

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of : DETERMINATION
NORTH COUNTRY PROPERTY : DTA NOS. 828455
MANAGEMENT, LLC : AND 828456
:
for Revision of Determinations or for Refund of Sales and
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period September 1, 2010 through August 31, 2015.
:

Petitioner, North Country Property Management, LLC, filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period September 1, 2010 through August 31, 2015.

A hearing was held in Albany, New York, on October 1, 2019, with all briefs to be submitted by May 18, 2020, which date began the six-month period for issuance of this determination. Petitioner appeared by Bartlett, Pontiff, Stewart & Rhodes, P.C., (Karla Williams Buettner, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall). After reviewing the entire record in this matter, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether purchases of rock salt and other deicers were subject to sales tax pursuant to Tax Law § 1105 (c) (5).

FINDINGS OF FACT

1. Petitioner, North Country Property Management, LLC (North Country), is a property services provider for primarily commercial, medical and industrial clients. North Country

began operations as a winter services provider in 2003 and, as such, performs snow and ice management for businesses in the Glens Falls, New York, area and major retailers on a national level.

2. The Division of Taxation (Division) performed two separate audits of petitioner. The first audit covered the sales tax periods September 1, 2010 through May 31, 2013 (Audit 1) and the second audit covered sales tax periods June 1, 2013 through August 31, 2015 (Audit 2).

3. With respect to Audit 1, the Division determined that petitioner owed approximately \$45,215.08 in sales tax on its purchases of rock salt. A notice of determination, bearing assessment number L-041796302, dated September 11, 2014, was issued to petitioner and subsequently paid.¹ The petition filed for Audit 1 is for a refund of \$45,215.08.

4. With respect to Audit 2, the Division issued a notice of determination, bearing assessment number L-046016487, dated January 27, 2017, to petitioner for sales tax due on rock salt purchases.

5. At the hearing, petitioner presented the testimony of Michael Merrill. Mr. Merrill is the CEO of petitioner. He testified concerning the business operations of petitioner and its use of the rock salt.

6. Petitioner purchases rock salt from international sellers from countries that include Australia, Egypt and Italy. The salt is trucked to a port and placed on a ship that offloads the salt onto a barge in New Jersey. From there, the barge travels up the Hudson River to Coeymans, New York, where it is offloaded into a storage facility. From Coeymans, the salt is placed on trucks, in bulk, for transportation to one of petitioner's hubs.

¹Although the notice assessed a larger tax amount, the parties have agreed that the amount protested is \$45,215.08, representing the portion of the assessment that asserted sales tax due on rock salt purchases.

7. Petitioner's customers are mainly commercial retailers and the contracts are for twelve months of snow removal services, although the snow season generally is a seven-month period. Retailers such as Price Chopper and CVS are customers.

8. Mr. Merrill described how rock salt and deicers are used in performing petitioner's snow removal services. He explained that petitioner applies rock salt to a surface such as a parking lot or driveway. Mr. Merrill stated that the salt remains wherever it is placed until it is physically moved by human force or by weather elements. He explained the science behind how the rock salt is activated in order to perform its desired function.

Specifically, Mr. Merrill explained that rock salt is a mineral that never changes its composition and, essentially, never dissipates. His testimony established that once the salt has been pushed off the sides of a treated road, by rain or wind, it creates salt burn that stays in the environment. He testified that some of his service contracts include a cleanup of winter debris in order to remove any remaining rock salt at the end of a snow season.

CONCLUSIONS OF LAW

A. Section 1105 (c) (5) imposes sales tax on the receipts from every sale, except for resale, of "[m]aintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law." The Division's regulations define "maintaining, servicing or repairing" as follows:

"[m]aintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such as painting; services to grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal" (20 NYCRR 527.7 [a] [1]).

Since the regulation specifically addresses snow removal as one of the enumerated activities that is considered to fall under the “maintaining, servicing and repairing” of real property, the Division assessed sales tax on the purchases of rock salt.

B. It is well settled that “an agency’s interpretation of the statutes it administers must be upheld absent demonstrated irrationality or unreasonableness” (*Lorillard Tobacco Co. v Roth*, 99 NY2d 316, 322 [2003] [internal quotation marks omitted]).

“While as a general rule courts will not defer to administrative agencies in matters of pure statutory interpretation, deference is appropriate where the question is one of specific application of a broad statutory term’ by the agency charged with administering the statute” (*Matter of Island Waste Servs., Ltd. v Tax Appeals Trib.*, 77 AD3d 1080, 1082 [3d Dept 2010], *lv denied* 16 NY3d 712 [2011], quoting *Matter of O’Brien v Spitzer*, 7 NY3d 239, 242 [2006]).

In prior cases involving Tax Law § 1105 (c) (5), the Court of Appeals and the Appellate Division deferred to the Division’s interpretation and application of “maintaining, servicing or repairing” because these were determined to be broad statutory terms (*see Matter of Island Waste Servs., Ltd. v Tax Appeals Trib., supra*). As such, it follows that the application of Tax Law § 1105 (c) (5) “involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom” (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]).

In order to prevail, petitioner must demonstrate “that its interpretation of the statute is not only plausible, but also that it is the only reasonable construction” (*Matter of Moran Towing & Transp. Co. v New York State Tax Commn.*, 72 NY2d 166, 173 [1988]). Petitioner provides a snow removal service. As such, it falls squarely within the meaning and intent of Tax Law § 1105 (c) (5).

C. Tax Law § 1101 (b) (4) (i) provides that tangible personal property purchased for use in performing the taxable service under Tax Law § 1105 (c) (5) may be exempt from tax if purchased for resale, where the property so sold becomes a physical component part of the property upon which the services are performed or whether the property is to be actually transferred to the purchaser of the service in conjunction with the performance of the taxable service. Petitioner argues that its purchases of the rock salt is exempt from sales tax since the rock salt meets both criteria under the statute.

Where petitioner claims an exemption from tax, the statute must be construed strictly and narrowly against petitioner, although not so narrowly as to defeat the exemption's purpose (*see e.g. Matter of Costco Wholesale Corp.*, Tax Appeals Tribunal, March 6, 2017; *Matter of Grace v New York State Tax Commn.*, 37 NY2d 193 [1975], *rearg denied* 37 NY2d 816 [1975], *lv denied* 338 NE2d 330 [1975]).

Petitioner argues that the rock salt is placed on the property, unless physically removed and, as such, becomes a physical component part thereof. This argument is rejected. The testimony in this case demonstrated that the rock salt, although a mineral that will not dissipate, does not become a physical component of the treated surfaces. The extensive testimony demonstrated that due to conditions such as wind and rain, the rock salt generally is pushed off of the treated surfaces and will end up on the sides of the roads or is swept up by petitioner while removing winter debris under its service contracts with its customers.

Alternatively, petitioner argues that the rock salt is actually transferred to the purchaser when petitioner treats the surfaces of its customers. Again, based upon the testimony provided, it is clear, that the rock salt is not transferred to its customers pursuant to the service contracts. Mr. Merrill specifically testified to the fact that under certain of its contracts, the rock salt is

removed when clearing winter debris. As such, this fact militates against a finding that the rock salt is transferred to its customers. Therefore, it is determined that petitioner's purchases of rock salt do not qualify for an exemption set forth in Tax Law § 1101 (b) (4) (i).

D. The petitions of North Country Property Management, LLC, are denied, the claim for refund is denied and notice of determination, #L-046016487, dated January 27, 2017, is sustained.

DATED: Albany, New York
November 12, 2020

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE