

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
M & Y DEVELOPERS, INC. : DETERMINATION
for Revision of a Determination or Refund of Sales and : DTA NO. 828404
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. :

Petitioner, M & Y Developers, Inc., 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 periods September 1, 2013 through November 30, 2016 and September 1, 2013 through December 31, 2016.

A hearing was held before Barbara J. Russo, Administrative Law Judge, in New York, New York, on December 11, 2018, with all briefs to be submitted by April 2, 2019, which date began the six-month period for issuance of this determination. Petitioner appeared by H. Friedman & Associates, CPA (Herschel Friedman, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Howard Beyer, Esq., of counsel).

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

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 of 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 which 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 which 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* (137 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.

18. The Division submitted 12 proposed findings of fact. Such proposed findings of fact have been generally accepted and incorporated herein except proposed findings of fact 4 and 5, which have been modified to more accurately reflect the record.

SUMMARY OF THE PARTIES' POSITIONS

19. Petitioner contends that it hires subcontractors to manufacture and install concrete and affix it to real property, and that such purchase is an exempt purchase of a construction contract as defined by 20 NYCRR 541.2. Petitioner further argues that the sales at issue are “nontaxable capital improvement construction contracts” exempt under Tax Law § 1105 (c) (3) and (5) and that the tax that is to be paid is a use tax by the ready-mix supplier.

20. The Division argues that petitioner’s purchase of concrete is a taxable sale of tangible personal property pursuant to Tax Law § 1105 (a).

CONCLUSIONS OF LAW

A. As a preliminary matter, two issues raised post-hearing must be addressed, specifically, 1) petitioner’s request for a correction of the hearing transcript, and 2) petitioner’s submission of additional documents after the record was closed.

With regard to petitioner’s request for a correction of the hearing transcript, the Tax Appeals Tribunal Rules of Practice and Procedure provide that:

“[i]f either party deems the transcript to be inaccurate in any material respect, the party shall promptly notify the administrative law judge, setting forth specifically the alleged inaccuracies. The administrative law judge shall specify the corrections to be made in the transcript, and such corrections shall be made a part of the record” (20 NYCRR 3000.15 [d] [7]).

The portion of the transcript at issue reads as follows:

Line Number	Testimony
20	Q: So let me ask you, what is the
21	product that you buy from Alpine Ready Mix.
22	A. Hardening concrete. Installed
23	hardening concrete.

Petitioner requested that page 128, lines 22 and 23 of the transcript, be changed from “hardening concrete” to “hardened concrete.” The Division objected to petitioner’s request, arguing that petitioner’s requested correction is antithetical to the record, which reflects that the concrete petitioner purchases has a “slump” and is capable of being pumped, poured and/or spread. The Division further argues, in an affirmation from Mr. Beyer, that while he recalls petitioner’s representative describing the concrete petitioner purchases as “hardened concrete” in his summation, he does not recall petitioner’s witness saying this. The Division further contends that it is unlikely that the court reporter recorded the witness’s testimony wrong twice. Additionally, the Division argues that how the concrete petitioner purchases is described is irrelevant to the outcome of this matter, in that hard, soft or otherwise, concrete is tangible personal property, and petitioner’s purchase of it is taxable as such.

Petitioner subsequently conceded in a letter dated April 29, 2019, that based on the decision in *Matter of Midland Asphalt Corp.* and subsequent Tax Appeals Tribunal cases, the controversy regarding “hardened concrete” or “hardening concrete” was moot.

Based on the foregoing, I find that petitioner has abandoned its request to change the transcript. Additionally, I find that the change is not material to the outcome of this matter. Furthermore, the record shows that at the time of delivery of the concrete, it is not yet hardened and is pliable while still wet. Petitioner’s witness testified that when the concrete is poured, M & Y employees will flatten it out, smooth it, add details or a key, and stated that: “[a]s long as it’s wet, anything that needs to be done, they [M & Y employees] would do.” Accordingly, petitioner’s request to change the transcript is rejected.

B. Regarding petitioner’s submission of additional documents after the record was closed, it is well established that new evidence may not be introduced after the record is closed. In

Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991), the Tribunal rejected petitioner's attempt to introduce new evidence after the record had been closed, stating that:

“[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (*see, Matter of Oggi Rest.*, Tax Appeals Tribunal, November 30, 1990; *Matter of Morgan Guar. Trust Co. of N.Y.*, Tax Appeals Tribunal, May 10, 1990; *Matter of International Ore & Fertilizer Corp.*, Tax Appeals Tribunal, March 1, 1990; *Matter of Ronnie's Suburban Inn*, Tax Appeals Tribunal, May 11, 1989; *Matter of Modern Refractories Serv. Corp.*, Tax Appeals Tribunal, December 15, 1988).”

Subsequent to the conclusion of the hearing, after the record was closed and beyond the conclusion of the briefing schedule, petitioner's representative requested permission to submit a court decision which 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. Petitioner was specifically instructed that nothing other than a copy of the specific decision or citation thereto would be allowed. On April 29, 2019, in addition to a copy of the decision in *Matter of Midland Asphalt Corp. v Chu*, petitioner submitted documents consisting of the entire record on review in that matter. As petitioner's additional documents were submitted after the closing of the record, and contrary to the specific instructions given by the Administrative Law Judge, the additional documents are rejected and will not be considered in the rendering of this determination. Petitioner's arguments with regard to *Matter of Midland Asphalt Corp. v Chu*, for which petitioner was granted additional time to cite or provide a copy of the decision, will be addressed herein.

C. As the instant matter presents the issue of whether petitioner is entitled to an exemption

from sales tax, it must be first noted that statutes and regulations authorizing exemptions and exclusions from taxation are to be strictly and narrowly construed (*see Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of the State of NY*, 2019 NY Slip Op 05184; *Matter of International Bar Assn. v Tax Appeals Tribunal*, 210 AD2d 819 [3d Dept 1994], *lv denied* 85 NY2d 806 [1995]; *Matter of Estate of Lever v New York State Tax Commn.*, 144 AD2d 751 [3d Dept 1988]). In order to qualify for the exemption, petitioner bears the burden of clearly proving entitlement to the exemption sought (*see Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of the State of NY*; *Matter of Grace v New York State Tax Commn.*, 37 NY2d 193 [1975], *reargument denied* 37 NY2d 816 [1975], *lv denied* 338 NE2d 330 [1975]).

D. The crux of the controversy in this proceeding is the question of whether petitioner's purchase of concrete was a taxable sale. The Division contends that petitioner's purchase of concrete was the purchase of tangible personal property subject to sales tax pursuant to Tax Law § 1105 (a). Petitioner, on the other hand, contends that it purchased a "nontaxable capital improvement construction contract" and that the concrete suppliers are contractors who install the concrete into real property. Petitioner argues that the concrete suppliers, rather than petitioner, are responsible to pay use tax on the concrete.

Tax Law § 1105 (a) imposes sales tax on the sale of tangible personal property, subject to certain listed exemptions. Tax Law § 1105 (c) (3) imposes sales tax on the receipts from every sale, except for resale, of the service of installing tangible personal property, except for installing property which, when installed, will constitute an addition or capital improvement to real property. The term "capital improvement" is defined in Tax Law § 1101 (b) (9) (i) 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 § 1101 (b) (4) provides that the sale of tangible personal property to a contractor for use or consumption in construction is a retail sale and subject to sales and use tax, regardless of whether tangible personal property is to be resold as such or incorporated as such into real property as a capital improvement or repair (*see Matter of Swet*, Tax Appeals Tribunal, February 22, 1991). A similar provision appears in the Division’s regulations (*see* 20 NYCRR 541.1 [b]).

Petitioner concedes that the ready-mix concrete is tangible personal property and that tangible personal property is generally subject to sales tax. However, petitioner argues that the transactions at issue are not merely the sale of tangible personal property. Rather, petitioner contends that the transactions at issue are petitioner’s purchases of a “construction contract” as defined by 20 NYCRR 541.2 (a).

A construction contract is defined as:

“(1) A contract to erect, construct, alter, repair or maintain any building or other structure, project, development or other improvement on or to real property, property or land.

(2) All forms of capital improvement contracts, including, but not limited to, a lump sum, time and material, cost plus, and any other capital improvement contract are treated the same for sales and use tax purposes” (20 NYCRR 541.2 [a]).

Petitioner argues that its concrete suppliers furnish and install the concrete to real property at the work sites. According to petitioner, the concrete suppliers are manufacturers and installers

of the ready-mix concrete, and as such must pay use tax rather than charging sales tax to petitioner.

Petitioner's argument is contrary to the facts and the law. The record establishes that petitioner, and not the concrete suppliers, is the party responsible for the installation of the concrete. Petitioner enters into written contracts with its customers to perform concrete work on real property. The evidence shows that petitioner prepares the site to receive the concrete, including excavating, protecting and supporting adjoining walls and structures, and building forms to hold poured concrete, framing footings for foundations, and installing structural material, such as rebar and chicken wire. Petitioner then hires the concrete supplier to supply the concrete, and asks the concrete supplier for the specific amount of yards needed. The concrete suppliers deliver the concrete via truck and either pour or pump the concrete to the site specified by petitioner. The invoices from the concrete suppliers show charges for the amount of concrete purchased, and do not indicate any charges to "erect, construct, alter, repair or maintain any building or other structure, project, development or other improvement on or to real property." After the concrete supplier delivers the concrete, petitioner's 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.

Petitioner's argument that the concrete suppliers are both manufacturing and installing the tangible personal property, i.e. concrete, into real property is thus not supported by the above facts and is contrary to Tax Appeals Tribunal (Tribunal) decisions involving concrete suppliers.

In *Matter of Miron Rapid Mix Concrete Corp.* (Tax Appeals Tribunal, January 9, 1992), the Tribunal found that the petitioner, who was in the business of manufacturing, selling and delivering concrete in a manner factually analogous to petitioner's concrete suppliers in this matter, was entitled to an exemption from sales and use tax under Tax Law § 1115 (a) (12) on the purchase of a truck chassis.¹ The Tribunal found that the truck chassis were used directly and predominantly in the production of tangible personal property (i.e. concrete) for sale. Like petitioner's concrete suppliers in the instant matter, Miron manufactured and sold concrete, and used concrete mixer trucks to manufacture and deliver the concrete to its customers. In both *Miron* and this matter, when the concrete is the desired consistency and the site is ready to receive the product, the concrete is discharged from the truck into a chute or line which directs the product to the desired location. The Tribunal found that the production phase of the concrete started by the time the ingredients were charged into the trucks, and continued uninterrupted in a unified process until the concrete was manufactured and delivered, and concluded that the entire use of the mixer trucks was intimately and directly connected to the process of producing concrete and, thus, the trucks were production equipment used directly and predominantly in the production of tangible personal property under Tax Law § 1115 (a) (12) (*Matter of Miron Rapid Mix Concrete Corp.*; see *Matter of B. R. DeWitt, Inc.*, Tax Appeals Tribunal, September 19, 1991).

Petitioner has failed to show any distinction between its concrete suppliers and the petitioner in *Miron*. Rather, the facts in the record show that the delivery and discharge of the

¹ Tax Law § 1115 (a) (12) provides, in relevant part, an exemption from sales and use tax for: “[m]achinery or equipment for use or consumption directly and predominantly in the production of tangible personal property . . . for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery or equipment.”

concrete by the concrete suppliers to the site specified by petitioner was part of the production process of tangible personal property, concrete, for sale to petitioner.

Petitioner's reliance on *Matter of Midland Asphalt Corp. v Chu* is misplaced. *Midland Asphalt* involved a claim for the production exemption under Tax Law § 1115 (a) (12) by a company that was in the business of applying an asphalt emulsion product during the construction of highways, parking lots and other surfaces through the use of its own specialized distribution and application vehicles. The taxpayer sought the exemption on its purchase of certain equipment and electricity used in the production of its asphalt product. The court found that 90% of the asphalt emulsion the taxpayer produced was used to meet its contractual obligations of applying the asphalt to highways and surfaces. The court concluded that substantial evidence supported the determination that the taxpayer was manufacturing the asphalt for its contracting business and was not primarily in the business of selling the asphalt separately from the services it provides.

By contrast, the concrete suppliers in this matter, like the taxpayer in *Miron Rapid Mix Concrete Corp.*, manufacture and deliver the concrete for sale to petitioner in a unified production process, ending at the point of discharge of the concrete to petitioner's desired location. Petitioner has failed to establish that it was not purchasing tangible personal property from the concrete suppliers. Accordingly, petitioner has failed to meet its burden of proving entitlement to an exemption from sales tax for its purchase of concrete.

E. The petition of M & Y Developers, Inc., is denied, and the refund claim determination notices, dated February 15, 2017 and March 22, 2017, are sustained.

DATED: Albany, New York
September 26, 2019

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE