

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | DECISION |
| J & J SHEET METAL WORKS, 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 June 1, 1980 | : | |
| through February 28, 1983 | : | |

Petitioner, J & J Sheet Metal Works, Inc., P.O. Box 888, Johnson City, New York 13790, 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, 1980 through February 28, 1983 (File No. 47246).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York on December 18, 1984 at 9:15 A.M., with all briefs to be submitted by January 15, 1985. Petitioner appeared by Murray Rappaport, CPA. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner is liable for tax on materials used in the performance of capital improvements where the customers issued direct payment permits.

FINDINGS OF FACT

1. Petitioner, J & J Sheet Metal Works, Inc., was engaged in the fabrication and installation of sheet metal. Petitioner also performed repair and maintenance work.

2. On September 20, 1983, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period June 1, 1980 through February 28, 1983 for taxes due of \$1,950.80, plus interest of \$550.77, for a total of \$2,501.57.

3. On audit, the Audit Division examined sales invoices for the entire period under audit. This examination revealed that petitioner collected sales tax on all taxable transactions except where an exemption certificate was issued by the purchaser. The examination of sales invoices also showed that petitioner performed certain installation work which the Audit Division considered to be capital improvements to real property. The Audit Division reviewed the contract folders and contracts that were available (some contracts were oral) and a list was prepared of the capital improvement jobs for which no sales or use tax was paid on the material purchases. The use tax assessed on these purchases amounted to \$9,272.23. Petitioner has agreed to and paid \$7,321.43. The unresolved portion, \$1,950.80, represented use tax assessed on materials used in work performed for other contractors who issued direct payment permits.

4. Petitioner argued that it accepted direct payment permits for the jobs in dispute in good faith and had not been apprised by the customers either by the issuance of a capital improvement certificate or orally that the work to be performed was in the nature of capital improvements. Petitioner, therefore concluded that it was not liable for tax on the materials used in contracts which the Audit Division determined were capital improvements and the customer erroneously issued a direct payment permit. Petitioner argued further that it was not its obligation to determine the nature of the work.

The Audit Division took the position that since the work performed constituted capital improvements, petitioner was the ultimate consumer of the materials and that the purchases thereof constituted retail sales under section 1101(b)(4) of the Tax Law. Furthermore, it was the Audit Division's position that the tax was not imposed on the transaction between petitioner and its customer, so consequently the issuance of a direct payment permit by petitioner's customer is irrelevant to the taxes assessed.

5. Petitioner accepted the direct payment permits from its customers in good faith.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part,

"...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 the provisions of section eleven hundred fifteen,...the sale shall be deemed a taxable sale at retail. Where such certificate or statement has been furnished to the vendor, the burden of proving that the receipt...is not taxable hereunder shall be solely upon the customer...The tax commission may authorize a purchaser, who acquires tangible personal property or services under circumstances which make it impossible at the time of acquisition to determine the manner in which the tangible personal property or services will be used, to pay the tax directly to the tax commission and waive collection of the tax by the vendor."

B. That section 1101(b)(4) of the Tax Law defines the term "retail sale", in relevant part, as "a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on or otherwise adding to, altering, improving, maintaining, servicing or repairing real property or land...".

Any contractor who makes a capital improvement must pay a tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property [20 NYCRR 527.7(b(5))].

C. That the material purchases at issue were used or consumed by petitioner in performing capital improvements to real property and, therefore, petitioner was liable for tax on such purchases in accordance with section 1101(b)(4) of the Tax Law.

Petitioner, in good faith, accepted direct payment permits from certain customers for which it was performing capital improvement work. These permits relieved petitioner of any obligation to collect sales tax from the customer (Saf-Tee Plumbing Corp. v. Tully, 77 A.D. 2d 1). However, the acceptance of the direct payment permits did not relieve petitioner of its own liability under section 1101(b)(4) of the Tax Law for the tax due as the consumer of materials purchased.

D. That the petition of J & J Sheet Metal Works, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 2, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985

Roderick Asch
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Juhl
COMMISSIONER