STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LAKE CITY MANUFACTURED HOUSING, INC., AND ARTHUR E. BUDZOWSKI AND GERALD R. GARITY, AS OFFICERS	:	DETERMINATION
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 a 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 (File No. 805999).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on October 25, 1989 at 9:15 A.M., with all briefs to be submitted by April 9, 1990. Petitioners appeared by Joseph F. Saeli, Jr., Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioners have shown that Lake City Manufactured Housing, Inc. acted as contractor with respect to the installation of certain modular homes it manufactured and sold to customers, thereby resulting in the exemption of such modular homes from taxation pursuant to Tax Law § 1115(a)(17).

FINDINGS OF FACT

On June 2, 1988, following an audit, the Division of Taxation 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 petitioner should have paid sales or use tax based upon 70% of the invoice amount. The

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

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.

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.

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 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.

CONCLUSIONS OF LAW

A. Generally, retail sales of tangible personal property are subject to sales tax (Tax Law § 1105[a]). Tax Law § 1115(a)(17) provides for an exemption from sales tax on tangible personal property sold by a contractor to a person for whom the contractor is improving real property by a capital improvement if such tangible personal property is to become an integral component part of that capital improvement. In addition, receipts from the performance of a capital improvement to real property by a contractor are not subject to tax (Tax Law § 1105[c][3][iii]; 20 NYCRR 541.1[c]).

B. Petitioner manufactured and sold factory-manufactured homes, as defined at 20 NYCRR 544.2(e) and as distinguished from mobile homes (see, 20 NYCRR 544.2[a]). From the record, it is clear that all of the manufactured homes remaining in dispute were installed (see, Finding of Fact "17") and, as a result of such installation, constituted capital improvements to real property (see, Finding of Fact "19"; Tax Law § 1101[b]). The question is whether petitioner contracted to install the manufactured homes in dispute. If petitioner contracted to install the homes, then the sales of the homes are exempt from tax under Tax Law § 1115(a)(17).

C. Contrary to petitioner's contention, the record herein simply does not establish that petitioner contracted to install the manufactured homes in dispute. The sales at issue must therefore be considered retail sales of tangible personal property, and are not exempt under Tax Law § 1115(a)(17). Accordingly, the assessments herein must be sustained.

To show that petitioner contracted to install the homes, petitioner produced certificates of capital improvement with respect to all but five of the transactions remaining in dispute. Indeed, petitioner established that, as a matter of policy, it obtained capital improvement certificates in connection with all of its production orders. These certificates listed petitioner as the contractor performing the capital improvement work. Petitioner also established that it arranged the delivery of the homes and that it contacted the installer to advise when the home would be at the site ready for installation. Petitioner also showed that W. D. Construction served as installer in each of the disputed sales.

The above-noted facts establish that petitioner sought to, and, in fact, did facilitate the installation of its homes. Such facts, however, fall short of establishing a contractual obligation on petitioner's part to install the homes. The certificates of capital improvement, while they list petitioner as contractor, are not contracts. Moreover, the weight to be accorded these documents is diminished by the fact that petitioner sought capital improvement certificates with respect to all of its sales, including those sold uninstalled. In addition, the installer billed and was paid by the dealer for its services. Petitioner was not responsible for payment of these services. Finally, there are no writings in the record between either petitioner and the installer, petitioner and the homeowner, or petitioner and the dealer to shed light on petitioner's responsibilities with respect to installation. It must be concluded, therefore, in view of the totality of the facts and circumstances herein, that petitioner has not shown that it contracted to install the homes in question.

D. The petition of Lake City Manufactured Housing, Inc. and Arthur E. Budzowski and Gerald R. Garity, as officers, is denied and the notices of determination and demands for payment of sales and use taxes due, dated June 2, 1988, as adjusted in accordance with Finding

of Fact "11", are sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE