

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JENSEN ASSOCIATES
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 July 1978 through
May 1980.

DECISION

Petitioner, Jensen Associates, 144-51 Northern Boulevard, Flushing, New York 11354, 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 July 1978 through May 1980 (File No. 49328).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 1, 1986 at 10:45 A.M., with all briefs to be filed by August 4, 1986. Petitioner appeared by Edwards & Antholis, Esqs. (Mark G. Yates, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Laura M. Nath, Esq., of counsel).

ISSUE

Whether the petitioner, Jensen Associates, paid sales tax on the purchase of a capital improvement to real property and is therefore due a refund of said tax.

FINDINGS OF FACT

1. At all times during the period at issue, petitioner, Jensen Associates, was a New York partnership. The partners were F S B Properties, Inc., a subsidiary of Flushing Savings Bank, and Ronald Kaier. On September 15, 1977,

Jensen Associates acquired two (2) apartment buildings, namely, 6 and 8 East 68th Street, New York, New York.

2. On July 17, 1978, Jensen Associates entered into a contract with Macar Contracting Corp. ("Macar"), a New York corporation with offices at 151-45 6th Road, Whitestone, New York, for the remodeling and/or renovation of the buildings. According to the project manual specifications, section 01010, paragraph 1.01, C.2., the contractor was required to pay "legally required sales, consumer and use taxes." The work performed by Macar resulted in a capital improvement to the real property.

3. Macar paid sales tax on materials and equipment which it purchased for use in performing the renovation and, on July 22, 1980, it sought reimbursement for this expense by billing Jensen Associates for \$65,730.67 in sales tax which it claims it paid on these items. Petitioner's understanding of this request was more fully explained in an inter-office memorandum, dated August 7, 1980, from William L. Hartnett, Jr., a vice president of F S B Properties, Inc., to James F. McConnell, treasurer of said corporation, as follows:

"Attached you will find a request from Macar Contracting Corp. for reimbursement of sales taxes paid by Macar on material and services provided to the above captioned project.

This is to request that you arrange for a partial reimbursement in the amount of \$50,000. A request for a refund of these taxes from the Tax Department is to be made so that funds provided to Macar for sales tax will be returned to (Jensen Associates)."

On the same day, Jensen Associates issued a check to Macar for \$50,000.00.

4. On August 7, 1981, Macar submitted the following statement to Jensen Associates:

<u>ITEMS</u>	<u>TOTAL BILLED</u>
Original Contract	\$1,200,000.00
Extras	484,798.25
Sales Tax	65,730.67
Insurance Claim	54,000.00
Totals	<u>\$1,804,528.92</u>

	<u>NOT BILLED</u>
Bathrooms w/Lath & Plaster	\$ 20,000.00

5. On September 30, 1981, petitioner submitted to the Audit Division an Application for Credit or Refund of State and Local Sales or Use Tax wherein it requested a refund of \$42,286.24. Petitioner's basis for the refund was explained as follows:

"Jensen Associates acquired two properties 6 & 8 East 68th Street on Sept. 15, 1977. Demolition work started approximately in spring of 1978. Renovation work for above two buildings was started on August 1978 and was substantially completed in March 1980.

* * *

Enclosed please find list of the sales taxes prepaid by our contractor, Macar Contracting Corp. for the above job. List includes names of all subcontractors and vendors with their respective tax amounts. To substantiate our claim we have also included all the invoices, receipts, etc. from respective parties for your reference. We have reimbursed the above monies to Macar Contracting Corp."

This amount was determined by an examination of the actual purchase invoices of Macar and is \$7,713.76 less than the \$50,000.00 reimbursement. Macar's original request for \$65,730.67 was an error (Presumably Macar estimated the amount of sales tax it had paid).

6. In October 1982, based upon a review of the contract and change orders, petitioner realized that Macar was legally responsible for payment of sales tax on the purchase of materials and equipment and that it should not have remitted the \$50,000.00 to Macar. Petitioner requested repayment of the

\$50,000.00 but was refused by Macar. Macar indicated that it was not obligated to pay the sales tax and that it paid the tax on behalf of petitioner.

7. On November 3, 1983, the Audit Division denied petitioner's refund claim, in full, with the following explanation:

"Merely because the contractor furnished you with a breakdown of his costs, including the amount of sales tax paid on materials, does not mean that you were billed for sales tax on a capital improvement. The invoices you included with your claim showed the amount of tax paid by the contractor for his materials, and was not his charging of sales tax on a capital improvement (i.e. materials and labor). You can not therefore, claim a refund on this amount."

8. On January 18, 1984, the petitioner timely filed a petition for a hearing to review the denial of its refund claim. It is the position of the petitioner that the payment of \$42,286.24 represented a payment for sales taxes on the completed construction project which was for a capital improvement to real property.

CONCLUSIONS OF LAW

A. That section 1101(b)(4) of the Tax Law, in pertinent part, defines "retail sale" as a sale of tangible personal property to any person for any purpose with certain exceptions not relevant herein. Accordingly, Macar Contracting Corp. was liable for payment of tax on materials and equipment used in renovating 6 and 8 East 68th Street pursuant to its contract with Jensen Associates.

B. That Jensen Associates paid Macar Contracting Corp. \$50,000.00, of which \$42,286.24 (the amount at issue herein) was a reimbursement of sales tax which Macar Contracting Corp. paid on the purchase of materials and equipment, and did not pay sales tax on the purchase of a capital improvement to real property.

C. That there is no provision in the Tax Law for the granting of a refund of monies which actually represent the reimbursement of an expense even though said expense was for sales tax.

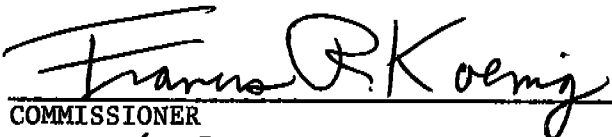
D. That the petition of Jensen Associates is denied and the refund denial issued November 3, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER