

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DELCRETE CORPORATION	:	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, 1972	:	
through August 31, 1975.	:	

Petitioner, Delcrete Corporation, 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, 1972 through August 31, 1975 (File No. 16353).

A hearing was commenced before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on July 17, 1980 at 10:45 A.M., continued before Julius E. Braun, Hearing Officer, at the same offices on October 29, 1981 at 12:00 Noon, and continued to conclusion before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on April 2, 1985 at 10:00 A.M., with all briefs to be submitted by May 2, 1985. Petitioner appeared by Kaufman, Kenning, Tyle & D'Amada (Charles B. Kenning, Esq., of counsel) at the hearings on July 17, 1980 and October 29, 1981, and by Goldstein, Goldman, Kessler & Underberg (Miles P. Zatkowsky, Esq., of counsel) at the hearing on April 2, 1985. The Audit Division appeared by Ralph J. Vecchio, Esq. (Ellen Purcell, Esq., of counsel) at the hearing on July 17, 1980, by Ralph J. Vecchio, Esq. (Thomas Sacca, Esq., of counsel) at the hearing on October 29, 1981, and

by John P. Dugan, Esq. (James Della Porta, Esq., of counsel) at the hearing on April 2, 1985.

ISSUES

- I. Whether sales tax was paid on the installation of certain improvements made by petitioner on leased land or, in the alternative, whether the improvements constituted capital improvements to real property and thus no tax was due thereon.
- II. Whether the amount of tax assessed in a Notice of Determination and Demand for Payment of Sales and Use Taxes Due may be reduced by the amount of a refund concededly due petitioner.

FINDINGS OF FACT

1. On June 17, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Delcrete Corporation ("Delcrete") in the amount of \$3,074.72, plus penalty and interest of \$1,844.54, for a total amount due of \$4,919.26.¹⁻² The assessment was premised on the Audit Division's conclusion that sales tax was due upon the amounts paid by petitioner for certain improvements to real property.

2. During the period in issue, E. J. Delmonte Corporation ("Delmonte") was an investment builder. That is, Delmonte would construct individual and

1 This notice was also issued to Ernest J. DelMonte and William R. Gibbons as officers of Delcrete and the pleadings herein name Delcrete, Ernest J. DelMonte and William R. Gibbons as petitioners. However, at the hearings held herein, only the petition of the corporation was called and heard.

2 On September 18, 1975, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Delcrete and to Ernest J. DelMonte and William R. Gibbons, individually and as officers, assessing tax of \$7,950.81, plus penalty and interest. This assessment has been paid and, therefore, no issues remain with respect thereto.

commercial buildings for lease to its tenants. It was Delmonte's practice to insist that a tenant's leasehold improvements be abandoned. A tenant would be permitted to remove fixtures as long as it did not substantially damage the real property.

3. Delcrete was incorporated in the State of Delaware on September 23, 1971 and commenced doing business in New York State on or about April 17, 1972. It was engaged in building concrete modules which were used in the erection of motels, apartments and hospitals.

4. On or about March 31, 1969, Delmonte purchased a parcel of land from Penn Central Railroad Company ("Penn Central"). Prior to this acquisition, Penn Central used the land to repair boxcars and freight cars. Consequently, the land was covered with railroad tracks and sidings. Upon acquisition of the land, Delmonte had the tracks and sidings removed because they were in disrepair.

5. On October 11, 1972, Delcrete and Delmonte entered into a lease whereby Delcrete agreed to rent manufacturing facilities on a ten-acre site located on the parcel purchased by Delcrete from Penn Central. The lease provided, in pertinent part:

"The lease is going to be an net, net (sic) basis and will include a currency devaluation clause and the applicable increases from the cost of living index from the third (3) year forward, but based on the cost of living index in effect as of March 31, 1972 the lessee is responsible for all direct or indirect cost involved in the maintenance and operation of the facilities included but not limited to taxes, maintenance, insurance, special assessments, utilities, repair or replacement.

At expiration of the original lease term, the lessee shall have the option to renew the lease for a period of five (5) years under the same terms and conditions of the original lease. The lessee is required to notify the lessor as to the election to renew six (6) months prior to the expiration of the original lease term. If exercised, such renewal shall run from March 1, 1977 to February 28, 1982."

6. On or about November, 1973, petitioner paid Reinagel Brothers, Inc. \$15,294.00 for railroad ties and \$2,325.00 for the labor charge of having the railroad ties installed. The invoice from Reinagel Brothers, Inc., which listed both items, stated that it was to repair side track. The invoice further stated that the \$15,294.00 included sales tax. The invoice was silent as to whether sales tax was included on the installation charge.

7. Contrary to the invoice description, Delcrete had new railroad siding installed. The railroad siding was designed and installed to connect with a switch off the main lines of Penn Central so that Delcrete could ship concrete room modules by railroad for delivery to Bloomington, Minnesota. The new railroad siding was also used by Penn Central to test the adequacy of Penn Central's arrangements to transport the modules. Lastly, Delcrete anticipated that the railroad siding would be utilized to fulfill new contracts. However, in contrast to Delcrete's expectations, all other shipments of modules were made by tractor-trailer.

8. It was contemplated by the parties to the lease that the railroad siding would remain at the end of Delcrete's tenancy. If the railroad siding was to be removed, the rails and ties would have some scrap value.

9. On March 1, 1974 and on April 30, 1974, Delcrete drafted checks to "Richard Wilcox" for the installation of a moveable wall. At the hearing, the Audit Division acknowledged that sales tax was paid on these items.

10. On July 2, 1973, petitioner paid Empire Fence \$7,483.57 for fence, gates, parts, labor and installation of a fence on the land which Delcrete leased from Delmonte. On October 8, 1973, petitioner paid Empire Fence an additional \$404.00 for the installation of a fence on land it leased from Delcrete. The invoices from Empire Fence did not mention sales tax.

11. Delcrete erected the fence, which was made of chain link and was approximately eight feet high, in order to delineate the property for its various functions of shipping, finishing and storage. In addition, the fence was constructed to protect the area from vandals. The fence was designed to meet petitioner's specific requirements.

12. The line posts of the fence were embedded in concrete and the cost of removing the fence would exceed any salvage value.

13. The fence was constructed with the permission of the landlord. It was understood that the fence would remain at the termination of the lease.

14. Petitioner requested Empire Fence to provide an invoice showing that sales tax was paid. However, Empire Fence did not comply with this request.

15. The Audit Division acknowledged at the hearing that petitioner is entitled to a refund of \$4,182.33 as a result of examining, among other things, module cost charts and records, module material purchase invoices, the construction plant and model modules.

CONCLUSIONS OF LAW

A. That since the sales tax was not separately stated on the sales invoices, petitioner has not established that sales tax was paid on either the purchase of the railroad siding or track (Tax Law §§1132(a); 1135).

B. That the periods at issue are prior to the enactment of Tax Law §1101(b)(9) and the promulgation of 20 NYCRR 527.7(a)(3). Accordingly, the pertinent criteria to be considered in determining whether improvements constituted capital improvements include "...the permanency of the affixation of the improvements to the related realty, whether the improvements can be readily removed without damage to them or the realty, and whether the improvements were intended as permanent installations (citations omitted)." (Matter of Flah's of Syracuse, Inc. v. Tully, 89 A.D.2d 729,730).


C. That petitioner has established that the improvements at issue constituted capital improvements. The railroad siding and fence were permanently affixed to the realty. Further, the railroad siding and fence were so affixed to the real property that their removal would cause them serious damage. Lastly, uncontradicted testimony established that Delmonte and Delcrete intended the railroad siding and fence to become permanent installations. Accordingly, the Audit Division improperly assessed tax upon the amounts expended for the railroad siding and fence.

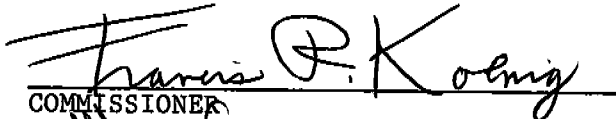
D. That the petition of Delcrete Corporation is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, issued June 17, 1976, is cancelled; that petitioner is entitled to a refund of \$4,182.33 in accordance with Finding of Fact "15".

DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER