STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HAWKINS MANUFACTURED HOUSING, INC.	:	DECISION DTA NO. 801764
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1982 through November 30, 1983.	:	

Petitioner, Hawkins Manufactured Housing, Inc., R. D. #1, Box 200, Harpursville, New York 13787, filed an exception to the determination of the Administrative Law Judge issued on April 14, 1988 with respect to its petition for a revision of a determination or for refund of sales and use taxes under Article 28 and 29 of the Tax Law for the period March 1, 1982 through November 30, 1983 (File No. 801764). Petitioner appeared by Ball, McDonough & Johnson, P.C. (Philip C. Johnson, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioner filed a brief on exception. The Division did not. Oral argument, at the request of petitioner was heard on July 14, 1988.

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

ISSUE

Whether the Division of Taxation's imposition of compensating use tax on a dealer's use of mobile and manufactured homes was proper.

FINDINGS OF FACT

We find the facts as stated in the determination of the Administrative Law Judge and such facts are incorporated herein by this reference. The relevant facts can be summarized as follows.

Petitioner, Hawkins Manufactured Housing, Inc., is a New York corporation engaged in the sale of mobile homes and factory manufactured homes. During the period at issue - March 1, 1982 through November 30, 1983 - petitioner purchased certain mobile homes from Titan Homes Division of Champion Home Builders Co., a manufacturer of such homes.

Petitioner purchased and took delivery of the aforementioned homes at Titan Homes' factory located in Oneida County, New York. At the time of delivery, petitioner paid the manufacturer sales tax at the then-prevailing rate in Oneida County of four percent. Petitioner subsequently transported its purchases to its premises in Broome County. At all times relevant herein, the prevailing sales and use tax rate in Broome County was seven percent.

On audit, the Division of Taxation determined that petitioner's use of the homes in Broome County was a taxable use and assessed use tax on the purchase price of the homes. The Division of Taxation assessed use tax at the rate of three percent; that is, to the extent that sales tax had not already been paid on the homes.

As a result of the foregoing determinations, on December 27, 1984, the Division of Taxation issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1982 through November 30, 1983 assessing $7,469.07 in tax due, plus interest.

OPINION

The controversy at hand comes about because of two changes in the Tax Law as it applies to the sale of mobile homes and factory manufactured homes.

Prior to January 1, 1982, the sale of mobile homes by a manufacturer to retail dealer was a sale for resale and not subject to sales or use tax (Tax Law §§ 1101[b] [4]; 1105 [a] and 1110). The sales tax was imposed on the transaction between the retail dealer and retail purchaser and the retail dealer was required to collect sales tax from the retail purchaser based on the point of final destination of the new home.

Beginning January 1, 1982 this incidence of tax was changed. By the addition of section 1115(a)(23), the sale by a dealer of a mobile home was exempted from tax, while the sale of a home by the manufacturer to the dealer was specifically deemed a retail sale subject to sales tax (L 1981, ch 861, § 1). Thus the incidence of the sales tax was shifted from the transaction between the dealer and retail purchaser to the transaction between the dealer and manufacturer and the manufacturer was now required to collect the proper amount of tax. The amendment exempting the sale by the dealer explicitly did not apply, for purposes of the section 1110 use tax, to homes purchased outside of New York State.

In 1983 the imposition of the tax was restored to the transaction between the dealer and retail purchaser (L 1983, ch 986, § 7).

The period at issue for which the use tax is asserted against petitioner is January 1, 1982 through November 30, 1983. The controversy revolves around the interpretation of the 1983 amendments to section 1110 concerning imposition of the use tax.

In 1983 Tax Law section 1110 was amended by adding the following:

> "Notwithstanding the foregoing, for purposes of clause (A) of this section, where a user purchases a mobile home or factory manufactured home (as defined in article nineteen-AA and article eighteen-B, respectively, of the executive law) from any person other than the manufacturer thereof, the tax shall be at the rate of four percent of the consideration given or contracted to be given for such property, or for the use of such property, by the user's seller, but excluding any credit for tangible personal property accepted in part payment and intended for resale, plus the cost of transportation except where such cost is separately stated in the written contract, if any, and on the bill rendered to the user's seller. If the consideration given or contracted to be given by the user's seller cannot be ascertained after reasonable efforts to do so by the person required to pay the tax imposed by this section, then, for purposes of clause (A) of this section, the tax shall be at the rate of four percent of seventy percent of the consideration given or contracted to be given for such property, or for the use of such property, by the user, but excluding any credit for tangible personal property accepted in part payment and intended for resale, plus the cost of transportation except where such cost is separately stated in the written contract, if any, and on the bill rendered to the user." (L 1983, ch 986, § 4.)

This language added to section 1110 was applicable only for the January 1, 1982 - September 1, 1983 period (L 1983, ch 986, §§ 5 and 10).

The petitioner asserts that this added language controls both the incidence of the use tax and its computation for all sales of mobile homes during this period. Petitioner argues that this added language imposes the use tax only on the use by a retail customer during this period and since petitioner was not a retail customer, it could not be subject to use tax.

The Division argues that the language added to section 1110 does not control the incidence of use tax, but only defines its calculation when the taxable use was made by a retail customer during the January 1, 1982 through September 1, 1983 period. A taxable use could be made by a retail customer during this period if the customer purchased the mobile home and then brought it into New York State.

The Administrative Law Judge found in favor of the Division, we affirm this determination.

For the period at issue, by the addition of section 1115(a)(23) as discussed above, the sale of a mobile home to a dealer in New York State, such as petitioner, was a retail sale for Article 28 purposes. The first two sentences of section 1110, which were not amended by Chapter 986 of the Laws of 1983, provide in pertinent part as follows:

> "§1110. Imposition of compensating use tax. Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail. . . For purposes of clause (A) of this section, the tax shall be at the rate of four percent of the consideration given or contracted to be given for such property, or for the use of such property, but excluding any credit for tangible personal property accepted in part payment and intended for resale, plus the cost of transportation except where such cost is separately stated in the written contract, if any, and on the bill rendered to the purchaser." (Emphasis added.)

Since petitioner's purchases were by definition retail purchases, the above provision subjects petitioner to a use tax, if his retention of the mobile homes for sale constituted a taxable use.

"Use" is defined at section 1101(7) of the Tax Law as "the exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time. . ." Clearly, petitioner's retention of the mobile homes for the purposes of sale is a "use" within this broad statutory definition.

The essence of petitioner's argument is that its use was not taxable because the language added to section 1110 imposed the use tax, during this period, exclusively on the retail customer. We have carefully examined petitioner's contention but conclude that the added language does not have the effect urged by petitioner.

As set forth above, the second sentence of section 1110, unamended by Chapter 986

provides that the use tax imposed by clause A of section 1110 on retail sales will be four percent of the consideration given. The purpose of this second sentence is not to define the taxable event, which is done by clause A, but instead to define the amount of the receipt upon which the tax is imposed.

Immediately following this provision is the language added to section 1110 by Chapter 986. We conclude that the purpose of the added language which beings with "[n]otwithstanding the foregoing . . .", is only to provide a special rule for the calculation of the amount of the taxable receipt, for the clause A use tax, where the taxable use is by a retail purchaser of a mobile home. Thus, this language does not attempt to limit the taxable event exclusively to the use by a retail purchaser, but only to set the amount of the receipt subject to tax when the taxable event was this particular use.

This special rule is understandable in the context of the disparate treatment originally provided by Chapter 861 of the Laws of 1981 to in-state versus out- of-state purchases of mobile homes. Under the initial enactment, the purchase by a dealer in New York would be subject to the sales and the use tax on the wholesale price. In contrast, retail customers who purchased out of New York State and subsequently brought the mobile home into the state would be subject to use tax on the higher retail price. The language added to section 1110 by Chapter 986 attempts to equalize the impact of the tax by providing that the amount of the use tax receipt for the out-of-state retail purchaser will be the consideration given for the mobile home by the user's seller (the dealer), thus the wholesale price.

Our interpretation of the language added to section 1110 does not result, as urged by the petitioner, in double imposition of the use tax on the dealer and the retail customer. A mobile

home purchased in New York State by a dealer would be subject to the sales and use tax, under our interpretation, during the period at issue. A retail customer who purchased a mobile home in New York would not be subject to a second use tax because such a customer would not have purchased at retail under the imposition section of clause A of section 1110. Only a retail customer who purchased outside of New York would be subject to the use tax because his purchase remained a retail purchase under the provisions of section 1115(a)(23).

Based on the foregoing, we conclude that the language added to section 1110 by Chapter 986 of the Laws of 1983 does not apply to the transaction at issue. Petitioner was, therefore, subject to the use tax imposed by the unamended provisions of section 1110 of the Tax Law.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Hawkins Manufactured Housing, Inc., is in all respects denied;

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

3. The petition of Hawkins Manufactured Housing, Inc. is granted to the extent indicated in

conclusions of law "J" and "K" of the Administrative Law Judge's determination and the Division of Taxation is directed to adjust the Notice of Determination issued on December 27, 1984 accordingly, but except as so granted, is in all other respects denied.

Dated: Albany, New York
JAN 12, 1989

John P. Dugan
President

Francis R. Koenig
Commissioner