

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
NW SIGN INDUSTRIES, INC. : DECISION
for Revision of a Determination or for Refund of : DTA NO. 825245
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period June 1, 2006 through :
February 28, 2010. :

Petitioner, NW Sign Industries, Inc., filed an exception to the determination of the Administrative Law Judge issued on January 15, 2015. Petitioner appeared by Flaster Greenberg (Bernard Eizen, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael J. Hall).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Oral argument was granted at petitioner's request, but such request was subsequently withdrawn. The six-month period for the issuance of this decision began on November 18, 2015, the date petitioner withdrew its request for oral argument.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether certain work performed by petitioner was shown to be capital improvements such that the transactions are excluded from sales tax pursuant to Tax Law § 1105 (c) (3).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 2, 5, 7 and 8 to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. Petitioner, NW Sign Industries, Inc., a Delaware corporation, operated a sign manufacturing and installation business located in Moorestown, New Jersey. Petitioner performed work within New York State.

2. On or about April 28, 2009, the Division of Taxation (Division) commenced an audit of petitioner. On June 11, 2009, the Division's auditor mailed an appointment letter to petitioner requesting copies of its books and records for the period June 1, 2006 through February 28, 2009. On April 1, 2010, the auditor mailed a letter to petitioner advising that the audit period was being expanded to include March 1, 2009 through February 28, 2010 and requesting copies of its books and records for the entire audit period. Both letters specifically requested copies of all capital improvement certificates.

3. In response to the appointment letter, petitioner's then-representative met with the Division and provided sales tax returns, Excel spreadsheets used in preparing the returns, and also information on a CD regarding sales invoices, assets, general ledger, corporation tax returns, cash receipts journals, corporate book, general journals, purchase information and resale certificates. The auditor was unable to reconcile the information contained on the spreadsheet with the sales tax returns.

4. The Division's review on audit covered sales, assets and recurring expenses. The Division concluded that no additional tax was due on capital assets or on expense purchases.

5. The auditor stated that although the records produced were adequate to perform her audit, she was missing certain information such as invoices, contracts, quotes, and exemption certificates. Petitioner did not provide any capital improvement certificates (form ST-124) during the audit and the auditor assessed additional sales tax due on claimed capital improvement jobs accordingly.

6. On November 22, 2010, a notice of determination, notice L-035030280, was issued to petitioner for additional sales tax due in the amount of \$292,219.78 plus interest. No penalty was assessed. This tax due amount consisted of \$288,995.11 in additional sales tax on unsubstantiated nontaxable sales and \$3,224.67, which appeared to be collected as tax by petitioner, yet not remitted to the state. Petitioner was then credited for use tax previously paid on purchases in the amount of \$17,149.03.

7. Petitioner timely filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). On June 29, 2012, a conciliation order was issued that reduced the amount of sales tax due to \$120,233.19. This reduction was based upon additional information with respect to claimed capital improvement jobs and an overlapping audit with one of petitioner's customers.

Following the issuance of the conciliation order, the Division further reduced the amount of sales tax due to \$80,707.04. This reduction was also based upon additional information with respect to claimed capital improvement jobs and an overlapping audit with one of petitioner's customers. Petitioner contests \$70,704.37 of the amount remaining at issue, which is attributable to jobs performed for Commerce Bank. Petitioner contends that these jobs resulted in capital improvements.

8. Petitioner provided the certificates of capital improvement associated with the Commerce Bank jobs remaining at issue to the Division at or after the BCMS conference. These forms, which are in evidence, do not contain a certificate of authority number for Commerce Bank. Additionally, each form describes the work being performed as: “Fabrication & Installation of Signage.”

The auditor testified that the capital improvement certificates in evidence were not valid because each was missing an identification number; was untimely filed; and did not adequately describe the work being done by petitioner that would qualify the sale as a capital improvement.

Attached to the capital improvement certificates in evidence are associated invoices. Most of these simply state charges for “fabrication,” “installation” and “travel time.” Some also state a charge for “permits” and/or “staff time.” Others contain less information.

9. Petitioner did not offer any testimony at the hearing.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that the Division properly rejected the capital improvement certificates submitted by petitioner as untimely and incomplete. She further determined that, although such a failure to provide timely and complete ST-124 forms is not determinative of capital improvement status, petitioner did not submit sufficient proof to establish that the jobs in question qualified as capital improvements under the three-part definition set forth in Tax Law § 1101 (b) (9) (i). The Administrative Law Judge based this conclusion on the lack of any detailed description of the work performed in the record. She specifically noted the vagueness of the job descriptions on the ST-124 forms; the paucity of additional information provided by the invoices; and the absence of any contracts between petitioner and its customer.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner asserts that it timely received the capital improvement certificates from its customer in good faith and that such certificates were properly completed. Petitioner thus contends that it was relieved of the burden of collecting sales tax and of proving the nontaxability of the transactions at issue pursuant to Tax Law § 1132 (c), 20 NYCRR 532.4 (b) (2) and 20 NYCRR 541.5 (b) (4) (i). Petitioner contends that the Administrative Law Judge ignored these provisions and erroneously concluded that petitioner was liable for sales tax on the jobs remaining at issue. Citing 20 NYCRR 532.4 (b) (2) (i), petitioner contends that it had no knowledge that the ST-124 forms issued by its customer were in any way false or fraudulent, and that it therefore accepted such documents in good faith. According to petitioner, under such circumstances, it should not be required to further investigate its customer's claim of a capital improvement. Finally, petitioner asserts that, even if the ST-124 forms were not properly completed, the Administrative Law Judge failed to apply the three-part test to determine taxability under Tax Law § 1101 (b) (9) (i). Petitioner contends that each of the jobs at issue met the requirements for a capital improvement under that provision.

The Division contends that petitioner has not proven that it received the capital improvement certificates in good faith and in a timely manner or that the certificates were properly completed. The Division also contends that, as petitioner did not provide any capital improvement certificates until after the audit, the certificates so provided must be deemed untimely and incomplete under the regulations. Accordingly, the Division asserts, petitioner continued to bear the burden of proving that any of the jobs at issue were capital improvement jobs and that it failed to meet this burden.

OPINION

Tax Law § 1105 (c) (3) taxes the receipts from every retail sale of the service of installing tangible personal property, with the following exception:

“(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in [Tax Law § 1101 (b) (9)].”

Tax Law § 1101 (b) (9) (i) defines capital improvement as an addition or alteration to real property which:

“(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.”

Tax Law § 1132 (c) creates a presumption of taxability for all transactions mentioned in, among other sections, Tax Law § 1105 (c), and places the burden of proving nontaxability upon the vendor or the customer. Tax Law § 1132 (c) also provides a vendor with relief from this burden where the customer timely provides the vendor with an appropriate exemption document in such form as the commissioner may prescribe. Division regulations promulgated pursuant to that section mirror such provision as follows:

“A vendor who in good faith accepts from a purchaser a properly completed exemption certificate . . . not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate or documentation itself will satisfy the vendor’s burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer” (20 NYCRR 532.4 [b] [2]).

Similarly, and specifically with respect to capital improvement certificates, 20 NYCRR 541.5 (b) (4) (i) provides that “[w]hen a properly completed certificate of capital improvement has been furnished to the contractor, the burden of proving the job or transaction is not taxable and the liability for the tax rests solely upon the customer.”

The Division’s regulations also require, however, the production of exemption certificates and documents, including capital improvement certificates, during an audit. Where a taxpayer fails to provide such documents following an auditor’s request, the Division’s regulations provide:

“Requested exemption certificates and documents which are not submitted to the department within the allotted time period . . . are deemed not to have been properly completed and timely received by the vendor. Any such exemption certificates or documents later presented by the vendor will not, in and of themselves, be considered sufficient to satisfy the vendor’s burden of proof concerning the taxability of the subject transaction” (20 NYCRR 532.4 [b] [4] [iii]).

Here, petitioner did not provide any capital improvement certificates during the audit, notwithstanding the Division’s specific written requests (*see* findings of fact 2 and 5). The capital improvement certificates that were provided to the auditor after the audit are thus deemed “not properly completed and timely received” by petitioner pursuant to 20 NYCRR 532.4 (b) (4) (iii). As a consequence, pursuant to the same regulation, such certificates are not sufficient to relieve petitioner from its burden of proving that the jobs remaining at issue were capital improvements.

We therefore turn to the question of whether petitioner has met its burden. Whether an installation of tangible personal property or a service to real property constitutes a capital improvement “must be decided on a case-by-case basis” (*Matter of Gem Stores, Inc.*, Tax

Appeals Tribunal, October 14, 1988). A taxpayer bears the burden to show that each element of the statutory test has been met in order to establish entitlement to capital improvement treatment (*see Matter of A. Colarusso and Son, Inc.*, Tax Appeals Tribunal, June 23, 2011). Specific facts are very important in determining whether a claimed capital improvement meets each element of the statutory test (*see Matter of MacLeod*, Tax Appeals Tribunal, July 3, 2008, *confirmed sub nom MacLeod v Megna*, 75 AD3d 928 [2010]).

Upon review of the record, we agree with the Administrative Law Judge that petitioner has not met its burden. The capital improvement certificates and invoices in the record provide, at best, a cursory description of the work performed by petitioner. Moreover, as the Administrative Law Judge noted, petitioner provided no contracts in respect of the jobs at issue, and did not offer any testimony describing such work. Indeed, petitioner's argument on exception on this point is simply a conclusory assertion that the jobs met the three-part test under Tax Law § 1101 (b) (9) (i). In sum, a clear lack of evidence regarding the specific jobs remaining at issue requires a finding against petitioner.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of NW Sign Industries, Inc., is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of NW Sign Industries, Inc., is denied; and

4. The notice of determination, dated November 22, 2010, as modified by the conciliation order, dated June 29, 2012, and as further modified in accordance with finding of fact 7, is sustained.

DATED: Albany, New York
May 12, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner