

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
P.M.G. DINER, INC.	:	DECISION
d/b/a BROOKLYN TOWNHOUSE RESTAURANT	:	
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, 1981	:	
through August 31, 1981.	:	

Petitioner, P.M.G. Diner, Inc., d/b/a Brooklyn Townhouse Restaurant, 717 Kings Highway, Brooklyn, New York 11223, 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, 1981 through August 31, 1981 (File No. 43354).

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 October 2, 1984 at 1:15 P.M., with all additional documentary evidence and briefs to be submitted by November 21, 1984. Petitioner appeared by Jack M. Portney, CPA. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether the Audit Division properly assessed use tax upon petitioner's purchase of component parts of a diner from an out-of-state manufacturer.

FINDINGS OF FACT

1. On March 1, 1983, the Audit Division issued to petitioner, P.M.G. Diner, Inc. doing business as Brooklyn Townhouse Restaurant, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing

sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1981 through August 31, 1981 in the amount of \$40,061.32, plus interest and penalty. The document states that the tax was assessed upon petitioner's purchase of a diner from an out-of-state manufacturer for \$500,766.52.

2. Petitioner is a corporation organized under the laws of this state with its principal place of business at 717 Kings Highway, Brooklyn, New York. On August 18, 1980, petitioner entered into a contract with Aacco Construction Co., Inc. ("Aacco") for Aacco's preparation of the site at 717 Kings Highway (at that time occupied by a service station) and the construction thereon of a diner for the total consideration of \$226,853.60. Petitioner later purchased certain component parts of a diner from Swingle Diners, Inc. ("Swingle"), a manufacturer with its principal place of business at 300 Lincoln Boulevard, Middlesex, New Jersey, for a price of \$500,766.52, exclusive of transportation costs. Swingle manufactured the component parts in accordance with petitioner's specifications.

3. Aacco furnished materials and performed work in conformity with plans and specifications prepared by the firm of Storch, Pesa and Associates. Petitioner did not offer in evidence such plans and specifications, but the agreement between petitioner and Aacco generally described the obligations of Aacco to include the following: demolition of the service station; installation of footing, a foundation, concrete piers and a concrete floor; erection of rear concrete block walls; installation of 600 ampere electrical service; erection of a bake shop consisting of metal stud walls and sheetrock; installation of a boiler room, a wood-paneled office and a bathroom; connection of the water supply to the diner; and construction of a wall of four-inch solid block veneer on the north side of the diner. Petitioner's representative stated that

Swingle also performed certain installation services; however, he supplied no detail regarding the services and did not present any contract entered into by petitioner and Swingle.

4. In petitioner's federal corporation income tax return for the fiscal year ended November 30, 1981, buildings and other depreciable assets were valued at \$866,821.00 on Schedule L, Balance Sheets (\$939,724.00 less accumulated depreciation of \$72,903.00); on Form 4562 appended to the return, petitioner claimed a deduction for depreciation of \$54,444.30 on buildings with a basis of \$816,664.50.

5. The Audit Division concedes that the charges for site preparation and construction paid by petitioner to Aacco were excepted from sales and use taxes by virtue of Tax Law section 1105(c)(3)(iii).

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes sales tax on the receipts from every retail sale of tangible personal property. Where a contractor or subcontractor sells tangible personal property to a person (other than an exempt organization) for whom he is adding to or improving real property, property or land by a capital improvement and such tangible personal property is to become an integral component part of the structure, building or real property, the receipts from the sale are exempted from sales and use taxes by virtue of section 1115(a)(17); under such circumstances, it is the obligation of the contractor or subcontractor, as the consumer of the tangible personal property, to pay the tax upon the cost of the materials to him (20 NYCRR 527.7[b][5]). Section 1105(c)(3) imposes sales tax on the receipts from every sale (except for resale) of the service of installing tangible personal property; excepted from taxation is the service of "installing property which, when

installed, will constitute an addition or capital improvement to real property, property or land..." (section 1105[c][3][iii]).

B. That petitioner failed to establish that any portion of its remittance to Swingle was other than for component parts of the diner. The transaction between petitioner and Swingle thus constituted a sale of tangible personal property, the use of which within this state by petitioner was subject to the compensating use tax imposed by section 1110.

C. That the petition of P.M.G. Diner, Inc., doing business as Brooklyn Townhouse Restaurant is hereby denied, and the assessment issued on March 1, 1983 is sustained in all respects.

DATED: Albany, New York

STATE TAX COMMISSION

APR 22 1985

Rodwick W. Chen
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Quinn
COMMISSIONER