

1992

Valgardson Housing Systems, Inc. v. Utah State Tax Commission : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Paul Van Dam; Utah Attorney General; Clark Snelson; Assistant Utah Attorney General; Attorneys for Respondent.

W. Andrew McCullough; McCullough, Jones, and Ivins; Attorneys for Petitioner.

Recommended Citation

Brief of Respondent, *Valgardson Housing Systems v. Tax Commission*, No. 920644 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/3611

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
50

.A10

DOCKET NO. 920644

IN THE COURT OF APPEALS OF THE STATE OF UTAH

VALGARDSON HOUSING SYSTEMS
INC.,

Petitioner/Appellant,
v.

UTAH STATE TAX COMMISSION,

Respondent/Appellee.

)
)
)
)
)
)
)
)
)
)

No. 920644-CA

Priority 15

BRIEF OF RESPONDENT UTAH STATE TAX COMMISSION

**APPEAL FROM THE DECISION OF THE UTAH STATE
TAX COMMISSION ISSUED JUNE 3, 1992**

W. Andrew McCullough
MCCULLOUGH, JONES & IVINS
930 South State Street, Suite 10
Orem, Utah 84058
Attorney for Petitioner

Paul Van Dam
Utah Attorney General
Clark L. Snelson
Assistant Attorney General
36 South State, 11th Floor
Salt Lake City, Utah 84111
Attorneys for Respondent

FILED

OCT 14 1992

IN THE COURT OF APPEALS OF THE STATE OF UTAH

VALGARDSON HOUSING SYSTEMS
INC.,

Petitioner/Appellant,
v.

UTAH STATE TAX COMMISSION,
Respondent/Appellee.

)
)
)
)
)
)
)
)
)
)
)

No. 920644-CA

Priority 15

BRIEF OF RESPONDENT UTAH STATE TAX COMMISSION

**APPEAL FROM THE DECISION OF THE UTAH STATE
TAX COMMISSION ISSUED JUNE 3, 1992**

W. Andrew McCullough
MCCULLOUGH, JONES & IVINS
930 South State Street, Suite 10
Orem, Utah 84058
Attorney for Petitioner

Paul Van Dam
Utah Attorney General
Clark L. Snelson
Assistant Attorney General
36 South State, 11th Floor
Salt Lake City, Utah 84111
Attorneys for Respondent

TABLE OF CONTENTS

STATEMENT OF JURISDICTION	1
ISSUE PRESENTED FOR REVIEW	1
STANDARD OF REVIEW	1
DETERMINATIVE STATUTORY PROVISIONS AND RULES	1
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
POINT I	
THE PROPER STANDARD OF REVIEW UNDER UAPA IS THE "ABUSE OF DISCRETION" STANDARD. THUS THE TAX COMMISSION'S DECISION SHOULD BE AFFIRMED UNLESS ITS ACTION IS FOUND TO BE UNREASONABLE.	6
POINT II	
VALGARDSON IS SUBJECT TO SALES TAX ON THE SALE OF ITS MODULAR HOUSING UNITS TO DEALERS.	12
CONCLUSION	20

TABLE OF AUTHORITIES

CASES:

<u>Adrian Housing Corp. v. Collins,</u> 319 S.E.2d 852 (Ga. 1984)	16
<u>Institutional Laundry v. Utah State Tax Comm'n,</u> 706 P.2d 1066 (Utah 1985)	19
<u>Morton Int'l, Inc. v. Auditing Div. of the Utah State Tax Comm'n,</u> 814 P.2d 581, 587 (Utah 1991)	1, 6, 7
<u>New England Homes, Inc. v. Commissioner of Rev.,</u> 1988 Mass. Tax Lexis 19 (August 1, 1988)	17
<u>Nucor Corp. v. Utah State Tax Comm'n,</u> 187 Utah Adv. Rep. 17, 18 (Utah 1992)	1, 6, 9
<u>Putvin v. Utah State Tax Comm'n,</u> No. 920329-CA, slip op. at 3 (Utah App. Sept. 1, 1990)	8, 10
<u>Sturtz v. Iowa Dept. of Rev.,</u> 373 N.W.2d 131 (Iowa 1985)	16
<u>Tummurru Trades, Inc. v. Utah State Tax Comm'n,</u> 802 P.2d 715 (Utah 1990)	15

RULES:

Utah Admin. R. R865-2S-1 (1987-1988)	2, 15
Utah Admin. R. R865-26S-1 (1987-1988)	2, 11
Utah Admin. R. R865-44S-1 (1987-1988)	18
Utah Admin. R. R865-58S-1 (1987-1988)	2, 19, 21

STATUTES:

Utah Code Ann. § 59-12-102(13) (1987)	1, 8, 13
Utah Code Ann. § 59-12-103 (1987)	1, 12
Utah Code Ann. § 59-12-104(28)	9
Utah Code Ann. § 59-12-107 (1987)	2, 12, 21
Utah Code Ann. § 59-12-118 (1987)	7
Utah Code Ann. § 63-46b-1 to -22 (1987)	1
Utah Code Ann. § 63-46b-16(4)(h)(i)	9
Utah Code Ann. § 78-2-2(4) (1992)	1
Utah Code Ann. § 78-2a-3(2)(k) (1992)	1

OTHER AUTHORITIES:

Illinois Department of Revenue Priv. Ltr. Rul. 84-0688 (June 25, 1984)	17
Illinois Department of Revenue's Priv. Ltr. Rul. 89-0625 (Oct. 18, 1989)	17
Illinois Department of Revenue's Priv. Ltr. Rul. 91-0188 (March 12, 1991)	17
Massachusetts' Department of Revenue Priv. Ltr. Rul. 85-42 (March 27, 1985)	17
Virigina Department of Taxation Priv. Ltr. Rul. 87-210 (Sept. 15, 1987)	18

STATEMENT OF JURISDICTION

The Petition for Review was originally filed in the Utah Supreme Court under number 920305. The case was transferred to the Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4) (1992). The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(k) (1992).

ISSUE PRESENTED FOR REVIEW

Where title passes prior to the time a modular housing unit is attached to real property does it constitute a sale of tangible personal property?

STANDARD OF REVIEW

The Utah Administrative Procedures Act ("UAPA"), Utah Code Ann. § 63-46b-1 to -22 (1987), applies to this appeal. The proper standard of review under UAPA is "abuse of discretion" found in § 63-46b-16(4)(h)(i). Nucor Corp. v. Utah State Tax Comm'n, 187 Utah Adv. Rep. 17, 18 (Utah 1992). Thus, the Tax Commission's decision should be upheld unless the Tax Commission has abused its discretion. See also Morton Int'l, Inc. v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581, 587 (Utah 1991).

DETERMINATIVE STATUTORY PROVISIONS AND RULES

STATUTES:

Utah Code Ann. § 59-12-103 (1987):

- (1) There is levied a tax on the purchaser for the amount paid or charged for the following:
 - (a) retail sales of tangible personal property made within the state;

Utah Code Ann. § 59-12-102(13) (1987):

- (a) "Tangible personal property" means:

- (i) all goods, wares, merchandise, produce, and commodities;
- (ii) all tangible or corporeal things and substances which are dealt in or capable of being possessed or exchanged;
- (iv) all other physically existing articles or things, including property severed from real estate.

- (b) "Tangible personal property" does not include:
- (i) real estate or any interest therein or improvements thereon;

Utah Code Ann. § 59-12-107(1)(a) (1987):

Each vendor is responsible for the collection of the sales or use tax imposed under this chapter.

ADMINISTRATIVE RULES:

Utah Admin. R. R865-26S-1 (1987-1988):

A. "Tangible personal property" means all goods, wares, merchandise, produce, and commodities, all tangible or corporeal things and substances which are dealt in or capable of being possessed or exchanged. It does not include real estate or any interest therein, Tangible personal property includes all other physically existing articles or things, including property severed from real estate.

Utah Admin. R. R865-2S-1 (1987-1988):

A. The sales and use taxes are transaction taxes imposed upon certain retail sales and leases of tangible personal property, as well as upon certain services.

B. The tax is not upon the articles sold or furnished, but upon the transaction, and the purchaser is the actual taxpayer. The vendor is charged with the duty of collecting the tax from the purchaser and of paying the tax to the state.

Utah Admin. R. R865-58S-1 (1987-1988):

A. Sale of tangible personal property to real property contractors and repairmen of real property is generally subject to tax.

1. The person who converts the personal property into real property is the consumer of the personal property

since he is the last one to own it as personal property.

2. The contractor or repairman is the consumer of tangible personal property used to improve, alter or repair real property;

3. The sale of real property is not subject to the tax nor is the labor performed on real property. For example, the sale of a completed home or building is not subject to the tax, but sales of materials and supplies to contractors and subcontractors are taxable transactions as sales to final consumers. . . .

STATEMENT OF THE CASE

The Auditing Division of the Utah State Tax Commission assessed a sales tax deficiency against Valgardson for its sales of modular housing units to dealers from January 1987 through March 1990. On August 6, 1991, Valgardson filed its Petition for Redetermination with the Tax Commission. A formal hearing was held before the Tax Commission on April 21, 1992. The Tax Commission's decision dated June 3, 1992 denied Valgardson's Petition and affirmed the Auditing Division's deficiency assessment. Valgardson filed for review of that decision in the Utah Supreme Court. The Supreme Court assigned the case to the Court of Appeals on September 30, 1992.

STATEMENT OF FACTS

1. Valgardson is a Utah Corporation and a licensed general contractor with its principal place of business in Springville, Utah. (Stipulated Facts ¶¶ 1 & 6, R. at 32-33.)

2. Valgardson is in the business of manufacturing modular housing and other modular buildings. (Stipulated Facts ¶ 2, R. at 32.)

3. Modular housing units are built on an assembly line at Valgardson's plant in Springville and transported by truck to a building site where they are placed on a foundation or a pad. (Stipulated Facts ¶ 3, R. at 32.)

4. Individual units are placed by a crane, or removed from the truck, and "skidded" to their permanent location. The units are "stitched" to other units or to the foundation or pad, and permanently attached to the foundation. (Stipulated Facts, ¶¶ 4 & 5, R. at 33.)

5. For the transactions at issue, Valgardson sold its modular housing units to dealers under a dealer agreement prepared by Valgardson. (T. at 17-18, 29.)

6. The dealers would then sell the completed home to their purchasers. (T. at 31.)

7. Valgardson had no contractual relationship with the dealers' purchasers, i.e. the homeowners. (T. at 32.)

8. Under the terms of the contract between Valgardson and its dealers, the responsibilities of the dealers include: building or supervising the building of the foundation (R. at 84); acquiring the appropriate building permits, licenses, and local trucking permits (R. at 88); carrying comprehensive public liability insurance (R. at 89); warranting all work and materials which it performs or furnishes on Valgardson's units (R. at 92).

9. The dealers agree to accept responsibility for the modular units as they are removed from Valgardson's trucks by crane. (R. at 85.) The dealers are also responsible for

"stitching" the modular units together. (T. at 16, 25 and Stipulated Facts ¶ 12, R. at 33.)

10. "Stitching" is a process which is necessary before the house is completed for the dealers' customer. Stitching involves installing some siding, capping the roof, affixing the units to the foundation, and connecting the utilities, plumbing and electricity, and performing minor interior work, i.e. doorways, carpeting and some drywall work. The entire stitching process generally takes a few days. (T. at 16, 27, 79.)

11. The contracts between Valgardson and the dealers stated that title passed on the housing units as they were removed from the truck and before they were attached to the foundation or pad. (Stipulated Facts ¶ 18, R. at 34.)

12. Upon permanent attachment of the modular housing units to the foundation, they become part of the real property under Utah's Sale and Use Tax Act. (Stipulated Facts ¶ 22, R. at 35.)

13. Where the contract was amended by work order or invoice that stated that title passed only after the housing unit was attached to the foundation or pad, the auditor determined that it was a real property transaction. (Stipulated Facts ¶ 18, R. at 34.)

SUMMARY OF ARGUMENT

Sales tax is a transaction tax. The transaction on which the Auditing Division imposed tax was the transaction between Valgardson Housing Systems and its dealers. This

transaction is governed by a contract which states that the transaction is complete and title passes when the dealers remove the modular housing units from Valgardson's truck. At this instant, the property being transferred is tangible personal property and is subject to tax. The Commission's determination that this transaction was taxable is supported by the stipulated facts, is consistent with governing statutes, regulations and case law. The Commission's decision is not only reasonable, but correct and proper, and should be affirmed.

ARGUMENT

POINT I

THE PROPER STANDARD OF REVIEW UNDER UAPA IS THE "ABUSE OF DISCRETION" STANDARD. THUS THE TAX COMMISSION'S DECISION SHOULD BE AFFIRMED UNLESS ITS ACTION IS FOUND TO BE UNREASONABLE.

Discussing the standard of review under UAPA, the Utah Supreme Court stated:

Under UAPA, this court reviews an agency decision which interprets statutory law using the correction of error standard found in section 63-46b-16(4)(d), unless the legislature has granted the agency discretion in interpreting and administering the statute. Agency discretion may be either expressed or implied and, if granted, results in review of the agency action for an abuse of discretion under section 63-46b-16(4)(h)(i).

Nucor Corp. v. Utah State Tax Comm'n, 187 Utah Adv. Rep. 17, 18 (Utah 1992) (footnotes omitted).¹ Thus, if either express or

¹ The Supreme Court has also stated, "[i]n many cases where we would summarily grant an agency deference on the basis of its expertise, it is also appropriate to grant the agency deference on the basis of an explicit or implicit grant of discretion contained in the governing statute." Morton Int'l, Inc. v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581, 588 (Utah 1991).

implied discretion is found, the proper standard of review is § 63-46b-16(4)(h)(i) which provides:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

. . . .

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

The standard of review appellate courts apply under § 63-46b-16(4)(h)(i) is one of "reasonableness." The Utah Supreme Court stated, "[i]n past cases, we have held that an agency has abused its discretion when the agency's action, viewed in the context of the language and purpose of the governing statute, is unreasonable." Morton Int'l, Inc. v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581, 587 (Utah 1991) (footnote omitted).

In the case at bar, the Commission has been granted both express and implied discretion to interpret the relevant statutes. Utah's Sales and Use Tax Act provides, "[t]he administration of this chapter is vested in and shall be exercised by the commission which may prescribe forms and rules to conform with this chapter for the making of returns and for the ascertainment, assessment, and collection of the taxes imposed under this chapter." Utah Code Ann. § 59-12-118 (1987). The Utah Court of Appeals has stated that by enacting § 59-12-118 "[t]he legislature has granted the Commission discretion in

administration of the tax code generally." Putvin v. Utah State Tax Comm'n, No. 920329-CA, slip op. at 3 (Utah App. Sept. 1, 1992).

The Tax Commission has also been granted implied discretion to interpret and apply the relevant statutes. First, the terms of the statute at issue are broad and general. In Morton this Court stated, "we have held that when the operative terms of a statute are broad and generalized, these terms 'bespeak a legislative intent to delegate their interpretation to the responsible agency." Morton, 581 P.2d at 588 (citation omitted). The issue in this case is whether the modular units produced by Valgardson are sold as tangible personal property. The definition of "tangible personal property" in § 59-12-102(13) uses very broad and general terms. The pertinent part of that definition provides:

"Tangible personal property" means:

- (i) all goods, wares, merchandise, produce, and commodities;
- (ii) all tangible or corporeal things and substances which are dealt in or capable of being possessed or exchanged;
- (iv) all other physically existing articles or things, including property severed from real estate.

Utah Code Ann. § 59-12-102(13) (1987).

The legislature has used very broad and general language to define "tangible personal property." Thus, under the Supreme Court's decision in Morton, the legislature has implicitly granted the Tax Commission discretion in interpreting and applying the statute.

Second, the Tax Commission's determination that modular units are tangible personal property for sales tax purposes is a policy decision which should be given deference on appeal. Again the Morton Court has provided guidance by stating, "in the absence of a discernible legislative intent concerning the specific question in issue, a choice among permissible interpretations of a statute is largely a policy determination. The agency that has been granted authority to administer the statute is the appropriate body to make such a determination." Morton, 814 P.2d at 589.²

Third, the Morton Court also found an implicit grant of agency discretion "[w]hen there is no discernible legislative intent concerning a specific issue the legislature has, in effect, left the issue unresolved. In such a case, it is appropriate to conclude that the legislature has delegated authority to the agency to decide the issue." Id.

The general and broad language the legislature used in enacting §§ 59-12-102 and 103 is useful since it would be impossible to delineate every possible item to which the sales tax would apply. Thus, from the language of the statute itself, it is difficult to ascertain any legislative intent relevant to whether a modular unit is tangible personal property. Therefore,

² Similarly in Nucor, the Supreme Court held that the proper standard of review was the "abuse of discretion" standard in § 63-46b-16(4)(h)(i) since the interpretation of the phrase "purchased for resale" in § 59-12-104(28) was found to be a "matter of policy that the legislature left to the Commission's discretion." Nucor Corp. v. Utah State Tax Comm'n, 187 Utah Adv. Rep. 17, 19 (Utah 1992).

applying the Morton decision to the present case indicates a grant of implied discretion to the Tax Commission in interpreting and applying the Sales and Use Tax Act since there is no specific mention of modular units in the statutory definition of "tangible personal property."

Finally, there is an implied grant of discretion to the Tax Commission since it routinely is required to determine what constitutes tangible personal property and has adopted an administrative rule which defines it.

A recent Utah Court of Appeals decision, Putvin v. Utah State Tax Comm'n, No. 920329-CA, slip op. at 3 (Utah App. Sept. 1, 1992), involved the issue of whether the Petitioner was a nonresident and thus entitled to an exemption from sales tax on the vehicles he purchased in Utah. The Putvin court found several implied grants of authority which required the "reasonableness" standard of review to apply. The court stated, "this court may recognize an implied grant of discretion to interpret the statutory term "nonresident" if, as here, there is an absence of discernible legislative history and the determination of residency status is the "type of determination" the Commission routinely performs." Id. (citation omitted).

As mentioned above, from the broad language defining "tangible personal property" it is difficult to glean any specific legislative intent as to whether a modular unit is tangible personal property. Further, the Tax Commission is constantly required to determine what is and what is not tangible

personal property. Thus, an implied grant of discretion from the legislature to the Tax Commission exists under the analysis of Putvin.

The existence of an administrative rule relevant to the issue is also evidence of an implied grant of discretion. The Putvin court stated:

The Commission routinely makes, and in fact is authorized by statute to adopt, rules defining who qualifies as a nonresident for sales tax exemption purposes. The Commission has clearly defined the term "bona fide nonresident" in detailed rules. Thus, we find the Commission has been given discretion to determine whether a purchaser qualifies as a nonresident for purposes of the sales tax exemption. We, therefore, review its decision for reasonableness.

Id. at 4-5.

Similarly in the present case, the Tax Commission has adopted Utah Admin. R. 865-26S-1 (1987-88) which defines "tangible personal property." Thus, there existed an implied grant of discretion to the Tax Commission in its interpretation and application of §§ 59-12-102-103 to the scenario presented by Valgardson's Petition for Redetermination.

There exists both an express and implied grant of discretion from the legislature to the Tax Commission in its interpretation and application of the statutes relevant to this appeal. Therefore, this Court should review the Commission's decision under § 63-46b-16(4)(h)(i) and affirm so long as the Commission's decision is reasonable.

POINT II

VALGARDSON IS SUBJECT TO SALES TAX ON THE SALE OF ITS MODULAR HOUSING UNITS TO DEALERS.

Valgardson manufactures modular housing units at its plant in Springville, Utah. It sells these units through a network of dealers. The sale is made pursuant to a contract. The terms of the contract provide that title passes and the transaction is complete before the units become real property. (R. at 38.)

Utah's Sales and Use Tax Act provides "[t]here is levied a tax on the purchaser for the amount paid or charged for the following: (a) retail sales of tangible personal property made within the state;" Utah Code Ann. § 59-12-103(1)(a) (1987).³ "Tangible personal property" is defined as:

- (a) "Tangible personal property" means:
 - (i) all goods, wares, merchandise, produce and commodities;
 - (ii) all tangible or corporeal things and substances which are dealt in or capable of being possessed or exchanged;
 - (iv) all other physically existing articles or things, including property severed from real estate.
- (b) "Tangible personal property" does not include:
 - (i) real estate or any interest therein or improvements thereon;

³ The vendor is responsible for the collection of the sales tax. Utah Code Ann. § 59-12-107 (1987) states:

- (1)(a) Each vendor is responsible for the collection of the sales or use tax imposed under this chapter.
- (b) The vendor is not required to maintain a separate account for the tax collected, but is deemed to be a person charged with receipt, safekeeping, and transfer of public moneys.

Utah Code Ann. § 59-12-102(13) (1987).

Valgardson sells its modular units to dealers who are responsible for linking the units together and affixing the units to a foundation. The dealers then sell the completed home to purchasers. Valgardson argues that there is no difference between its operations and that of a contractor who builds on-site. (Petitioner's Brief at 11.) However, there is a big difference in responsibility. Valgardson's contract with its dealers establishes its responsibility. Under Valgardson's dealer agreement, many of the responsibilities an on-site contractor would have are placed on the dealers. For example, under the terms of the contract, the dealers are responsible for: the building or supervision of the building of the foundation (R. at 84); acquiring the appropriate building permits, licenses, and local trucking permits (R. at 88); carrying comprehensive public liability insurance (R. at 89); and warranting all work and materials which it performs or furnishes on Valgardson's units (R. at 92). Title passes and the dealers accept full responsibility for the modular units as soon as they are removed from Valgardson's trucks. (R. at 85.) The dealers are also responsible for "stitching"⁴ the modular units together and providing a completed home to the purchaser. (T. at 16.) An on-

⁴ Stitching refers to installing some siding, capping the roof, affixing the units to the foundation, connecting the utilities, plumbing and electricity, and performing minor interior work, i.e. doorways, carpeting and some dry wall work. The entire stitching process generally takes a few days. (T. at 16, 27, 79.)

site contractor would bear these responsibilities. However, Valgardson has structured its contract to avoid these significant responsibilities and their accompanying expenses.

The determinative factor in this case is the fact that when title passes from Valgardson to its dealers the units are not attached to the foundation and thus are tangible personal property by definition. Valgardson's process at its factory involves fabricating and assembling tangible personal property into a unit that, when combined with other units (i.e. nailed and bolted together, the wiring and plumbing connected, trim, floor coverings and walls seamed and finished, exterior walls and roofs seamed, and the entire structure secured to the foundation), becomes a part of the real property. However, under the terms of the contract, title passes prior to the time these processes are completed by the dealers. (R. at 85, Stipulation of Facts ¶ 17, R. at 34.)

The Tax Commission, in finding that Valgardson was liable for sales tax on the sale of its units to dealers, concluded that the nature of the property at the time of the sale is determinative as to whether a modular housing unit should be taxed as a sale of tangible personal property. The Tax Commission held:

Those units do not become part of the real property unless and until they are permanently affixed. Until that time, the modular units remain mobile and thus do not have the essential characteristic of being permanently affixed which distinguishes improvements to real property from other types of tangible personal property.

Findings of Fact, Conclusions of Law, and Final Decision. (R. at 7-8). This reasoning is supported by an administrative rule which provides:

- A. The sales and use taxes are transaction taxes imposed upon certain retail sales and leases of tangible personal property, as well as upon certain services.
- B. The tax is not upon the articles sold or furnished, but upon the transaction,

Utah Admin. R. R865-2S-1 (1987-1988). Since the sales tax is a tax on the transaction, it is imperative to examine the transaction in determining whether it is subject to sales tax. In the present case, the transaction subject to tax is between Valgardson and its dealers. When title and possession passes from Valgardson to its dealers what is transferred are two halves of a house being removed from Valgardson's truck. This is a sale of tangible personal property. Valgardson focuses on what happens after this transaction is complete. That is a separate transaction between the dealers and the homebuyers. The dealers, not Valgardson, sell the buyers a completed home.

The Utah Supreme Court was faced with a similar situation in Tummurru Trades, Inc. v. Utah State Tax Comm'n, 802 P.2d 715 (Utah 1990). Tummurru was in the "business of constructing modular buildings and wholesale and retail sales of building materials." Id. at 716. A portion of the Tax Commission's assessment of sales tax was on the transaction between the contracting arm of Tummurru which purchased modular units from the inventory of the corporation. This Court found possession and title as the determining factors by stating:

Because Tummurru took possession of the items within the state of Utah and title passes within the state, it became the ultimate consumer for sales tax purposes. The fact that the items would be incorporated into real property located out of the state does not change the nature of Tummurru's consumer use of the items.

Id. at 719. Similarly in the present case, when possession and title passes from Valgardson to its dealer, the modular units are tangible personal property since they are not affixed to real estate. The fact that the modular units are subsequently attached to real property does not change the nature of the property at the time of the transaction between Valgardson and its dealers.

Other states addressing this same issue have taken a similar approach. In Adrian Housing Corp. v. Collins, 319 S.E.2d 852 (Ga. 1984), the Georgia Supreme Court faced with the identical issue and similar facts as in the present case, affirmed the Commissioner's assessment of a sales tax on the full price of the units. The petitioner in Adrian made many of the same arguments which Valgardson does in this appeal. The Adrian court stated:

Adrian argues strenuously that the modular homes cannot be tangible personal property because they are fixed to realty. We agree that when the modules are delivered and fixed to the foundation on the customer's lot they may become realty. The focus here, however, is at the time the modules are transferred from Adrian to Gillis. At that time, the modules are half units on Gillis' flatbed trailers waiting to be moved to a purchaser's lot by Gillis, and are properly considered tangible personal property.

Id. at 855. The same result was reached in Sturtz v. Iowa Dept. of Rev., 373 N.W.2d 131 (Iowa 1985), where the court held the

manufacturer of modular homes liable for sales tax on the sales of its units to its dealer/distributor who in turn sold the units to the final purchaser. Other states have followed suit.⁵ For example, in a June 25, 1984 Priv. Ltr. Rul. 84-0688 (June 25, 1984), the Illinois Department of Revenue facing similar facts presented in this appeal ruled:

the answer to your question depends upon who permanently affixes the modular unit to real estate. . . . if a dealer sells a modular home to a lot owner as tangible personal property (without permanently affixing it to real estate), the dealer incurs Retailers' Occupation Tax liability based upon his gross proceeds from the sale The question as to who permanently affixed the modular home will depend upon the contract between the parties and the circumstances. Dealer delivery of a modular home to the site under a contract for sale does not constitute permanent affixing to real estate. This is true even where the dealer "sets" the modular units on the foundation but does not permanently affix it thereto.

See also Illinois Department of Revenue's Priv. Ltr. Rul. 91-0188 (March 12, 1991) and Priv. Ltr. Rul. 89-0625 (Oct. 18, 1989).

In a letter ruling from Massachusetts' Department of Revenue, it was held that "the modular buildings are real property at the time of sale by the dealer to its customers, but tangible personal property when sold by the Company to the dealer. Therefore, the Company is responsible for collection of the sales tax on its sale of the modular buildings to dealers in Massachusetts." Priv. Ltr. Rul. 85-42 (March 27, 1985). See also New England Homes, Inc. v. Commissioner of Rev., 1988 Mass. Tax Lexis 19 (August 1, 1988); In re Petition of Lake City

⁵ Copies of the letter rulings referred to are attached as Appendix A.

Manufactured Housing, Inc., 1991 N.Y. Tax Lexis 603 (November 14, 1991); and Priv. Ltr. Rul. 87-210 (Sept. 15, 1987) from the Virginia Department of Taxation ("while the taxpayer is a contractor for purposes of the modular buildings . . . which it installs for Virginia customers, it will be considered a retailer with respect to buildings which it sells without installation.").

These courts and commissions look at the nature of the property at the time of the transaction, when title passes, the contract, and the circumstances under which the manufacturers and dealers operated in determining whether there was a sale of tangible personal property subject to sales tax. These were the determining factors underlying the Tax Commission's decision. At the time title passes, the units are tangible personal property since they are not yet affixed to the real estate.

Valgardson uses the same contract for both its in-state and out-of-state sales. (T. at 61-62.) These out-of-state sales were treated by Valgardson and the Auditing Division as sales of tangible personal property. (T. at 62.) This resulted in a tax advantage to Valgardson since no tax is due on interstate sales of tangible personal property. Utah Admin. R. R865-44S-1 (1987-88). Valgardson now attempts to characterize the same transaction using the same contract as a sale of real property for its in-state sales. Valgardson claims that it should be treated as any other real property contractor, yet, what it really is asking for is to be treated as a manufacturer and retailer of tangible personal property on its out-of-state jobs

and a real property contractor on its in-state jobs. The Utah Supreme Court has stated, "[w]hen a taxpayer has chosen to conduct business under particular arrangement, it cannot disregard the consequence of that arrangement when it would otherwise be to the taxpayer's disadvantage." Institutional Laundry v. Utah State Tax Comm'n, 706 P.2d 1066 (Utah 1985) (citations omitted). Since the contracts are the same in both instances and describe a sale of tangible personal property, Valgardson must accept the tax consequences under the arrangement it does business. Valgardson is not entitled to the best of both worlds in this case.

Valgardson's reliance on Utah Admin. R. R865-58S-1 (1987-88) is misplaced. A proper reading of the rule supports the Tax Commission's position. The pertinent language of this rule states:

A. Sale of tangible personal property to real property contractors and repairmen of real property is generally subject to tax.

1. The person who converts the personal property into real property is the consumer of the personal property since he is the last one to own it as personal property.

. . . .

3. The sale of real property is not subject to the tax nor is the labor performed on real property. For example, the sale of a completed home or building is not subject to the tax, but sales of materials and supplies to contractors and subcontractors are taxable transactions as sales to final consumers. . . .

Utah Admin. R. R865-58S-1 (1987-88).


In this case, Valgardson sells tangible personal property to a real property contractor, its dealers. The dealers are the persons who convert the tangible personal property into real property since they are the ones responsible for permanently attaching the units to the foundation, connecting the utilities, completing the siding, applying the drywall, laying the carpet, capping the roof, and turning over a completed home to the purchaser. Since the dealers are the parties responsible for converting the tangible personal property into real property, the dealers are the ultimate consumers of all the tangible personal property they use; including the modular units purchased from Valgardson.

CONCLUSION

The Tax Commission is specifically empowered to interpret and apply the sales and use tax act. In this instance, it has made a determination that the transaction between Valgardson and its dealers are sales of tangible personal property, a decision which the Commission routinely makes. In making its decision, the Commission has relied on the fact that at the time the title passes from Valgardson to its dealers that the modular housing units have not been permanently attached to real property. The dealers, who are contractually responsible to construct the foundation, attach the modular units thereto, connect the utilities, and stitch the units together by adding siding, interior sheet rock, carpeting and roofing, are, under Utah law, the consumers of the tangible personal property used in

furnishing a real property improvement to the purchaser. (Utah Admin. R. R865-58S-1.) Therefore, Valgardson is responsible to collect tax from the dealers upon the sale of the modular housing units. (Utah Code Ann. § 59-12-107.) The Commission's decision in this regard is consistent with existing statutes, rules and case law. When viewed in light of the record as a whole, the Commission's decision is reasonable and should be affirmed.

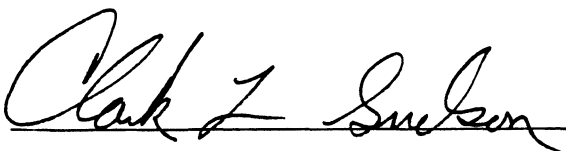
DATED this 14th day of October, 1992.


CLARK L. SNELSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of October, 1992, I caused 4 copies of the foregoing BRIEF OF RESPONDENT to be mailed, postage prepaid, to:

Andrew McCullough
MCCULLOUGH, JONES & IVINS
930 South State Street, Suite 10
Orem, Utah 84058



APPENDIX A

PRIVATE LETTER RULING 84-0688

State of Illinois
Department of Revenue
June 25, 1984

This is to acknowledge receipt of your letter of May 31, 1984, in which you stated and made inquiry as follows:

"Please advise of the requirements to assure the tax implication on the purchase of a modular home set up on a concrete foundation on property owned by the purchaser is that of use tax on the seller/contractor, not retailers' occupation tax passed on to the purchaser.

"Please send a duplicate copy of this opinion to:

In Illinois, persons who sell modular homes as tangible personal property for use or consumption do incur Retailers' Occupation Tax liability. Persons who purchase modular homes as tangible personal property for use incur complementary Use Tax liability. Construction contractors (persons who permanently affix tangible personal property to real estate) are deemed to be the users of the tangible personal property which they purchase for conversion to real estate.

Thus, the answer to your question depends upon who permanently affixes the modular unit to real estate. If a dealer contracts with a lot owner for the construction of a modular home on the owner's site, the dealer is functioning as a construction contractor, is deemed to be the user and incurs Use Tax liability based on his cost price of the modular home. In this situation, the lot owner would take title to the modular home as real property and would incur no sales tax liability by virtue of the Illinois sales tax laws.

On the other hand, if a dealer sells a modular home to a lot owner as tangible personal property (without permanently affixing it to real estate), the dealer incurs Retailers' Occupation Tax liability based upon his gross proceeds from the sale and the lot owner incurs the complementary Use Tax liability.

The question as to who permanently affixed the modular home will depend upon the contract between the parties and the circumstances. Dealer delivery of a modular home to the site under a contract for sale does not constitute permanent affixing to real estate. This is true even where the dealer "sets" the modular units on the foundation but does not permanently affix it thereto.

SOURCE: J. THOMAS JOHNSON, Director of Revenue

By: George C. Sorensen, Staff Attorney, Legal Services Bureau, Springfield Office, Phone: (217) 782-7054

Construction Contractor

Private Letter Ruling No. 91-0188

State of Illinois
Department of Revenue

Slip Opinion

March 12, 1991

SUBJECT: Construction contractors pay tax to their suppliers when they purchase items of tangible personal property which they will permanently affix to real estate.

This is to acknowledge receipt of your letter of February 15, 1991. In your letter you stated:

"We are requesting that you reply in written form to verify information on payment of sales tax on modular homes received during a phone conversation with * * * * * in the tax division of the Illinois Department of Revenue. This information was said to be confirmed by her supervisor, Mr. * * * * * who overheard the conversation.

We were told that because we are a manufacturer of modular homes, not mobile, and that at the time materials are purchased we do not pay sales tax, but when those materials are transferred out of our inventory, and into the product being made, this is when the sales tax needs to be determined. These sales would be reported on a monthly basis using the form ST-1.

As a manufacturer we sell our modular homes wholesale to a retailer and we are responsible to pay the tax on the materials cost. When the retailer sells the home, it is sold as a mortgage and as a mortgage the home will have a contract for deed, being taxed as real estate and therefore no sales tax is collected on the retail sale.

This is a totally different type of sale than that of a mobile home because mobile homes are considered private property and taxed as such the retailer must collect tax and report this transaction on form ST-556.

Therefore, in summary, when we manufacture a modular home the sales tax on the materials is reported on the ST-1.

Please confirm this letter as the correct procedure to follow in our tax reporting."

We are a bit unclear from your letter as to the manner in which the sales of modular homes are structured. The manner in which the sales are made affects the tax consequences.

If you as the manufacturer, sell the modular home to someone who resells the modular home (reseller) and reseller affixes that home to the real estate, the reseller in such a situation acts as a construction contractor. In such a case, when you purchase the materials that will be made into the modular home, you will purchase the materials tax free for resale. When you sell home to the reseller, you will charge and collect tax on your selling price of the home charged reseller. When reseller sells the home to the property owner and affixes that home to realty, the price charged by reseller is not taxed. This result occurs because reseller is acting as a construction contractor in this situation. Construction contractors pay tax to their suppliers when they purchase items that will be permanently affixed to real estate. (See 86 Ill.

min. Code 130.1940 and 130.2075, enclosed)

The only time that you would incur tax on the purchases of materials you incorporate into the modular home would be if you as the manufacturer, also act as a construction contractor by permanently affixing the modular home to realty.

Also, if sell the home to a reseller who will resell the home as tangible personal property, that is not affixed to real estate, no tax is due when you sell the modular home to reseller or when you purchase materials to be incorporated into the home. In such a situation you would give a certificate of resale to your supplier when you purchase the materials and the reseller would give you a certificate of resale when he purchases the home from you for sale (See 86 Ill. Adm. Code 130.1410, enclosed)

130.1410, 130.1940, and 130.2075

SOURCE: Keith Staats, Staff Attorney, Legal Services Bureau, Phone: (217)

2-7054

PRIVATE LETTER RULING 89-0625

State of Illinois
Department of Revenue
Slip Opinion
October 18, 1989

This will acknowledge receipt of your letter dated May 18, 1989. We regret the delay in responding. Your letter was amongst a pile of letters which was misplaced by us and has only recently been discovered. In your letter, you have stated and made inquiry as follows:

"Due to the conflict of information received from the Illinois Department of Revenue we are asking for a legal ruling on the type of sales tax the above captioned corporation is required to pay.

* * * * * constructs modular homes for sale to home owners. We are currently collecting and remitting state sales tax at a rate of 5%, local tax at a rate of 1% and mass transit tax at a rate of 1/4%, and county complementary tax at a rate of 1/4%."

In Illinois, retailers of tangible personal property incur Retailers' Occupation Tax liability based on their selling price of that tangible personal property at rates applicable to their Illinois locations. This is how you have been treating the activities of * * * * *.

However, in Illinois, construction contractors are not deemed to be retailers of tangible personal property. Construction contractors are deemed to be the users of the building materials which they take off the market as tangible personal property by permanently affixing it to real estate. Consequently, construction contractors incur Illinois Use Tax and local occupation tax reimbursement liabilities based on their cost price of building materials purchased for permanent incorporation into real estate. In short, construction contractors pay tax based on their cost price of building materials and pay the tax to their suppliers at the rates in effect at their suppliers' locations.

The answer to your question concerning the appropriate tax applicable to hereinafter ("* * * * *") depends upon who permanently affixes the modular unit to real estate. If * * * * * contracts with a lot owner or with a construction contractor for the sale of a modular unit * * * * * with simply delivering the modular unit to the lot site, then * * * * * incurs Retailers' Occupation Tax liability based on its selling price of the modular unit. This is the procedure you have been following and, in this situation, the lot owner (or construction contractor) would incur the complementary Use Tax liability.

On the other hand, if * * * * * contracts with a lot owner for the construction of a modular unit on the owner's site, then * * * * * is functioning as a construction contractor, is deemed to be the user and incurs a sales tax liability based on its cost price of the modular unit. In this situation, the lot owner would take title to the modular home as real property and, consequently, would incur no sales tax liability. The question as to who permanently affixes the modular unit to real estate depends upon the contract between the parties and the circumstances. Dealer delivery of a modular unit to a site under a contract for sale does not constitute a permanent affixing to real estate. This is true even where the dealer "sets" the modular unit on the foundation but does not permanently affix thereto.

WRCE: Archie Lawrence, Staff Attorney, Legal Services Bureau, Springfield
Office, Phone: (217) 782-7054

PRIVATE LETTER RULING 89-0063

State of Illinois
Department of Revenue

Slip Opinion
January 19, 1989

This is to acknowledge receipt of your letter of December 28, 1988. In your letter you state the following:

* * * * * is a modular home manufacturer with its assembly plant located in * * * Wisconsin. We build both single and multi-family dwellings and distribute them through a dealership network in your state. At the present time it is unclear as to the correct sales/use tax that must be charged to our dealers. We wish to receive a written explanation stating the correct sales tax percentage, and also the percentage of the home cost this tax applies to.

Construction Contractors:

A modular home dealer will be viewed as a construction contractor if he is required to physically affirm the modular home to real estate. When a dealer sells (with installation) a modular home so as to make it a part of the real estate, he is viewed as the end-user of the modular home in the form of tangible personal property. When he sells and installs the modular home, he is selling a real estate improvement and real estate improvements are not subject to sales tax in Illinois. However, as the final person to exercise the privilege of using the modular home in the form of tangible personal property, he incurs a Use Tax liability based on his supplier's selling price of the modular home. Please refer to 86 Ill. Adm. Code 130.101, 130.1940(c), 130.2075(c), 150.101, 150.201(i) and 150.801, enclosed.

Assuming that you are required to collect the 5% Illinois Use Tax, you would collect that tax from the dealers to whom you sell the modular homes if they will be acting as construction contractors. The dealers will not incur any Illinois sales tax liabilities on their receipts from their subsequent sales of real estate improvements.

If you sell modular homes to a dealer who will resell those modular homes in the form of tangible personal property (i.e., no installation done by the dealer), you are relieved of any obligation to collect the 5% Illinois Use Tax if the dealer provides you with a valid certificate of resale. Please refer to 86 Ill. Adm. Code 130.1410, enclosed. A certificate of resale will relieve you of any obligation to collect tax, but the dealer will incur State and local sales tax liabilities when he subsequently sells the modular homes to construction contractors or other end-users.

If you have any additional questions, please feel free to contact us. SOURCE: Randall P. Bower, Staff Attorney, Legal Services Bureau, Springfield Office, Phone: (217) 782-7054

Letter Ruling

COMMONWEALTH OF MASSACHUSETTS - DEPARTMENT OF REVENUE

1985 Mass. Tax LEXIS 49; LR 85-42

March 27, 1985

1]

("Company") is a manufacturer of modular buildings in the province of Quebec, Canada. The Company has applied for registration with the Massachusetts Department of Revenue as a sales and use tax vendor because it anticipates selling its buildings to dealers in Massachusetts. The Company will deliver modular buildings to the dealer, who will be responsible for securing the modules to a foundation and rendering them weathertight and habitable for sale to customers. Transportation charges to deliver the modules will be part of the amount charged to the dealer. You inquire as to the sales tax consequences of the sale of the modules to the dealers.

Massachusetts General Laws Chapter 64H, Section 2 imposes a five percent sales tax on all retail sales of tangible personal property unless otherwise exempted. Sales of tangible personal property for resale and sales of realty are not subject to the sales or use tax. The sales price upon which the tax is

based is usually the total amount charged by the vendor. Section 1(14)(a) of Chapter 64H states that "In determining the 'sale price', no deduction shall be

made on account of (i) the cost of property sold; (ii) the cost of materials used, labor or service cost, interest charges, losses or other expenses;

(iii) the cost of transportation of the property prior to its sale at retail." However, separately-stated transportation charges for transportation of property prior to its sale are excluded. G.L. c. 64H, § 1(14)(c)(v).

Based on your description, the modular buildings are real property at the time of sale by the dealer to its customers, but tangible personal property when sold by the Company to the dealer. Therefore, the Company is responsible for collection of the sales tax on its sale of the modular buildings to dealers in

Massachusetts. The sales price upon which the tax is based is the total price charged less separately-stated delivery charges for transportation after sale. (See Letter Ruling 83-68, a copy of which is enclosed).

Commissioner of Revenue

NEW ENGLAND HOMES, INC. v. COMMISSIONER OF REVENUE

Docket Nos. 133860, 133861

COMMONWEALTH OF MASSACHUSETTS - APPELLATE TAX BOARD

1988 Mass. Tax LEXIS 19

August 1, 1988

1]

F. Dennis Saylor, IV, Esq., for the appellant.

Thomas W. Hammond, Esq., for the appellee.

LL

is is an appeal under the formal procedure pursuant to G.L. c.62C s.39, as amended, from the refusal of the appellee to abate sales taxes assessed under L. c.64H s.2 for the calendar years 1978 and 1979.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c.58A s.13, as amended, and Rule 32 of the Rules of Practice and Procedure of the Appellate Tax Board.

FINDINGS OF FACT AND REPORT

The appellant, New England Homes, Inc., is a corporation organized under the laws of New Hampshire with a principal place of business in Portsmouth, New Hampshire. It is engaged in the business of fabricating and constructing modular and "panelized" houses. During 1978 and 1979 the appellant paid sales taxes on sales of materials it used in the construction of "panelized" houses in Massachusetts under "crane-erect" contracts.

On October 16, 1980, the Commissioner of Revenue issued a Notice of Intention to Assess additional sales taxes in the amount of \$1,677.15 plus interest for 1978 and \$4,704.65 plus interest for 1979 on sales of "crane-erect" "panelized" [*2] homes, based on the total amount billed under those contracts. The Commissioner contended that in the "crane-erect" contracts the appellant was acting as a retailer of tangible personal property. Although the record does not show the assessment dates, the board assumes that they were made not less than thirty days after the Notices of Intention to Assess, as provided by G.L. c.62C s.26. The appellant paid the additional taxes and interest and on October 19, 1982, within two years of the assumed assessment date, filed application for abatement, which the Commissioner denied January 17, 1984. According to the appellant's brief, the disputed taxes were paid on November 13, 1981; for purposes of G.L. c.62C s.37, the applications for abatement were filed within one year from that date. The appellant filed the petitions with the Appellate Tax Board on March 15, 1984, within 60 days of the date of the notice of denial.

The board finds that its jurisdictional requirements were met.

The appellant supplies prefabricated housing units to Massachusetts buyers under three types of contracts:

1. Modular house contract: The appellant manufactures one or more three-dimensional boxes [*3] at its plant in New Hampshire, delivers them to the construction site, and assembles and installs them as a complete house on a foundation prepared by the buyer or the buyer's contractor;

2. Shell-erect panel contract: The appellant manufactures two-dimensional panels for walls, partitions, and floors at its New Hampshire plant, delivers them to the construction site, and installs them on a foundation prepared by the buyer or the buyer's contractor;

3. Crane-erect panel contract: The appellant manufactures two-dimensional panels at its New Hampshire plant, delivers them to the construction site, loads them, and hoists them by crane to the foundation, where the buyer or the buyer's contractor installs them on a foundation with the assistance of the appellant's crane operator.

In the first two types of contracts control, possession, and title of the panels do not pass to the buyer until after the property has been affixed to the foundation and become part of the real estate. In these circumstances the Commissioner of Revenue considers the appellant to be a contractor, liable for sales or use tax only on the price paid for materials used in construction. Under the third [*4] type of contract, however, the Commissioner contends that control, possession, and title of the panels is transferred before the panels have been affixed to the real estate. He maintains that at the time of transfer the panels are still tangible personal property, that the appellant is a vendor of tangible personal property, and that the appellant is required to collect and pay sales tax on the price paid by the buyer for the completed panels, including installation charges not separately stated. See letter to the appellant from the Chief of the Appeal and Review Bureau of the Department of Revenue, July 15, 1981 (Exhibit A). The appellant contends that it remains a contractor for these transactions, and not a vendor of tangible personal property, because its crane operator retains control over each panel until the buyer's contractor has finished spiking it into the foundation or the structure does not release it until it has been permanently affixed to the structure and become part of the real estate.

The appellant presented its case through two witnesses: Robert Schrader, the manager of its Panel Division, and Barry Ryan, its field superintendent. The Board's findings [*5] are based on their testimony.

According to the evidence a typical house is designed by the owner with the appellant's help. The appellant estimates the specifications and price and prepares production drawings. The owner chooses the siding, the doors and windows, and the configuration of the building. The appellant can furnish anything the customer wants; the appellant designs and engineers the house in accordance with the customer's selection of number of floors, number and layout of rooms, and roof structure (framed or trussed). The appellant tries to standardize the size of the walls but can supply other sizes. Unlike the modular houses that the appellant offers, there are no standard models for the "panelized" houses; all of them are custom-built to the customer's specifications. The appellant maintains no inventory of panels and does not sell individual panels. If a customer cancels an order, the panels have only salvage value to the appellant. Blueprints, made by the engineering design department, are needed for the customer's approval, for communication between the customer and the manufacturing facilities, and for construction. Roof stress engineering is done by the [*6] appellant. On "panelized" houses, engineering work is required continually and is done by the resident engineer. To maintain control over its product, the appellant never sells panels without shipment to the site and some participation in erection of the

use.

The price charged to the customer for the panels is determined by the appellant's estimating department in a lump sum which covers construction in accordance with the specifications. The customer makes a deposit before signing the contract and is required to furnish a letter confirming the availability of funds to complete the contract. This is usually done through a mortgage and in effect, the appellant serves as a subcontractor of the owner for its portion of the total construction cost. If the customer intends to pay cash, the appellant asks the customer to place the funds in escrow. The crane-erect contract is signed by Mr. Schrader as manager of the panel division and must be approved by the president. Insurance and the risk of loss of or damage to panels in transit are the responsibility of the appellant. The risk of loss shifts to the customer when the appellant has completed the work required under the contract. [*7]

"Panelized housing" is manufactured in a plant containing a series of tables on which exterior walls and interior partitions are laid out, framed, and sheathed, millwork (doors and windows) are installed, and siding applied. For shipment to the site, the walls are loaded vertically on a trailer along with partitions, gables, and the roof system. The exterior walls normally measure seven by eight feet and are shipped with windows, doors, and siding in place. Interior partitions separate the rooms; in panelized construction they do not carry "mechanics" -- electricity, plumbing, and heating.

Under the "shell-erect" type of contract, not at issue in this case, the appellant delivers and erects the panels. When the appellant leaves the site, the exterior of the building is 95 percent complete, and the interior is framed, ready for installation of "mechanics," insulation, plaster or concrete block, trim, cabinets, and for painting. The building is complete and airtight, ready for the subcontractors.

Under the "crane-erect" type of contract at issue in this appeal, the appellant also lays out and frames the panels in the plant, applies the millwork and siding, and ships the panels [*8] to the site. The customers are owners or owners' building contractors who have their own crews. At the site the appellant merely supplies a crane and operator and sets the panels in place; it is the owner or contractor and his crew who are responsible for fastening the panels to the rest of the structure on the foundation built by the owner.

Under a crane-erect contract, the buyer is responsible for obtaining a building permit. It appears that the foundation is also the responsibility of the owner. Although Mr. Ryan, the appellant's field superintendent, testified that the appellant manufactures the floor system, the evidence does not close who is responsible for its installation. The appellant's crane operator delivers the panels, unloads them from the trailer, and sets them in place with the appellant's crane. The buyer or his contractor then receives the panels and the components of the roof system and fastens them to the rest of the structure. When the panel is secured, the steel jaws which are nailed to the panel and by which the panel is attached to the crane cable are removed.

The on-site crew of the buyer or his contractor is responsible for making the panels plumb [*9] and square with the foundation. Although the panel remains attached to the crane until secured, the board finds that control, and therefore possession, is transferred to the on-site crew when the crew takes responsibility for placing it in its final position and fastening it to the rest of the structure. Once a panel has been affixed to the structure by fastening it to the foundation or companion panels, it cannot be removed without destroying it. The crane operator remains at the site to take care of any

blems such as damaged siding, twisted studs, or bowed rafters; to fill out perwork; and to note any engineering problems for the field engineer to place or repair. When the crane operator leaves the site, the appellant has ovided a completed exterior and framed the interior, and may or may not have nished the roof. If there are no finishing problems or warped timbers quiring replacement, the building is weather-tight but not yet ready for cupancy.

On the basis of the foregoing evidence, the board found that the appellant anferred possession of the panels to the buyer or the buyer's contractor en it placed them on the foundation or other part of the structure [*10] be installed by the buyer or the contractor. At this time the panels were ill tangible personal property, and the transfer was therefore subject to the les tax, based on the full price charged for the panels, including stallation charges not separately stated.

OPINION

G.L. c.64H s.2 imposes an excise on "sales at retail of tangible personal roperty by any vendor at the rate of five per cent of the gross receipts of e vendor from all such sales of such property" Under G.L. c.64H l(13) a "sale at retail" is defined as "a sale of tangible personal property r any purpose other than resale in the regular course of business." Under L. c.64H s.1(12) a "sale" includes "[A]ny transfer of title or possession, or th, . . . of tangible personal property for a consideration, in any manner or any means whatsoever."

The board found that the appellant transferred possession of the panels to e buyer or the buyer's contractor before they were permanently affixed to and ame part of the real estate. Until permanently affixed, such panels are not arts of a house" (Brief for the Appellant, p. 6) but are tangible personal roperty. It is of no significance [*11] that they are custom-designed and stom-made and have no use or value independently of the particular house for ich they were designed and manufactured. The panels are not, as the ellant suggests on page 6 of its brief, "transformed into 'personal roperty' depending upon who affixes them to the foundation." If transfer of ssession or title takes place before they are affixed to the structure, they e sold as personal property.

Under the sales tax statute, transfer of title is not a prerequisite to ation if possession has been transferred. Under the applicable provision of e Uniform Commercial Code, G.L. c.106 s.2-401, however,

(2) Unless otherwise explicitly agreed title passes to the buyer at the time l place at which the seller completes his performance with reference to the 'sical delivery of the goods, despite any reservation of a security interest l even though a document of title is to be delivered at a different time or ice

e board finds that under this provision title to each panel passed from the ellant to the buyer when the panel was secured and it became possible for

's holding the panel in place to be removed.

The board's [*12] interpretation of the sales tax statute is confirmed by documents attached to the Commissioner's letter stating its determination assess the additional taxes, and cited in its pre-trial memorandum and its ef: Emergency Regulation No. 12, "Contractors and Subcontractors," ulgated by the State Tax Commission on July 7, 1966, and Letter Ruling 68, " Sales Tax - Modular Homes."

The appellant contends that paragraph 4 of Emergency Regulation 12 does not

ply to its operation. It argues that one of its panels is not "a complete unit of standard equipment requiring no further fabrication" and that therefore

should not be regarded as "primarily a vendor of tangible personal property."

This argument overlooks the fact that paragraph 4 creates an exception to paragraph 3, which specifies the conditions under which a contractor who fabricates articles used "pursuant to a construction contract" will be subject to the sales or use tax when he buys them rather than when he sells them.

Under the terms of the crane-erect contract the appellant is not using the materials he purchases "pursuant to a construction contract," but is using them to fabricate a component to be incorporated [*13] in the structure by the owner

of his contractor. Whether a panel is "a complete unit of standard equipment" or not, it is tangible personal property until installed and affixed to the structure.

Similarly, the appellant's reliance on Sales Tax Information Letter No. 5, issued in April 1966 and stating that a contractor who builds a swimming pool into the ground pays a sales tax to the building materials wholesaler, rather than collecting one from his customer, overlooks the distinction between a contractor who himself builds a swimming pool into the ground and the appellant, who furnishes panels to be affixed by the owner or another contractor.

A Memo dated September 1, 1967, written by the Chief of the Sales Tax Bureau

and approved by the Commissioner of Corporations and Taxation, specifically addresses the sales tax treatment of "Prefabricated or Precut Buildings." The pertinent parts of this Memo state that the sale of prefabricated buildings by

a registered vendor is subject to the sales tax; that their purchase for use in Massachusetts is subject to the use tax; that when the contract calls for delivery and erection, and title does not pass until the unit is erected and [4] weather-tight, the contractor is the consumer and is subject to sales

tax based on his cost of the materials; but that a seller who renders some assistance to customers in installation is a vendor rather than a contractor

that collect and pay the sales tax on the entire amount charged to the customer, including installation charges not separately stated.

The board found that the appellant was a seller of prefabricated or precut materials assisting customers in installation and was therefore a vendor, rather

than a contractor, under the terms of the Department's Memo of September 1, 1967. Although the appellant's crane operator assisted in the installation of the panels, it was the buyer or his contractor who were primarily responsible for the installation. Contrary to what it seems to think, the appellant was

required upon to prove that a home was weather-tight, but only that the panels

re part of the real estate at the time of transfer. This it has failed to
The cited administrative interpretations of the sales tax statute date
e
blicly adopted little more than a year after the enactment of the temporary
les tax statute by St. 1966 c.14 on March 2, 1966, [*15] and even before
e enactment of the permanent statute by St. 1967 c.757 on November 29, 1967.
e Commissioner's position cannot be discounted as having been adopted for the
st time in the present litigation. See Xtra, Inc. v. Commissioner of
venue, 380 Mass. 277, 282 (1980); Polaroid Corp. v. Commissioner of Revenue,
Mass. 490 (1984); General Electric Co. v. Commissioner of Revenue, 402
s.
(1988). In the board's opinion, these interpretations correctly state the
ning of the statutes as they relate to the transactions involved in this
deal.

In support of its contention that its sales of panels are real property
struction activities, the appellant cites Department of Revenue v. Sterling
tom Homes, 91 Wis.2d 675, 283 N.W.2d 573 (1979). The taxpayer there, a
er
custom-designed houses, manufactured prefabricated components to the buyer's
cifications, furnished the builder with detailed foundation plans, and
rdinated the builder's work in fitting the prefabricated components. The
ses and components were unique, and the taxpayer maintained no inventory of
ses or components. Under the Wisconsin statutes [*16] (Stats.
77.51(4)(ii) and 77.51(18)), sales of building materials, supplies, and
ipment to owners, contractors, subcontractors, or builders were deemed
ail
es; contractors and subcontractors were the consumers of tangible personal
erty used by them in real property construction activities; and sales of
gible personal property to them were subject to sales or use tax.
tractors engaged primarily in real property construction activities could
esale certificate on purchases of tangible personal property only if they
nd reason to believe that they would sell to customers for whom they did not
form real property construction activities with the property purchased. The
consin court held that the taxpayer was engaged in real estate construction
ivities in all respects, with the single exception that it conducted its
ivities at its factory, not at the building site. Had the taxpayer
formed
functions at the site, the court said, the components would not have been
ject to tax. The court held that the legislature had not hinged the
stion
taxability on the distinction between on-site and off-site real estate
struction activities; [*17] the taxpayer was engaged in real estate
struction activities within the meaning of the statute, and the court
used
introduce a distinction that the legislature had not made. The court
ressly declined to consider whether component parts dedicated to a

particular

tion of a building were in effect fixtures, but relied on the specific legislative exemption for real property construction activities. Since the Massachusetts statute provides no comparable exemption, but taxes sales of tangible personal property, however used, the board cannot avoid addressing the

question whether the panels were tangible personal property or real estate at the time of sale. On this issue it found for the appellee.

The appellant also relies on *Marsh v. Spradling*, 537 S.W.2d 402 (Mo. 1976), where the taxpayer designed and built wooden cabinets to order in his shop and assembled and installed them in houses, usually new ones under construction,

price that included installation. The taxpayer paid sales taxes on his purchases of lumber and materials. The court held that installation was an integral part of the contract; that in the absence of contrary agreement a cabinet became [*18] part of the real estate, and title to it passed to the owner, when it was nailed to the house; and that the sale, when completed, was subject to the sales tax. This sequence of events, however, is analogous to that under the appellant's "shell-erect" contracts, which the appellee acknowledges incur no sales tax under the Massachusetts statute.

The appellant's request for a ruling of law on the point at issue was denied.

In the Matter of the Petition of LAKE CITY MANUFACTURED
HOUSING, INC., AND ARTHUR E. BUDZOWSKI AND GERALD R. GARITY,
AS OFFICERS 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, 1984 through May 31, 1987

DTA No. 805999

STATE OF NEW YORK-TAX APPEALS TRIBUNAL

1991 N.Y. Tax LEXIS 603

November 14, 1991

1]

John P. Dugan, President; Francis R. Koenig, Commissioner; Maria T. Jones,
Commissioner

R CURIAM

ISION

Petitioners Lake City Manufactured Housing, Inc., and Arthur E. Budzowski
d
ald R. Garity, as officers, 10068 Keystone Drive, Lake City, Pennsylvania
423 filed an exception to the determination of the Administrative Law Judge
sued on December 13, 1990 with respect to their petition for revision of
eterminations or for refund of sales and use taxes under Articles 28 and 29 of
e Tax Law for the period September 1, 1984 through May 31, 1987. Petitioners
eared by Joseph F. Saeli, Jr., Esq. The Division of Taxation appeared by
liam F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioners filed a brief in support. The Division of Taxation filed a
ter in lieu of a brief. Oral argument was not requested.

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

Issue

Whether petitioners have shown that they sold the homes at issue as part of
itioners' performance of a capital improvement.

Findings of Fact

We find the facts as determined by the Administrative Law Judge except for
ding [*2] of fact "8" which has been modified. The Administrative Law
ge's findings of fact and the modified finding of fact are set forth below.

On June 2, 1988, following an audit, the Division of Taxation (hereinafter
"Division") issued to petitioner Lake City Manufactured Housing, Inc.

'Lake

City") a Notice of Determination and Demand for Payment of Sales and Use Taxes which assessed \$ 104,629.40 in tax due, plus minimum interest, for the period September 1, 1984 through May 31, 1987. Also on June 2, 1988, the Division issued to petitioners Arthur E. Budzowski and Gerald R. Garity, as officers of Lake City Manufactured Housing, Inc., notices of determination and demands for payment of sales and use taxes due which assessed identical amounts of tax and interest as the notice issued to Lake City.

The status of petitioners Budzowski and Garity as persons responsible to collect tax on behalf of Lake City is not at issue herein.

Petitioner Lake City Manufactured Housing, Inc. n1 has been in the business manufacturing modular, or manufactured, homes since 1973. Petitioner's manufacturing facility is located in Lake City, Pennsylvania.

n1 All references to "petitioner" shall refer to the corporate petitioner unless otherwise indicated. [*3]

The modular homes which are the subject of this matter were all manufactured

Lake City at its Lake City, Pennsylvania facility. The raw materials from which these modular homes were built, such as lumber, plywood, roofing, ywall, ndows and siding, were all purchased from sources outside of New York. All these raw materials were stored at Lake City's factory, and no materials were stored in New York State. Lake City paid Pennsylvania sales or use tax on its purchases of raw materials.

On audit, the Division reviewed invoices which detailed petitioner's sales New York customers. There were 85 such sales during the audit period. Petitioner had been remitting sales and use tax to New York based upon an amount equal to 60% of the invoice amount of each modular home sold in New York. Petitioner had charged and collected from each of its New York customers a tax stated on the invoice as "use tax" which was based on 60% of the invoice amount. Following its initial review of petitioner's invoices, the Division concluded that petitioner should have paid sales or use tax based upon 70% of the invoice amount. The Division issued to petitioner a Statement of Proposed Audit Adjustment in accordance with this conclusion, which was based upon the Division's mistaken impression that petitioner's modular homes should be taxed in a manner consistent with the sales and use taxation of mobile homes. Petitioner subsequently tendered payment of the proposed adjustment. The Division, however, returned petitioner's check and issued the assessment at issue which was based upon 100% of the invoice amount of the 85 New York sales made by petitioner during the audit period.

The assessment, as set forth in the notice of determination, had two components: a use tax component of \$ 52,131.14 which was based on 100% of the sales price of the 23 homes that the Division determined petitioner sold and

stalled, and a sales tax component of \$ 52,498.26 which was based on 100% of the invoice amount of the 62 homes with respect to which the Division terminated at petitioner sold but did not install.

We modify finding of fact "8" to read as follows:

With respect to the use tax component, the Division conceded that the stallation of modular homes constituted a capital improvement, but took the position that, in bringing the component parts of the homes into New York, petitioner [*5] used these materials in New York and thereby triggered the position of use tax. Since the Division concluded that petitioner had erroneously collected sales tax from its customers based upon 60% of the voice d remitted such tax to the Division, the Division determined that no use tax credit was allowed with respect to such erroneously collected sales tax. n2

n2 The Administrative Law Judge's finding of fact "8" read as follows:

"With respect to the use tax component, the Division conceded that the stallation of the modular homes constituted a capital improvement, but took the position that, in bringing the component parts of the homes into New York, petitioner used these materials in New York and thereby triggered the position the use tax. Since petitioner had collected tax from its customers based on 60% of the invoice and remitted such tax to the Division, no credit was allowed with respect to such erroneously collected tax."

This fact was modified to clarify that the finding of fact was intended to state what the Division did on audit with respect to the use tax component and its rationale for this action.

With respect to the sales tax component of the [*6] assessment, the Division concluded that 62 of petitioner's New York sales consisted of sales of modular home sections or components without installation. The Division took the position that such sales were retail sales of tangible personal property subject to sales tax. Petitioner's receipts in respect of the 62 such sales during the audit period totaled \$ 1,915,273.00. The Division determined that sales tax on these sales totaled \$ 130,753.00. The Division allowed petitioner credit of \$ 8,254.74 in tax which petitioner had collected and remitted in respect of these sales (based upon 60% of the invoice price), and determined petitioner to be liable for the difference of \$ 52,498.26.

The Division's conclusion as to whether a particular modular home was sold on an installed or uninstalled basis was based solely upon information contained

e invoice. Where an invoice included a charge designated "roll-on", the Division determined that the home in question was installed by petitioner. Where an invoice did not set forth such a "roll-on" charge, the Division concluded that the home in question was sold uninstalled.

At the commencement of the hearing in the instant matter, [*7] the Division conceded that the use tax component of its assessment was improper. Remaining at issue, therefore, is an assessment of \$ 52,498.26, plus interest, which results from the sales tax component of the assessment.

Also at the hearing, petitioner conceded its liability with respect to one home determined by the Division to be subject to sales tax. Specifically, petitioner conceded it owed sales tax on its sale of a modular home, sold uninstalled, to Cairo Homes pursuant to an invoice dated January 24, 1986. Petitioner collected and remitted \$ 1,504.56 in tax on this sale, and conceded it owed an additional \$ 1,065.98 with respect to this sale.

Petitioner sells most of its homes in Pennsylvania, Ohio and New York. Most

of the sales remaining at issue were made through a real estate agent, or through a dealer whose function is similar to that of a real estate agent. In every one of these cases, the customer had identified a specific piece of land on which the home was to be installed before an order was placed with Lake City. The dealer or realtor accompanied the customer to the site to determine whether a modular home could be installed at the site. The dealer or realtor then prepared a diagram of the customer's proposed floor plan for the modular home. Modifications were sometimes necessary to the customer's original design before a feasible final design could be prepared. Lake City then prepared a blueprint which was forwarded to the customer for final approval.

Petitioner's modular homes were custom built, and the company did not maintain any inventory of standard home designs. Its customers chose such things as linoleum patterns, wallpaper patterns, roofing and siding from a selection of samples petitioner provided to its dealers.

Petitioner sent each of its customers a certificate of capital improvement to be signed by the customer before production began. On each of these forms, Lake City was identified on the certificate as the contractor. Petitioner obtained a certificate of capital improvement for each of the sales which are the subject of this proceeding. Petitioner was unable to produce these certificates at the hearing.

Modular homes typically consist of two or four sections. These sections are

manufactured at Lake City's factory and are shipped by truck to the installation

site. Petitioner made all arrangements [*9] for the shipping of the houses.

When the sections arrived at the site, they were unloaded from the truck either with electric jacks or a crane, and were assembled and permanently installed on a

undation. The "roll-on" crew which performed the installation work for each the homes in questions was W. D. Construction. In every instance, petitioner contacted the "roll-on" crew to arrange for the installation and to advise the staller when the sections of the house would be on-site and ready for stallation. Since the same installer was used in each of the sales at issue, is installer was aware of the particular manner in which petitioner's homes could be installed.

As noted previously, certain of petitioner's invoices listed a "roll-on" charge representing the cost of installation work and certain of these invoices did not list such a charge. A "roll-on" charge was listed on the customer invoice in instances where the installer had inspected the site and advised petitioner what the "roll-on" charge would be. The "roll-on" charge was not listed on the customer invoice in those instances where either the installer did not inspect the site or where the conditions at the [*10] site indicated that additional work might be necessary for proper installation. Under such circumstances, since petitioner shipped the invoice along with the house, the "roll-on" charge could not be listed on the invoice. Where the "roll-on" charge was not listed on petitioner's invoice, the installer billed the dealer. The dealer, in turn, would either pay the installer (and thereby absorb the "roll-on" charge) or pass the charge along to the customer.

The installation of a modular manufactured home on its foundation is permanent; a home cannot be moved once it has been installed.

Petitioner maintained insurance on each home until it was permanently stalled on its foundation. At that point, the home was covered by the customer's homeowners insurance. Also at that point, title to the home passed from petitioner to the customer. At no point did the dealer maintain any insurance on the home. Also, in the event a customer cancelled an order after production commenced, petitioner did not have any claim against the dealer. For purposes of granting mortgage loans, banks treated petitioner's modular homes the same as other homes. Banks established draw schedules, and any final

release of funds would not be made until the home had been permanently stalled on its foundation and inspected by the bank.

Petitioner provided a one-year warranty on each home. Petitioner, and not the dealer, was responsible for performing any work under the warranty.

Opinion

The Administrative Law Judge held that retail sales of tangible personal property are generally subject to sales tax, although such property may be exempt from sales tax if it was sold by a contractor to a person for whom the contractor is performing a capital improvement to real property, and the tangible personal property was an integral part of that capital improvement. Therefore, the Administrative Law Judge determined that petitioner had failed to

monstrate that all the modular homes it sold in New York State were capital improvements performed by petitioner, deeming sixty-two of petitioner's sales of modular homes to be retail sales of tangible personal property and, as such, subject to sales tax. Therefore, the Administrative Law Judge denied the petition of petitioner and sustained the notices of determination and demands for payment.

On exception, petitioner makes several assertions. First, [*12] it argues that the Administrative Law Judge exceeded his authority by addressing the issue of whether petitioner is entitled to a credit or refund for erroneously collected use tax. Second, it asserts that the Administrative Law Judge improperly ignored 20 NYCRR 544.3(b). n3 Finally, it contends that petitioner successfully demonstrated at the hearing that it was responsible for

all installations of the homes and, therefore, had performed capital improvements in every instance at issue.

n3 The Administrative Law Judge framed the issue as whether petitioner contracted to install the homes. Petitioner asserts that the fundamental question presented, pursuant to the regulation, is whether the manufacturer sold the home directly to the customer, rather than to a contractor, subcontractor, or repairman who then installed it.

In opposition, the Division makes several assertions. First, it contends that the question of whether the Administrative Law Judge had exceeded his authority regarding the use tax is moot because the Division conceded that at the hearing. Second, it asserts that 20 NYCRR 544.3(b) was properly ignored because it does not address the situation at hand. Finally, [*13] it argues that the Administrative Law Judge properly framed the issue as whether petitioner contracted to install the homes.

We affirm the determination of the Administrative Law Judge.

Every retail sale of tangible personal property is subject to sales tax unless otherwise exempted or excluded from tax (Tax Law @ 1105[a]). Tangible personal property sold by a contractor to a person for whom it is making a capital improvement to real property, where the tangible personal property is some an integral part of the improvement, is exempt from sales tax (Tax Law @ 1105[a][17]). A capital improvement is defined at Tax Law @ 1101(b)(9)(i) as: "(i) 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

self; and

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

The fundamental issue in this case is whether petitioner, as a contractor, performed a capital improvement on the real property of its customers [*14] with respect to the sixty-two sales at issue. Failure to show that a capital improvement was made by petitioner results in the imposition of sales tax. To determine if a capital improvement was made, we must look at the transaction as it occurred.

The retail sale of a modular home from one party to another is the sale of tangible personal property, and is therefore subject to sales tax under Tax Law § 1105(a). To qualify for an exemption from sales tax based upon the performance of a capital improvement in conjunction with the sale of the tangible personal property, the applicability of the exemption must be affirmatively shown (Tax Law § 1132(c)). The contractor must demonstrate that it sold the home to the customer and that it installed the home as part of the sale (Tax Law § 1115(a)(17)). Just because a capital improvement is ultimately made to property, it does not necessarily follow that an exemption from sales tax is available. The burden is on the contractor to demonstrate that it made a capital improvement in conjunction with the sale. If this showing is not made, the sale of the home is a sale of tangible personal property which is subject to sales tax.

Based [*15] upon this analysis, petitioner has failed to demonstrate that the sales of modular homes were in conjunction with the making of capital improvements by petitioner on the real property of its customers. At issue are sixty-two modular homes sold by petitioner. For these sales to qualify for exemption from sales tax, petitioner must affirmatively demonstrate that it is the contractor who installed the homes. Petitioner has not done this. The sales of the homes to customers are well documented. However, proof regarding installation of these homes is lacking.

In its audit, the Division relied on sales invoices to determine whether a modular home was sold on an installed or uninstalled basis, as shown by the presence or absence, respectively, of a roll-on charge. The sales invoices for sixty-two homes at issue did not include a roll-on charge. This led the Auditor and the Administrative Law Judge to conclude that the sales of those sixty-two modular homes did not qualify for an exemption from sales tax under Tax Law § 1115(a)(17). We agree.

Petitioner has offered no documentation to show the existence of a contractor-subcontractor relationship with W. D. Construction, [*16] the installer. Although Lake City's president, Mr. Budzowski, testified that Lake

ty was subcontracting to W. D. Construction, the Administrative Law Judge found this oral testimony of petitioner's president to be insufficient in the absence of supporting documentation. We agree with this finding.

Further, the assertion of a contractor-subcontractor relationship is contradicted by the fact that, with respect to the sales at issue, petitioner was not billed for the installation and did not pay for it.

Petitioner has produced all but five of the certificates of capital improvement for the sales at issue. However, certificates of capital improvement are irrelevant to the threshold issue, i.e., whether petitioner was the contractor that made the installation. If this showing is made, the certificates would then become relevant. But, since petitioner has not shown that it was the contractor-installer, the capital improvement certificates are simply not applicable. n4

n4 The capital improvement certificate, in accordance with Tax Law § 15(a)(17), makes it quite clear on its face that it only applies to a contractor making capital improvements to real property. At the top of the form

states "[t]o be completed by customer and given to, signed by and retained by contractor making capital improvement to the real property." Further, in bold print the form states that "THIS CERTIFICATE MAY NOT BE USED TO PURCHASE BUILDING MATERIALS OR OTHER TANGIBLE PERSONAL PROPERTY TAX FREE" (see, Exhibit 1).

The capital improvement form was modified in April, 1982, to make it clear that it could not be accepted by a vendor who was not a contractor with respect

to that sale (see, Matter of Neal Andrews, Ltd., Tax Appeals Tribunal, October 1988). [*17]

For this reason, petitioner's reliance on Matter of Saf-Tee Plumbing Corp.

177 (77 AD2d 1, 432 NYS2d 409) is misplaced. Saf-Tee Plumbing addressed the issue of whether work done by a contractor for a customer constitutes a repair or a capital improvement in regard to the good faith receipt of a certificate

of capital improvement by the contractor. The issue in the present case is whether

a seller of a product which might qualify as a capital improvement has demonstrated that it installed the product and was the contractor, thereby triggering the capital improvement exemption.

Further, petitioner's reliance on Matter of Morton Bldgs. v. Chu (126 AD2d 1, 510 NYS2d 320, aff'd 70 NY2d 725, 519 NYS2d 643) is incorrect. Morton Bldgs. addressed the issue of applying a use tax to the manufacture, sale, and erection of pre-engineered buildings in New York State using building components

manufactured outside the State. The weight given to the certificates of capital

improvement was not an issue in Morton Bldgs., as they were accepted without discussion in the undisputed facts of the case. In contrast, the weight given

the certificates of capital improvement [*18] in the present case is an issue. We agree with the Administrative Law Judge in determining that the certificates of capital construction are inconclusive. Morton Bldgs. is, therefore, inapplicable to the case at hand.

This is not, as petitioner alleges, a matter of form over substance. Absent additional evidence conclusively showing that petitioner made capital improvements in conjunction with each sale of a modular home, we cannot draw conclusions which petitioner advances. The sales of the sixty-two modular homes are, therefore, subject to sales tax pursuant to Tax Law § 1105(a).

Petitioner has made several assertions on exception. First, petitioner maintains that the Administrative Law Judge exceeded his authority by addressing the issue of whether petitioner is entitled to a credit or refund for erroneously collected use tax. This is in regard to the modified fact set forth above. We believe the fact, as modified, is responsive to petitioner's objection.

Second, petitioner states that, as a general matter, the Division of Tax Appeals is bound by the regulations set forth by the Department of Taxation and Finance and that, based upon this principle, the Administrative [*19] Law Judge improperly ignored 20 NYCRR 544.3(b). Regarding the authority of the Division of Tax Appeals, it is an independent entity which is specifically authorized to rule on the validity of the regulations promulgated by the Division (see, Tax Law §§ 2002, 2006[7]). Given this fact, petitioner's reliance on Matter of Duflo Spray-Chemical v. Jorling (153 AD2d 244, 550 NYS2d 77), Matter of Sinclair v. Smith (97 AD2d 953, 468 NYS2d 749), and Matter of Summers v. Coughlin (76 AD2d 980, 429 NYS2d 74) is misplaced.

The regulation in question, 20 NYCRR 544.3(b), states:

"(b) Sales of factory manufactured homes. (1) The sale of a factory manufactured home which has not been installed on real property as a capital improvement is subject to the sales and compensating use taxes as the sale of tangible personal property. Upon a retail sale, tax is computed on the total sales price. The '70 percent rule' described in subparagraph (a)(2)(i) of this section does not apply to the sale or use of a factory manufactured home.

"(2) The sale of a factory manufactured home to a contractor, subcontractor, repairman to be installed as a capital improvement by such contractor, [0] subcontractor or repairman is subject to sales and compensating use tax as a retail sale of tangible personal property."

Petitioner interprets the regulation to mean that if a factory manufactured home is sold directly to the customer (not a middleman) and is installed on property, it is not a sale of tangible personal property and is, therefore, not

subject to sales tax (Petitioner's brief on exception, p. 7). In opposition, the Division states that the regulation is not on point because it does not address the factual issue here -- whether petitioner sold and installed the homes by its employees or a subcontractor. The Division asserts that this is a scenario not addressed in the regulation, since 20 NYCRR 544.3(b)(1) addresses uninstalled sales and 20 NYCRR 544.3(b)(2) addresses sales to contractors and subcontractors (Division's reply letter, pp. 2-3). Both interpretations are correct.

The critical portion of the regulation for purposes of this issue is the first line of 20 NYCRR 544.3(b)(1) which states, in sum, that regardless of who the buyer is, a sale of an uninstalled factory manufactured home is subject to sales tax. Conversely, the sale of an installed [*21] factory manufactured home, i.e., sale of an uninstalled home where installation is a component of the sales transaction, is not subject to sales tax.

It is possible for a buyer to purchase a factory manufactured home from the manufacturer but to make arrangements to have it installed by another party. Petitioner has failed to establish that the sales at issue were not completed

in this manner. In this scenario, the sale of the home would be subject to sales tax because the home was purchased on an uninstalled basis. Though the home will ultimately be installed on the real property of the buyer, thereby constituting a capital improvement, the steps taken to reach this point do not trigger the exemption from sales tax because installation was secured independent of the sale of the home. This is a subtlety that petitioner needs to appreciate, as this subtlety is the basis of the Administrative Law Judge's determination and our affirmation on exception.

Thus, the Administrative Law Judge did not err by not addressing regulation NYCRR 544.3(b)(1) in his determination because this regulation does not

result here. Under the regulation, petitioner sold the homes on an [*2] uninstalled basis and is subject to tax on these sales.

To summarize, the timing and nature of the transactions which result in a factory manufactured home being installed on the real property of a customer, states whether an exemption from sales tax is available. The making of a capital improvement does not automatically allow for an exemption. Rather, the

making of a capital improvement must be in conjunction with the sale of the tangible personal property which is integrated in the improvement. Any discrepancy in the timing or control of the transaction may result in the unavailability of the exemption. As stated previously, petitioner has failed

to demonstrate that it was responsible for the installation of the modular homes at issue. Absent this proof, petitioner does not qualify for an exemption from sales tax on the transactions.

Accordingly, it is ORDERED, ADJUDGED, and DECREED, that

1. The exception of Lake City Manufactured Housing, Inc., and Arthur E. dzowski and Gerald R. Garity, as officers, is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Lake City Manufactured Housing, Inc., and Arthur E. dzowski and Gerald [*23] R. Garity, as officers, is denied; and
4. The notices of determination and demand for payment of sales and use xes due, as adjusted in the Administrative Law Judge's determination, are stained.

Re: Ruling Request/Sales and Use Tax

P.D. 87-210

VIRGINIA DEPARTMENT OF TAXATION

1987 Va. Tax LEXIS 78

September 15, 1987

1]

FORST

This will reply to your letter of July 23, 1987 seeking information on the correct application of the sales and use tax to the sale and installation by *

* (taxpayer), of one-unit modular buildings made of concrete and steel for Virginia customers.

FACTS

According to the information enclosed with your letter, the taxpayer is engaged in the manufacture of the above mentioned modular buildings in its Florida factory for use as branch banks, fast food restaurants, professional offices, gas marts, health clinics, etc. In general, the taxpayer ships the buildings to its Virginia customers with fully tested plumbing, heating, and air conditioning systems in place. Some buildings are also shipped with floor tiles, furnishings, bathroom fixtures, and pictures for walls already in place, according to customer specifications. After shipment of the buildings to its Virginia customers, the taxpayer provides installation work at the job site.

Accordingly, the taxpayer seeks a ruling on the correct application of the tax to the sale and installation of the modular buildings for Virginia customers.

RULING

@ 58.1-610 of the Virginia Code provides that "[a]ny person who contracts to . . . to perform construction, reconstruction, installation, repair, or any other service with respect to real estate or fixtures thereon, and in connection therewith to furnish tangible personal property, shall be deemed to have purchased such tangible personal property for use or consumption." In addition, the statute provides that "[a]ny sale . . . to . . . such person shall be deemed a sale . . . to . . . the ultimate consumer and not for resale." Thus, a contractor respecting real estate is deemed to be the taxable user or consumer of all materials furnished under a contract to erect or install property that will become affixed to realty and does not collect the sales tax from his

customers when performing such contracts.

Since the modular buildings sold and installed by the taxpayer become a part of realty and are assessed as real property (rather than tangible personal property) for Virginia local tax purposes, I conclude that the taxpayer acts as a contractor respecting real estate when it sells and installs such buildings, together with any fixtures permanently affixed thereto, for Virginia customers.

Accordingly, the taxpayer will be subject to the tax on any materials, [*3] equipment, etc., used to construct buildings for Virginia customers, subject to a nonrefundable credit for any tax paid on such materials, equipment, etc., in the state in which they were purchased. In addition, the taxpayer will not be required to collect the sales tax from its Virginia customers. For example, if the taxpayer pays Florida sales tax on its purchases of materials used in the fabrication of the modular buildings, the taxpayer may claim a credit against Virginia's use tax to the extent of such Florida sales tax previously paid, in an amount not to exceed the amount of the Virginia tax.

However, while the taxpayer is a contractor for purposes of the modular buildings, (and fixtures attached thereto), which it installs for Virginia customers, it will be considered a retailer with respect to buildings which it sells without installation. Accordingly, the taxpayer would be required to collect the tax on the total sales price of any modular building which it sells

to a Virginia customer for its own installation or to a Virginia contractor for installation for a customer. In addition, the taxpayer will be considered a retailer with respect to any other items of tangible personal [*4] property which it provides to its Virginia customers in connection with its installation of the modular buildings, but which do not become permanently affixed to the buildings, such as wall pictures, furniture, and similar items.

For your further information, I have enclosed copies of two rulings issued by the department, dated April 3, 1985 and April 21, 1987, in closely related cases, together with applicable sales and use tax regulation sections. I hope that all of the foregoing has responded to your questions, but let me know if you have any further questions.

W. H. Forst, Tax Commissioner