

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
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| of | : | |
| | : | |
| WINKRETE PRE-CAST 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 December 1, 1976 | : | |
| through May 31, 1980. | : | |

Petitioner, Winkrete Pre-Cast Corp., 435 Place Trans Canada, Longueuil, Quebec J4G 1P4, 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 May 31, 1980 (File No. 32090).

A formal hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, State Office Campus, Building 9, Albany, New York, on June 12, 1984 at 1:00 P.M., with all briefs to be submitted by August 27, 1984. Petitioner appeared by Kenneth J. Bobrycki, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the petitioner, Winkrete Pre-Cast Corp., is liable for tax on materials used in the manufacture of precast insulated concrete panels which were later installed in a brewery.

II. Whether the petitioner is liable for sales tax on sales of pre-stressed concrete panels to The Pyramid Companies.

III. Whether the petitioner made taxable sales of concrete products to the West Genesee School District Booster Club.

IV. Whether reasonable cause existed for the failure of petitioner to file sales and use tax returns for the periods ended August 31, 1979, November 30, 1979 and February 29, 1980 so as to warrant cancellation of penalty and that portion of interest above the minimum statutory rate [Tax Law §1145(a)(1)(ii)].

FINDINGS OF FACT

1. On October 3, 1980, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due under Articles 28 and 29 of the Tax Law against the petitioner, Winkrete Pre-Cast Corp. ("Winkrete"), for taxes due of \$52,567.36, plus penalty of \$3,393.16 and interest of \$8,576.10, for a total amount due of \$64,536.62 for the period December 1, 1976 through May 31, 1980.

2. During the period at issue, the petitioner was both a contractor and manufacturer of precast concrete paneling, both spiral and decorative. For purposes of the audit period December 1, 1976 through February 28, 1979, the petitioner was treated as a contractor, as it installed the concrete paneling in capital improvement contracts. During the remainder of the audit period, March 1, 1979 through May 31, 1980, 78 percent of petitioner's sales of paneling were "furnish only" contracts without installation; therefore, the petitioner was treated as a manufacturer.

3. On audit, the examiner for the Audit Division reviewed purchase invoices and sales invoices, including contract billings, for the entire audit period. The examiner determined that the petitioner owed additional sales and use taxes, after allowing for credit for tax erroneously paid on utilities and miscellaneous purchases, of \$65,940.09. The petitioner agreed to and paid additional sales and use taxes of \$13,372.73 plus penalty and interest. The

petitioner disagreed with the additional sales and use taxes determined due as follows:

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|---|---------------|
| Denial of Credit - Schlitz job | \$18,469.27 |
| Sales tax due on sales to Pyramid Corporations | 33,645.05 |
| Sales tax due on sales to West Genesee School District Booster Club | <u>453.04</u> |
| Total Disagreed | \$52,567.36 |

The petitioner also disagreed with the penalty and interest imposed on the above Notice for its failure to file sales and use tax returns for the periods ended August 31, 1979, November 30, 1979 and February 29, 1980.

At the hearing, the petitioner alleged that the assessment erroneously asserted tax due on sales made by the petitioner to the Unistress Corporation. However, the substance of these transactions was explained to the satisfaction of the examiner prior to completion of the audit and said sales were not included in the Notice.

4. On or about July 13, 1973, the petitioner executed a contract with J. A. Jones Construction Company as agent for the Jos. Schlitz Brewing Company ("Schlitz") for "(f)urnishing all labor, tools, equipment, materials and supplies, and do all things necessary to construct and complete 'Architectural Precast Concrete for Cellar Buildings 10, 11, 12 and 13'" at the Schlitz brewery in Radisson, New York.

The production process for the manufacture of fermented malt beverages involves brewing, fermenting, filtering, storage (aging) and packaging. After the brewing process has been completed, the beer in process is moved into the cellars area, which is one large structure with required partitions within which refrigerated temperature controls must be maintained at all times during

the production process. In the Schlitz brewery in Radisson, New York, the areas involved are designated as follows:

| <u>Area No.</u> | <u>Designation</u> | <u>Controlled Temperature Requirement</u> |
|---------------------|----------------------------|---|
| 13 | Fermenting Cellar | 60° |
| 12 | Filter Cellar | 45° |
| 11 | Ruh (aging) Storage Cellar | 33° |
| 10 | Government Cellar | 33° |

While beer in process is in the cellars area, it is held in large tanks and the rigid temperature controls are required to prevent spoilage of the product. The entire cellars area is similar to a large refrigerator.

The precast insulated concrete panels surround the entire cellars area, including the walls and ceilings. The panels, which are made of concrete, special insulation and reinforcing bar, are 10'x8'x6". The panels were totally manufactured at petitioner's plant, delivered to the job site and "hung" on a lattice structure. The panels were not transformed or altered in any way at the job site, and were a finished product at delivery.

The petitioner paid sales tax on the materials used to manufacture the panels and subsequently took a credit for said tax on its sales and use tax return for the quarter ended May 31, 1977. This credit was denied by the examiner.

In connection with the contract, the petitioner received from Schlitz a Direct Payment Permit, an Exempt Use Certificate, and a Certificate of Capital Improvement.

5. During the period at issue, the petitioner contracted with owners of various suburban shopping malls for the manufacture of pre-stressed concrete panels. The fabrication was done pursuant to specifications provided by the owner/erector, The Pyramid Companies. The petitioner did not perform any

construction work for or receive exemption certificates from The Pyramid Companies. The petitioner did not collect sales tax on these sales.

On April 30, 1980, Winkrete invoiced The Pyramid Companies for the taxes due plus accumulated penalty and interest. By letter dated July 23, 1980, The Pyramid Companies, through their attorney, Charles J. Engel, Jr., asserted that the transactions were not taxable and further refused to pay the tax.

6. The petitioner received two handwritten purchase orders for concrete products on paper bearing the heading "Board of Education West Genesee Central Schools". The purchase orders indicated that the petitioner bill and mail invoice to: "West Genesee Boosters Club, c/o T. N. Regan, Treas., 118 Thornton Ctr. N., Camillus, NY 13031." The Audit Division's examiner, Fred Koslowski, testified that the address on the purchase order was the home address of the club, that the order was signed by the club president, and that "(u)pon investigation with the personnel of Winkrete, it was determined that the check was paid by the booster club."

7. Winkrete did not file sales and use tax returns for the periods ended August 31, 1979, November 30, 1979 and February 29, 1980. In addition, the petitioner's returns for the periods ended May 31, 1977, August 31, 1977, November 30, 1977 and February 28, 1978 were late filed.

8. On or about January 1, 1979, ownership of Winkrete passed by way of a stock transfer from Dwight Winkelman to Prefac Concrete Co. Ltd. ("Prefac"), a Canadian corporation. The acquisition was made to facilitate Prefac's construction of the Carrier Dome in Syracuse, New York, which began in May of 1979 and was not completed until March of 1980. In view of the Carrier project, the petitioner requested that the field audit, which was scheduled to begin in the

fall of 1979, be postponed until the spring of 1980. As a result, the audit was conducted between the months of April and August of 1980.

9. The acquisition agreement between Prefac and Dwight Winkelman contained warranties and promises of indemnification with respect to any sales taxes arising prior to January 1, 1979. Winkrete attempted to collect the money from Mr. Winkelman by retaining the law firm of Bond, Schoeneck & King. On July 30, 1980, the law firm notified Winkrete of a conflict of interest which it felt was manageable. Apparently, the law firm had at that time or in the past represented The Pyramid Companies as well as Mr. Winkelman.

On August 3, 1981, the law firm resigned from representing Winkrete because of its conflict and representation of Dwight Winkelman. In August of 1982, Mr. Winkelman died, thus aborting any efforts to settle with him on his warranties.

10. Petitioner argues that the pre-cast insulated concrete panels installed in the Schlitz brewery are an integral part of the equipment required in the production of beer and are therefore exempt from tax pursuant to Tax Law §1115(a)(12). Petitioner argued that the panels were identifiable as equipment at the time of delivery to the job site.

11. Petitioner contends that the sales of pre-stressed concrete panels to The Pyramid Companies are not taxable pursuant to Tax Law §1115(a)(17). Petitioner argues that the intent of the statute is to exempt materials sold to an owner who in turn does the installation without the intervention of a general contractor. Petitioner further contends that the very act of fabricating specified tangible personal property, irrespective of its installation, is an addition or capital improvement to real property.

12. With regard to the booster club sales, the petitioner argued that the invoice it received was an official purchase order of the West Genesee School District and that the contract was with the School District, a governmental entity, and therefore not subject to tax.

The petitioner offered no evidence to show that it invoiced or billed the West Genesee School District or that payment was made from the funds of such School District.

13. Petitioner argued that the sales and use tax returns at issue were not filed because an agreement had been reached between it and the examiner that the filing need not be made until the completion of the audit. Petitioner offered no substantial evidence to support this argument.

Petitioner further argued that its failure to pay the tax was due to the affirmative misrepresentations of The Pyramid Companies.

Additionally, petitioner argued that the conflict of interest of Bond, Schoeneck & King postponed petitioner's ability to enforce the warranties made by Mr. Winkelman and, consequently, its ability to pay the tax.

CONCLUSIONS OF LAW

A. That section 1101(b)(4) of the Tax Law defines a retail sale, in pertinent part, as a "sale of any tangible personal property to a contractor... for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving...real property, property or land, as the terms real property, property or land are defined in the real property tax law...".

B. That section 1115(a)(12) of the Tax Law provides for an exemption from sales and use tax for receipts from the sale of "[m]achinery or equipment for

use or consumption directly and predominantly in the production of tangible personal property...for sale...by manufacturing...".

C. That the difference between tangible personal property used for a capital improvement and machinery or equipment used in production is that the term "equipment" as used in section 1115(a)(12) "means 'only such personalty as has an identifiable character as equipment at the time of purchase at retail... which is adapted by its design to perform either in conjunction with machinery or otherwise, some particular function in a stage of the generating process'" (emphasis added) (citation omitted) (Slattery Associates, Inc. v. Tully, 79 A.D.2d 761 aff'd 54 N.Y.2d 711).

D. That the concrete, special insulation and reinforcing bar used by the petitioner to manufacture the panels which were later installed in the Schlitz brewery "clearly did not possess the requisite 'identifiable character' as machinery or equipment at the time of their purchase at retail to qualify for the exemption" (Slattery Associates, Inc., supra). Therefore, the Audit Division properly denied petitioner's claim for credit for taxes paid on these materials.

E. That section 1132(c) of the Tax Law provides, in pertinent part, that "(u)nless (1) a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe...to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax...the sale shall be deemed a taxable sale at retail...".

F. That since the petitioner did not receive an exemption certificate covering the sales made to The Pyramid Companies, said sales are subject to tax.

G. That 20 NYCRR 529.1¹ provides that "(a)ny organization claiming exemption from tax must furnish its vendors with documentation substantiating its right to the exemption claimed. In addition, the billing must be made directly to the governmental entity...and paid for from funds of such...governmental entity. Any transaction which is not supported by proper documentation is taxable."

H. That the petitioner failed to sustain the burden of proof required to show that the concrete products were billed to and paid for with funds of the West Genesee School District.

I. That section 1145(a)(1) of the Tax Law, in effect during the audit period, provides for imposition of a penalty for failure to timely file a return or pay over sales tax unless such delay was excusable. Petitioner offered no reasonable explanation for failing to file the returns at issue. The returns were already late when the audit was started (Finding of Fact "8", supra). In addition, the petitioner's prior filing record indicates negligence in filing returns (Finding of Fact "7", supra).

1 Although not in effect during the audit period, said regulation expressed this Commission's policy during that period.

J. That the petition of Winkrete Pre-Cast Corporation is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 3, 1980 is sustained.

DATED: Albany, New York

MAR 14 1985

STATE TAX COMMISSION

Roderick W. Clun
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Dineen
COMMISSIONER