

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|---|---|----------|
| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| J. A. NEARING 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, 1979 | : | |
| through August 31, 1982. | : | |

Petitioner, J. A. Nearing Co., Inc. 9390 Davis Avenue, Laurel, Maryland 20707, 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, 1979 through August 31, 1982 (File No. 44444).

A formal hearing was held before Arthur S. Bray, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on February 4, 1985 at 1:15 P.M., with all briefs to be submitted by June 21, 1985. Petitioner appeared by Chamberlain, D'Amada, Oppenheimer & Greenfield (Richard B. Sullivan, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether petitioner, a Maryland corporation, was obligated to collect and remit sales and use tax on sales made to New York customers and, if so, whether such obligation violates the Constitution of the United States of America.

II. Whether petitioner has established that certain sales were exempt from sales tax as sales for resale.

III. Whether petitioner was required to collect sales tax on sales of green-houses to parties who issued exemption certificates covering the items purchased.

FINDINGS OF FACT

1. Petitioner, J. A. Nearing Co., Inc., was a Maryland corporation which engaged in the manufacture and sale of aluminum and glass greenhouses and accessories throughout the continental United States, Alaska and Canada. It did not install greenhouses.

2. On March 18, 1983, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, J. A. Nearing Co., Inc., assessing sales and use taxes due for the period September 1, 1979 through August 31, 1982 in the amount of \$19,327.11, plus interest of \$3,869.70, for a total amount due of \$23,196.81.

3. On audit, a complete review was made of all pertinent records. This led to the identification of sales for which invoices were issued to customers with New York addresses. The Audit Division determined, on the basis of an absence of resale certificates, that sales tax was due on sales to the firm of Greenhouse Sales & Installation Co., Inc. ("Greenhouse Sales") in the amount of \$6,521.06. The Audit Division also concluded that there was additional sales tax due in the amount of \$12,806.05 based upon sales made to New York customers other than Greenhouse Sales. With respect to one customer, i.e. MGG Erectors, Inc. ("MGG Erectors"), the Audit Division concluded that sales tax was not due because petitioner had a resale certificate from MGG Erectors. However, the Audit Division did assess sales tax on sales made directly to the president of MGG Erectors, John P. Miller, Jr. Lastly, a portion of the assessment was based upon sales for which petitioner had received capital improvement certificates. The Audit Division concluded that all of the latter sales were taxable since petitioner did not perform capital improvements in New York.

4. Petitioner had basically two types of sales in New York. The majority of sales were made to dealers. However, a portion of the sales were made directly to the users of the greenhouses.

5. Petitioner's sales were promoted through advertisements in various national periodicals. In response to these advertisements, prospective customers would request a catalogue which was mailed to the customer. If an order was placed, the requested item was produced and thereafter shipped by carrier, FOB, Laurel, Maryland.

6. Petitioner enclosed Janco order blanks in the back of its catalogues.¹ These order blanks were the only way in which a customer could order a greenhouse or solar room. The reverse side of this form provided, in part:

"Delivery to the initial carrier constitutes delivery to customer. This corporation's responsibility ceases upon delivery of merchandise to common carrier, and goods are shipped at the customer's risk, since all merchandise is sold FOB shipping point."

7. The dealers referred to above were independent contractors whom petitioner had authorized to carry its line of merchandise, but not to act for or bind the company.

8. Orders received by petitioner were reviewed by petitioner's order department to determine if the order was acceptable, because occasionally a customer would change petitioner's standard order form.

9. During the period in issue, petitioner prepared a questionnaire which it would submit to the dealers of its products in order to clarify their tax status. Any dealer who requested to be exempt from tax because of the resale

1 Janco is petitioner's trade name.

exemption was required to submit its Certificate of Authority to collect tax in the state in which it operated.

10. Many of the sales which led to the assessment at issue herein were made to Greenhouse Sales. Greenhouse Sales provided petitioner with a completed questionnaire indicating that it was exempt from New York tax, and a Certificate of Authority. However, Greenhouse Sales did not provide petitioner with any type of resale or exemption certificate even though such a certificate was requested by petitioner.

11. Several of petitioner's customers supplied petitioner with certificates of capital improvement. These certificates led petitioner to believe that sales tax need not be collected.

12. Petitioner owned one tractor and leased the remaining trucks which it used to make deliveries. Nevertheless, petitioner maintained that approximately twenty percent of its greenhouses and most of the greenhouse accessories were shipped to customers by common carrier. No substantiation was presented as to the percentage of sales delivered by common carrier.

13. The main reason petitioner utilized leased vehicles was to take delivery of raw materials from suppliers. If petitioner was planning to take delivery of raw materials from a supplier in a particular area, it would make deliveries on the way.

14. Petitioner's order form indicated that delivery was made free of charge. Customers were not separately billed for freight charges. In practice, however, petitioner incorporated the cost of delivery into the cost of its product.

15. Petitioner was registered as a vendor with the New York State Department of Taxation and Finance.

CONCLUSIONS OF LAW

A. That Tax Law §1101(b)(8)(i)(D) defines a vendor as including:

"Any other person making sales to persons within the state of tangible personal property or services, the use of which is taxed by this article, who may be authorized by the tax commission to collect such tax by part IV of this article;"

B. That since petitioner was authorized by the Tax Commission to collect sales and use tax, petitioner was subject to the obligations of a vendor (Tax Law §1101[b][8][i][D]; 20 NYCRR 526.10[e]; Matter of Franklin Mint Corp. v. Tully, 94 A.D.2d 877, aff'd. 61 N.Y.2d 980). It is noted that the constitutionality of the laws of the State of New York are presumed at the administrative level.

C. That a sale for resale is not considered a retail sale subject to tax (Tax Law §1101[b][4]; 20 NYCRR 526.6[c]). However, "[a] sale for resale will be recognized only if the vendor receives a properly completed resale certificate." (20 NYCRR 526.6[c][2]). Since petitioner did not have a resale certificate from John P. Miller, Jr., as opposed to a resale certificate from MGG Erectors, the Audit Division properly determined that the sales to John P. Miller, Jr. were taxable.

D. That section 1132(c) of the Tax Law provides, in part, that:

"...it shall be presumed that all receipts for property or services ...are subject to tax until the contrary is established, and the burden of proving that any receipt...is not taxable hereunder shall be upon the person required to collect tax or the customer. Unless (1) a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe...to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under section eleven hundred fifteen...the sale shall be deemed a taxable sale at retail. Where such a certificate has been furnished to the vendor, the burden of proving that the receipt...is not taxable hereunder shall be solely upon the customer."

E. That a Contractor Exempt Purchase Certificate is an exemption certificate within the meaning and intent of section 1132(c) of the Tax Law. Petitioner accepted such certificate in good faith and was not under a duty to investigate its customers (Matter of Saf-Tee Plumbing Corp. v. Tully, 77 A.D.2d 1). The purchaser is liable for the misuse of an exemption certificate. Therefore, petitioner was not required to collect sales tax on those transactions in which a purchaser issued a properly completed exemption certificate (Matter of Modern Suppliers, Inc., State Tax Commission, November 14, 1980). Accordingly, the Audit Division is directed to cancel the sales tax assessed upon those sales for which petitioner received a resale or exemption certificate. It is noted that since petitioner did not receive a resale or exemption certificate from Greenhouse Sales, sales tax was properly assessed upon the sales to that firm.

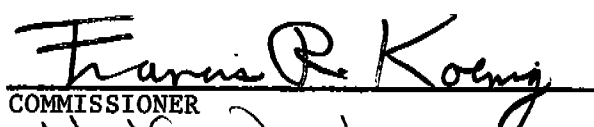
F. That the petition of J. A. Nearing Co., Inc. is granted only to the extent of Conclusion of Law "E" and the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due accordingly; the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is, in all other respects, sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1986


PRESIDENT


COMMISSIONER


COMMISSIONER