

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MORTON BUILDINGS, 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, 1978	:	
through August 31, 1981.	:	

Petitioner, Morton Buildings, Inc., 252 West Adams Street, Morton, Illinois 61550, 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, 1978 through August 31, 1981 (File No. 37284).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 1, 1984 at 1:15 P.M., with all briefs to be submitted by February 15, 1985. Petitioner appeared by Seyfarth, Shaw, Fairweather & Geraldson, Esqs. (Abraham M. Stanger, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly subjected to compensating use tax materials used by petitioner in constructing agricultural and commercial buildings.

II. If so, whether the Audit Division correctly calculated the use tax based on petitioner's cost of materials including certain labor and overhead expenses.

FINDINGS OF FACT

1. On December 20, 1981, the Audit Division issued to petitioner, Morton Buildings, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes pursuant to Articles 28 and 29 of the Tax Law for the period September 1, 1978 through August 31, 1981 in the amount of \$401,170.61, plus interest.

2. Petitioner is a corporation organized under the laws of Illinois and has its principal place of business in Morton, Illinois. In New York, petitioner maintains three business premises, consisting of sales offices and erection facilities, in Warsaw, Homer and Cobleskill. Petitioner is engaged in the manufacture, sale and erection of pre-engineered timber-frame, metal-sheathed buildings for agricultural and commercial use. The overall style of the buildings is uniform, but various features, such as windows, doors and skylights, may be specially ordered and the dimensions may be varied to suit the customer's needs.

3. Petitioner has several factories, all of which are located outside New York. Petitioner purchases the materials (e.g., lumber and coils of steel) used in its business in bulk outside New York; materials are not purchased for application to any particular customer order. At these out-of-state factories, petitioner's employees manufacture the building components and some of the hardware which will be used in constructing buildings at customers' premises.

4. Petitioner's sales representatives schedule appointments with prospective customers and visit them at their business locations to determine their needs and to furnish cost estimates. If a customer wishes to purchase a Morton building, he/she executes a written contract and tenders a downpayment; the printed form contract provides, in pertinent part:

"It is understood by the parties hereto that the terms and conditions of this contract and the financial ability of the purchaser are subject to acceptance at the Morton, Illinois office of Morton Buildings, Inc.; and that prior to such acceptance the entire liability of Morton Buildings, Inc. under this contract may be discharged by the return of any monies which the purchaser may have deposited as a condition of this contract."

At that time, the sales representative also secures from any New York customer a properly completed Certificate of Capital Improvement with respect to the erection of the building. The sales representative subsequently forwards the contract, downpayment and Certificate of Capital Improvement to petitioner's main office in Illinois for approval. Upon approval, the necessary building components are withdrawn from inventory and certain operations, such as the cutting of windows and doors and the partial assembly of some components, are performed. The components are then transported to the customer's site.

5. The customer is responsible for any required site preparation, such as leveling of the ground. All construction labor is performed by petitioner's employees.

6. The assessment under consideration rests on the following two bases:

(a) Use tax due in the sum of \$1,701.35 upon petitioner's recurring purchases. This portion of the assessment is not in dispute.

(b) Use tax of \$399,469.26 upon materials petitioner used in capital construction. The examiner based this portion of the assessment on "cost" figures which were utilized by petitioner to determine the profitability of projects and which consequently included certain labor and overhead costs incurred by petitioner in its manufacturing activities.

7. On infrequent occasions, petitioner sells replacement parts, as available, to customers who previously purchased and had erected a Morton building.

CONCLUSIONS OF LAW

A. That except to the extent that tangible personal property has been or will be subject to the sales tax, section 1110 of Tax Law Article 28 imposes a compensating use tax for the use within this state of tangible personal property purchased at retail.

B. That petitioner purchases tangible personal property (raw materials) outside this state; manufactures, processes and assembles the tangible personal property into building components; and erects capital improvements in this state from such components. Were petitioner to purchase the building components from third party manufacturers, it would be liable for the compensating use tax based upon the cost of the components (section 1115[a][17]; 20 NYCRR 527.7[b][5]). However, insofar as petitioner itself manufactures the building components, but does not offer the components for sale in the regular course of its business, it is required to pay the tax based on the cost of the raw materials it used in manufacturing, processing and assembling the components (20 NYCRR 531.3[b][5]).

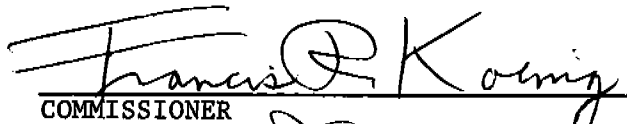
C. That the petition of Morton Buildings, Inc. is granted to the extent indicated in Conclusion of Law "B"; the assessment issued on December 20, 1981 is to be reduced upon petitioner's provision of the relevant information to the Audit Division; and except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985


PRESIDENT


COMMISSIONER


COMMISSIONER