

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

E. J. DELMONTE CORP. :

DECISION

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 June 1, 1969 :
through August 31, 1972.

Petitioner, E. J. DelMonte Corp., 909 Linden Avenue, Rochester, New York 14625, 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 June 1, 1969 through August 31, 1972 (File No. 11323).

A formal hearing was commenced before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Rochester, New York, on July 17, 1980 at 9:15 A.M. Petitioner appeared by Charles B. Kenning, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Ellen Purcell, Esq., of counsel). The hearing was continued before Julius E. Braun, Hearing Officer, at the same location on October 29, 1981 at 11:45 A.M. Petitioner appeared by Charles B. Kenning, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Thomas Sacca, Esq., of counsel). The hearing was again continued before the same hearing officer at the same location on December 9, 1982 at 9:15 A.M. Petitioner appeared by Charles B. Kenning, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Thomas Sacca, Esq., of counsel). The hearing was continued to completion before Frank W. Barrie, Hearing Officer, at the same location on September 16, 1983 at 9:00 A.M. with all briefs to be submitted by February 27,

1984. The petitioner appeared by Charles B. Kenning, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the transfer of tangible personal property in the amount of \$113,582.94 by petitioner to Delcrete Corporation on August 31, 1972 was a taxable retail sale or whether it was non-taxable as a transfer of property upon the organization of Delcrete Corporation in consideration for the issuance of its stock or, in the alternative, non-taxable as a contribution to the capital of Delcrete Corporation without the issuance of stock or other consideration.

FINDINGS OF FACT

1. On June 18, 1973, the Audit Division issued a Notice of Determination and Demand against petitioner¹ alleging additional sales and use tax due in the amount of \$23,108.03 plus penalty and interest. However, only sales tax in the amount of \$7,950.81 plus penalty and interest, which the Audit Division alleges is due on the transfer of tangible personal property by petitioner to Delcrete Corporation, is at issue for purposes of this decision.²

2. Petitioner is involved in real estate development and leasing and its president, Ernest J. DelMonte, is an officer in a number of associated corporations including Equitable Leasing Corp., Rochester Development Corp. and Delcrete Corporation (hereinafter, "Delcrete").

¹ This notice was also issued against Ernest J. DelMonte, individually and as an officer of E. J. DelMonte Corp. and the pleadings herein name both E. J. DelMonte Corp. and Ernest J. DelMonte as petitioners. However, at the hearings held herein only the petition of the corporation was called and heard.

² At the hearing held on September 16, 1983, the parties agreed that the tax due on the remaining assessment is \$8,728.97 plus interest (a reduction from \$15,157.22) and petitioner agreed to pay this amount.

3. Delcrete was incorporated as a Delaware corporation on September 23, 1971. On September 30, 1971, Delcrete issued 348,500 shares of stock: 300,000 shares to Ernest DelMonte and the remaining shares to fifteen other individuals.

4. On August 31, 1972, petitioner transferred assets including depreciated building improvements, furniture, fixtures and equipment valued at \$133,293.97, of which \$113,582.94 was attributable to tangible personal property, to Delcrete. The property transferred represented production assets which enabled Delcrete to begin the manufacture of pre-cast concrete modules used for hotel and nursing home rooms. On the date of transfer, petitioner received 300,000 shares of Delcrete stock. William Gibbons, petitioner's vice president and Delcrete's president, testified that petitioner paid a penny for each of the Delcrete shares issued to it on August 31, 1972 or a total of \$3,000³. It is noted that, the "Excess Paid-In Capital" general ledger account also shows on August 31, 1972 the posting of a credit in the amount of \$113,582.94 which is equal to the value of the assets transferred by petitioner. In addition, the "Excess Paid-In Capital" account shows a credit balance as of August 31, 1972 of \$592,513.61 which indicates that the 663,500 shares of petitioner's one cent par value stock outstanding were issued for a price in excess of par.

5. On January 30, 1973, Delcrete filed an application dated November 3, 1972 with the Secretary of State of New York for authority to conduct business in New York under Business Corporation Law §1304. Petitioner was authorized to conduct business in New York upon such filing.

³ Delcrete's ledger account for capital stock, Exhibit 5 herein, shows a posting thereto on August 31, 1972 of \$3,000.00 (which would account for the issuance to petitioner on that date of 300,000 shares of one cent par value stock). The ledger account further shows a credit balance, as of August 31, 1972, of \$6,635.00 which reconciles with petitioner's stock register, Exhibit 3 herein, which shows that as of August 31, 1982, petitioner had 663,500 shares of penny par value stock outstanding.

CONCLUSIONS OF LAW

A. That Tax Law §1101(b)(4)(iii)(D) provides that the term retail sale does not include:

"The transfer of property to a corporation upon its organization in consideration for the issuance of its stock."
[L. 1982, c. 454, §3, eff. Sept. 1, 1982, redesignated former subpar. (ii) as subpar. (iii).]

B. That petitioner did not transfer the tangible personal property (which the Audit Division alleges is subject to sales tax) to Delcrete upon Delcrete's organization. Rather, Delcrete came into existence on September 23, 1971 while the transfer at issue occurred eleven months later on August 31, 1972.

Furthermore, 20 NYCRR 526.6(d)(5)⁴ provides, in part, as follows:

"Transfers of property to a corporation upon its organization. (i) The transfer of property to a corporation upon its organization, in consideration for issuance of its stock, is not a retail sale.

(ii) Corporate existence is deemed to begin upon the filing of the certificate of incorporation with the Secretary of State. Only transfers made at the time of the commencement of the corporate business, or within a reasonable time thereafter, while the corporation is still in the process of organizing its business, are eligible for the exclusion.

(iii) Transfers made to a dormant corporation, which is being activated, are not eligible for the exclusion."

Therefore, the transfer of property at issue was not upon the organization of Delecrete and the transaction at issue herein is not excluded from the definition of a "retail sale" pursuant to Tax Law §1101(b)(4)(iii)(D). See Matter of Seymour Morris d/b/a Sunny Vending Co., State Tax Commission, February 4, 1983, confirmed ___ A.D.2d ___ (Supreme Court, Appellate Division, Third Judicial Department, April 26, 1984).

⁴ Although the regulations cited in Conclusions of Law "B", supra, and "C", infra, became effective September 1, 1976 (after the period at issue), they reflect prior audit policy.

C. That, in the alternative, petitioner argued that its transfer of property to Delcrete was not a retail sale because it was a contribution to the capital of Delcrete Corporation without the issuance of stock or consideration pursuant to 20 NYCRR 526.6(d)(8)(ii) which provides as follows:

"The transfer of property to a corporation, as a contribution to capital, at a time other than its organization, without the issuance of stock or other consideration, is not a retail sale".

D. That both the issuance of the 300,000 shares of Delcrete Capital stock to petitioner and the transfer of production assets including tangible personal property valued at \$113,582.94 occurred on August 31, 1972. It is reasonable to conclude that the issuance of this large block of capital stock was in consideration for the transfer of the production assets. We note that even if petitioner paid the nominal one cent per share par value, such minimal amount was not the sole consideration for the issuance of the stock. See 18 Am Jur 2d, Corporations §256 where it is noted that par value shares when issued should be issued for at least the par value thereof. They may, of course, be issued for an amount greater than par value. Furthermore, if petitioner had transferred the assets to Delcrete without the issuance of stock, it would not have posted a credit for the assets transferred to a general ledger account entitled "Excess Paid-In Capital".


E. That, in conclusion, the Audit Division properly imposed sales tax on the transfer of tangible personal property in the amount of \$113,582.94 by petitioner to Delcrete because such transfer was properly viewed as a retail sale under Tax Law §1101(b)(5) which defines sale, in part as a "transfer of title or possession or both... by any means whatsoever for a consideration."

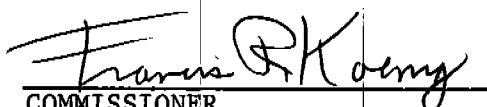
F. That the petition of E. J. DelMonte Corporation as it pertains to the issue addressed herein is denied .

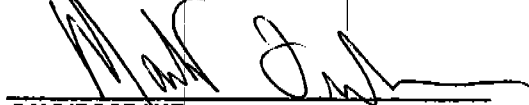
DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 1984


PRESIDENT


COMMISSIONER


COMMISSIONER