

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**SPRUCE LODGE, LLC** : DETERMINATION  
DTA NO. 821975

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 August 22, 2003 through November 30, 2004. :

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Petitioner, Spruce Lodge, LLC, 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 August 22, 2003 through November 30, 2004.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 2, 2008 at 11:15 A.M., with all briefs to be submitted by October 17, 2008, which date began the six-month period for the issuance of this determination. Petitioner appeared by Dragon Benware Crowley & Co., P.C. (Douglas Hoffman, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (Jennifer Murphy, Esq., of counsel, at hearing, and James Della Porta, Esq., of counsel, on brief).

***ISSUE***

Whether the Division of Taxation properly disallowed petitioner's claim for refund.

***FINDINGS OF FACT***

1. Petitioner, Spruce Lodge, LLC (Spruce Lodge), organized on February 21, 2001, has one member, Carol Hoffman. Prior to and during the period in issue, Spruce Lodge owned and operated a bed and breakfast lodge located at 31 Sentinel Road in Lake Placid, New York (the Sentinel Road, Lake Placid property).

2. On October 22, 2003, the Sentinel Road, Lake Placid property was designated as Empire Zone property within the boundaries of the Moriah / Port Henry, Essex County Empire Zone. On January 7, 2004, Spruce Lodge became eligible to access the benefits referred to in General Municipal Law § 966 in connection with the facilities located at the Sentinel Road, Lake Placid property. On September 1, 2004, Spruce Lodge received Qualified Empire Zone Enterprise (QEZE) sales tax certification, which was effective October 1, 2004.

3. Sometime in 2003, petitioner decided to expand its lodging facilities by adding new hotel units to its property. At that time, petitioner also decided to act as the contractor for the construction of those new hotel units. Petitioner ordered two modular buildings from Guildcrest Homes (Guildcrest) of Morewood, Ontario, Canada. Carol and Douglas Hoffman dealt with Guildcrest's agent, and through a visit to Guildcrest, they checked off the options they wanted. The record does not include any documents that may have been signed when Spruce Lodge ordered the modular units from Guildcrest. The Hoffmans reviewed building plans prepared by Guildcrest as manufacturing progressed. Spruce Lodge presented the building plans to the Lake Placid Village planning board for its approval. The planning board required revisions to the building plans, which petitioner conveyed to Guildcrest. Complying with all New York State building codes, Guildcrest manufactured the component modular units (boxes) to petitioner's specifications in Canada.

4. After obtaining the necessary building permit, petitioner had two foundations constructed on the Sentinel Road, Lake Placid property in September 2003. Guildcrest's tractor-trailers delivered boxes to the Sentinel Road, Lake Placid property on November 18 and 25, 2003. Each delivery consisted of eight boxes, which were the component units of one modular building. As soon as a box was inspected, a crane lifted it off the tractor-trailer and placed it on its foundation. Payment in full was due for each modular building on the date of its delivery. For both deliveries, petitioner hired the cranes (Lake City Rigging, Inc.) and the labor (Tissot Construction, Inc., and Arthur Torrance) that installed each box on its foundations. The record includes, among other things, copies of invoices issued to petitioner by Lake City Rigging, Inc., and Tissot Construction, Inc., for installation work performed on November 18, 2003 and November 25, 2003, and petitioner's checks in payment of such invoices.

5. Guildcrest's invoice (number J003867), dated November 17, 2003, billed petitioner as follows:

Custom Burlington	\$133,798.01
Revision to Contract #1	3,241.46
Revision to Contract #2	932.00
Revision to Contract #3	906.92
Revision to Contract #4	100.28
Revision to Contract #5	-64.86
Revision to Contract #6	934.83
Engineering Seals	400.00
Transportation	1,800.00
State Tax	6,100.82
(Reimbursement for Use Tax paid by Guildcrest for building material.)	
Deposit	-15,000.00
Subtotal	<u>133,149.46</u>
Total	\$133,149.46

On November 18, 2003, petitioner paid Guildcrest the sum of \$133,149.46, by check drawn on its MBT Bank checking account.

6. Guildcrest's invoice (number J003868), dated November 24, 2003, billed petitioner as follows:

Burlington	\$133,798.01
Engineering Seals	400.00
Revision to Contract #1	3,241.46
Revision to Contract #2	932.00
Revision to Contract #3	906.92
Revision to Contract #4	100.28
Revision to Contract #5	-64.86
Revision to Contract #5	934.83
Transportation	1,800.00
State Tax	6,100.82
(Reimbursement for Use Tax paid by Guildcrest for building material).	
Deposit	-14,629.89
Subtotal	<u>133,519.57</u>
Total	\$133,519.57

On November 25, 2003, petitioner paid Guildcrest the sum of \$133,519.57, by check drawn on its Champlain National Bank checking account.

7. On September 18, 2006, petitioner filed an Application for Credit or Refund of Sales or Use Tax requesting a refund of \$7,152.68. In its request, petitioner sought a refund of the New York State portion of the sales tax paid on its purchases of building material from Guildcrest because the building materials were used in new construction on Empire Zone property. Supporting documents attached to petitioner's refund claim included copies of the Guildcrest invoices dated November 17, 2003 and November 24, 2003, a copy of petitioner's QEZE sales tax certification and a copy of petitioner's Empire Zone Program certificate of eligibility.

8. The Division of Taxation (Division) denied the refund claim by letter dated February 6, 2007 for the following reason:

A contractor is required to pay sales and compensating use tax on all materials he purchases. Many contractors do not provide their customers with a statement separately stating the amount of labor, the contractor's cost of materials and sales tax included in the total contract price. If the contractor does provide their customer with such an itemized statement, the listing of sales tax paid by the contractor does not constitute a charge for sales tax to you, the customer. Since the sales tax listed on the invoices dated 11/17/2003 & 11/24/2003 from Guildcrest Homes represents the amount paid by the contractor on their purchase of materials, rather than a charge for sales tax to you, your application for refund is denied in full.

9. In order for the modular buildings to be habitable, petitioner purchased materials and supplies, and hired plumbers, electricians and laborers to perform the necessary work. By October 2004, the new hotel units were available for rental.

10. Guildcrest's comptroller indicated to Mr. Hoffman that the tax collected from petitioner was reported on Guildcrest's November 2003 New York State sales tax return. However, the manner in which Guildcrest reported the collected tax on its sales tax return is not part of the record.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

11. Petitioner maintains that it purchased tangible personal property (modular units) from Guildcrest for use in constructing commercial real property (new hotel units) located at Sentinel Road, Lake Placid, designated Empire Zone real property. Petitioner further maintains that it self-constructed the new hotel units and actually incorporated the modular units manufactured by Guildcrest onto the designated Empire Zone real property. As the end user of the building materials (the modular units), petitioner points out that it was responsible for the payment of sales and use tax due on its purchases from Guildcrest, a Canadian vendor registered for New

York State sales tax purposes. Petitioner argues that Guildcrest's failure to compute and collect the correct amount of tax due on the two transactions does not alter the fact that it paid tax to Guildcrest at the time of both deliveries. It further argues that Guildcrest reported the tax collected on its November 2003 New York State sales tax return. As the purchaser of modular units that it installed on commercial real property located in an Empire Zone, Spruce Lodge claims it is entitled to a refund of the New York State portion of the tax it paid to Guildcrest on each delivery of such modular units pursuant to Tax Law § 1119(a)(6).

12. The Division claims that petitioner is not entitled to a sales tax refund because it did not pay sales tax to the vendor on the transactions at issue. It maintains that the sales invoices list a charge for "State Tax" and state that the tax was "[r]eimbursement for use tax paid by Guildcrest for building materials." The Division further maintains that the tax amounts listed on the invoices are significantly less than the sales tax that would be due if the tangible personal property being sold were subject to sales tax. It asserts that the amounts are consistent with Guildcrest's apparent belief that its transactions with petitioner constituted capital improvement work and thus it owed tax on the cost of its materials. The Division argues that it could not have asserted sales tax due from Guildcrest under Tax Law § 1137(a)(iii) based on the itemized tax expense listed on the invoices. Because of the symmetry between sections 1137 and 1139 of the Tax Law, the Division maintains that Spruce Lodge did not pay sales tax and, therefore, is not entitled to a sales tax refund.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1101(b) provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and section eleven hundred ten, the following terms shall mean:

(1) Purchase at retail. A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision.

\* \* \*

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, 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. . . .

\* \* \*

(9) Capital improvement. (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 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. . . .

B. Tax Law § 1105(a) imposes a tax on “[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article.”

C. The regulation at 20 NYCRR 541.2(g) provides, in pertinent part, as follows:

*Capital improvement.* (1) A *capital improvement* means an addition or alteration to real property, which:

(i) substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property;

(ii) becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(iii) is intended to become a permanent installation.

\* \* \*

(2) (ii) A capital improvement does not include the sale of tangible property to a customer under contract if the contractor who sells the tangible personal property is not responsible for the affixation or installation of the tangible personal property furnished.

*Example 4:* A customer enters into an agreement with a supplier to supply all materials necessary for the framing of a home and enters into a separate and distinct agreement with a contractor for the installation of the materials purchased from the supplier. The customer is liable for the payment of tax on all of the materials purchased from the supplier as the purchase is a purchase of tangible personal property and not the purchase of a capital improvement. Upon the issuance of a capital improvement certificate by the customer to the contractor, no tax is due on the labor charge for installing the materials

D. Tax Law § 1119(a) provides, in pertinent part, that

Subject to the conditions and limitations provided for herein, a refund or credit shall be allowed for a tax paid pursuant to subdivision (a) of section eleven hundred five or section eleven hundred ten. . . (6) on the sale of tangible personal property purchased for use in constructing, expanding or rehabilitating industrial or commercial real property (other than property used or to be used exclusively by one or more registered vendors primarily engaged in the retail sale of tangible personal property) located in an area designated as an empire zone pursuant to article eighteen-B of the general municipal law, but only to the extent that such property becomes an integral component part of the real property. . . .

5 NYCRR 11.1(c) provides that “[c]ertain benefits may be available in empire zones without obtaining certification pursuant to [Part 11 Joint Certification of Business Enterprises] . . .

(3) a refund or credit of State and local sales taxes for certain purchases pursuant to sections 1119(a) and 1210 of the Tax Law.”

E. In the instant matter, Guildcrest manufactured two modular buildings to petitioner’s specifications in Canada. Guildcrest’s tractor-trailers delivered boxes to petitioner’s Sentinel Road, Lake Placid property on November 18 and 25, 2003. Each delivery consisted of eight boxes, which were the component units of one modular building. At the time of delivery of each modular building, Guildcrest required payment in full. For each transaction, Guildcrest presented to petitioner a sales invoice listing the charges and the amount due, which amount petitioner paid on the date of delivery. On each invoice, a separate charge for “State Tax” was listed, along with a notation that the tax amount stated was “[r]eimbursement for use tax paid by Guildcrest for building materials.” As the end user of the modular buildings, petitioner claims that it was responsible for the payment of the sales and use taxes due on its purchases from Guildcrest, a Canadian vendor registered for New York State sales tax purposes. Petitioner further claims that it hired and paid for the crane and labor that lifted the modular buildings off the tractor-trailers and placed the modular buildings on commercial real property located in an Empire Zone. Petitioner seeks a refund of the New York State portion of the tax it paid to Guildcrest on each delivery of the modular buildings, totaling \$7,152.68, pursuant to Tax Law § 1119(a). The Division maintains that petitioner is not entitled to a sales tax refund because it did not pay sales tax to the vendor on the transactions in issue. Rather, the Division argues that petitioner merely reimbursed Guildcrest for one of the costs incurred by Guildcrest while performing capital improvement projects for petitioner.

Statutory exemptions are strictly construed against the taxpayer, who must demonstrate that the only reasonable interpretation of the provision provides his or her entitlement to the

exemption (*Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715 [1975], *lv denied* 37 NY2d 708, 375 NYS2d 1027 [1975]; *Matter of Blue Spruce Farms v. New York State Tax Commn.*, 99 AD2d 867, 472 NYS2d 744 [1984], *affd* 64 NY2d 682, 485 NYS2d 526 [1984]).

F. It is clear from the evidence presented that the transactions at issue were retail sales of tangible personal property to petitioner, not capital improvement work performed for petitioner by Guildcrest. Work performed on real property will qualify as a capital improvement to real property if all the conditions set forth in Tax Law § 1101(b)(9)(i) are met (*see* Conclusion of Law A). Although Guildcrest manufactured the modular buildings and delivered them to the Sentinel Road, Lake Placid property on November 18 and 25, 2003, petitioner hired the cranes and the labor that installed each component unit (box) on its foundation (Finding of Fact 4). Since Guildcrest was not responsible for the installation of the tangible personal property furnished on each date, i.e., the component units (boxes) of one modular building, its transactions with petitioner were sales of tangible personal property, not capital improvement work (*see* 20 NYCRR 541.2[g][2][ii]). As such, petitioner was liable for the payment of sales tax on the modular buildings purchased from Guildcrest, the supplier (Tax Law § 1105[a]; 20 NYCRR 541.2[g][2][ii]). On each invoice, Guildcrest listed separate charges for the modular building, engineering seals, transportation and State Tax, as well as the total amount due on delivery (Findings of Fact 5, 6). It is noted that the tax amount computed by Guildcrest and listed on each invoice is less than the amount of sales tax due on each transaction. However, Guildcrest's failure to compute and charge the correct amount of tax due on each sale does not alter the fact that a separate charge for tax was stated on each invoice for such sale (*Modu Craft, Inc. v. Liberatore*, 89 AD2d 776, 453 NYS2d 488, 489 [1982]; Tax Law § 1132[a][1]; 20 NYCRR

532.1[b][1], [2]). Since the total amount due on each invoice was paid in full at the time of each delivery, petitioner has proven that it paid tax on its purchases of the modular buildings from Guildcrest (Findings of Fact 5, 6).

G. Petitioner maintains that the modular buildings, which it purchased and installed on foundations located at the Sentinel Road, Lake Placid property in November 2003, were used to construct hotel units that became an integral component of Empire Zone designated real property. Therefore, petitioner claims that it is entitled to a refund of the New York State 4.25% portion of the tax it paid to Guildcrest on its purchases of the modular buildings, i.e., \$7,125.68, pursuant to Tax Law § 1119(a)(6).

The evidence clearly establishes that the modular buildings that petitioner purchased and installed on the Sentinel Road property during the period in issue are exempt from sales tax pursuant to Tax Law § 1119(a)(6) (*see* Conclusion of Law D). The Sentinel Road, Lake Placid property, at which petitioner operated a bed and breakfast lodge, received Empire Zone designation on October 22, 2003 (Finding of Fact 2). To expand its lodging facilities by adding new hotel units to its property, petitioner purchased modular buildings from Guildcrest, which manufactured the modular buildings to petitioner's specifications in Canada. In addition, petitioner paid for the crane and labor that lifted the modular buildings off the tractor-trailers and installed them on foundations. After additional work was performed on the modular buildings, petitioner used them as hotel units available for rental beginning in or about October 2004. Accordingly, petitioner's claim for refund of \$7,125.68, the New York State 4.25% portion of the tax it paid to Guildcrest on its purchases of the modular buildings, is granted.

H. The petition of Spruce Lodge, LLC is granted. The refund claim for the period August 22, 2003 through November 30, 2004 is granted.

DATED: Troy, New York  
April 9, 2009

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE