

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition   | : |               |
| of  | : |               |
| DELTA SONIC CAR WASH<br>SYSTEMS, INC.   | : | DETERMINATION |
| for Revision of a Determination or for Refund<br>of Sales and Use Taxes under Articles 28 and 29<br>of the Tax Law for the Period March 1, 1983<br>through February 28, 1986. | : |               |

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Petitioner, Delta Sonic Car Wash Systems, Inc., 570 Delaware Avenue, Buffalo, New York 14203, 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, 1983 through February 28, 1986 (File No. 806086).

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 February 7, 1990 at 1:15 P.M., with all briefs to be submitted by April 20, 1990. Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear (Paul R. Comeau, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

ISSUES

I. Whether certain machinery and equipment was purchased by petitioner for use or consumption directly and predominantly in the production for sale of tangible personal property by manufacturing or processing and was thereby exempt from the imposition of sales and use taxes pursuant to Tax Law § 1115(a)(12).

II. Whether certain utilities purchased by petitioner qualify for the production exemption provided by Tax Law § 1115(c).

III. Whether petitioner renders a service which constitutes an exempt laundering service pursuant to Tax Law § 1105(c)(3)(ii).

## FINDINGS OF FACT

### Stipulated Facts

On February 7, 1990, the representatives of petitioner and the Division of Taxation entered into a stipulation of facts. The facts contained therein are set forth below in Findings of Fact "1" through "11".

On December 10, 1986, as a result of a field audit, the Division of Taxation issued to Delta Sonic Car Wash Systems, Inc. (hereinafter "petitioner") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period May 31, 1983 through February 28, 1986 in the amount of \$238,199.37, plus interest, for a total amount due of \$277,264.67. At a conciliation conference, the Division agreed that petitioner had made sales for resale of certain uniforms, promotional items and car accessories and (pursuant to a Conciliation Order dated July 8, 1988) thereby reduced the amount of tax due to \$235,101.41.

Petitioner agrees with the audit adjustments for residential fuel (\$697.71) and prepaid tax on gasoline inventories (\$13,275.05).

A Consent Extending Period of Limitation for Assessment of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law was executed by petitioner on May 6, 1986 which permitted assessment of tax due for the period March 1, 1983 through August 31, 1983 at any time on or before December 20, 1986.

During the period at issue, petitioner purchased certain machinery, equipment and supplies from various vendors for use in its business, but did not pay sales or use tax on these purchases.

Petitioner also purchased utilities, but did not pay tax on all of such purchases. With respect to its purchases from National Fuel Gas, petitioner did not pay \$15,139.38 in tax. With respect to its purchases from Niagara Mohawk Power Corp., petitioner presented an exempt use certificate to its supplier, and reported on its own returns tax on 15% of its purchases. With respect to its purchases from Rochester Gas and Electric Co., petitioner paid its supplier, and took a credit of 85% of the tax paid. The total tax due on the electricity was determined to be

\$63,463.50. If petitioner is successful in its claim for exemption from tax pursuant to Tax Law § 1115(a)(12), a determination of the allocation of utility purchases used for such machinery and equipment would have to be made.

As part of its business operation, petitioner purchased water and also purchased certain raw materials, consisting of concentrated chemicals, in bulk. Petitioner established that the chemical concentrates were sold to its customers and the Division excluded these purchases as purchases for resale.

Petitioner maintains facilities at several different locations in the greater Buffalo area. The overall process performed by petitioner is initiated by placing vehicles on a conveyor system, after which the vehicles are passed through various integrated and automated treatment stations where certain products, some of which are optional to the customer, are delivered to the said vehicles. The overall process lasts between one to three minutes, depending upon how quickly the vehicles are passed through the process. The customer chooses which of the various optional products he wishes to have applied to his vehicle and the selected products are delivered and applied to his vehicle during the process. Some of petitioner's products are included in its base price and are applied to every customer's vehicle. During the audit period, the base price for petitioner's process was approximately \$3.00 and a customer's selection to have all of the products applied to his vehicle increased the total cost to approximately \$5.00. The process was almost completely automated with persons employed only at the beginning to accept payment and to record the customer's purchase in the computer and at the end to assist in the drying process.

Traces of petitioner's chemical mixtures, foam and water remain on the vehicles of its customers after the completion of the process, most of which can be found in recessed or concealed areas of the vehicle and also on the undercarriage. A substantial portion of the waxes which are dispensed by petitioner's machinery and equipment remain on the vehicles' surfaces.

Petitioner did not separately offer for sale to its customers any of the chemical mixtures, foam, water or waxes which were mixed, treated or dispensed by its machinery and equipment.

None of its customers have expressed a desire to purchase petitioner's products as separate items, but rather have requested that petitioner perform the service of washing, waxing or, in some other manner, applying certain products such as whitewall cleaner, chassis bath and rust inhibitor in conjunction with the basic service.

The machinery and equipment employed by petitioner in its process can be categorized as follows:

(a) The first category of machinery and equipment used by petitioner includes those which dilute chemical concentrates to desired formulations, treat water with various chemicals, mix, pressurize, heat and purify the mixtures and those which pump and convey the mixtures to other locations for further mixing and/or conversion to foam;

(b) The second category includes the cloth machinery, hydraulic systems and attendant items which produce foam from the mixtures of various chemicals and those which mix and distribute waxes and conditioners. The cloth machinery serves to agitate the foam which results from the entrainment of air into the various liquid solutions;

(c) The third category includes primarily the blow dryers which smooth and distribute the waxes and other materials and which also serve to dry the vehicles; and

(d) The fourth category of machinery and equipment is that which initiates, regulates and controls the overall process. Included within this category are the computer, electric eye, conveyor system and other switching and regulatory devices which record the customers' purchases, regulate the flow of the materials dispensed to the vehicles, regulate the speed of the vehicles through the process and turn each machine on and off.

Petitioner purchases approximately six million gallons of water per year for each of its car wash locations. All of the water which is used in its process is chemically treated by petitioner.

#### Additional Facts

The facts found herein are essentially the same as those found by the State Tax Commission in Matter of Delta Sonic Car Wash Systems, Inc. (State Tax Commn., January 9,

1987, confirmed 142 AD2d 828, 530 NYS2d 341). The only difference between the instant matter and the earlier matter is the audit period and the specific amount of the assessment. The machinery and equipment with respect to which petitioner claimed an exemption pursuant to Tax Law § 1115(a)(12) in that case is substantially the same as the equipment at issue herein. Also, the overall process performed by petitioner for its customers in the earlier case is the same as that performed in the instant matter.

Throughout the period at issue, petitioner collected sales tax from its customers on its sales of car washing services. Petitioner properly remitted such taxes to the Division. No part of the assessment herein is based upon petitioner's sale of services to its customers.

#### SUMMARY OF PETITIONER'S CONTENTIONS<sup>1</sup>

Petitioner contends that its machinery and equipment, as set forth in Finding of Fact "10", were purchased for use directly and predominantly in the production by processing or manufacturing of various chemicals. It contends that it purchases raw materials, i.e., chemicals and water, and converts them into different products which are sold to customers and carried out by the customers on their vehicles.

If the decision of the Division of Tax Appeals herein results in a determination that petitioner's purchases of certain machinery and equipment were for use directly and predominantly in the production for sale of tangible personal property and are, therefore, exempt from the imposition of sales and use taxes under Tax Law § 1115(a)(12), petitioner concedes that its customer charges are taxable. If, however, the decision of the Division of Tax Appeals determines that petitioner's purchases do not qualify for this exemption, petitioner maintains that it performs a laundering service,

the receipts from the sale of which are exempt from sales tax pursuant to Tax Law § 1105(c)(3)(ii).

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<sup>1</sup>Petitioner's contentions were part of the stipulation herein.

### CONCLUSIONS OF LAW

A. Tax Law § 1115(a)(12) provides for an exemption from the imposition of sales and use taxes on the purchase of machinery, equipment and supplies used or consumed directly and predominantly in the production of tangible personal property for sale, by manufacturing, processing, etc. Tax Law § 1115(c) provides for a similar exemption with respect to purchases of, inter alia, fuel, gas and electricity.

B. Here, petitioner has presented an extensive argument to support its position that its purchases of machinery, equipment, supplies and utilities were exempt from tax pursuant to the aforecited exemption provisions and that language to the contrary in the holding of the Appellate Division in Matter of Delta Sonic Car Wash Systems, Inc. v. Chu (142 AD2d 828, 530 NYS2d 341) should not be followed.

In Delta Sonic the court confirmed a State Tax Commission decision which determined that certain machinery and equipment used to provide car washing services, essentially the same equipment as that at issue herein (see Finding of Fact "12"), was not eligible for exemption pursuant to Tax Law § 1115(a)(12). The underlying facts found by the Tax Commission in the earlier case did not differ in any material respect from the facts herein. In its decision, the Appellate Division found that:

"[I]t was reasonable for the Tax Commission to find that '[p]etitioner did not offer for sale to its customers any of the chemical mixtures, foam, water or waxes which were mixed, treated or dispensed by its machinery and equipment'."

The court then concluded:

"In the absence of a showing that the products produced by the machinery and equipment were sold to customers, petitioner has not established that it is entitled to an exemption under Tax Law § 1115(a)(12) (see, Matter of Shanty Hollow Corp. v. New York State Tax Commn., 111 AD2d 968, 490 NYS2d 67, lv denied 66 NY2d 603, 498 NYS2d 1023)." (530 NYS2d at 342, 343.)

C. In accordance with the principle of stare decisis, it is concluded that Matter of Delta Sonic Car Wash Systems, Inc. v. Chu (supra) is dispositive of the instant matter. The exemptions set forth in Tax Law § 1115(a)(12) and (c) are thus not applicable to the machinery, equipment, supplies and utilities at issue herein.

D. Petitioner argues that the administrative law judge herein is free to reach a different conclusion than that reached by the Appellate Division, the identity of facts in each case notwithstanding. Petitioner's argument rests upon the differing levels of review at the administrative hearing level and in an Article 78 proceeding.

Petitioner's argument is unpersuasive. The Tax Appeals Tribunal has consistently considered decisions of the appellate courts of this state as precedential.<sup>2</sup> Since the ultimate responsibility for statutory construction lies with the courts (Moran Towing and Transportation Co. v. New York State State Tax Commn., 72 NY2d 166, 531 NYS2d 885, 889), the Tribunal's use of such decisions (and the use of such a decision in the instant proceeding) is proper.

E. With respect to Issue III, no part of the assessment herein results from petitioner's sales of its car washing services to customers. Additionally, there is no evidence that a claim for refund under Tax Law § 1139(a) has been made by petitioner with respect to sales tax collected and paid on its sales of car washing services. There is, therefore, no justiciable controversy with respect to this issue. Further discussion of the substantive merits of Issue III is thus immaterial to the instant determination.

F. The petition of Delta Sonic Car Wash Systems, Inc. is in all respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated December 10, 1986, as modified by the Conciliation Order, dated July 8, 1988, is sustained.  
DATED: Troy, New York

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<sup>2</sup>The Tribunal's use of appellate court decisions as precedent are too numerous to list herein. An example is Matter of Sidney Friedman (Tax Appeals Tribunal, July 8, 1988) wherein the Tribunal found Matter of Wolfstitch v. State Tax Commn. (106 AD2d 745, 483 NYS2d 779) dispositive. Another example is Matter of O. W. Hubbell & Sons, Inc. (Tax Appeals Tribunal, March 22, 1990) wherein the Tribunal relied upon Matter of Midland Asphalt v. Chu (136 AD2d 851, 523 NYS2d 697), Matter of Southern Tier Iron Works v. Tully (66 AD2d 921, 410 NYS2d 711), and Matter of Burger King, Inc. v. State Tax Commn. (51 NY2d 614, 435 NYS2d 889).

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ADMINISTRATIVE LAW JUDGE