

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
ENDICOTT FORGING & MFG. CO., INC.
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.

DECISION

Petitioner, Endicott Forging & Mfg. Co., Inc., 1901 North Street, Endicott, New York 13760, 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. 39586).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on May 18, 1984 at 10:00 A.M., with all briefs to be submitted by September 15, 1984. Petitioner appeared by Pearis, Resseguie, Kline & Barber (Stuart M. Pearis, Esq. and Andrew B. Mair, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Anna D. Colello, Esq., of counsel).

ISSUES

I. Whether the amounts paid by petitioner for the service of sinking and resinking dies was subject to sales and use tax.

II. Whether the amounts paid for labor and parts to rebuild production machinery was subject to sales and use tax.

III. Whether the Audit Division properly concluded that petitioner's purchase of studs was subject to sales and use tax.

FINDINGS OF FACT

1. On June 20, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, Endicott Forging & Mfg. Co., Inc., assessing a deficiency of sales and use taxes due in the amount of \$136,042.90, plus minimum interest of \$31,476.06, for a total amount due of \$167,518.99. To the extent at issue herein, the assessment was premised upon several items. First, the Audit Division concluded that tax was due for the labor charges incurred for sinking and resinking dies. Second, tax was assessed upon the labor charges and certain parts used to rebuild production equipment. Lastly, the Audit Division assessed tax upon petitioner's purchase of studs.

2. Following a pre-hearing conference, it was concluded that no tax was due upon the amounts paid for either the materials portion of machine overhauls or the purchase of new dies. As a result of these adjustments, the amount of tax asserted to be due was reduced to \$103,935.12, plus interest of \$36,449.74, for a total of \$140,835.06.

3. On or about January 17, 1983, petitioner paid, under protest, the assessed tax plus interest. Accordingly, petitioner now seeks a refund of the amount paid.

4. Petitioner is incorporated in the State of New York and maintains its principal place of business in Endicott, New York.

5. During the period in issue, petitioner was engaged in the manufacturing of closed die impression drop and upset forges.

6. Petitioner utilized one of two forging processes. One process involved placing heated steel into a machine with a die and then squeezing the steel within a closed cavity. The squeezing was done on a horizontal plane, on a

machine known as an upsetter. In the second process, top and bottom dies were placed in a machine known as a hammer. Heated steel was then placed in the impression. The top die would then drop upon the bottom die forcing the steel to fill the closed cavity thereby creating the required part.

7. A die block is a large piece of steel that does not contain an impression.

8. Diesinking is the process of creating an impression in a die block using diesinking machines and cutter tools.

9. Resinking consists of either recreating the original impression within a die block or a new impression in a die block. Resinking is necessary because the forging process normally results in an enlargement of the cavity within the die block. Thus, resinking is necessary to maintain the tolerances determined by the customer.

10. Petitioner purchased die blocks from die block vendors. The impressions in the die blocks were created in petitioner's die room or by an outside contractor. The particular impression to be sunk into the die was determined by the customer's specifications and was made through the use of a skilled operator utilizing a die sinking machine.

11. Original dies and resunk dies have a useful life in excess of one year.

12. There were instances during the audit period when the outside vendor doing the sinking or resinking of the die would furnish the die block. In these instances, the Audit Division treated the die block and labor as exempt from tax.

13. There were occasions during the audit period when petitioner would contract with a third party specializing in the manufacture of die blocks to transmit the die block to the outside vendor who did the sinking or resinking

of the die. In these situations, the labor was treated as taxable and the die block was treated as exempt.

14. There were situations where petitioner shipped die blocks that were already on petitioner's premises to an outside vendor for resinking dies. In these situations, the labor was considered taxable.

15. It was petitioner's practice to issue separate price quotations for forges and dies. The reverse side of the price quotation form contained the terms and conditions of the price quotation. Paragraph 13 thereof stated:

"Preparation charges are a portion of the costs required for the initial production of forgings including design, material, manufacture of any special tooling and poured cast proof from finish die impression. The payment of such charge does not convey any title or right of possession to the purchaser of any such tools involved. Such payment does convey the right to the exclusive use of any special tools required and to their preservation by the seller for two years only after the date of shipment of the last order requiring their use. Preparation charges are made only for the initial quantity and for the rate of delivery specified of a particular design, the seller assuming all expense of upkeep. The additional charge for any change in design or for different rate of delivery will be quoted by the seller upon request. Terms of payment for preparation charges are net 30 days from date of invoice."

Certain copies of petitioner's production order also contained the above-mentioned inscription.

16. At the time of the audit, petitioner's treasurer stated that petitioner owned the dies.

17. During the period in issue, petitioner's largest customers were Ingersoll-Rand; Ingersoll-Rand Canada, Inc.; CM Chain; a Division of McKinnon Corporation; and Caterpillar Tractor Co. Each of the order forms submitted by these customers contained a provision that the patterns, dies and molds furnished by petitioner were the property of the buyer. The terms and conditions of the contracts which petitioner had with its major customers were representative of the terms and conditions of petitioner's contracts with other customers.

18. It was petitioner's practice to treat as inventory on its financial statements only those dies which were for sale. Once dies were billed to a customer they were not treated as part of petitioner's inventory.

19. Petitioner treated die sales as sales on its financial statements. The costs incurred by petitioner to maintain the dies were treated as a cost of sales.

20. During the audit period, petitioner did not use a customer's die block (which had the customer's impression in it) without the approval of the customer. When written permission was given, petitioner would keep it on file.

21. Customers were permitted to remove their dies from petitioner's premises.

22. It was petitioner's practice to separately state the prices for the forging and the dies.

23. If a die block were worn out so that it no longer met the customer's specifications, petitioner would resink the die to put a new impression in it. This would occur either in petitioner's die shop or through a contract with petitioner's outside vendor. The process of resinking the die would be done at petitioner's expense because of paragraph 13 of petitioner's agreement which is set forth in Finding of Fact "15", supra. The Audit Division held the resinking of dies taxable.

24. The number of times a die was expected to be used was taken into account in determining the price quoted for the die.

25. The only time petitioner would charge a customer for the resinking of dies would be if there was a change made in the design at the customer's request.

26. During the audit period, there were times when petitioner sent large production machinery or parts of machinery used in the manufacturing process to outside vendors for the purpose of having such production machinery or parts of machinery rebuilt. Rebuilding the machine extended the useful life more than a year. In addition, parts which were intended as permanent improvements would be added to the machine. The cost of rebuilding the production machinery was considerably less than the cost of a new machine.

27. Petitioner purchased studs from Nelson Stud Company. A stud is a small piece of steel which is affixed to a larger piece of steel through the use of an arc welder. The stud would be gripped by tongs and used to insert the steel between the dies during the forging operation. When the forging was completed, it was transferred to a press where the excess steel, known as the flash, and the stud were trimmed from the forging in the finishing operation. The flash and stud were then discarded. An alternative to using a stud would have been to use a larger piece of steel. This excess steel would then have been available to grip the forging. Upon making the forging, the excess steel would be discarded.

28. The studs were considered taxable by the Audit Division.

CONCLUSIONS OF LAW

A. That although the terms and conditions with respect to the title to the dies established by petitioner's customers in their purchase orders conflict with the provisions contained in petitioner's acknowledgement form, it is clear from the conduct of the parties that the title to the dies passed to petitioner's customers.

B. That inasmuch as title to the dies passed to petitioner's customers, the transactions were sales of property in the regular course of petitioner's

business notwithstanding the fact that the dies remained at petitioner's premises. (See Matter of Castomatic, Division of Arwood Corp., State Tax Commission, February 11, 1983).

C. That 20 NYCRR 527.5(d)(4) provides that "where a manufacturer reimburses a vendor or repairman performing warranty work, the reimbursement is not taxable, as it was for resale." Since petitioner was required by the contract to provide maintenance and repair services to the dies sold to its customers, the costs of resinking the dies were sales of services for resale within the meaning and intent of section 1105(c)(3) of the Tax Law and 20 NYCRR 527.5(d)(4) and thus not subject to tax (See Matter of Castomatic, Division of Arwood Corp., supra).

D. That since the die blocks were purchased for resale, the labor costs of sinking the dies constituted a sale for resale and were thereby exempt from tax [Tax Law §1105(c)(2)].

E. That Tax Law §1105(c)(3) imposes tax upon the receipts from the sale of "[i]nstalling tangible personal property, or maintaining, servicing, repairing tangible personal property not held for sale in the regular course of business...". Under the circumstances presented herein, the charges for maintaining, servicing and repairing petitioner's production machinery were properly held subject to sales tax [Tax Law §527.5(a)(3)].

F. That during the period in issue, section 1115(a)(12) of the Tax Law provided, in pertinent part:¹

"§1115. Exemptions from sales and use taxes. --

1 It is noted that this section was amended by section 24 of Chapter 846 of the laws of 1981. The amendment is not pertinent to this proceeding.

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, or telephone central office equipment or station apparatus or comparable telegraph equipment for use directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication, but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment or apparatus." (Emphasis added.)

G. That 20 NYCRR 528.13(e)(3) provides as follows:

"(3)(i) The term supply means an item of tangible personal property used in the maintenance of machinery or equipment and an item of tangible personal property used or consumed in production, whose use is incidental to such production, or which is expendable.

(ii) Supplies used in connection with machinery and equipment directly and predominantly used in the production of tangible personal property for sale are not exempt."

H. That the studs, which are described in Finding of Fact "27", constitute a supply within the meaning of Tax Law §1115(a)(12) and 20 NYCRR 528.13(e)(3). Accordingly, the Audit Division properly concluded that petitioner's purchase of studs was subject to sales and use tax [Tax Law §1105(a)]. (It is noted that no issue is presented herein with respect to the applicability of Tax Law §1105-B(b).)

I. That the petition of Endicott Forging & Mfg. Co., Inc. is granted only to the extent of Conclusions of Law "C" and "D"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1982; that the Audit Division is directed to refund the appropriate amount of tax paid by petitioner under


protest; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

MAY 29 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER