

REDACTED DECISION - DOCKET NUMBER 09-276 U - BY - A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE AND MICHEL DUNCAN BISHOP, FORMER CHIEF ADMINISTRATIVE LAW JUDGE- SUBMITTED FOR DECISION ON JULY 29, 2011 - ISSUED ON NOVEMBER 2, 2012.

SYNOPSIS POINTS

TAXATION -- SUPERVISION -- GENERAL DUTIES AND POWERS OF TAX COMMISSIONER -- It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See W. Va. Code Ann. § 11-1-2 (West 2010)*

TAXATION -- PROCEDURE AND ADMINISTRATION -- COLLECTION OF TAX -- "The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable." *W. Va. Code Ann. § 11-10-11(a) (West 2010).*

TAXATION -- USE TAX -- A use tax is applied to purchases of tangible personal property for use in one's business. *See W. Va. Code Ann § 11-15A-2(a) (West 2010).*

TAXATION -- USE TAX -- Section 3 of Article 15A, Chapter 11 contains exemptions to the use tax. One of these exemptions is, if the tangible personal property at issue is exempt from sales tax (and is being used for the exempt purpose) pursuant to Article 15 of Chapter 11. *See W. Va. Code Ann § 11-15A-3(a)(2) (West 2010).*

TAXATION -- SALES TAX EXEMPTIONS -- There is an exemption from the sales tax (and use tax) for tangible personal property such as the wire, conduit and other property used by the Petitioner in the course of its business, if the property is purchased by it "for the purpose of resale in the form of tangible personal property" *W. Va. Code Ann. § 11-15-9(a)(9) (West 2010).*

TAXATION -- SALES TAX EXEMPTIONS -- The exemption contained in Subsection (a)(9) of Article 9 does not apply to purchases by the Petitioner if it is "engaged in the activity of contracting" and the tangible personal property "is to be installed in, affixed to or incorporated by that person or his or her agent into any real property, building or structure" *Id.*

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- Contracting means and includes the furnishing of work, or both materials and work, for another (by a sole contractor, general contractor, prime contractor, subcontractor or construction manager) in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for removal or demolition of a building or structure, or any part thereof, or for the alteration, improvement or development of real property. Contracting also includes services

provided by a construction manager so long as the project for which the construction manager provides the services results in a capital improvement to a building or structure or to real property. W. Va. Code Ann. § 11-15-2(b)(3)(A) (West 2010).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- Only repairs or improvements that result in a capital improvement are considered contracting. *Id.*, at 2(b)(3)(C)(iii) & (v).

TAXATION -- CONSUMERS SALES AND SERVICE TAX -- Capital improvements are improvements that are affixed to or attached to and become a part of a building or structure or the real property or which add utility to real property, or any part thereof, and that last or are intended to be relatively permanent.” *Id.*, at 2(b)(3)(C)(vi).

TAXATION -- CONSUMERS SALES AND SERVICE AND USE TAX LEGISLATIVE RULES -- Capital improvements include the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, and the alteration, improvement or development of real property, which adds utility to the building or structure or real property or any part thereof by substantially adding to the value of the building or structure or real property or appreciably prolonging or extending the useful life of the building or structure or real property, and becomes part of the building or structure or real property or is permanently affixed to or attached to the building or structure or real property so that its removal would cause material damage to the article being removed or to the building or structure or real property itself, and is intended to become a permanent installation or to remain for an indefinite period of time. *See* W. Va. Code R. § 110-15-107.3.3.2 (1993).

TAXATION -- CONSUMERS SALES AND SERVICE AND USE TAX LEGISLATIVE RULES -- “In situations where the subcontractor is providing services to a prime contractor in fulfillment of the prime contractor's contract resulting in a capital improvement to a building, structure or real property, the subcontractor will be treated as a contractor in relation to his purchases.” W. Va. Code R. § 110-15-107.2.10.3 (1993).

TAXATION -- CONSUMERS SALES AND SERVICE AND USE TAX LEGISLATIVE RULES -- Normally, structures, as that term is used in the contracting statutes and rules, must be affixed to or add utility to real property. *See* W. Va. Code R. § 110-15-2.24.3.6 (1993).

TAXATION -- CONSUMERS SALES AND SERVICE AND USE TAX LEGISLATIVE RULES -- In certain limited circumstances, the machinery and equipment, such as was being repaired or improved by the Petitioner, may be considered structures. *See* W. Va. Code R. § 110-15-111.7 (1993).

WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is

erroneous, unlawful, void or otherwise invalid. See W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW --

Here, only six of the eighty-eight jobs in question involved improvements or repairs to buildings or real property. The other eighty-two involved repairs or improvements to machinery or equipment in an industrial setting. Those eighty-two repairs and improvements may or may not have been on machinery or equipment that, by their nature, became structures. However, it is clear that the work was not a capital improvement because it did not become part of or affixed to a building or structure, to the extent that its removal would cause material damage to the item being removed or to the building or structure. This Tribunal concludes the opposite, the work at issue was temporary, designed to be easily removed or changed, due to the nature of the work being done by the Petitioner's customers, namely manufacturing and other industrial activities.

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- Of the six remaining jobs,

- a. Exhibit G-2, Job 263553, was an improvement to a building that extended its useful life and most likely was permanently affixed; as such, it constituted contracting.
- b. Exhibit J-14, Job 264110 was not an improvement or repair to a building, structure or real property, and as such was not contracting.
- c. Exhibit J-25, 274019 was an improvement to a building; however, it did not substantially add to the value of the building or extend its useful life, thus it was not contracting.
- d. Exhibit J-33, Job 274046 was an improvement to a building that may have extended its useful life and may have been permanently affixed. Therefore, the Petitioner has not met its burden of showing that this work was not contracting.
- e. T-1, Job 264010 was not an improvement to real property in that it did not add substantial value to the real property nor did it extend its useful life.
- f. Exhibit I, Job 263512 was an improvement to real property by a general contractor that added substantial value and/or extended the real property's useful life. Moreover, this work was affixed to the real property to the extent that its removal would materially damage the real property

OFFICE OF TAX APPEALS -- DISPOSITION -- Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the use tax assessment, issued against the Petitioner on or about December 6, 2008, for a total tax due of \$_____, is hereby **MODIFIED** to reflect, as of August 15, 2012, a tax due of \$_____ and interest due of \$_____.

FINAL DECISION

On June 15, 2009, the Auditing Division of the West Virginia State Tax Commissioner's Office (the Tax Department or the Respondent) issued an Audit Notice of Assessment, for use tax against the Petitioner.¹ This assessment was issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq.*, of the West Virginia Code. The assessment was for the period of March 1, 2006, through June 30, 2008, for tax in the amount of \$_____, and interest in the amount of \$_____, for a total assessed tax liability of \$_____. According to the petition for reassessment, written notice of this assessment was served on the Petitioner on June 19, 2009.

Thereafter, on August 6, 2009, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. Subsequently, notice of a hearing on the petition was sent to Petitioner, and in accordance with the provisions of West Virginia Code Section 11-10A-10 (2010) a hearing was held on May 18, 2010.² At the beginning of the May 2010 hearing, counsel for the Tax Commissioner stated that the parties had met and, as a result, the amount of the assessment had been reduced. The Tax Commissioner now considered the assessed amount to be \$_____. At the conclusion of the May 18, 2010 hearing the record was kept open to allow the parties to confer and further modify the assessment. The evidentiary hearing was reconvened on

¹ While the assessment was issued against Petitioner, the company does business as Petitioner (hereinafter Petitioner).

² The evidentiary hearing in this matter was heard by Chief Administrative Law Judge Michele Duncan Bishop. Judge Bishop resigned her post on December 31, 2010. This Decision is authored by her successor, Chief Administrative Law Judge A.M. "Fenway" Pollack.

June 2, 2010, at which time the parties presented new evidence which revised the assessment downward.³

Due to the fact that the decision in this matter was being written by an Administrative Law Judge different than the one who oversaw the evidentiary hearing, it was determined, by the undersigned that a second evidentiary hearing was necessary in order to allow the introduction of additional evidence. Therefore, a second evidentiary hearing was held on January 27, 2012, and the matter became ripe for a decision at that time.

FINDING OF FACTS

1. The Petitioner is in the business of electrical contracting.
2. The Petitioner's normal practice is to buy the materials used in its business while providing the seller with a certificate of resale. Later, the Petitioner reviews the work it performed on each job to determine if it constituted contracting. If so, the Petitioner would remit the applicable use tax payments to the West Virginia State Tax Department.
3. In the summer of 2009, an auditor from the Tax Department began an audit of the Petitioner. The audit took several months. The auditor began by looking at the Petitioner's use tax returns, and the jobs associated with the same. Thereafter, he determined if the Petitioner charged sales tax, if so, that job was removed from consideration. This left approximately two hundred and fifty (250) jobs to be examined. The auditor then sat down with representatives of the Petitioner to discuss the nature of the work performed during these two hundred and fifty (250) jobs.

³ On June 2, 2010, the Respondent removed some of the jobs at issue in this matter; however, this Tribunal was not provided with a revised dollar amount of the assessment.

4. However, after discussing approximately fifteen or twenty of the jobs, the auditor felt he understood the nature of the work performed on all 250. The auditor then undertook further discussion with his supervisor and with representatives of the Petitioner. The upshot of these discussions was a pared down list of jobs which the auditor believed were contracting/capital improvements.⁴ This pared down list consisted of 104 jobs and it is what led to the June 15, 2009 assessment at issue, in this matter.

5. At the evidentiary hearings in this matter, the Petitioner's one witness was its President, Mr. A. Mr. A went through each job and testified as to the nature of the work performed

6. After all testimony was completed in the first evidentiary hearing, the Respondent removed sixteen of the one hundred and four jobs, leaving eighty-eight jobs that the Respondent still maintained were contracting/capital improvement work.

7. Due to the un-rebutted nature of Mr. A's testimony, the undersigned, finds, as a matter of fact, that the work performed on the eighty-eight jobs in question was of the nature as described by Mr. A.

DISCUSSION

The general law which governs this case is clear and unambiguous. If a person, such as the Petitioner here, purchases tangible personal property for use in its business it is generally taxable, pursuant to West Virginia Code Section 11-15A-2(a). However, there are exemptions from the use tax, and one of those exemptions is if the property is exempt from sales tax, pursuant to Article 15 of Chapter 11. Section 9 of Article 15, Chapter 11 contains the sales tax exemptions and subsection (a)(9) of Section 9 provides

⁴ As will be discussed in greater detail below in the discussion section, this entire matter hinges exclusively on whether the "jobs" in question were contracting/capital improvements rather than repairs.

an exemption for “sales of tangible personal property to a person for the purpose of resale in the form of tangible personal property . . .” W. Va. Code Ann. § 11-15-9(a)(9) (West 2010). As evidenced by the Petitioner’s testimony in this matter, it was common practice for it to provide an exemption certificate to its suppliers, informing them that the materials being purchased were being purchased for resale to its customers, as part and parcel of the electrical contracting service it was providing. However, the “rub” in this case is that subsection (a)(9) of Article 9 goes on to state that:

Provided, however, that sales of building materials or building supplies or other property to any person engaging in the activity of contracting, as defined in this article, which is to be installed in, affixed to or incorporated by that person or his or her agent into any real property, building or structure is not exempt under this subdivision

Id.

So, as testified to by the Tax Commissioner’s only witness in this case, the auditor Billy Click, the Tax Department looked at the Petitioner’s jobs and after some discussion and review, ended up with one hundred and four (104) jobs that it, (the Tax Department) felt were contracting, and therefore, the use tax exemption contained in Subsection (a)(9) would not apply.⁵ Therefore, the sole issue to be decided is, did the eighty-eight jobs at issue constitute contracting?

Section 2 of Article 15, Chapter 11 contains the definition of contracting, which states:

“Contracting” means and includes the furnishing of work, or both materials and work, for another (by a sole contractor, general contractor, prime contractor, subcontractor or construction manager) in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure,

⁵ As discussed above, after the conclusion of testimony, the Respondent removed fourteen jobs from the assessment. This decision applies to the remaining eighty-eight.

or any part thereof, or for removal or demolition of a building or structure, or any part thereof, or for the alteration, improvement or development of real property. Contracting also includes services provided by a construction manager so long as the project for which the construction manager provides the services results in a capital improvement to a building or structure or to real property

W. Va. Code Ann. § 11-15-2(b)(3)(A) (West 2010). Subsection 2(b)(3) goes on to explain that only those repairs or improvements that result in a capital improvement are considered contracting. Id., at 2(b)(3)(C)(iii) & (v). Subsection 2(b)(3) also contains a definition of capital improvements, “[T]he term “capital improvement” means improvements that are affixed to or attached to and become a part of a building or structure or the real property or which add utility to real property, or any part thereof, and that last or are intended to be relatively permanent.” Id., at 2(b)(3)(C)(vi).

The Tax Commissioner has promulgated voluminous regulations regarding contracting, which are contained in Section 107 of Series 15, Section 110 of the West Virginia Code of State Rules. These regulations provide additional guidance regarding contracting in general and more importantly to the task at hand, what is or is not a capital improvement.

The term "capital improvement" includes the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, and the alteration, improvement or development of real property, which:

adds utility to the building or structure or real property or any part thereof by substantially adding to the value of the building or structure or real property or appreciably prolonging or extending the useful life of the building or structure or real property, and

becomes part of the building or structure or real property or is permanently affixed to or attached to the building or structure or real property so that its removal would cause material damage to the article being removed or to the building or structure or real property itself, and

is intended to become a permanent installation or to remain for an indefinite period of time.

W. Va. Code R. § 110-15-107.3.3.2 (1993). The Tax Commissioner's Sales and Service and Use Tax regulations provide two other illustrative subsections, the first of which deals with subcontractors. "In situations where the subcontractor is providing services to a prime contractor in fulfillment of the prime contractor's contract resulting in a capital improvement to a building, structure or real property, the subcontractor will be treated as a contractor in relation to his purchases." *Id.*, at 107.2.10.3. Lastly, the definition of "structure" would, at first blush, indicate that the machinery and equipment being repaired or improved by the Petitioner could not be structures. *See* W. Va. Code R. § 110-15-2.24.3.6 (1993) (structures must be affixed to or add utility to real property). However, Subsection 111.7 explains that in certain limited circumstances tangible personal property, such as the machinery and equipment at issue here, can, by their nature, become structures.

Tangible Personal Property Which Become Structures by Their Basic Nature. - Items which are manufactured as tangible personal property can, by their very nature, become structure and will be considered to constitute a capital improvement to a building, structure, or real property. Installation of these items will be considered to be contracting. However, the determination is factual and must be made on an item by item basis. The following is a list of criteria to be used in making such a determination:

The degree of architectural and engineering skills necessary to design and construct the structure.

The overall scope of the business and the contractual obligations of the person designing and building the structure.

The amount and variety of materials needed to complete the structure, including the identity of materials prior to assembly and the complexity of assembly.

The size and weight of the structure.

The permanency or degree of annexation of the structure to other real property which would affect its mobility.

The cost of building, moving or dismantling the structure.

Example. A farm silo, which is a prefabricated glass lined structure, is intended to be permanently installed. The prefabricated glass lined structure is 70 feet high, 20 feet around, weighs 30 tons, and it is affixed to a concrete foundation weighing 60 tons, and it is set in the ground specifically for the purpose of supporting the silo. The assembly kit includes 105 steel sheets and 7,000 bolts. The silo can be removed without material damage to the realty or the unit itself at a cost of \$7,000. In view of its massive size, the firm and permanent manner in which it is erected on a most substantial foundation, its purpose and function, the expense and size of the task and the difficulty of removing it, it is considered a structure and not machinery and equipment.

W. Va. Code R. § 110-15-111.7 (1993).

Therefore, the law of this case can be summarized as follows; if the repairs or improvements that the Petitioner (or any general contractor it was subbing for) was undertaking were improvements or repairs to buildings, structures, or real property which either substantially add to the value of or extended the useful life of the same and which become part of or are permanently affixed or attached to the building, structure or real property, so that its removal would cause material damage to the article being removed or to the building, structure or real property, they would constitute contracting, and therefore

would not be exempt for the use tax provisions of West Virginia Code Section 11-15A-2(a)

At both of the evidentiary hearings in this matter, the only person to testify regarding the nature of the work performed on each job was the Petitioner's President. This testimony was un-rebutted. Taken in its entirety Mr. A's testimony can be summed up as follows:

1. On some jobs the Petitioner was the only contractor; on others, the Petitioner worked under a general contractor.
2. For a variety of reasons, including, most likely the passage of time, Mr. A could not remember the exact nature of the work performed by every general contractor.
3. The general nature of the work performed by the Petitioner, on every job, was electrical repairs and or installation.
4. Specifically, the Petitioner would run electrical power lines or wires to various pieces of machinery in almost exclusively industrial settings. On some occasions the Petitioner would also install or move new control equipment for industrial machinery. On other occasions, when the Petitioner was acting in a subcontractor capacity, the general contractor would be installing or repairing or moving industrial machinery and equipment.

Using the law laid out above, one can conclude that save for a few jobs that will be discussed in greater detail below, the work performed by the Petitioner, on the jobs in question, was not contracting. First, the work performed was not improvements or repairs to a building or real property. It also does not appear that the work was done on structures, as that term is generally used. However, Section 111.7 of Series 15, Title 110 of the Code of State Rules provides that in certain limited circumstances, machinery and equipment, can, by their nature, become structures. However, whether or not the repairs or improvements were done to structures is not determinative to our decision, because none of the work performed, by either the Petitioner or the general contractors it was working under, meets the last criteria of a capital improvement, because they did not become part of or affixed to a building or structure, to the extent that their removal would cause material damage to the item being removed or to the building or structure.⁶

In making this determination, we rely, in large part, on the specific testimony from Mr. A, regarding the permanency of the installation and repairs performed.

JUDGE POLLACK: *And this conduit is, again, generally, like you've described earlier, connected by –*

MR. A: *Yes.*

JUDGE POLLACK: *--- screw tension clips ---*

MR. A: *Yeah.*

JUDGE POLLACK: *--- clamps?*

MR. A: *Either ---. Right; either a clamp that'll clamp directly to a beam, or we use another method called a trapeze hanger, which is clamps on a horizontal beam with All Thread piecing it and then straps that'll strap the conduit onto that thing, but it's all clamped. There's no drilling, no welding,*

JUDGE POLLACK: *And again, the cabling would be attached, like ---. Generally, in all these jobs, are you*

⁶ While the issue of whether the machinery or equipment, by its nature, became structures is not determinative, it should be noted that it appears doubtful that any of the machinery or equipment meets the criteria laid out in Section 111.7.

telling me that cabling is --- the conduit is attached one of two ways?

MR. A: Right; that's all ---. Right, right. or the other way is sometimes XXXXXXXX also used cable trays. The cable trays are ---.

JUDGE POLLACK: Right. I can picture ---

MR. A: They're held in a trapeze hanger.

JUDGE POLLACK: --- plastic with a bunch of cables?

MR. A: Yeah, they'd be, like, aluminum ladder tray, and they're installed in a trapeze hanger. And so the conduit would just terminate onto the cable tray. We'd pull the cable down the tray, then --- and into another conduit, down into the piece of equipment.

JUDGE POLLACK: Okay. So is there ever a time where you're running conduit under concrete floors or in walls or attached to the building?

MR. A: In industrial setting, really, no. In commercial settings, yes. Like, for example, we did electrical on XXXXXXXXX building in Parkersburg. Yes, as they built the building we put lots of conduits in the slab in that commercial building up to get conduits up the walls, rather than run them overhead, but industrially, we don't run anything underground, but they keep ---. They want to keep everything upgraded and change them and move them. So all of our work at XXXXXXXXX facility ---. I mean they have their standards of how --- standards of installation that we have to go by. And XXXXXXXXX standards are cable tray and conduits, aluminum conduits that we have to follow using, you know, the clamping systems they tell us and the methods that they dictate to us to use in their facility.

See Transcript of January 27, 2012, evidentiary hearing at P. 36-37. During the second evidentiary hearing Mr. A, more than once, testified that the improvement/repairs his company was doing were, by their very nature, not permanent. In fact, the nature of the vast majority of these eighty-eight jobs⁷ was the opposite. The work being done was temporary, only designed to last until the customer needs new improvements or repairs to

⁷ At the first evidentiary hearing the parties relied on Petitioner's Exhibit BB, which was a list of the jobs at issue. At the second evidentiary hearing the parties relied on a version of Exhibit BB which had been modified by the Office of Tax Appeals. This modification consisted of renumbering the jobs to account for the sixteen (16) jobs that had been removed from consideration by the Tax Commissioner at the conclusion of the first hearing. This modified exhibit was labeled BB-2 and a copy of the same is attached to this Final Decision.

its machinery and equipment. Common sense dictates that the installation of a new control panel (which is a typical description of the type of jobs at issue) on a huge piece of industrial equipment could be an improvement to a structure and it could extend the useful life of the structure. Common sense also dictates that the removal of such an installation would not cause material damage to the control panel or to the structure it is controlling. As a result, save for some of the jobs described in detail below, the work done in the jobs at issue in this matter was not contracting.

Six of the eighty-eight jobs in question require further review, because they were not done in an industrial setting. Because our analysis of these six jobs relies on Mr. A's testimony it will be reproduced below.

MR. B: *Okay. Exhibit G-2 is Job 263553, the XXXXXXXXX conference room, \$_____ in materials. What was going on there, Mr. A?*

MR. A: *That was a renovation of their conference room where they wanted to put in some new lights and new outlets and also they wanted to put in some, some network drops so they could bring in their computers and hook them up and put on some Power Point shows and presentations and that sort of thing. So it was just general renovation of that conference room, the existing conference room, just wanted it redone.*

MR. B: *No further questions regarding G-2.*

This work was a repair or improvement to a building, and would extend its useful life. Therefore we have the same analysis as above; would this improvement become part of the building to the extent that its removal would cause material damage to the lights or outlets or to the building itself? Based upon the testimony as given, this job may well be a capital improvement. Light fixtures and electrical outlets typically become part of a building, particularly electrical outlets. In all cases before the Office of Tax Appeals the burden is on the Petitioner. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W.

Va. Code. R. §§ 121-1-63.1 and 69.2 (2003). Here, the Petitioner has not met its burden of showing that the improvements on this job did not become part of the building in question.

MR. B: *Okay. J-14, Job 264110, power relocate, \$_____.* Talk about that, Mr. A.

MR. A: *264110?*

MR. B: *That's right.*

MR. A: *Powerhouse relocate. That was to relocate a messenger cable from one side of the road to the other. And that came from the fact that this was existing messenger cable running down the road along the powerhouse. The powerhouse was going to start doing some renovation work in it. So in order to do that, they had to get some equipment in there and do some more to that powerhouse. So we had to go in there and take that messenger cable and cross the road, down the other side of the road and back again so that messenger cable wouldn't be interfering with the work that was going to happen in the powerhouse at some later time. So it was preparing for the work that was going to start happening in the powerhouse, so that's what that job involved. It was existing. We just moved it from one side of the street down a little ways and back to get out of the way of the powerhouse.*

MR. B: *Ever have to move it back?*

MR. A: *No. To my knowledge, it's never been moved back.*

MR. B: *No further questions regarding J-14.*

MR. MARLOW: *You were saying messenger power?*

MR. A: *Messenger cable.*

MR. MARLOW: *Messenger cable, yes.*

MR. A: *And messenger cable is --- actually, what that is, it's a steel cable that's run between poles to support other cables, so that's what that steel messenger cable is.*

This job is not an improvement to a building, structure or real property, and as such is not a capital improvement.

MR. B: *J-25, 274019, Building XX network and phone, \$_____ material costs. Mr. A?*

MR. A: *Yeah. That was just replacing existing network drops and phone cables in Building XX. No new equipment*

added. Just replacing cabling.

MR. B: *No further questions. J-25?*

MR. MARLOW: *You said replacing existing network drops and cables?*

MR. A: *Yes.*

MR. MARLOW: *Okay. That's it.*

This job is an improvement to a building, however, it does not substantially add to the value of the building or extend its useful life, thus it was not a capital improvement.

MR. B: *J-33, Job 274046, Building XX remodel first, second, \$_____.*

MR. A: *You see it? Right there it is.*

MR. B: *Forty-six (46).*

MR. A: *In that one, existing offices in Building XX, we installed some new light fixtures, some new fixtures in lighting and existing offices in Building XXX.*

MR. B: *These were in addition to what they already had in the building or did they take them out?*

MR. A: *No. They took the old ones out and put some new ones in.*

MR. B: *No further questions regarding J-33.*

MR. MARLOW: *No questions.*

Here, our analysis is similar to the discussion above regarding job exhibit G-2. However, this job just involves light fixtures, not electrical outlets. This job is an improvement to a building. While \$_____ worth of light fixtures does not substantially add to the value of the building they may extend its useful life. Additionally, the fixtures may have been permanently affixed to the building, to the extent that their removal would cause material damage. As a result, the Petitioner has not met its burden of showing that this work was not a capital improvement.

MR. A: *Let me find these jobs first. 264010. Okay. Where do I have them located? Right there. Okay. No, that's right.*

MS. C: *Fifty-four (54), yeah.*

MR. A: *Yeah. Okay. XXXXXXXXXXXX is a security company that's now a part of XXXXXXXXXXXX. They're just a company, an outside vendor who we've really not worked with much*

in the past, but they just came in to XXXXXXXXXX and added some security and put in some security items in XXXXXXXXXX.

MR. B: *So tell us about the first job here at T-1, Job 264010, plant security, material cost \$_____.*

MR. B: *Okay. That project happened along the --- XXXXXXXXXX sits right on the Ohio River, so their property is actually some river frontage along the back of that plant. So as part of the Homeland Security Act, XXXXXXXXXX got some money to go in and beef up their cameras monitoring the back property of their plant just in case terrorists come in by the river. So this is a project where XXXXXXXXXX purchased the equipment from the other company, XXXXXXXXXX, and placed new cameras along the back of their plant to monitor the riverbank. And we provided the conduit and cabling to those new cameras back there to monitor the river.*

MR. B: *Mike?*

MR. MARLOW: *No questions.*

Here it appears that the Petitioner was a subcontractor for XXXXXXXXXX. As such, whatever work XXXXXXXXXX was doing would be deemed to have been done by the Petitioner. Placing security cameras, along a river bank, presumably on poles would not add substantial value or extend the useful life of the property. Additionally, these cameras are not permanently affixed to the extent that their removal would cause material damage to the real property. As such, this job was not a capital improvement.

The last job needing separate analysis is the "XXXXXXX" job, regarding which the Petitioner's witness testified at length.

MR. A: *XXXXXXX --- excuse me. XXXXXXXXXX is a conveyor company. They are a designer and manufacturer of their own conveyor systems.*

JUDGE POLLACK: *Uh-huh (yes).*

MR. A: *And then they go and they sell those to customers around, you know, around the country. And we first performed work with XXXXXXXXXX at XXXXXXXXXX there in XXXXXXXXXX several years ago, where they come in and put in a conveyor system that carried gypsum from a building on their site down to a barge loading facility on*

the river there. And so that was our first work with XXXXXXXXXX --- is they designed, come in and install that conveyor system, and we did the 1 electrical portion of that work on that conveyor system. The work at XXXXXXXXXX was a conveyor system that XXXXXXXXXX come in, designed. And the purpose of this conveyor was to mix different types of coal before the coal went into the building to be burned in that power house. So it would be, like, high sulfur, low sulfur. There had to be a certain recipe of coal they had to mix before the coal got taken in there. So that's what this is, a coal blending conveyor. And in this particular case, XXXXXXXXXX ---. We bid the price to them, and they presented us with a resale certificate, and they instructed us not to include tax in the sale or to our price to them. We went in, installed the conveyor system. All of the motors and equipment was already there. We come in and installed the conduits down the conveyor system to install to their motor controllers, which fed to the --- to different motors, tensioners and instrumentation on that conveyor system to make that operate.

JUDGE POLLACK: Okay. Now, I've seen coal conveyors before, but just go ahead and

tell --- describe it for us. Usually, they're on metal legs ---

MR. A: Right.

JUDGE POLLACK: --- every couple of feet and ---.

MR. A: They'll have what they call a bent --- is a support for that conveyor, and that bent would be a steel --- just a steel structure. That bent would be a concrete base poured in the ground.

JUDGE POLLACK: Right.

MR. A: That bent would sit on that concrete base through 1 some eyebolts with a nut to tighten them down. Those bents would --- every so often would be ---. You know, they have a bent, like, every 40 feet or 50 ---

JUDGE POLLACK: Right.

MR. A: --- feet, which ---. And that held the conveyor up in place at an angle for the conveyor to operate.

Mr. B: --- XXXXXXXXXX . I did want to confirm with him his answers. Mr. A, you described in discussing the XXXXXXXXXX job these bents, concrete supports, basically, for the conveyor. Did XXXXXXXXXX have the contract for those bents?

MR. A: They subbed out the work to install the bents.

Mr. B: Okay. And they subbed that out to who?

MR. WILLIAMSON: XXXXXXXXXX out of Wheeling.

Mr. B: Okay. And how's the conveyor fixed to the bents?

MR. A: *The bents will have a horizontal structural piece that the conveyor will sit on through the bent, and XXXXXXXXX had the contract to install the bents, and they had the contract to install the conveyors into the bents.*

Mr. B: *Okay. XXXXXXXXX didn't have the contract to install it? Did they just have it to --- a contract to sell the conveyor?*

MR. A: *That's correct. XXXXXXXXX did not perform any work on the project.*

Mr. B: *Okay.*

JUDGE POLLACK: *They sold it?*

MR. A: *They sold it.*

JUDGE POLLACK: *And this other company installed it?*

MR. A: *Right, XXXXXXXXX did the ---. Right; XXXXXXXXX installed the bents, and they did all the mechanical work. They installed the ---*

JUDGE POLLACK: *XXXXXXXXXX?*

MR. A: *--- the conveyors themselves. Yeah, XXXXXXXXX out of Wheeling, West Virginia.*

JUDGE POLLACK: *And did you have any relationship I with XXXXXXXXX?*

MR. A: *No, we are not under contract by them for anything on the job.*

ATTORNEY MUDRINICH: *Who paid XXXXXXXXX? Where'd they get paid? From XXXXXXXXX?*

MR. A: *To my knowledge, yes.*

ATTORNEY MUDRINICH: *Yeah. They were just the subcontractor.*

See Transcript of Evidentiary Hearing, January 27, 2012, pgs. 63-65, 69-70. Here, the Petitioner was a subcontractor for XXXXXXXXX. As discussed above, if XXXXXXXXX was fulfilling a contract that resulted in a capital improvement the Petitioner would be treated, for tax purposes on its purchases, as the general contractor. See W. Va. Code R. § 110-15-107.2.10.3 (1993). XXXXXXXXX was improving and substantially adding to the value of its customer's real property. Additionally, the conveyor system was permanently affixed to the real property by way of concrete foundations for each leg of the conveyor belt, to the extent that its removal would

materially damage the real property. As such, this job was contracting on the part of the Petitioner.

The Petitioner, at the evidentiary hearing and in its briefs to this Tribunal argues that XXXXXXXXX purchased the conveyer system for resale and that XXXXXXXXX gave the Petitioner a resale certificate to that effect, indicating that XXXXXXXXX believed the work it was doing for its customer was not contracting. The problem with the Petitioner's argument is twofold. First, the Petitioner offers no authority for the proposition that its acceptance of the certificate from XXXXXXXXX means it is not responsible for paying use tax on the materials purchased for this job. It is this Tribunal's statutory duty to decide if the work the Petitioner was doing was contracting that resulted in a capital improvement. What XXXXXXXXX told the Petitioner and the details of the business agreement between the two, is not determinative to the issue before us. It is axiomatic that a Taxpayer cannot tell the Tax Commissioner (or this Tribunal) that "hey, that guy over there told me I don't owe the tax". Additionally, the testimony in this matter clearly shows that XXXXXXXXX did not "purchase" the conveyer system at issue, it built it, and the installation of the system was a capital improvement. Therefore, pursuant to Section 9.3.4.4⁸ of the Consumer Sales and Service and Use Tax Rules, sales of the materials to build the conveyer would not be exempt. Likewise, the sales to the Petitioner of the electrical supplies used in this job would also not be exempt.

⁸ Section 9.3.4.4 states: Except as otherwise provided in this Section, the exemption allowed by Section 9.3.4 of these rules does not apply to sales of building materials or building supplies or other property to any person engaging in the activity of contracting when the materials, supplies or property are to be installed in, affixed to or incorporated by such person or his agent into any real property, building or structure. W. Va. Code R. § 110-15—9.3.4.4 (1993).

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

3. A use tax is applied to purchases of tangible personal property for use in one’s business. *See* W. Va. Code Ann § 11-15A-2(a) (West 2010).

4. Section 3 of Article 15A, Chapter 11 contains exemptions to the use tax. One of these exemptions is if the tangible personal property at issue is exempt from sales tax (and is being used for the exempt purpose) pursuant to Article 15 of Chapter 11. *See* W. Va. Code Ann § 11-15A-3(a)(2) (West 2010).

5. There is an exemption from the sales tax (and use tax) for tangible personal property such as the wire, conduit and other property used by the Petitioner in the course of its business, if the property is purchased by it “for the purpose of resale in the form of tangible personal property” W. Va. Code Ann. § 11-15-9(a)(9) (West 2010).

6. The exemption contained in Subsection (a)(9) of Article 9 does not apply to purchases by the Petitioner if it is “engaged in the activity of contracting” and the tangible personal property “is to be installed in, affixed to or incorporated by that person or his or her agent into any real property, building or structure” *Id.*

7. Contracting means and includes the furnishing of work, or both materials and work, for another (by a sole contractor, general contractor, prime contractor, subcontractor or construction manager) in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for removal or demolition of a building or structure, or any part thereof, or for the alteration, improvement or development of real property. Contracting also includes services provided by a construction manager so long as the project for which the construction manager provides the services results in a capital improvement to a building or structure or to real property. W. Va. Code Ann. § 11-15-2(b)(3)(A) (West 2010).

8. Only repairs or improvements that result in a capital improvement are considered contracting. Id., at 2(b)(3)(C)(iii) & (v).

9. Capital improvements are improvements that are affixed to or attached to and become a part of a building or structure or the real property or which add utility to real property, or any part thereof, and that last or are intended to be relatively permanent. Id., at 2(b)(3)(C)(vi).

10. Capital improvements include the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, and the alteration, improvement or development of real property, which adds utility to the building or structure or real property or any part thereof by substantially adding to the value of the building or structure or real property or appreciably prolonging or extending the useful life of the building or structure or real property, and becomes part of the building or structure or real property or is permanently affixed to or attached to the

building or structure or real property so that its removal would cause material damage to the article being removed or to the building or structure or real property itself, and is intended to become a permanent installation or to remain for an indefinite period of time. *See* W. Va. Code R. § 110-15-107.3.3.2 (1993).

11. “In situations where the subcontractor is providing services to a prime contractor in fulfillment of the prime contractor's contract resulting in a capital improvement to a building, structure or real property, the subcontractor will be treated as a contractor in relation to his purchases.” W. Va. Code R. § 110-15-107.2.10.3 (1993).

12. Normally, structures, as that term is used in the contracting statutes and rules, must be affixed to or add utility to real property. *See* W. Va. Code R. § 110-15-2.24.3.6 (1993).

13. In certain limited circumstances, the machinery and equipment, such as was being repaired or improved by the Petitioner, may be considered structures. *See* W. Va. Code R. § 110-15-111.7 (1993).

14. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

15. Here, only six of the eighty-eight jobs in question involved improvements or repairs to buildings or real property. The other eighty-two involved repairs or improvements to machinery or equipment in an industrial setting. Those eighty-two repairs and improvements may or may not have been on machinery or equipment that, by their nature, became structures. However, it is clear that the work was not a capital

improvement because it did not become part of or affixed to a building or structure, to the extent that its removal would cause material damage to the item being removed or to the building or structure. This Tribunal concludes the opposite, the work at issue was temporary, designed to be easily removed or changed, due to the nature of the work being done by the Petitioner's customers, namely manufacturing and other industrial activities.

16. Of the six remaining jobs,

a. Exhibit G-2, Job 263553, was an improvement to a building that extended its useful life and most likely was permanently affixed, as such it constituted contracting.

b. Exhibit J-14, Job 264110 was not an improvement or repair to a building, structure or real property, and as such was not contracting.

c. Exhibit J-25, 274019 was an improvement to a building, however, it did not substantially add to the value of the building or extend its useful life, thus it was not contracting.

d. Exhibit J-33, Job 274046 was an improvement to a building that may have extended its useful life and may have been permanently affixed. Therefore, the Petitioner has not met its burden of showing that this work was not contracting.

e. T-1, Job 264010 was not an improvement to real property in that it did not add substantial value to the real property nor did it extend its useful life.

f. Exhibit I, Job 263512 was an improvement to real property by a general contractor that added substantial value and/or extended the real property's useful life. Moreover, this work was affixed to the real property to the extent that its removal would materially damage the real property

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the use tax assessment, issued against the Petitioner on June 15, 2009, for a total tax due of \$_____, is hereby **MODIFIED** to reflect, as of August 15, 2012, a tax due of \$_____ and interest due of \$_____ for a **TOTAL** tax liability of \$_____.

Interest continues to accrue on this unpaid tax until this liability is fully paid. W. Va. Code Ann. § 11-10-17(a) 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS

By:

A. M. "Fenway" Pollack
Chief Administrative Law Judge

Date Entered