

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
D.J.H. CONSTRUCTION, 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 June 1, 1976 :
through May 31, 1980.

Petitioner, D.J.H. Construction, Inc., c/o Henry F. Secord, President, 1750 Union Road, West Seneca, New York 14224, 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, 1976 through May 31, 1980 (File Nos. 35702 and 45849).

A hearing was commenced before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, W. A. Harriman State Office Building Campus, Albany, New York on December 6, 1983 at 2:00 P.M. and concluded on October 17, 1985 with all briefs to be submitted by December 30, 1985. Petitioner appeared by Ian R. Arcus, Esq. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the notices of determination and demands for payment of sales and use taxes due were barred by the statute of limitations.

II. Whether petitioner's purchase of machinery and equipment for use in manufacturing concrete pipe was exempt from sales and use taxes by section 1115(a)(12) of the Tax Law.

III. Whether equipment and supplies purchased by petitioner for use in the performance of capital improvement contracts with exempt organizations are exempt from sales and use taxes.

IV. Whether sales tax was paid on the purchase of a vehicle.

FINDINGS OF FACT

1. The Audit Division, on the basis of a field audit, issued notices of determination and demands for payment of sales and use taxes due to petitioner, D.J.H. Construction, Inc., as follows:

<u>Date of Notice</u>	<u>Periods Ending</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
9/15/80	8/31/76-8/31/77	\$57,698.36	\$17,165.26	\$ 74,863.62
6/18/81	11/30/77-2/28/80	29,708.09	5,997.33	35,705.42
11/3/82	11/30/78-2/28/80	2,439.61	939.85	3,379.46
6/14/83	5/31/80	91,678.68	30,756.36	122,435.04

After the Notice dated June 14, 1983 was issued, the Audit Division reduced the amount of tax assessed to \$89,769.59.

2. Each of the foregoing notices were premised upon the Audit Division's position that sales and use taxes were due upon certain recurring expense purchases and certain asset acquisitions since petitioner was unable to document to the Audit Division's satisfaction that sales tax was paid on said purchases. The recurring purchases included such items as tools, lubricant and other items that wouldn't have been large enough to capitalize. The particular assets which were included in the portion of the assessment pertaining to capital assets were disclosed by an examination of petitioner's depreciation schedules and purchase invoices.

3. On June 11, 1980, petitioner executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1976 through February 28, 1980 to any time

on or before September 20, 1980. On November 24, 1980, petitioner executed a second Consent Extending Period of Limitation for Assessment of Sales and Use Taxes Due under Articles 28 and 29 of the Tax Law for the period September 1, 1977 through February 28, 1980 until any time on or before June 20, 1981.

4. Petitioner filed, on an annual basis, New York State and local sales and use tax returns. Its returns for the years ending May 31, 1976, May 31, 1977 and May 31, 1978 were timely filed. Petitioner's return for the year ending May 31, 1979 was filed on November 7, 1979 and the return for the year ending May 31, 1980 was filed on September 26, 1980.

5. Because the time limit for issuing the notices dated September 15, 1980 and June 18, 1981 was about to expire, the Audit Division did not have sufficient time to attribute the correct amount of tax to each quarterly period. Accordingly, the amount of tax due for each quarterly period on said notices was determined by dividing the total amount of tax found due into equal amounts per quarterly period. After the notices were issued, the Audit Division recomputed the amount of tax due per quarterly period. However, the total amount of tax asserted to be due remained unchanged.

6. Prior to 1976, petitioner's business activity consisted of installing large diameter concrete pipe for use in water and sewer lines for local governmental entities. In or about 1976, petitioner decided to build its own concrete pipe manufacturing plant. Petitioner's officers planned that, upon the completion of the pipe manufacturing plant, the plant would be transferred to a corporation known as Concord Pipe. It was anticipated that petitioner would continue with its pipeline installation activities under new management.

7. When the decision to build the pipe manufacturing plant was made, the outlook for selling concrete pipe was good. Further, petitioner's principals

felt that the manufacture and sale of concrete pipe would be profitable. Accordingly, petitioner built the plant with the intention of becoming the main supplier of concrete pipe in the Northeastern region of the country.

8. In or about 1978, the pipe manufacturing plant was capable of limited production and in 1979 the plant became fully operational. As constructed, the plant was able to operate twenty-four hours a day, seven days a week and could produce approximately 770,000 tons of concrete pipe a year. In contrast, prior to the construction of the pipe manufacturing plant, petitioner utilized between 400 and 500 tons of concrete pipe per year for its own needs.

9. During the period of time between petitioner's decision to build the concrete manufacturing plant and the time when the plant became operational, the demand for concrete pipe diminished considerably. The decline in demand for the concrete pipe was precipitated by a decline in federal funding for projects wherein concrete pipe was used.

10. After the concrete plant became operational, petitioner made a practice of bidding to supply concrete pipe on all projects which it was aware of. Nevertheless, petitioner never sold any concrete pipe to others. One reason for this lack of sales may have arisen from a contractor's possible reluctance to purchase concrete pipe from a manufacturer who also installs pipe.

11. In order to install pipe, petitioner built tunnel shields. A tunnel shield was used for holding back banks of earth so men could work underground. It was petitioner's practice to build the tunnel shields, as needed, out of materials that had been available in petitioner's yard. When petitioner finished using the tunnel shield it would be put back in the yard to be used again as needed. If a different size tunnel shield was needed for a new project, the old one would be cut apart and reconstructed.

12. In the course of its construction activities, petitioner utilized hay which was topsoil-seeded. The hay, which was blown on to the ground with a mulcher, eventually disintegrated into the grass. Petitioner performed this activity because petitioner's contracts required it to restore construction sites to their previous condition upon completion of excavation work.

13. Prior to any construction, petitioner's contracts with the governmental entities required it to have color photographs taken of the existing terrain by a qualified photographer. The photographs were sent by the photographer directly to the governmental entity which had title to the photographs. However, petitioner was able to obtain copies of the photographs at its own expense. The photographs were used to ensure proper restoration of the land. They might also be used by the governmental entity in the event of a claim for damages.

14. The contracts entered into by petitioner required that an informational sign be erected and maintained throughout the duration of the construction project. The sign contained the project number, the amount of funding, the name of the project and the name of the governor. Petitioner did not receive title to the sign. When the construction project was completed, the signs were left at the construction site.

15. No evidence was offered to establish that petitioner's contracts provided that petitioner purchase either the photographs or signs as an agent for a governmental entity or that the purchase invoices indicated that petitioner was purchasing the signs or photographs as an agent.

16. On August 27, 1977 petitioner purchased a vehicle from Barney's GMC, Inc. Sales tax was paid on this vehicle.

17. At the hearing the parties stipulated to the following items:

- (1) that sales tax had been paid at the time of purchase on certain transportation equipment;
- (2) that certain items designated as capital expenditures were related to the operation of the pipe manufacturing plant;
- (3) that, with respect to certain items designated as expense purchases, either sales tax was paid or sales tax was not due;
- (4) that certain items were utilized and or consumed in the pipe manufacturing process; and
- (5) that petitioner has conceded that sales and use tax is due with respect to certain items designated as expense purchases.

CONCLUSIONS OF LAW

A. That section 1147(b) of the Tax Law provides, in part, that "...no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return...". Since petitioner annually files sales and use tax returns, those returns which were timely filed were deemed filed on June 20 (Tax Law §§1136[b]; 1147[b]).

B. That section 1147(c) of the Tax Law further provides, in part:

"Where, before the expiration of the period prescribed herein for the assessment of additional tax, a taxpayer has consented in writing that such period be extended the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period..."

C. That the Notice dated September 15, 1980 was timely as it was issued prior to September 20, 1980, which was the date agreed to in the first consent to extend the statute of limitations (Tax Law §1147[c]). Similarly, the Notice dated June 18, 1981 was timely as it was issued prior to June 20, 1981, which was the date agreed to in the second consent to extend the statute of limitations (Tax Law §1147[c]). It is recognized that the Audit Division attributed

certain transactions to the wrong quarterly periods resulting in the amount of tax assessed being too great in some periods and the amount of tax being understated for other periods. However, petitioner was aware of the transactions in issue and has not demonstrated any prejudice caused by the attributing of transactions which arose during the audit period to the wrong quarterly period. Accordingly, it is concluded that the foregoing notices were not flawed in a manner which would render them void (see Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 1001). The notices dated November 3, 1982 and June 14, 1983 were timely as they were issued within the prescribed three year period (Tax Law §1147[b]).

D. That section 1115(a)(12) of the Tax Law exempts from sales and use taxes:

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

E. That in order for machinery or equipment to be exempt under section 1115(a)(12) of the Tax Law, it must be used directly and predominantly in the production of tangible personal property for sale (Matter of Lawrence Hunter [Purchaser], State Tax Commission, May 27, 1983). In view of the fact that petitioner has never sold pipe to a customer, petitioner is not entitled to the exemption since the pipe manufacturing equipment was not used at least fifty percent of the time in producing tangible personal property for sale on an uninstalled basis (Matter of Lawrence Hunter [Purchaser], *supra*).

F. That since petitioner did not make any purchases of tunnel shields during the periods in issue, no sales or use tax is due thereon.

G. That Tax Law §1115(a)(15) provides that receipts from the following shall be exempt from sales and use taxes:

"Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering or improving real property, property or land of such an organization, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property."

H. That although the hay disintegrated into the ground, the hay, as such, did not become an integral component of the real property. Accordingly, petitioner's purchases of hay are not exempt from sales and use taxes by virtue of section 1115(a)(15) of the Tax Law.

I. That petitioner has failed to sustain its burden of proof in establishing that it was an agent of a tax exempt organization in its purchase of photographs or signs (see Matter of Schultz Construction, Inc., State Tax Commission, July 31, 1984). Accordingly, said purchases were not exempt from sales and use taxes.

J. That since sales tax was paid on the vehicle described in Finding of Fact "16", the portion of the assessment which pertains to this vehicle is cancelled.

K. That the Audit Division is directed to modify the notices of determination and demands for payment of sales and use taxes due in accordance with Findings of Fact "1" and "17".

L. That the petitions of D.J.H. Construction, Inc. are granted to the extent of Conclusions of Law "F", "J" and "K" and the Audit Division is directed to modify the notices of determination and demands for payment of sales and use

taxes due accordingly; and except as so granted the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER