

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
HAWKINS MANUFACTURED HOUSING, INC. : DETERMINATION
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 March 1, 1982 :
through November 30, 1983. :

Petitioner, Hawkins Manufactured Housing, Inc., R.D. #1, Box 200, Harpursville, New York 13787, filed a 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 March 1, 1982 through November 30, 1983 (File No. 801764).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 164 Hawley Street, Binghamton, New York, on September 17, 1987 at 1:15 P.M., with all briefs to be submitted by February 11, 1988. Petitioner appeared by Philip C. Johnson, Esq. The Audit Division appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division's imposition of compensating use tax on a dealer's purchases of mobile and manufactured homes was proper.

FINDINGS OF FACT

1. Petitioner, Hawkins Manufactured Housing, Inc., is a New York corporation engaged in the retail sale of mobile homes and factory manufactured homes. At all times relevant herein, petitioner was a dealer in "mobile homes" and "factory manufactured homes" as those terms are defined in article 19-AA and article 18-B, respectively, of the Executive Law.

2. During the period at issue, petitioner purchased certain mobile homes and factory manufactured homes from the Titan Homes Division of Champion Home Builders Co., a

manufacturer of such homes. Except as discussed in Finding of Fact "6", infra, the deficiency at issue herein results from the Audit Division's assessment of use tax on petitioner's purported taxable use of the homes at its premises located in Broome County, New York.

3. Petitioner purchased and took delivery of the aforementioned homes at Titan Homes' factory located in Oneida County, New York. At the time of delivery, petitioner paid the manufacturer sales tax at the then-prevailing rate in Oneida County of four percent. Petitioner subsequently transported its purchases to its premises in Broome County. At all times relevant herein, the prevailing sales and use tax rate in Broome County was seven percent.

4. On audit, the Audit Division determined that petitioner's use of the homes in Broome County was a taxable use and assessed use tax on the purchase price of the homes. The Audit Division assessed use tax at the rate of three percent; that is, to the extent that sales tax had not already been paid on the homes.

5. Petitioner did not take issue with the Audit Division's computations in determining the amount of tax at issue herein.

6. Petitioner also made two purchases from Titan in 1982 upon which it paid no sales tax. With respect to its purchase of a \$14,671.00 home, petitioner conceded that the Audit Division's assessment of \$586.84 in sales tax due on said purchase was proper. With respect to petitioner's purchase of a \$13,710.00 home, the Audit Division assessed \$959.70 in sales tax due thereon (a 7% rate). As with the homes discussed in Findings of Fact "2" and "3", petitioner took delivery of this home in Oneida County. Petitioner conceded sales tax due of \$548.40 (a 4% rate) on this purchase. The remaining three percent of tax was assessed premised on the same assertions as set forth in Finding of Fact "4".

7. As a result of the foregoing determinations, on December 27, 1984, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1982 through November 30, 1983 assessing \$7,469.07 in tax due, plus interest.

CONCLUSIONS OF LAW

A. Section 1 of chapter 861 of the Laws of 1981 amended Tax Law § 1115(a) (which section provides for specific exemptions from sales and use taxes) by adding a new paragraph twenty-three as follows:

"(23) Mobile homes and factory manufactured homes as those terms are defined in article nineteen-AA and article eighteen-B, respectively, of the executive law. However, this exemption shall not apply to mobile homes and factory manufactured homes sold by the manufacturer thereof. The sale of a mobile home or factory manufactured home by a manufacturer thereof to a dealer shall not be deemed a sale for resale within the meaning of paragraph four of subdivision (b) of section eleven hundred one of this chapter. Provided further that for purposes of the tax imposed pursuant to section eleven hundred ten of this chapter this exemption shall not apply to mobile homes and factory manufactured homes purchased outside the state by the user thereof." (Emphasis supplied.)

This paragraph was revised, effective September 1, 1983, by Laws of 1983 (ch 986, § 7) to delete the above-quoted language.

B. Section 3 of chapter 861 of the Laws of 1981, as amended by section 8 of chapter 986 of the Laws of 1983, provided as follows:

"§ 3. This act shall take effect January first, nineteen hundred eighty-two and shall be applicable with respect to the sale or use of any mobile home or factory manufactured home sold or used on or after such date. However, dealers of mobile homes and factory manufactured homes as those terms are defined in article nineteen-AA and article eighteen-B, respectively, of the executive law shall pay the retail sales tax imposed under subdivision (a) of section eleven hundred five of the tax law and the compensating use tax required under section eleven hundred ten of the tax law on all new mobile homes and factory manufactured homes purchased from manufacturers thereof on or before December thirty-first, nineteen hundred eighty-one and sold by such dealers after December thirty-first, nineteen hundred eighty-one." (Emphasis supplied.)

C. Section 1110 of the Tax Law provides for the imposition of a compensating use tax as follows:

"Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail...."

D. By defining a dealer's purchases from a manufacturer as not being purchases for resale, the foregoing provisions had the effect of imposing sales tax liability on sales of mobile and manufactured homes at the point of the manufacturer-to-dealer sale. Additionally, Laws of 1981

(ch 861, § 3), as amended by Laws of 1983 (ch 986, § 8), by its plain language clearly contemplated the imposition of the compensating use tax, together with sales tax, upon dealers. Our analysis must therefore focus upon whether, in light of the effective dates of the foregoing provisions and subsequent enactments (to be discussed infra), petitioner's possession of the homes under the circumstances herein constituted a taxable use under Tax Law § 1110.

E. As set forth above, from January 1, 1982 through September 1, 1983, Tax Law § 1115(a)(23) stated that mobile and manufactured home sales from manufacturers to dealers were not "sales for resale". Absent the availability of the resale exclusion, such sales must be retail sales (see ___ Tax Law § 1101[b][4]; 20 NYCRR 526.6[a]), for no other of the retail sales exclusions are applicable to the circumstances presented herein. Inasmuch as petitioner's purchases were at retail and therefore subject to sales tax, it must be determined whether a taxable use occurred within Broome County. Petitioner's retention of the homes at issue at its premises constituted a "use" of the homes within the meaning of Tax Law § 1101(b)(7) (see ___ also 20 NYCRR 526.9). The Audit Division's assertion of compensating use tax on petitioner's use of the homes at issue was therefore proper (see ___ Xerox Corporation v. State Tax Commn., 71 AD2d 177).

F. During the period January 1, 1982 through August 31, 1983, Tax Law § 1110 also provided as follows:

"Notwithstanding the foregoing, for purposes of clause (A) of this section, where a user purchases a mobile home or factory manufactured home (as defined in article nineteen-AA and article eighteen-B, respectively, of the executive law) from any person other than the manufacturer thereof, the tax shall be at the rate of four percent of the consideration given or contracted to be given for such property, or for the use of such property, by the user's seller, but excluding any credit for tangible personal property accepted in part payment and intended for resale, plus the cost of transportation except where such cost is separately stated in the written contract, if any, and on the bill rendered to the user's seller. If the consideration given or contracted to be given by the user's seller cannot be ascertained after reasonable efforts to do so by the person required to pay the tax imposed by this section, then, for purposes of clause (A) of this section, the tax shall be at the rate of four percent of seventy percent of the consideration given or contracted to be given for such property, or for the use of such property, by the user, but excluding any credit for tangible personal property accepted in part payment and intended for resale, plus the cost of transportation except where such cost is separately stated in the written contract, if any, and on the bill rendered to the user." (Tax Law § 1110, as amended by L 1983, ch 986, § 4.)

G. Petitioner argues that the above-quoted "special provision" created an exemption from use tax for mobile and manufactured homes dealers. Petitioner contends that the entire purpose of the enactment of this special provision was to designate the customer as the "user" of mobile and manufactured homes and to exempt dealers from use tax. In support of its position, petitioner notes that the retail dealer is described in this special provision as the "user's seller" and further notes the rules set forth the special provision to calculate the customer's use tax liability. Petitioner further notes that any interpretation other than its own would result in a pyramiding of use tax.

H. Petitioner's contention that Tax Law § 1110, as amended by Laws of 1983 (ch 986, § 4), created, in effect, a use tax exemption for retail dealers of mobile and manufactured homes is rejected. This "special provision", as set forth above in Conclusion of Law "F", created rules for computation of use tax liability for customers of mobile and manufactured homes dealers during the period January 1, 1982 through September 1, 1983; that is, during the latter portion of the period when sales tax could be imposed at the point of manufacturer-to-dealer sale. The phrase, "[n]otwithstanding the foregoing, for purposes of clause (A) of this section", which begins this special provision, is identical to the phrase which begins the immediately preceding sentence in section 1110.¹ Both sentences set forth rules by which tax was to be computed under section 1110 for the use of "any tangible personal property purchased at retail." Neither of these two sentences provides for the imposition of use tax upon any particular property or services nor does either of the sentences provide for exemption from use tax for any particular property or services. The imposition of use tax and exemptions therefrom is provided for in the first

¹"For purposes of clause (A) of this section, the tax shall be at the rate of four percent of the consideration given or contracted to be given for such property, or for the use of such property, but excluding any credit for tangible personal property accepted in part payment and intended for resale, plus the cost of transportation except where such cost is separately stated in the written contract, if any, and on the bill rendered to the purchaser." (Tax Law § 1110)

sentence of section 1110 of the Tax Law (set forth herein at Conclusion of Law "C").

I. Inasmuch as petitioner's purchases of the homes at issue were at retail and petitioner's retention of the homes at its premises constituted a "use" of the homes (see ___ Conclusion of Law "E"), petitioner must be subject to use tax liability unless otherwise exempt. It is well settled that an exemption from taxation "must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption" (People ex rel. Savings Bank of New London v. Coleman, 135 NY 231). The so-called special provision to which petitioner points for exemption does not "plainly" give the claimed exemption. Rather, such provision provides only for exemption by "doubtful implication" and the long-standing policy of the law is not to permit establishment of exemption in such a manner (see ___ People ex rel. Mizpah Lodge v. Burke, 228 NY 245).²

J. The Audit Division's imposition of use tax upon petitioner for the period September 1, 1983 through November 30, 1983 was improper. This use tax liability was premised upon purchases of homes by petitioner from Titan during the same period. During this period, Tax Law § 1115(a)(23) (as amended by L 1983, ch 986, § 7 [eff September 1, 1983]) no longer precluded the application of the resale exclusion to petitioner's purchases from Titan. Such purchases were entitled to the resale exclusion and were therefore not "purchases at retail". Absent a retail purchase, the imposition of use tax on petitioner was improper.

K. The petition of Hawkins Manufactured Housing, Inc. is granted only to the extent indicated in Conclusion of Law "J"; the Audit Division is directed to adjust the Notice of Determination and Demand for Payment of Sales and Use Taxes Due herein in accordance

²Whether or not this conclusion could result in a pyramiding of tax by imposing use tax on both dealers and customers during the period January 1, 1982 through September 1, 1983, as petitioner contends, is doubtful, for Tax Law § 1115(a)(23), as amended Laws 1981, Ch 861, § 1, exempted in-state dealer-to-customer sales of mobile and manufactured homes from use tax. In any event, any pyramiding effects of these statutes should be limited given the subsequent changes in the Tax Law regarding mobile and manufactured homes (see ___ Laws 1983, ch 986, §§ 5, 6, 7, 9).

therewith; and, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
April 14, 1988

ADMINISTRATIVE LAW JUDGE