

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Conair, Inc.

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision
of a Determination or Refund of Sales & Use Tax
under Article 28 & 29 of the Tax Law for the
Period 12/1/76-11/30/79.

:

:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of February, 1985, he served the within notice of Decision by certified mail upon Conair, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Conair, Inc.
Conair Bldg.
Franklin, PA 16323

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
6th day of February, 1985.

David Parchuck

James R. Hagelund

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Conair, Inc. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 12/1/76-11/30/79. :

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of February, 1985, he served the within notice of Decision by certified mail upon E. Wallace Breisch, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

E. Wallace Breisch
524 Olive St.
Pittsburg, PA 15237

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
6th day of February, 1985.





Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

February 6, 1985

Conair, Inc.
Conair Bldg.
Franklin, PA 16323

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
E. Wallace Breisch
524 Olive St.
Pittsburg, PA 15237
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
CONAIR, 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 December 1, 1976 :
through November 30, 1979.

Petitioner, Conair, Inc., Conair Building, Franklin, Pennsylvania 16323, 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 December 1, 1976 through November 30, 1979 (File No. 30405).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on April 24, 1984 at 9:15 A.M., with all briefs to be submitted by June 24, 1984. Petitioner appeared by E. Wallace Breisch, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether a "spiral silo" is exempt from sales and use taxes under section 1115(a)(12) of the Tax Law.

II. Whether the installation of a "spiral silo" constituted a capital improvement to real property.

FINDINGS OF FACT

1. Petitioner, Conair, Inc. was engaged in the manufacture, sale and installation of bulk storage silos.¹ The silos are part of material flow

¹ The term "silo" is a historical term applied to the tanks in issue without regard to the fact that the tanks are not storage silos as used in a farming operation.

systems used by manufacturers of plastic products. Conair manufactures two types of silos. The first type, referred to as a "spiral silo", is manufactured at Conair's plant in Franklin, Pennsylvania in a standard size of 11' 6" diameter with heights to 60' and shipped ready to erect at the customer's site. Spiral silos are also available in diameters of 15' or larger which are formed at the customer's site rather than in Conair's plant. The second type of silo is "steel welded" and is factory manufactured in 10' and 12' diameters.

2. An audit was conducted of petitioner's books and records for the period December 1, 1976 through November 30, 1979 and disclosed additional sales and use taxes due of \$16,886.09. Petitioner has agreed to a liability of \$8,617.89. The unresolved portion of the audit (\$8,268.20) represents use tax assessed on the cost of materials used to manufacture five (5) standard 11'6" spiral silos which were sold and erected in New York State. The five silos in dispute are the following:

<u>Period</u>	<u>Customer</u>	<u>Taxable Purchases</u>	<u>Tax Due</u>
August 31, 1977	Fisher Body	\$ 8,406.00	\$ 588.42
May 30, 1978	Sunnydale Farm	5,944.00	475.52
November 30, 1978	Marpak Industries	10,868.00	760.76
May 31, 1979	Fisher Body	86,664.00	6,066.48
November 30, 1979	Hilford Chemical	5,386.00	377.02

The Audit Division took the position that the above installations of "spiral silos" constituted capital improvements to real property and therefore the materials incorporated therein were subject to use tax. Alternatively, the Division argued that the silos, although used in the production of tangible personal property, do not have the characteristics of machinery or equipment before or after installation and accordingly do not qualify for the exemption provided in section 1115(a)(12) of the Tax Law.

On the other hand, petitioner argued that the silos are not affixed to the realty in such a manner as to constitute a capital improvement and that the silos are exempt machinery and equipment under section 1115(a)(12) of the Tax Law.

3. Each spiral silo is secured to sixteen anchor bolts extending upwardly from a supporting concrete pad which is to be supplied by the customer to petitioner's specifications. A crane is used to place the silo on the pad. The silo houses a vacuum pump at the bottom and a vacuum hopper is mounted on the top of the silo. Both supply the power to transfer plastic pellets or powders from a railcar to the silo and into plastic molding machines. The silo is connected to the railcar by a flexible conveying line and to the molding machines by metal piping. The silo provides the surge capacity necessary to continue production while changing railcars and it also acts as a central distribution point for raw materials. The silos in issue are part of a material conveying system for the customer's plastics manufacturing facility. The silos were not sold as items separate and apart from a material flow system. The installation of the silo was the only part of the system considered taxable by the Audit Division.

4. Silos similar to those at issue herein have been removed from the original purchasers' locations and reset at other locations.

5. On April 1, 1982, petitioner and the Audit Division entered into a stipulation of facts that has been incorporated into the decision.

CONCLUSIONS OF LAW

A. That section 1115(a)(12) of the Tax Law provides an exemption from sales and use taxes for "(m)achinery or equipment for use or consumption

directly and predominantly in the production of tangible personal property... for sale, by manufacturing, processing...".

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 steps of production where the product is finished and packaged for sale [20 NYCRR 528.13(b)(1)(ii)].

The term "equipment" as used in section 1115(a)(12) of the Tax Law was held that it means having an identifiable character as equipment at the time of purchase at retail which is adapted by its design to perform in conjunction with machinery or otherwise, have some particular function in a stage of the manufacturing process (Slattery Associates, Inc. v. Tully, 54 NY 2d 711).

B. That a "spiral silo" which is manufactured at petitioner's factory and shipped as a unit to be erected as such constituted equipment used directly and predominantly in production in accordance with the meaning and intent of section 1115(a)(12) of the Tax Law and therefore is exempt from the imposition of sales and use taxes.

The exemption under section 1115(a)(12) is applicable to this type of spiral silo whether it retains its identity as tangible personal property after installation or whether it is permanently affixed so as to constitute a capital improvement. Therefore, issue II is moot.

C. That the petition of Conair, Inc. is granted to the extent indicated in Conclusion of Law "B"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due

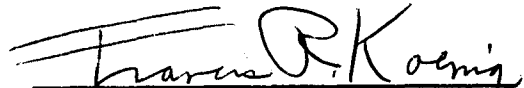
issued March 20, 1980 by reducing the additional taxes due to \$8,617.89; and that, in all other respects, the petition is denied.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 169 520

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to <i>Enair Inc.</i>	
Street and No. <i>Conner Bldg</i>	
P.O. State and ZIP Code <i>Franklin Pa 16323</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

P 693 169 521

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to <i>E. Wallace Breuch</i>	
Street and No. <i>524 Olive St</i>	
P.O. State and ZIP Code <i>Pittsburg PA 15237</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	