as purchases of tangible personal property for use in maintaining, servicing and repairing real property owned by the City;

3) Petitioner's purchases of materials were for resale to the City;

4) Even if the petitioner's purchases were a retail sale, petitioner is entitled to an exemption pursuant to Tax Law § 1119(c); and

5) The Division's regulations (20 NYCRR 541.3) provide that, in a contract between a contractor and a governmental entity, the contract is sufficient proof of the exempt status of purchases made for such contract.

In reply, the Division argues that the Tribunal cannot consider petitioner's argument that the purchases were sales for resale because no exception to the Administrative Law Judge's determination on this issue was taken by petitioner. Further, if this issue is considered, petitioner's position is contrary to the express terms of Tax Law § 1104(b)(4)(i). The Division argues that the materials were installed on privately owned property and not real property

owned by the City, irregardless of whether or not they became part of the City's water system. Finally, Tax Law § 1119(c) does not favor a refund to petitioner because it only applies to a contractor who purchases tangible personal property and later resells it as such, rather than to the situation of a contractor who purchases tangible personal property and installs it as part of a capital improvement.

On the issue of whether or not petitioner's purchases were retail sales, we agree with the Administrative Law Judge that section 1101(b)(4) is dispositive of this, irrespective of whether or not the plumbing parts were sold to the City prior to their installation. However, we do not agree with the argument made by the Division that, because the sale of these items to petitioner was considered a retail sale for sales tax purposes, there could be no transfer of title to the City of New York as per the contractual agreement with petitioner.

We find that the Administrative Law Judge was correct in her conclusion that petitioner's plumbing installations were made to the real property of the City of New York and that the purchases of these plumbing parts by petitioner were exempt from sales tax. The Division does not dispute that the water system is the property of the City of New York but, in essence, argues that at the point of installation of the water meters and appurtenant plumbing supplies at issue, the City's water system was no longer on real property owned by the City but was on real property under private ownership. This argument misses the point that the pipes and mains comprising the City's water system are themselves real property pursuant to section 102(12)(e) of the Real Property Tax Law. The definition of "real property" is comprehensive and includes more than land and buildings. Therefore, as the Administrative Law Judge concluded, improvements made to these pipes and mains are also improvements made to real property.

The Division argued that petitioner failed to provide the Division with a breakdown of the purchases which it included as the basis for its refund claim and that the Division was inappropriately denied the right to establish at the hearing that some of petitioner's purchases may not have become part of a capital improvement. The Administrative Law Judge ruled at

the hearing that prior to the issuance of the refund denial, the Division did not request petitioner to substantiate that the purchases listed in its summary of invoices did not include tools but only purchases under the City contract. Notwithstanding this lack of notice, petitioner, by its counsel, agreed on the record that if petitioner prevailed in this proceeding, it would amend its refund claim to delete claims for any sales tax paid with respect to tools which were not consumed or sold to the City in the performance of the contracts. The Administrative Law Judge, in granting the petition, amended petitioner's refund claim in accordance with petitioner's offer. Therefore, we affirm the determination of the Administrative Law Judge and we remand this matter to the Administrative Law Judge to determine the amount of refund due to petitioner.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded to the Administrative Law Judge to determine the proper refund amount owing to petitioner.

DATED: Troy, New York
February 20, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner