

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
CONAIR, INC. : 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 December 1, 1976 :
through November 30, 1979.

Petitioner, Conair, Inc., Conair Building, Franklin, Pennsylvania 16323, 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 December 1, 1976 through November 30, 1979 (File No. 30405).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on April 24, 1984 at 9:15 A.M., with all briefs to be submitted by June 24, 1984. Petitioner appeared by E. Wallace Breisch, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether a "spiral silo" is exempt from sales and use taxes under section 1115(a)(12) of the Tax Law.

II. Whether the installation of a "spiral silo" constituted a capital improvement to real property.

FINDINGS OF FACT

1. Petitioner, Conair, Inc. was engaged in the manufacture, sale and installation of bulk storage silos.¹ The silos are part of material flow

¹ The term "silo" is a historical term applied to the tanks in issue without regard to the fact that the tanks are not storage silos as used in a farming operation.

systems used by manufacturers of plastic products. Conair manufactures two types of silos. The first type, referred to as a "spiral silo", is manufactured at Conair's plant in Franklin, Pennsylvania in a standard size of 11' 6" diameter with heights to 60' and shipped ready to erect at the customer's site. Spiral silos are also available in diameters of 15' or larger which are formed at the customer's site rather than in Conair's plant. The second type of silo is "steel welded" and is factory manufactured in 10' and 12' diameters.

2. An audit was conducted of petitioner's books and records for the period December 1, 1976 through November 30, 1979 and disclosed additional sales and use taxes due of \$16,886.09. Petitioner has agreed to a liability of \$8,617.89. The unresolved portion of the audit (\$8,268.20) represents use tax assessed on the cost of materials used to manufacture five (5) standard 11'6" spiral silos which were sold and erected in New York State. The five silos in dispute are the following:

<u>Period</u>	<u>Customer</u>	<u>Taxable Purchases</u>	<u>Tax Due</u>
August 31, 1977	Fisher Body	\$ 8,406.00	\$ 588.42
May 30, 1978	Sunnydale Farm	5,944.00	475.52
November 30, 1978	Marpak Industries	10,868.00	760.76
May 31, 1979	Fisher Body	86,664.00	6,066.48
November 30, 1979	Hilford Chemical	5,386.00	377.02

The Audit Division took the position that the above installations of "spiral silos" constituted capital improvements to real property and therefore the materials incorporated therein were subject to use tax. Alternatively, the Division argued that the silos, although used in the production of tangible personal property, do not have the characteristics of machinery or equipment before or after installation and accordingly do not qualify for the exemption provided in section 1115(a)(12) of the Tax Law.

On the other hand, petitioner argued that the silos are not affixed to the realty in such a manner as to constitute a capital improvement and that the silos are exempt machinery and equipment under section 1115(a)(12) of the Tax Law.

3. Each spiral silo is secured to sixteen anchor bolts extending upwardly from a supporting concrete pad which is to be supplied by the customer to petitioner's specifications. A crane is used to place the silo on the pad. The silo houses a vacuum pump at the bottom and a vacuum hopper is mounted on the top of the silo. Both supply the power to transfer plastic pellets or powders from a railcar to the silo and into plastic molding machines. The silo is connected to the railcar by a flexible conveying line and to the molding machines by metal piping. The silo provides the surge capacity necessary to continue production while changing railcars and it also acts as a central distribution point for raw materials. The silos in issue are part of a material conveying system for the customer's plastics manufacturing facility. The silos were not sold as items separate and apart from a material flow system. The installation of the silo was the only part of the system considered taxable by the Audit Division.

4. Silos similar to those at issue herein have been removed from the original purchasers' locations and reset at other locations.

5. On April 1, 1982, petitioner and the Audit Division entered into a stipulation of facts that has been incorporated into the decision.

CONCLUSIONS OF LAW

A. That section 1115(a)(12) of the Tax Law provides an exemption from sales and use taxes for "(m)achinery or equipment for use or consumption

directly and predominantly in the production of tangible personal property... for sale, by manufacturing, processing...".

Production includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last steps of production where the product is finished and packaged for sale [20 NYCRR 528.13(b)(1)(ii)].

The term "equipment" as used in section 1115(a)(12) of the Tax Law was held that it means having an identifiable character as equipment at the time of purchase at retail which is adapted by its design to perform in conjunction with machinery or otherwise, have some particular function in a stage of the manufacturing process (Slattery Associates, Inc. v. Tully, 54 NY 2d 711).

B. That a "spiral silo" which is manufactured at petitioner's factory and shipped as a unit to be erected as such constituted equipment used directly and predominantly in production in accordance with the meaning and intent of section 1115(a)(12) of the Tax Law and therefore is exempt from the imposition of sales and use taxes.

The exemption under section 1115(a)(12) is applicable to this type of spiral silo whether it retains its identity as tangible personal property after installation or whether it is permanently affixed so as to constitute a capital improvement. Therefore, issue II is moot.

C. That the petition of Conair, Inc. is granted to the extent indicated in Conclusion of Law "B"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due

issued March 20, 1980 by reducing the additional taxes due to \$8,617.89; and that, in all other respects, the petition is denied.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985

Rodwich Aulan
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER