

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ELMHURST RUBBER CO., 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 September 1, 1977 :
through May 31, 1980.

Petitioner, Elmhurst Rubber Co., Inc., 79-48 Albion Avenue, Elmhurst, New York 11373, 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 September 1, 1977 through May 31, 1980 (File No. 35152).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 19, 1983 at 9:15 A.M. Petitioner appeared by Alvin M. Fischbein, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether molds and dies purchased by petitioner were for resale to its customers within the meaning and intent of section 1101(b)(4)(i) of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Elmhurst Rubber Co., Inc. was engaged in the manufacture of specialized rubber products.
2. On April 15, 1981, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period September 1, 1977 through May 31,

1980 for taxes due of \$3,424.72, plus interest of \$606.43, for a total of \$4,031.15.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period at issue to June 20, 1981.

4. The audit of petitioner's books and records disclosed a total use tax liability of \$6,198.13. Petitioner agreed to taxes due of \$2,773.41. The balance, \$3,424.72, represented the tax due on petitioner's purchases of molds and dies. The purchases were held subject to the New York City local tax. The Audit Division took the position that such molds and dies were used by petitioner in its manufacturing process and not resold to customers. The Audit Division did not assess tax on the purchases where the purchase order specified that title to the molds and dies was transferred to the customer.

The above deficiency was based on an examination of purchase orders for the period March 1, 1978 through May 31, 1978. The error factor found for the test period of 13.74 percent was applied to total purchases of molds and dies for the audit period to determine taxable purchases of \$85,618.00. Petitioner agreed to the audit method used by the Audit Division.

5. At the hearing, petitioner conceded that purchases amounting to \$1,180.00 were taxable; however, it argued that the remaining molds and dies were resold to customers and title to such molds and dies passed to the customer. In support of its argument, petitioner submitted invoices showing a charge to the customer for the mold or die.

6. The molds and dies in dispute were designed and purchased by petitioner to its customers' specifications. Petitioner used the mold or die to produce samples of the product. The samples were sent to the customer for approval along with an invoice charging the customer for the samples and the mold or

die. The molds or dies were retained by petitioner to manufacture the required quantity of the product after acceptance of the samples. The molds or dies became property of the customer upon payment therefor and the customer is entitled to possession on request.

CONCLUSIONS OF LAW

A. That the molds and dies were used by petitioner in its manufacturing process prior to any transfer of title or possession thereto and that such use precluded petitioner from purchasing said items for resale within the meaning and intent of section 1101(b)(4)(i) of the Tax Law (Matter of Baronet Lithograph Co., State Tax Commission, August 25, 1978; Matter of Harrison Services, Inc., State Tax Commission, January 16, 1981).

That the primary purpose of the molds and dies was not of reselling them to its customers but rather for petitioner's use as indicated above and any resale thereof was purely incidental (Matter of Laux Advertising, Inc. v. State Tax Commission, 67 A.D.2d 1066; Matter of Cut-Outs, Inc. v. State Tax Commission, 85 A.D.2d 838).

B. That the petition of Elmhurst Rubber Co., Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 15, 1981 is sustained.

DATED: Albany, New York

MAR 21 1984

STATE TAX COMMISSION

Rodolph W. Allen
PRESIDENT

Francis R. K. O'Leary
COMMISSIONER

John J. O'Leary
COMMISSIONER