

BUREAU OF LAW

MEMORANDUM

TO: State Tax Commission

FROM: Vincent P. Molineaux, Hearing Officer

SUBJECT: ROGER ALDRICH d/b/a EMPIRE SILO CO.

For Revision of Sales and Use Taxes
Under Articles 28 and 29 of the Tax
Law for the Periods Commencing
August 1, 1965 and Ending August 31, 1966

A hearing on the above matter was held before me at the
Utica District Office on June 23, 1967.

The issue is whether the applicant, Empire Silo, should
be required to pay a sales or use tax on materials used in building
silos under lump sum contracts.

The business of the applicant is the erection, on contract,
of silos on pre-installed bases. The silos erected by Mr. Aldrich
range from 12 to 30 feet in diameter and 30 to 60 feet in height.
They are comprised of pre-cast concrete tongue and groove staves,
fitted together and held in place by steel hoops. They are not
affixed to the ground but stand of their own weight on a prepared
footer. The staves are 12 inches wide, 3 inches thick and 30
inches long and weigh 85 pounds each. When erected, the silos are
finished on the inside with a whole or partial coating of epoxy or
cement. The cement finishing may require as many as 50 bags of
cement.

Empire Silo purchases the staves ready made in bulk from
Buffalo and the hoops and clamps from Plainfield, Illinois without
payment of a sales tax on either. Farmers' exemption certificates,
completed Form ST-125, were received from each purchaser of a silo
in the periods under review.

The function of the silo is to preserve fodder in a moist
condition to be fed to cattle in the winter months when they are
unable to obtain fresh fodder. The silage undergoes some chemical
changes in the first few weeks in the silo which helps in preserving
it but the ensiling does not improve the feed or make it more
useful than the material when first put in.

It is argued on behalf of the applicant, that Section
1115(6) exempts greenhouses and similar structures and since a
silo is a similar structure, it would also be exempt. However, the
Section exempts:

"(6) Tangible personal property, except property incorporated in a building or structure, for use or consumption directly and exclusively in the production for sale of tangible personal property on farms, including stock, dairy, poultry, fruit, fur bearing animals, and truck farms, ranches, nurseries, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards." (Underscoring supplied)

It is obvious then, that it is the tangible personal property produced for sale in such structures that is exempt and that tangible personal property incorporated into the building or structure is specifically not exempt. Since the applicant concedes that the silo is similar to a greenhouse there is no claim that the silo is not a structure.

Furthermore, Real Property Tax Law, Section 102 subdivision 12 defines, "Real property", "property" or "land" to mean and include:

"(b) Buildings and other articles and structures, substructures and superstructures erected upon, under or above the land, or affixed thereto, including bridges and wharves and piers and the value of the right to collect wharfage, craning or dockage thereon, but shall not include bulk milk tanks or coolers installed upon a farm to hold milk awaiting shipment to market;"

It is obvious that silos, not having been excluded like milk tanks, are included.

Petitioner cites Grain Company, Inc. v. Alden State Bank, (1926), 218 App. Div. 263, in support of the claim that silos remain personal property. In that case it was held that pursuant to the terms of a conditional sales contract the silos remained personal property and title to said silos remained in the conditional vendor, which title was good as against a prior mortgagee of the land despite the fact that the conditional sales contract was never filed. The court cited with approval the case of Greenary Package Manufacturing Co. v. Horton, (1917), 178 App. Div. 467. In that case a conditional sales contract was also entered into which reserved title to the silo (affixed only by its weight) as personalty to the conditional vendor. The court held that the title to the silo remained in the conditional vendor and that the trustee in bankruptcy acquired no lien on the property. The court, however, noted "There is nowhere in the record any suggestion that there was a creditor of the vendee for more than two years after the silo was attached and after it had become, on account of its nature and the manner of its annexation to the realty, a part of it as to all persons except the parties to this action." (Emphasis added)

Here the testimony is replete with statements that the silos were used to store crops for the purpose of using the same as feed for cattle which are presumably ultimately sold. Although it may be that some of the feed was sold there is nothing to show that most of it was not used as fodder. In Sales Tax Information Booklet No. 3, "Questions and Answers for Farmers", the following questions and answers are:

"Custom Work

- Q. Are charges for custom work such as combining, hay baling or crop spraying subject to tax?**
- A. No. These services are not taxable, provided the crop will either be sold or used as feed for livestock from which milk, eggs, meat or other products will be sold.**
- Q. Is the grinding and mixing of feed grain taxable when part or all of the ingredients are furnished by the farmer?**
- A. No. This service is exempt, if the feed is fed to livestock from which the products are being sold."**

It could be argued from the above questions and answers that the storage of crops which are to be used as feed for livestock is "production" under Section 1115(6) of the Tax Law since the products which are ultimately sold are livestock or products derived therefrom.

Section 1115(12) of the Tax Law which exempts receipts from the tax sales of machinery or equipment for use or consumption directly and exclusively in the production of tangible personal property, has been held to exempt from the tax purchases by a lump-sum contractor tangible personal property which had the character of machinery or equipment when purchased by him despite the fact that such machinery or equipment were later installed in an entire pumping plant. (See Counsel's opinion dated October 31, 1966, a copy of which is hereto attached) Section 1115(a)(6) could therefore be interpreted to grant exemptions to contractors who purchase tangible personal property which are later incorporated in a building or structure, were it not for the language in Section 1115(a)(6) of the Tax Law with respect to such incorporation.

In view of the difficulties encountered by analyzing other sections of the Tax Law and the liberalized constructions under different factual circumstances, the proposed determination

has been solely limited to the question of whether or not a silo when completed was real property within the intent and meaning of Section 1105(c)(3) of the Tax Law and whether or not the materials used for the construction of the silo were incorporated in a building or structure within the intent and meaning of Section 1115(a)(6) of the Tax Law.

For the reasons stated above, I recommend that the determination of the State Tax Commission in the above matter denying the application for revision be substantially in the form submitted herewith.

/s/

VINCENT P. MOLINEAUX

Hearing Officer

VPN:kon
Enc.

October 25, 1968

10-28-68

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

ROGER ALDRICH
d/b/a EMPIRE SILO CO.

FOR REVISION OR REFUND OF SALES AND/OR USE
TAXES UNDER ARTICLES 28 AND 29 OF THE TAX LAW
AND THE LOCAL LAWS OR RESOLUTIONS OF JEFFERSON
COUNTY AND THE CITY OF PLATTENBURG, FOR THE
PERIODS COMMENCING AUGUST 1, 1965 AND ENDING
AUGUST 31, 1966

Roger Aldrich, d/b/a Empire Silo Company filed an application to review the determination of sales and use taxes, pursuant to Articles 28 and 29 of the Tax Law, and a hearing having been held at the office of the State Tax Commission, Utica, New York on June 23, 1967, before Vincent P. Molineaux, Hearing Officer of the Department of Taxation and Finance, and the record having been duly examined and considered, the

State Tax Commission hereby finds:

(1) That the taxpayer is engaged in the erection of silos under written contracts and for the periods in question did erect a number of silos on farm land, each for a lump sum price.

(2) That the silos are used by the owners of the land to store growing crops, including grass, cereal grains, stalks and the like.

(3) That the silos are buildings or structures which are erected on structures prepared by the owner of the land, which latter structures are generally made of cement and are called footers; the silos are built by joining together numerous concrete staves with steel hoops clamped around the exterior and then sealing the staves by either epoxy or cement coating; the typical concrete stove is 12 inches wide, 30 inches long,

approximately 3 inches thick and weights 85 pounds; the steel hoops are approximately 14 to 20 feet long; the silos, when completed, may be 30 feet in diameter and may reach as high as 60 feet; the silos are not affixed to the footer other than by its own weight.

(4) That the staves were purchased by Empire Silo Company in bulk from Buffalo, New York and the hoops and clamps from Plainfield, Illinois, without payment of sales or use tax on either, and no sales tax was collected from the purchasers of the finished silos.

(5) That in all instances, completed farmer's exemption certificates, Form ST-123, were taken from the purchasers of the silos.

(6) That Roger Aldrich, d/b/a Empire Silo Company, filed sales and use tax returns for the periods ending August 31, 1965, November 30, 1965, May 31, 1966 and August 31, 1966 on which he listed no taxable sales and services and on which he paid no sales or use taxes.

(7) That the State Tax Commission issued Notice No. 90730711, dated November 25, 1966, assessing tax against Roger Aldrich, d/b/a Empire Silo Company, in the amount of \$2,433.02 for the periods commencing August 1, 1965 and ending August 31, 1966, based upon cost of materials used in erection of silos.

(8) That the said tax has been paid.

Based upon the foregoing findings and all of the evidence presented therein, the State Tax Commission hereby

DETERMINES:

(A) That the silos, when completed were real property within the definition of section 102(12)(c) of the Real Property Tax Law; that the silos when completed were real property within

the intent and meaning of section 1103(e)(3) of the Tax Law and were, therefore, not subject to sales tax under such section.

(B) That the concrete staves, hoops, clamps and other materials which were used in the performance of contracts for the erection of the silos were not resold as unassembled sections and that title to such unassembled sections did not pass to the owners of the land until they were assembled and affixed to the real property as an addition thereto; that all such purchases of the unassembled concrete staves, hoops, clamps and other materials were made by the taxpayer who was the ultimate purchaser of such unassembled staves, hoops, clamps and other materials.

(C) That the aforesaid staves, hoops, clamps and other materials were tangible personal property when purchased by the taxpayer, were not purchased by him for resale as tangible personal property, and were subject to sales and compensating use taxes in accordance with section 1103(a) and section 1110 of the Tax Law.

(D) That the concrete staves, hoops, clamps and other materials which were purchased by the taxpayer as tangible personal property were subsequently incorporated in a building or structure; that accordingly the receipts from the sale of the tangible personal property to the taxpayer were not exempt from sales and use taxes within the intent and meaning of section 1113(a)(6) of the Tax Law.

(E) That no sales tax having been paid upon the staves purchased in New York State and no use tax having been paid upon the hoops, clamps and other materials acquired outside of New York, sales or use taxes were due and owing on all the materials used in the construction of the silos.

(7) That the Notice No. 90730711 assessing tax against Roger Aldrich, d/b/a Empire Silo Company, for the periods ending August 31, 1965, November 30, 1965, May 31, 1966 and August 31, 1966 is correct.

(8) That the taxpayer's application is hereby denied.

DATED: Albany, New York this 1st day of November 1968.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

PRESIDENT

/s/

A. BRUCE MANLEY

COMMISSIONER

SECRETARY