

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

D & H MEYERS, 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, 1977 :
through November 30, 1983.

Petitioner D & H Meyers, Inc., King's Plaza, Batavia, New York 14020, 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, 1977 through November 30, 1983 (File No. 52292).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on January 14, 1986 at 1:15 P.M., with additional evidence to be submitted by February 14, 1986. Petitioner appeared by Martin Sanders, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the Audit Division's denial of exemption from imposition of sales and use taxes with respect to certain purchases of electricity consumed in the operation of petitioner's supermarket was proper.

II. Whether the method used by the Audit Division to determine the amount of exempt kilowatt-hours of electricity consumed by certain equipment in petitioner's supermarket was proper.

FINDINGS OF FACT

1. On September 29, 1980, petitioner, D & H Meyers, Inc., filed an Application for Credit or Refund of State and Local Sales or Use Tax claiming credit of \$1,695.00 in sales tax paid on certain purchases of electricity consumed by petitioner during the period September 1, 1977 through September 1, 1980. The claimed credit was premised upon petitioner's contention that the electricity at issue was consumed in production and was therefore exempt from sales tax. On its sales tax returns filed subsequent to the period covered by its refund claim, commencing with the period ended February 28, 1981, and continuing through the period ended November 30, 1983, petitioner took credit for sales tax paid on similar purchases of electricity which petitioner determined had been consumed in production. Petitioner took \$3,895.00 in tax credits on its sales tax returns for the aforementioned periods. As a result, the total amount claimed herein by petitioner, including both credit sought by petitioner in its refund application and credits taken by petitioner on its sales tax returns, is \$5,590.00.

2. On February 21, 1984 the Audit Division advised petitioner that its claims for refund or credit of sales tax paid on utilities had been reduced from \$5,590.00, as claimed by petitioner, to \$1,903.53, following a review of petitioner's application and documentation submitted in support thereof. The Audit Division deducted the amount of credit computed to be due petitioner for the entire period (9/1/77 - 11/30/83) from the amount of credit for sales tax paid on utilities actually taken by petitioner on its sales tax returns for the period December 1, 1980 through November 30, 1983. This resulted in an assertion of additional sales tax due in the amount of \$1,991.47. Based upon this determination, the Audit Division issued to petitioner on February 21, 1984,

two notices of determination and demands for payment of sales and use taxes due which granted petitioner credit of \$796.52 for the period September 1, 1977 through November 30, 1980 and also for the period ended November 30, 1983. In addition, said notices asserted additional tax due of \$2,787.99 for the period December 1, 1980 through August 31, 1983. The net amount of additional tax due from petitioner as asserted by the Audit Division was therefore \$1,991.47, plus interest.

3. At all times during the period at issue herein, petitioner owned and operated a supermarket in Batavia, New York which was open 24 hours per day. Included among the store's operations were meat, produce, deli and bakery departments. Petitioner's claimed exemptions were premised upon purchases of electricity used to operate some 21 separate pieces of equipment in use throughout the store. The Audit Division granted exemption from imposition of sales tax for purchases of electricity with respect to 14 of the items in question. The Audit Division disallowed, in full, exemption from sales tax with respect to electricity purchases for three pieces of equipment in petitioner's produce department, two pieces of equipment in petitioner's meat department, and one piece of equipment in petitioner's deli and bakery department. The Audit Division disallowed, in part, exemption for electricity purchases for one item in petitioner's meat department. Specifically, the disallowed items were as follows:

DISALLOWED IN FULL

<u>Description</u>	<u>Make</u>
Meat Prep. Dairy Cases	Copeland
Produce Prep. & Cooler	Copeland
Wrapper	Heat Sealing
Scale	Hobart
Scale	Electronic Scale
Revolving Oven	Barbecue King

DISALLOWED IN PART

Meat Cooler

Copeland

4. The Audit Division's denial of petitioner's claimed credit with respect to its purchases of electricity for the equipment listed above was premised upon the Audit Division's position that such electricity was not consumed directly in the production process.

5. The scales in petitioner's produce department were used to weigh customers' purchases of produce. The wrapper was used to package various products before such products were placed in open cases for sale. Petitioner introduced no evidence as to the manner in which the remaining disallowed items listed above were used.

6. Regarding its produce department operations, petitioner took the position that the equipment in question was used in the final stage of the production of goods for sale by farming and therefore the electricity consumed by such equipment should be exempt from sales tax.

7. With respect to the Audit Division's partial denial of exemption for purchases of electricity consumed by petitioner's meat cooler, the Audit Division reduced the length of average daily exempt usage from petitioner's claimed 20 hours per day of usage to the Audit Division's assertion of 18 hours per day of exempt usage. This reduction was premised upon the Audit Division's contention that the electricity consumed by this item was partly used for nonexempt purposes. Specifically, the Audit Division contended that this item was used when the store was closed to store meat which had previously been placed out for sale.

8. In support of its refund claim, petitioner submitted to the Audit Division a survey of the electricity consumption of each of the 21 pieces of

equipment for which petitioner claimed exemption with respect to its purchases of electricity. The survey was prepared on petitioner's behalf by Energy & Value Consultants, Inc., and set forth a description of each of the 21 items together with its respective make and model number. For five of the items, the survey set forth figures indicating each item's horsepower, voltage, and amperage. For four of the items, the survey set forth only horsepower and voltage figures. With respect to six of the items, only voltage and amperage figures were provided, and with respect to another six of the items only voltage figures were provided. Finally, with respect to all 21 items, the survey set forth kilowatt-hours of use, length of average daily usage and kilowatt-hours of use per day. The survey did not indicate the manner by which the figures indicating kilowatt-hours of use were determined.

9. After making its determination as to which equipment consumed electricity directly in production, the Audit Division sought to determine the proportion of petitioner's purchases of electricity which qualified for exemption from sales tax. To make this determination, the Audit Division first calculated kilowatt-hours for each piece of equipment which it had determined was used in production. With respect to each of the allowed items for which the survey listed a horsepower figure, the Audit Division used that horsepower figure to calculate kilowatt-hours by the following formula:

$$\frac{\text{Horsepower} \times 746}{1,000} = \text{Kilowatt-hours}$$

10. With respect to those items for which horsepower figures were not set forth in the survey, but for which voltage and amperage figures were set forth, the Audit Division used such voltage and amperage figures to determine kilowatt-hours by the following formula:

$$\frac{\text{Volts} \times \text{Amperes}}{1,000} = \text{Kilowatt-hours}$$

11. With respect to the allowed items for which neither horsepower nor amperage figures were provided, the Audit Division accepted the kilowatt-hours figure set forth in the survey in making their determinations.

12. The formula set forth in Finding of Fact "9" was derived from information furnished to the Audit Division by the New York State Energy Office and the United States Department of Energy and was based upon a study of electric motors ranging from 1 to 125 horsepower and having an average efficiency of 85 percent.

13. Having made its determination as to kilowatt-hours of exempt usage consumed by petitioner's equipment and the hours per day of such exempt usage, the Audit Division then calculated the ratio of kilowatt-hours of exempt usage to total kilowatt-hours of usage. This ratio was then applied to the total amount of petitioner's purchases of electricity to determine the amount of such purchases qualifying for exemption. The Audit Division used petitioner's utility bills to determine petitioner's total kilowatt-hours of usage and its total purchases of electricity.

14. The horsepower figures for the 7 pieces of equipment which listed such information ranged from 0.25 horsepower to 7.5 horsepower.

15. At the hearing petitioner contended that its equipment was older than the equipment upon which the Audit Division's formula (as set forth in Finding of Fact "9") was based. Petitioner stated that the motors in its equipment were therefore less efficient than those upon which the Audit Division's formula was based. Petitioner claimed that, given the small size and inefficiency of the motors used in the equipment at issue, the kilowatt-hour calculations which were made using the formula set forth in Finding of Fact "9" were inaccurate.

Petitioner further contended that the Kilowatt-hour calculations as set forth in its survey (Finding of Fact "8", supra) accurately reflected the consumption of electricity by the equipment in question. Petitioner failed to substantiate its claim regarding the age and relative inefficiency of its equipment.

16. Of the 21 pieces of equipment for which petitioner submitted data regarding kilowatt-hours in its survey, petitioner used the formula set forth in Finding of Fact "10" to determine kilowatt-hours for 4 of the items. Of the 17 remaining items, petitioner's data did not indicate the basis for its kilowatt-hour determinations.

17. Petitioner claimed that the "Barbecue Revolving Oven", for which exemption was disallowed, was incorrectly listed on the survey submitted in support of its claim. Petitioner stated that this item had not been used "for several years" and that a "Precision Oven", used to bake bread and other bakery products, had been in use in its store since that time. Petitioner presented no evidence as to when the "Precision Oven" was placed into service in its store.

CONCLUSIONS OF LAW

A. That section 1115(c) of the Tax Law provides for an exemption from the sales and use taxes imposed under sections 1105 and 1110 of the Tax Law as follows:

"Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing, processing, assembling, generating, refining, mining, extracting, farming, agriculture, horticulture or floriculture, shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten."

B. That 20 NYCRR 528.22(c) provides the following with respect to section 1115(c) of the Tax Law:

"(c) Directly and exclusively. (1) Directly means the fuel, gas, electricity, refrigeration and steam and like services and must during the production phase of a process, either:

(i) operate exempt production machinery or equipment,
or

(ii) create conditions necessary for production, or

(iii) perform an actual part of the production process.

(2) Usage in activities collateral to the actual production process is not deemed to be used directly in production.

* * *

(3)(i) Exclusively means that the fuel, gas, electricity, refrigeration and steam and like services are used in total (100%) in the production process.

(ii) Because fuel, gas, electricity, refrigeration and steam when purchased by the user are normally received in bulk or in a continuous flow and a portion thereof is used for purposes which would make the exemption inapplicable to such purchases, the user may claim a refund or credit for the tax paid only on that portion used or consumed directly and exclusively in production."

C. That, in view of the aforecited statute and regulations, the Audit Division properly denied exemption from sales tax for petitioner's purchases of electricity consumed in its produce department by the equipment described in Finding of Fact "5". Petitioner's scale is and was a convenience for its customers, aiding petitioner in the selling and distribution of produce. The scale is in no way related to the production process. Similarly, the wrapper also serves petitioner in the distribution and selling of produce. In no way does the wrapper effect a change in the nature, shape or form of the produce

(see 20 NYCRR 531.2[e]). Consequently, the Audit Division properly denied exemption for purchases of electricity consumed by this equipment.

D. That petitioner has failed to meet the burden of proof imposed upon it by law to establish wherein the Audit Division's determinations with respect to its "Meat Prep Dairy Cases", "Produce Prep and Cooler", and "Revolving Oven" were improper. Inasmuch as petitioner failed to present any evidence as to the manner in which this equipment was used, it has failed to show that the electricity consumed by such equipment was consumed "directly and exclusively" in the production of tangible personal property for sale.

E. That petitioner's claimed average daily exempt usage of 20 hours for its meat cooler was proper. Inasmuch as petitioner's store was open 24 hours per day, the Audit Division's contention that the meat cooler and meat preparation room were used for nonexempt purposes when the store was closed is without merit. The Audit Division, therefore, improperly reduced the usage from 20 hours per day to 18 hours per day.

F. That the Audit Division properly recalculated the kilowatt-hours of exempt electrical use consumed by the equipment in petitioner's store. While petitioner submitted a survey with apparent kilowatt-hours figures for each item of equipment at issue, petitioner failed to set forth the basis of its calculations. Petitioner failed to establish its contention that than motors operating the equipment at issue were older and less efficient than the motors upon which the Audit Division's formula was based. In addition, petitioner failed to establish the validity of its survey. This failure is especially apparent in view of petitioner's contention that one of the items listed on the survey had not been used by petitioner "for several years" (see Finding of Fact "17", supra). Petitioner has thus failed to show wherein the Audit Division's

calculations were improper or unreasonable and has further failed to establish the reasonableness or accuracy of its own calculations.


G. That the petition of D & H Meyers, Inc., is granted to the extent indicated in Conclusion of Law "E"; that the Audit Division is hereby directed to recompute the notices of determination and demands for payment of sales and use taxes due dated February 21, 1984 in accordance therewith; and that, except as so granted, the petition of D & H Meyers, Inc. is in all respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER