STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **EDMUND J. WIATR, JR.** 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 8, 2015.	DETERMINATION DTA NO. 829311

Petitioner, Edmund J. Wiatr, Jr., 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 8, 2015.

Petitioner, appearing pro se, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel), agreed to have the controversy determined on submission without the need for a hearing pursuant to section 3000.12 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The final brief was to be submitted by March 25, 2022, which date commenced the six-month period for issuance of this determination.

After due consideration of the pleadings, affidavits and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

ISSUES[1]

I. Whether the Division of Taxation properly denied petitioner's refund claim for sales

[1] The Division asserts that petitioner has made a claim for costs pursuant to Tax Law § 3030; however, the Division does not provide a basis for this assertion. Petitioner never addresses the issue in his reply brief. Moreover, a motion for costs would be premature at this stage of the proceedings given a prevailing party is required to wait for a "final judgment" in the litigation before pursuing such a motion (***see*** Tax Law § 3030).

tax paid on his purchases.

II. Whether the Division of Tax Appeals has jurisdiction over Freedom of Information Law requests made to the Division of Taxation.

III. Whether certain information should be redacted from evidence placed into the record.

FINDINGS OF FACT

1. Petitioner, Edmund J. Wiatr, Jr., resides in Utica, New York. On December 8, 2015, petitioner made a purchase from Jay-K of New Hartford, New York. Petitioner describes the items purchased from Jay-K as "completed kitchen cabinetry."

2. On June 14, 2018, the Division received form AU-11, application for credit or refund of sales or use tax, from petitioner. On the form AU-11 filed, petitioner sought the refund of $1,741.26 in New York State sales tax paid on his December 8, 2015 purchase from Jay-K. On the form AU-11 petitioner provided the following explanation for his claim: "[i]tem qualified as a Capital Improvement per NYS Tax Bulletin, Sales & Use Tax, TB-ST-104 dtd [sic] July 27, 2012. Invoice attached." The invoice for petitioner's purchase from Jay-K was attached to the form AU-11.[2]

3. The relevant invoice from Jay-K for the subject purchase states that the company provides "Quality Building Materials Since 1937." The Jay-K invoice indicates that the merchandise at issue was sold to petitioner on December 8, 2015, and that Jay-K would "furnish only listed items." The invoice lists the customer's purchase order number as "WIATR KITCHEN."

[2] Portions of the invoice were not completely legible.

4. The Jay-K invoice also provided the following:

ITEM CODE	GO	GS	DESCRIPTION[3]	U/M	PRICE/UNIT	EXTENSION
45 HOLDSO	1	1	ASK1815 SOID 49938 all lines 1 thru 4, 6 thru 45 here bldg3 sect 6 aisle 4 12/7/15 df	EACH	0.001	0.00
49 BLDG3	1	1	LOCATION BUILDING #3	EACH	0.001	0.00

MERCHANDISE[4]	19900.01
TAX 8.750 %	1741.26
TOTAL	21641.27

5. There is no indication on the invoice that Jay-K provided any installation services associated with the merchandise sold to petitioner. Throughout the proceedings, petitioner never claimed that the invoice included installation of the merchandise purchased.

6. The Division of Taxation (Division) submitted into the record an affidavit of its employee James A. Shiely, sales tax technician II. In his affidavit, Mr. Shiely represents that on August 21, 2018, the Division's employee Meisha Welcome, tax technician, contacted Jay-K, and Jay-K represented to Ms. Welcome that it does not do any installations of the materials it

[3] The detailed description of the merchandise sold appears to be somewhat cryptic.

[4] Petitioner attempts to categorize the subject item(s) purchased at times referring to them as "finished kitchen cabinets," "high-end kitchen cabinetry," "equipment" or a "capital expenditure." Petitioner asserts that the merchandise at issue was "neither supplies, materials nor tangible personal property." The relevant invoice refers to the subject matter at issue sold as "merchandise" and indicates that the seller sold "building materials."

sells.[5]

7. The Division issued petitioner a refund claim determination notice, dated September 11, 2018, denying petitioner's refund request in full (refund denial). The refund denial noted:

> "As a general rule, if you are a contractor or property owner, you must pay sales tax on the purchase of building materials, unless some exemption applies, in which case you must provide an exemption certificate or other document to the supplier which indicates that no tax is imposed or required to be collected when the materials are purchased.
>
> Please refer to publication 862 for further information on capital improvement guidelines."

8. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the refund denial.

9. BCMS held a conciliation conference on December 10, 2018. Thereafter, BCMS issued conciliation order number 000304398, dated January 18, 2019, denying petitioner's refund request and sustaining the Division's refund denial.

10. Petitioner filed a petition with the Division of Tax Appeals challenging the BCMS conciliation order.

11. On June 30, 2021 and June 8, 2021 respectively, petitioner and the Division executed a consent agreement to have the controversy determined on submission without a hearing pursuant to 20 NYCRR 3000.12.

12. Petitioner submitted a freedom of information law (FOIL) request, dated September 20, 2021, to the Division requesting records relating to its denial of petitioner's refund request

[5] Petitioner challenges the appropriateness of the Division's use of hearsay in its affidavits. The Rules of Practice and Procedure of the Tax Appeals Tribunal permit the use of affidavits in practice before the Division of Tax Appeals (***see*** 20 NYCRR 3000.15 [d]). However, the administrative law judge will determine the weight to be given such evidence under the circumstances (***id***.).

(FOIL request). It appears petitioner followed up his initial FOIL request several times and was often told by the Division that delays in responding were the result of COVID-19. Petitioner asserts that he is not satisfied with the information the Division provided to him in response to his FOIL request, that the Division is not in compliance with the relevant FOIL disclosure requirements and that, as a result, the Division's actions have adversely impacted his ability to argue the merits of his claim.

13. The Division placed the petition, its answer, the conciliation order and the Shiely affidavit into the record. The submissions made by the Division included certain information pertaining to petitioner and his refund application including his social security number. Petitioner asserts that the Division of Tax Appeals should redact his social security number from the Division's submissions as such information is personal and confidential.

CONCLUSIONS OF LAW

A. Tax Law § 1132 (c) (1) sets forth a presumption that all sales receipts for tangible personal property, as well as from installation, maintenance, servicing or repair of tangible personal property mentioned in Tax Law § 1105 (a), (b), (c), and (d), are subject to tax "until the contrary is established," and sets the burden of proving the contrary upon the vendor or its customer (***see*** 20 NYCRR 532.4 [a] [1]; [b] [1]). The burden here is on petitioner to establish by clear and convincing evidence that products and services purchased are not taxable and that the refund denial was erroneous (***see Matter of MacLeod***, Tax Appeals Tribunal, July 3, 2008, ***confirmed*** 75 AD3d 928 [3d Dept 2010]).

B. Petitioner asserts that the purchases at issue are not tangible personal property. The Tax Law defines tangible personal property as "[c]orporeal personal property of any nature"

(Tax Law § 1101 [b] [6]). This definition is clearly very expansive as to what is tangible personal property.

The relevant regulation provides additional insight into what constitutes "tangible personal property." In particular 20 NYCRR 526.8 provides in part:

> "(a) Definition. The term tangible personal property means corporeal personal property of any nature having a material existence and perceptibility to the human senses. Tangible personal property includes, without limitation:
> (1) raw materials, such as wood, metal, rubber and minerals;
> (2) manufactured items, such as gasoline, oil, chemicals, jewelry, furniture, machinery, clothing, vehicles, appliances, lighting fixtures, building materials" (20 NYCRR 526.8).

20 NYCRR 526.8 (d) goes on to provide the example that: "[p]roperty sold as tangible personal property, and subsequently annexed to real property, or which becomes part of real property, is nevertheless considered tangible personal property at the time of sale."

In the case at hand, petitioner claims that the purchases made from Jay-K are not tangible personal property. Petitioner bears the burden of proof in establishing this assertion. Petitioner claims the purchase was for "completed kitchen cabinetry," "finished kitchen cabinets," "high-end kitchen cabinetry," "equipment," or "capital expenditures." The invoice at issue is cryptic in describing exactly what in particular was sold but it states that the seller sells "quality building materials" and notes that the total purchase was for "merchandise" (***see*** finding of fact 3 and 4). The record does not accurately establish what in fact was sold. Therefore, petitioner has failed to meet his burden in establishing that the thing(s) purchased from the seller were not tangible personal property subject to sales tax. However, even based upon petitioner's own morphing description of the items purchased, his classification of such as "kitchen cabinetry" seems prevalent. Kitchen cabinetry is clearly corporeal personal property having a material existence

and perceptibility to the human senses. Accordingly, even under petitioner's description of what was purchased, the purchases are tangible personal property. Furthermore, the relevant regulations note that "real property" is not tangible personal property (***see*** 20 NYCRR 526.8). However, as noted above, the regulations point out that even if tangible personal property later becomes annexed to, or part of, real estate, when initially sold, the merchandise is tangible personal property (***see*** 20 NYCRR 526.8 [d]). Regardless of what description petitioner attempts to use, what was sold in this case appears in fact to be tangible personal property. Petitioner's argument that if he calls the purchases something other than "tangible personal property" then they are not such is flawed and rejected.

C. Petitioner appears to argue that the Tax Law does not tax capital improvement expenditures. Sales of tangible personal property to a contractor for use or consumption in construction is a retail sale, and is subject to sales and use tax, regardless of whether such tangible personal property is to be resold as such or is to be incorporated into real property as a capital improvement or a repair (***see*** Tax Law § 1105 [c]; ***Matter of Swet***, Tax Appeals Tribunal, February 22, 1991). Purchases of materials that, when installed, will be classified as a capital improvement are taxable, whether a property owner or a contractor buys them (***see*** Tax Law § 1101 [b] [4]). Furthermore, the sales tax regulations at 20 NYCRR 527.7 (b) (5) provide that "[a]ny contractor who is making a capital improvement must pay tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property."

Where a contractor purchases tangible personal property for use in performing a capital improvement for a customer, that contractor, as the purchaser, is liable for the sales tax, with the tax typically passed along to the customer as part of the total price for the capital improvement

project. Likewise, where a property owner purchases tangible personal property for use in performing a capital improvement, and installs such tangible personal property, either on their own or through a separate party hired for that purpose, the property owner is the final purchaser of the tangible personal property and is liable for the sales tax due thereon (***see Matter of Costabile, Costabile and Delponte***, Tax Appeals Tribunal, April 14, 2017). 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 a capital improvement to real property. Accordingly, receipts from the performance of a capital improvement to real property by a contractor are not subject to sales tax (***see*** 20 NYCRR 541.1 [c]). Petitioner's argument that his purchases were not subject to sales tax in part hinges upon whether petitioner has shown that the transaction at issue was the purchase of a contract to perform capital improvements, i.e., to install kitchen cabinetry, and not the retail purchase of kitchen cabinetry for installation by petitioner himself or through a separately hired installer. The purchase of a contract to perform a capital improvement is not taxable, whereas the retail purchase of merchandise for installation by the homeowner himself or through a separately hired installer are taxable at the time of purchase (***see Matter of M & Y Developers, Inc***., Tax Appeals Tribunal, March 1, 2021). Had the invoice with Jay-K been for the installation of the kitchen cabinetry, then Jay-K would have already been liable for and paid sales tax on the purchase of the merchandise; the Tax Law presumes that sales tax Jay-K already paid would be included in the total price of the contract between petitioner and Jay-K.[6]

[6] Although not binding authority on the Division of Tax Appeals, New York State Division of Taxpayer Guidance tax bulletin TB-ST-104 (“Capital Improvements” [2012]), notes: “[b]uilding materials and other tangible personal property purchased for capital improvement work are taxable, whether purchased by a contractor, subcontractor, repairman (hereafter contractor), or homeowner. The sales tax paid by contractors becomes an

In the case at hand, petitioner does not assert, nor does the relevant invoice indicate that the relevant purchase was for a contractor to install a capital improvement. Regardless of the representations the Division made in the Shiely affidavit regarding someone else's alleged contact with Jay-K (***see*** finding of fact 6), the conclusions found herein do not change. Furthermore, it is noted that the record does not include any contract for installation services. Accordingly, the exemption from sales tax for contracts for the purchase and installation of capital improvements does not apply in this case and the sale of the merchandise was properly determined to be subject to sales tax.

PETITIONER'S FOIL REQUEST

D. Petitioner asserts that the Division did not respond to his FOIL request appropriately. In this regard, the Division of Tax Appeals is a venue of limited jurisdiction (***see Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.***, 151 Misc 2d 326 [Sup Ct., Albany County 1991, Keniry J.]). The Division of Tax Appeals cannot extend its jurisdiction to beyond what is prescribed by statute (***see Matter of Hooper***, Tax Appeals Tribunal, July 1, 2010). FOIL is not within the jurisdiction of the Division of Tax Appeals and petitioner's remedy with regard to its FOIL request lies elsewhere (***see*** Public Officers Law § 89; 20 NYCRR 2370.8; ***Matter of 4 U Convenience and Essani***, Tax Appeals Tribunal, February 12, 2016, citing ***Matter of Markowitz***, Tax Appeals Tribunal, February 27, 1997). Petitioner certainly may pursue the appropriate remedy to address any perceived potential FOIL response deficiencies; however, petitioner must address such through the appropriate venue, which is not the Division of Tax

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expense that can be passed through to the customer as part of the overall charge for the capital improvement."

Appeals. Accordingly, petitioner's request for the Division of Tax Appeals to intervene in its FOIL request is denied.

PETITIONER'S REQUESTED REDACTIONS

E. The Division placed certain records into evidence that included petitioner's social security number. Petitioner asserts the Division and Division of Tax Appeals should redact his social security number from the Division's submissions as such information is personal and confidential.

Tax Law §1146 (a) provides a general rule forbidding disclosure of information filed under article 28 of the Tax Law. However, Tax Law § 1146 (a) provides an exception from that prohibition, permitting disclosure:

> "except on behalf of the commissioner in an action or proceeding under the provisions of the tax law or in any other action or proceeding involving the collection of a tax due under this chapter to which the state or the commissioner is a party or a claimant, or on behalf of any party to any action, proceeding or hearing under the provisions of this article when the returns, reports or facts shown thereby are directly involved in such action, proceeding or hearing, in any of which events the court, or in the case of a hearing, the commissioner may require the production of, and may admit into evidence, so much of said returns, reports or of the facts shown thereby, as are pertinent to the action, proceeding or hearing and no more" (Tax Law § 1146 [a]).

This exception appears applicable in this case because petitioner's social security number is the primary mechanism used to affirmatively identify petitioner. Such identifying information is required to be included with the petition under the Rules of Practice and Procedure of the Tax Appeals Tribunal (***see*** 20 NYCRR 3000.3 [b] [10]). The Division of Tax Appeal does not disclose or otherwise utilize this information. This information may likewise be pertinent in addressing any appeal made to the Tax Appeals Tribunal or the judiciary if appropriate. Furthermore, the Division of Tax Appeals lacks jurisdiction to consider whether a

violation of the tax information secrecy provisions of Tax Law § 1146 (a) occurred (***see Matter of Gilani***, Tax Appeals Tribunal, October 12, 2017, citing ***Matter of Coram Diner and Kostas Hionas***, Tax Appeals Tribunal, March 12, 2015 and ***Matter of Bankers Trust New York***, Tax Appeals Tribunal, March 14, 1996).

Petitioner's demand for the redaction of his social security number from the relevant evidence and filings in this matter is denied.

F. The petition of Edmund J. Wiatr, Jr. is denied, and the Division of Taxation's refund claim determination notice, dated September 11, 2018, is sustained.

DATED: Albany, New York
September 22, 2022

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE