

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DELTA SONIC CAR WASH SYSTEMS, 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 February 28, 1983.

Petitioner, Delta Sonic Car Wash Systems, Inc., 570 Delaware Avenue, Buffalo, New York 14202, 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 February 28, 1983 (File No. 50883).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on February 26, 1986 at 10:45 A.M., with all briefs to be submitted by August 4, 1986. Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear, Esqs. (Paul R. Comeau, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioner's purchases of certain machinery and equipment were purchased for use or consumption directly and predominantly in the production for sale of tangible personal property by manufacturing or processing and are thereby exempt from the imposition of sales and use taxes pursuant to section 1115(a)(12) of the Tax Law.

II. Whether petitioner **sells** to its customers water which **is** delivered through mains or pipes and which the receipts therefrom are, pursuant to the

provisions of section 1115(a)(2) of the Tax Law, exempt from sales and use taxes.

111. Whether petitioner renders a service which constitutes an exempt laundering service pursuant to section 1105(c)(3)(11) of the Tax Law.

FINDINGS OF FACT

1. On December 20, 1983, as a result of a field audit, the Audit Division issued to Delta Sonic Car Wash Systems, Inc. (hereinafter "petitioner") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1979 through February 28, 1983 in the amount of \$106,536.93 plus interest, for a total amount due of \$130,465.79. At a pre-hearing conference, the Audit Division agreed that petitioner had made sales for resale of certain promotional items and car accessories and thereby reduced the amount of tax due to \$102,833.59. Prior to the hearing held herein, the Audit Division reconsidered the taxability of petitioner's gasoline sales and thereupon agreed that no tax was due from petitioner on said sales, thereby further reducing the amount of tax assessed by \$25,443.67, for a total amount of tax remaining at issue of \$77,389.92, plus applicable interest.

2. A Consent Extending Period of Limitation for Assessment of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law was executed by petitioner which permitted assessment of tax due for the period September 1, 1979 through August 31, 1980 at any time on or before December 20, 1983.

3. During the period at issue, petitioner purchased certain machinery, equipment and supplies from various vendors for use in its business, but did not pay sales or use tax on these purchases. Petitioner also purchased utilities to provide power for its machinery and equipment and did pay sales tax on these

purchases. At the hearing held herein, it was agreed between the parties that petitioner's claim for refund for tax paid for utilities which petitioner contends were used or consumed directly and exclusively to produce tangible personal property shall be held in abeyance until after the issuance of a decision by the State Tax Commission at which time, if petitioner **is** successful in its claim for an exemption from tax pursuant to section 1115(a)(12) of the Tax Law, a determination of the allocation **of** utility purchases to the production machinery would have to be made.

4. At issue in this audit are certain fixed assets and expense purchases of petitioner. Pursuant to an agreement between the parties, determinations as to which of the fixed assets, if any, represent machinery and equipment employed directly and predominantly in petitioner's business and which, if any, **of** the expense purchases constitute equipment and machinery rather than parts or supplies, shall be made after the issuance **of** a decision by the State Tax Commission relating to the issues set forth hereinabove.

5. **As** part of its business operation, petitioner purchased water and also purchased certain raw materials, consisting of concentrated chemicals, in bulk. Petitioner established that the chemical concentrates were sold to its customers and the Audit Division excluded these purchases **as** purchases for resale.

6. Petitioner maintains facilities at several different locations in the greater Buffalo area. The overall process performed by petitioner is initiated by placing vehicles on a conveyor system, after which the vehicles are passed through various integrated and automated treatment stations where certain products, some of which are optional to the customer, are delivered to the said vehicles. The overall process lasts between one to three minutes, depending upon how quickly the vehicles are passed through the process. The customer

chooses which of the various optional products he wishes to have applied to his vehicle and the selected products are delivered and applied to his vehicle during the process. Some of petitioner's products are included in its base price and are applied to every customer's vehicle. During the audit period, the base price for petitioner's process was approximately \$2.80 and a customer's selection to have all of the products applied to his vehicle increased the total cost to approximately \$4.30. The process was almost completely automated with persons employed only at the beginning to accept payment and to record the customer's purchase in the computer and at the end to assist in the drying process.

7. The machinery and equipment employed by petitioner in its process can be categorized as follows:

- a. The first category of machinery and equipment used by petitioner includes those which dilute chemical concentrates to desired formulations, treat water with various chemicals, mix, pressurize, heat and purify the mixtures and those which pump and convey the mixtures to other locations for further mixing and/or conversion to foam;
- b. The second category includes the cloth machinery, hydraulic systems and attendant items which produce foam from the mixtures of various chemicals and those which mix and distribute waxes and conditioners. The cloth machinery serves to agitate the foam which results from the entrainment of air into the various liquid solutions;
- c. The third category includes primarily the blow dryers which smooth and distribute the waxes and other materials and which also serve to dry the vehicles; and

d. The fourth category of machinery and equipment **is** that which initiates, regulates and controls the overall process. Included within this category are the computer, electric eye, conveyor system and other switching and regulatory devices which record the customers' purchases, regulate the flow of the materials dispensed to the vehicles, regulate the speed of the vehicles through the process and turn each machine on and **off**.

8. Traces of petitioner's chemical mixtures, foam and water remain on the vehicles of its customers after the completion of the process, most of which can be found in recessed or concealed areas of the vehicle and also on the undercarriage. A substantial portion of the waxes which are dispensed by petitioner's machinery and equipment remain on the vehicles' surfaces.

9. Petitioner did not offer for sale to its customers any of the chemical mixtures, foam, water or waxes which were mixed, treated or dispensed by its machinery and equipment. None of its customers have expressed a desire to purchase petitioner's products, but rather have requested that petitioner perform the service **of** washing, waxing or, in some other manner, applying certain products such as whitewall cleaner, chassis bath and rust inhibitor in conjunction with the basic service.

10. Petitioner contends that its machinery and equipment, as set forth in Finding of Fact "7", supra, were purchased for use directly and predominantly in the production by processing or manufacturing of various chemicals. It contends that it purchases raw materials, i.e., chemicals and water and converts them into different products which are sold to customers and carried out by the customers on their vehicles.

11. Petitioner purchases approximately six million gallons of water per year for each of its car wash locations. All of the water which is used in its process is chemically treated by petitioner. This water is dispensed to its customers' vehicles through pipes. Some of this water remains on the customers' vehicles after completion of petitioner's process.

12. If the decision of the State Tax Commission herein results in a determination that petitioner's purchases of certain machinery and equipment were for use directly and predominantly in the production for sale of tangible personal property and are, therefore, exempt from the imposition of sales and use taxes under section 1115(a)(12) of the Tax Law, petitioner concedes that its customer charges are taxable. If, however, the decision of the Commission determines that petitioner's purchases do not qualify for this exemption, petitioner maintains that it performs a laundering service, the receipts from the sale of which are exempt from sales tax pursuant to section 1105(c)(3)(11) of the Tax Law or, in the alternative, said receipts are exempt from sales tax on the basis that, pursuant to section 1115(a)(2) of the Tax Law, it sells water to its customers which is delivered through mains or pipes.

13. Along with its brief, petitioner submitted proposed findings of fact. In accordance with section 307(c) of the State Administrative Procedure Act, petitioner's proposed findings of fact have been generally accepted with the following exceptions: proposed finding of fact "9" has been conceded by the Audit Division by its failure to raise as an issue herein the failure of petitioner to file a timely petition for the period at issue; proposed findings of fact "11", "14", "16", "22", "23" and "24" are rejected as being conclusory in nature and not fully supported by the record; portions of proposed findings of fact "10", "12", "13", "18" and "20" have been accepted while certain

portions thereof are rejected as being conclusory in nature and not fully supported by the record.

CONCLUSIONS OF LAW

A. That section 1115(a)(12) of the Tax Law provides, in pertinent part, as follows:

"(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...for sale, by manufacturing, processing,"

B. That 20 NYCRR 528.13(b)(1)(ii) provides as follows:

"Production includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale."

C. That 20 NYCRR 528.13(b)(2) provides that "[t]he exemption applies only to machinery and equipment used directly and predominantly in the production phase."

D. That 20 NYCRR 528.13(c)(1) defines the term "directly" as follows:

"Directly means the machinery or equipment must, during the production phase of a process:

(i) **act** upon or effect a change in material to form the product to be sold, or

(ii) have an active causal relationship in the production of the product to be sold, **or**

(iii) be used in the handling, storage, or conveyance of materials or the product to be sold, or

(iv) be used **to** place the product to be sold in the package in which it will enter the stream of commerce."

E. That it is clear from a reading of the relevant portions of 20 NYCRR 528.13, referred to in Conclusions of Law "B" and "C", that the intent of the exemption from sales and use taxes provided in section 1115(a)(12) of the Tax Law is to provide said exemption for machinery or equipment which produces a product to be sold. Petitioner performs the service of washing, waxing and polishing the vehicles of its customers. The water, foam, waxes, rust inhibitors and other chemicals used by petitioner in performing these services are not offered for sale to the customers, but are applied to customers' vehicles only upon the purchase of petitioner's service. Testimony was adduced at the hearing held herein that customers do not ask to purchase water or chemicals but, instead, ask only that petitioner perform the service of washing, waxing or polishing their vehicles. The fact that traces of foam and water and certain amounts of other chemicals applied do remain on the customers' vehicles does not serve to convert petitioner's process to production of tangible personal property for sale through manufacturing or processing. The exemption from sales and use taxes provided for by section 1115(a)(12) of the Tax Law is, therefore, not applicable to the machinery and equipment employed by petitioner herein.

F. That petitioner's contention that it sells water to its customers which is delivered through mains or pipes and that the receipts therefrom are exempt from sales and use taxes pursuant to section 1115(a)(2) of the Tax Law has been previously rejected by the State Tax Commission (Matter of Hamburg Car Wash, Ltd. and Harry H. and Janet Abel, State Tax Commission, August 9, 1976) which held that:

"[T]he transactions herein do not fall within the exemption of section 1115(a)(2) for the sale of water when delivered through mains or pipes. This exemption is primarily designed for public utilities. The sale of water in the instant case was in conjunction with the

provision of a taxable service. This was not the mere sale of water but the sale of a commercial, taxable service."

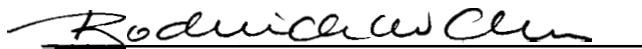
G. That petitioner's contention that its service is an exempt laundering service within the meaning and intent of section 1105(c)(3)(ii) of the Tax Law has also been rejected by the State Tax Commission which held that said exemption was applicable only to clothing and cloth fabrics (Matter of Patsy Scarano d/b/a Easy Way Car Wash, State Tax Commission, December 3, 1975; Matter of Douglas H. Casement, Enterprises, State Tax Commission, November 27, 1981).

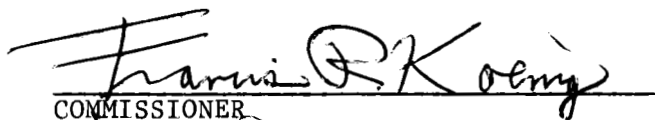
H. That the petition of Delta Sonic Car Wash Systems, Inc. is granted only to the extent indicated in Finding of Fact "1"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 20, 1983 accordingly; and that, except as so granted, the petition is in all other respects denied.

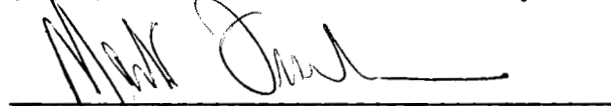
DATED: Albany, New York

STATE TAX COMMISSION

JAN 09 1987


PRESIDENT


COMMISSIONER


COMMISSIONER