STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **M & Y DEVELOPERS, INC.** for Revision of a Determination or Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods September 1, 2013 through November 30, 2016 and September 1, 2013 through December 31, 2016.	DECISION DTA NO. 828404

Petitioner, M & Y Developers, Inc., filed an exception to the determination of the Administrative Law Judge issued on September 26, 2019. Petitioner appeared by Hodgson Russ LLP (Joshua K. Lawrence, Esq., and Timothy P. Noonan, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was held by teleconference on August 27, 2020, which date began the six-month period for issuance of this decision.

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

ISSUE

Whether the Division of Taxation properly denied petitioner's request for refund of sales tax paid by petitioner to its vendors on the purchase of concrete.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that we have not restated finding of fact 18, which lists the Administrative Law Judge's ruling on proposed findings of fact.

1. Petitioner, M & Y Developers, Inc., performs general contracting and concrete placement work (concrete work) for customers in New York, including the building of concrete foundations, and installation of sidewalks, driveways and walkways. Petitioner enters into written contracts with its customers for its general contracting and concrete work.

2. The size of the jobs that petitioner performs varies but can require the services of up to 30 or 40 of petitioner's employees.

3. When performing concrete work, petitioner's responsibilities include preparing a site to receive concrete. This includes excavating a site and ensuring that it is properly elevated and leveled in accordance with construction documents. This also includes protecting and supporting adjoining walls and structures, as well as building forms to hold poured concrete, framing footings for foundations, and installing structural material, such as rebar and chicken wire, to prevent concrete from cracking.

4. While petitioner does very minor excavation work itself, it generally hires subcontractors for this work. Petitioner, however, oversees the work of these subcontractors to ensure that any required excavation work is done correctly.

5. M & Y coordinates the activities of the subcontractors at the site, including the concrete suppliers, pumping companies, third-party concrete testers and engineers.

6. Petitioner purchases concrete from suppliers who deliver it to the site and pump or pour it using a chute or line to direct the flow to the desired location specified by petitioner. Petitioner

does not enter into written contracts with the concrete suppliers. Submitted into the record were a number of invoices the concrete suppliers furnished to petitioner for its purchase of concrete, which show the type of concrete mix purchased, the quantity and the price.

7. Petitioner hires the concrete supplier, or "ready-mix company," to supply the concrete. Once petitioner finishes the site preparation work, it determines how many yards of concrete are needed, and asks the concrete supplier for that amount in yards. The concrete that petitioner needs for each job varies in that it has specific "PSI" (pounds per square inch) requirements, which are determined by a third-party engineer. Once petitioner hires the concrete supplier, the supplier is informed of the required PSI as established in the construction documents, either through petitioner, the site owner or the general contractor. Petitioner obtains a TR3 (concrete design mix technical report) from the concrete supplier, which lists the ingredients that the supplier will use to achieve the required PSI. Petitioner will then tell the concrete supplier when and where to deliver the concrete. The concrete is then delivered to the work site by the concrete supplier who pumps or pours the concrete from the concrete truck into the forms or areas prepared by petitioner.

8. While the concrete supplier is pouring or pumping the concrete, petitioner will have two or three of its own employees on site. These employees will smooth out and/or flatten any concrete that is poured or pumped. For flat work, petitioner's employees will distribute the concrete with a machine called a helicopter, and smooth it out. Petitioner's employees will also perform any additional work that may be required while the concrete is still wet, such as installing keys into the concrete, detailing the concrete, or putting in lines for sidewalks.

9. If the site owner is not satisfied with the concrete work once it is completed, it is petitioner's responsibility to correct any problems.

10. On December 19, 2016, petitioner submitted an application for credit or refund of sales or use tax, form AU-11, to the Division of Taxation (Division) seeking a sales tax refund of $190,401.65 (first application). The refund amount claimed was for sales tax petitioner stated was paid to two concrete suppliers, Alpine Ready Mix and Liberty Transit Mix, between September 1, 2013 and November 30, 2016, for the purchase and installation of concrete. The basis of petitioner's request was that the concrete suppliers should be responsible for paying use tax on the raw materials used for the concrete, and that they were shifting the tax burden onto petitioner. Petitioner claimed that it was exempt from sales tax under the capital improvement provisions of the Tax Law.

11. On February 15, 2017, the Division issued a refund claim determination notice (Notice 1) to petitioner that denied petitioner's first application. The reason for the refund denial was the Division's determination that petitioner's purchase of concrete was the taxable sale of tangible personal property. Notice 1 stated, in part, as follows:

> "Any contractor who is making a capital improvement must pay a tax on the cost of the material to him, as he is the ultimate consumer of the tangible personal property.
>
> In addition, the contractor controls and is responsible for proper installation. Based on the documentation presented you as the contractor were responsible for the proper installation of the foundation and sidewalks. The operator of the concrete truck is only responsible for providing and delivering the materials. You, as the contractor controls the distribution of the concrete."

12. On February 19, 2017, petitioner submitted a second application for credit or refund of sales or use tax, form AU-11, to the Division (second application). The second application sought a sales tax refund of $296,793.39, which included the same $190,401.65 petitioner sought in the first application, plus an additional $106,391.74. The additional amount sought was for sales tax petitioner claimed was paid on additional purchases of concrete from Alpine Ready Mix

and Liberty Transit Mix, as well as from other concrete suppliers for the period September 1, 2013 through December 31, 2016.

13. On March 22, 2017, the Division issued a refund claim determination notice to petitioner (Notice 2), denying petitioner's second application. Notice 2 set forth the same reasons for denial as Notice 1, plus noted that petitioner's second application was, in part, duplicative of the first application that was previously denied, and further that portions of the claim were not timely.

14. Petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) for Notice 1 and Notice 2. On August 4, 2017, BCMS issued a conciliation order denying petitioner's request and sustaining the statutory notices.

15. At the hearing, the parties stipulated that the amount of refund claim at issue in this proceeding was $248,480.49.

16. On February 1, 2019, petitioner filed a request for a correction of the hearing transcript, together with the affidavit of Yosef Gruber, petitioner's witness who testified at the hearing, requesting that page 128, lines 22 and 23 of the transcript be changed from "hardening concrete" to "hardened concrete." On March 4, 2019, the Division filed an affirmation of Howard Beyer, Esq., opposing petitioner's request for a correction of the transcript.

17. On April 16, 2019, subsequent to the closing of the record and beyond the final date for submission of briefs, petitioner's representative requested permission to submit a court decision that he believed was relevant to this matter, but which he did not cite in his brief. Petitioner was granted until April 30, 2019 to submit a copy of the specific case decision or citation thereto, and nothing more. On April 29, 2019, petitioner submitted a cover letter and a copy of the decision in ***Matter of Midland Asphalt Corp. v Chu*** (136 AD2d 851 [3d Dept 1988]), together with the

record on review in that matter. On May 14, 2019, the Division objected to petitioner's submission of new documents.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by addressing two issues raised post-hearing; namely, petitioner's request to correct the transcript of the hearing and petitioner's submission of evidence after the closing of the record. With regard to the first issue, the Administrative Law Judge found that petitioner abandoned its request to correct the transcript by conceding that any impact such correction would have would be moot in light of the Appellate Division's holding in ***Matter of Midland Asphalt Corp***. The Administrative Law Judge also rejected petitioner's submission of additional evidence, finding that the documents were submitted after the closing of the record.

The Administrative Law Judge then addressed the substantive issue of whether petitioner is entitled to an exemption from sales tax for its purchases from its concrete suppliers. The Administrative Law Judge noted that statutes and regulations authorizing exemptions and exclusions from taxation are to be strictly and narrowly construed and that the taxpayer bears the burden of proof with respect thereto. The Administrative Law Judge quoted the relevant section of the Tax Law imposing sales tax on sales of tangible personal property, including the capital improvement exception and definition of a capital improvement under the statute. The Administrative Law Judge also cited the section of the Tax Law that imposes sales tax on sales of tangible personal property to contractors for use in construction, regardless of whether such tangible personal property is to be resold or incorporated into real property as a capital improvement or repair.

The Administrative Law Judge rejected petitioner's contention that the transactions at issue were purchases of capital improvement construction contracts and not purchases of tangible personal property. The Administrative Law Judge found petitioner's contentions to be contrary to the record in that it was petitioner who was the party responsible for the installation of the concrete at its job sites. Specifically, the Administrative Law Judge observed that the invoices of the sales here at issue did not indicate charges for construction or other improvements to real property, but rather indicated the amount of concrete purchased. The Administrative Law Judge analogized the taxpayer's position in ***Matter of Miron Rapid Mix Concrete Corp.*** (Tax Appeals Tribunal, January 9, 1992) to the facts presented here, where the Tribunal affirmed a determination that the taxpayer, a concrete supplier, was engaged in the production and sale of tangible personal property starting with the charging of the ingredients into a mixer truck and continuing uninterrupted in a unified process until the final product is delivered to the construction site. The Administrative Law Judge stated that petitioner's reliance on ***Matter of Midland Asphalt Corp.*** for a contrary outcome was misplaced because, in that case, the taxpayer sought a sales tax exemption for equipment predominately used to produce asphalt for its own contractual obligations rather than to sell it separately from the services it provided and was distinguishable from the instant case. The Administrative Law Judge instead found petitioner's situation to be similar to that of the suppliers described in ***Miron Rapid Mix Corp.*** that were found to be engaging in retail sales of concrete. The Administrative Law Judge concluded that petitioner failed to establish that it was not purchasing tangible personal property from its concrete suppliers. Accordingly, the Administrative Law Judge denied the petition and sustained the refund claim determination notices here at issue.

ARGUMENTS ON EXCEPTION

Petitioner argues that the Administrative Law Judge erred in concluding that petitioner's purchases from its suppliers were not purchases of capital improvement contracts for services excepted from sales tax under Tax Law § 1105 (c) (3) and (5). Petitioner states that the threshold question of whether it purchased the concrete at retail under Tax Law § 1105 (a) or purchased contracts for construction of capital improvements under Tax Law § 1105 (c) (3) is a question of fact rather than a question of statutory construction, and thus strict construction was not the appropriate standard to apply. Petitioner urges this Tribunal to find that the record supports its contention that its purchases from its concrete suppliers were for construction contracts for installation of capital improvements at its project sites rather than purchases of concrete at retail.

The Division states that the Administrative Law Judge correctly determined that the purchases at issue here constituted retail purchases of tangible personal property and urges this Tribunal to affirm the determination of the Administrative Law Judge. The Division argues that while the inherent characteristics of concrete require it to be delivered directly into a prepared site or form at the end of its manufacturing process, such delivery does not transform the sale of concrete, itself tangible personal property, into a nontaxable service. In support thereof, the Division points out that petitioner's suppliers' invoices for the concrete purchases do not include charges for installation services or labor. The Division also argues that petitioner's position, if accepted, would call into question prior cases of this Tribunal and New York courts regarding taxability of sales of concrete and exemptions for equipment used in its manufacture.

OPINION

Pursuant to Tax Law § 1105 (a), a sales tax is imposed on the receipts from every retail sale

of tangible personal property, except as otherwise provided. The definition of retail sale includes the sale of tangible personal property to a contractor for use or consumption in construction, regardless of whether the tangible personal property is to be resold as such or incorporated into real property as a capital improvement or repair (Tax Law § 1101 [b] [4]; ***see also*** 20 NYCRR 541.1 [b]; ***Matter of Swet***, Tax Appeals Tribunal, February 22, 1991).

Sales tax is also imposed on the receipts from the sale of certain services enumerated under Tax Law § 1105 (c) (3), including installation, maintenance, repairing and servicing of tangible personal property, but such imposition of sales tax does not extend to installation of property, which, when installed, would constitute an addition or capital improvement to real property (Tax Law § 1105 [c] [3] [iii]; ***see also*** Tax Law § 1105 [c] [5]). Accordingly, receipts from the performance of a capital improvement to real property by a contractor are not subject to sales tax (20 NYCRR 541.1 [c]).

The term "capital improvement" is defined under Tax Law § 1101 (b) (9) to be an addition or alteration to real property that substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property, that 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 is intended to become a permanent installation. There is no dispute that the concrete work performed by petitioner as described herein resulted in capital improvements to real property.

Petitioner's argument that its purchases were not subject to sales tax hinges upon whether petitioner has shown that the transactions at issue were purchases of contracts to perform capital improvements, i.e., to install concrete, and not retail purchases of concrete for use by petitioner in its construction contracts. In other words, did petitioner purchase tangible personal property

or did petitioner purchase a service? Petitioner maintains that this is a question of fact and that the Administrative Law Judge misapprehended relevant facts that show that petitioner's concrete suppliers were in fact subcontractors performing capital improvement services at petitioner's job sites. Petitioner points to its president's testimony at the hearing in support of its claim that petitioner had de minimus role in concrete installation at its job sites and that the invoices from its concrete suppliers in fact represented charges for capital improvements to real property.

We affirm the determination of the Administrative Law Judge that petitioner's purchases of concrete constituted purchases of tangible personal property at retail.

First, we note that the record does not support petitioner's claim that it had only de minimus involvement in the installation of concrete at its job sites. As found by the Administrative Law Judge, and confirmed by our review of the record, petitioner was involved with each step of the concrete installation process; from subcontracting excavators, to building forms to hold the concrete as it hardens into the desired structure, to installing structural elements and performing smoothing work on the still-wet concrete. Even if petitioner's concrete suppliers were responsible to petitioner for delivering a product that conforms to the engineering specifications of the project, petitioner was ultimately responsible to the end customer for the installation.

The invoices from petitioner's suppliers also help to inform our conclusion. As noted by the Administrative Law Judge, the invoices from petitioner's concrete suppliers indicate sales of various amounts of concrete prepared to the required specifications together with the charges for such amounts of concrete. While not determinative, the structure and billing of a transaction is a factor to be considered in deciding proper sales tax treatment (***Matter of Echostar Satellite Corp. v Tax Appeals Trib. of the State of N.Y.***, 20 NY3d 286, 292 [2012]; cf. ***Matter of Midland Asphalt Corp. v Chu*** [petitioner determined to provide a capital improvement service despite

invoices to the contrary]). Here, the invoices do not refer to or charge for installation of the concrete, but simply charge for discrete amounts of concrete. The invoices thus do not indicate that the concrete suppliers provided a service of installing a capital improvement, as that term is defined by Tax Law § 1101 (b) (9).

In support of its arguments, petitioner posits that ***Midland Asphalt Corp.*** should guide our analysis of whether petitioner's purchases were of capital improvement contracts. ***Midland Asphalt Corp.*** dealt with the question of whether, as claimed by the taxpayer, purchases of equipment and electricity were directly and predominately used in the production of tangible personal property for sale so as to qualify for an exemption from sales tax on such purchases under Tax Law § 1115 (a) (12). There, the court found that the vast majority of the asphalt produced was produced to meet the taxpayer's own contractual obligations to provide and apply the asphalt emulsion, and not to sell asphalt as such, and therefore the taxpayer's purchases did not qualify for the sales tax exemption (***Midland Asphalt Corp.***, at 852). The court thus concluded that the taxpayer was in the business of providing the service of installing tangible personal property that resulted in capital improvements.

Petitioner asserts that the distribution and application of asphalt emulsion in ***Midland Asphalt Corp***. is analogous to its transactions with its concrete suppliers. Petitioner has not shown, however, that the process of distributing and applying asphalt emulsion is sufficiently similar to the process of pumping or pouring concrete for the analogy to hold. In our view, the work of depositing concrete in a form or a designated area (***see*** finding of fact 7), the concrete's inherent hardening characteristic notwithstanding, is more akin to the delivery of building materials, i.e., a sale of tangible personal property, than the work of applying asphalt emulsion to

a roadway or parking lot by means of a spray application vehicle or a mix-paver (***see Matter of Midland Asphalt Corp.***, State Tax Commission, June 30, 1986).

In a proceeding before the Division of Tax Appeals, a petitioner bears the burden of proof (20 NYCRR 3000.15 [d] [5]). Here, petitioner has not borne its burden of showing that its purchases of concrete from its suppliers do not fall under the definition of retail sale set out in Tax Law § 1101 (b) (4) (i), which includes sales of tangible personal property to contractors for use in capital improvement construction. Petitioner's concrete purchases were thus taxable under Tax Law § 1105 (a).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of M & Y Developers, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of M & Y Developers, Inc. is denied; and

4. The refund claim determination notices, dated February 15, 2017 and March 22, 2017, are sustained.

DATED: Albany, New York
March 1, 2021

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner