

[CORPORATE TAXPAYER],

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

[Corporate Taxpayer] (the “Company”), appeals from Maine Revenue Services’ (“MRS’s”) denial of its request for a refund of Maine sales tax. After considering the evidence presented and the applicable law, we uphold the refund denial in full.

I. Background

At all relevant times, the Company was a Maine corporation doing business in this state. On [date], the Company entered into a contract (the “Contract”) with [Seller] (the “Seller”), whereby the Seller would “furnish and install” certain tangible personal property (the “Equipment”) into the Company’s real estate.¹ The Contract provided a single, total contract price for materials and labor and stated that “[s]ales tax is included.” According to the Contract, 25% of the total contract price was due at signing with subsequent invoicing to be progressive.

Over the course of the Contract, the Seller issued the Company three invoices for payment. The first invoice was for labor only and was in an amount exceeding the down payment. The second invoice was for labor, tangible personal property, and sales tax, and listed

¹ MRS points out that the Seller was a licensed Maine retailer of the types of tangible personal property that it sold and installed in this case.

the cost of the Equipment and the corresponding sales tax amount separately. The third invoice was for labor only, and was for the balance of the total contract price.

On [date], the Company filed a request with MRS for a refund of the sales tax that it paid under the Contract. As grounds for the refund, the Company argued that title to the Equipment did not pass to it until after the Equipment was installed into real estate, that it therefore did not make a taxable purchase of tangible personal property, and that an overpayment refund of sales tax was therefore due. MRS determined that title to the Equipment passed to the Company prior to installation into real estate and that the Company correctly paid the tax. Accordingly, MRS denied the Company's refund request and this appeal followed.

It is the Company's burden on appeal to show that it is entitled to the refund it seeks. 36 M.R.S. § 151-D(10)(F).

II. Discussion

Sales tax "is imposed on the value of all tangible personal property . . . sold at retail in this State." 36 M.R.S. § 1811. However, where sales or use tax "has been paid more than once or has been erroneously or illegally collected or computed," the tax must be refunded to the taxpayer on written request made within 3 years from the date of the overpayment. 36 M.R.S. § 2011. The Company does not contend that sales tax was paid more than once or that it was erroneously or illegally computed. Thus, to be entitled to a refund under section 2011, the Company must show that the tax it paid was "erroneously or illegally collected."

Sales tax does not accrue where the tangible personal property sold has first been incorporated into real property. See *Enerquin Air, Inc. v. State Tax Assessor*, 670 A.2d 926 (Me. 1996); *Katz v. State Tax Assessor*, 472 A.2d 428 (Me. 1984). Instead, the person who furnishes and affixes or installs the personal property "is selling a completed improvement to the realty, an

incorporated building material, and not items of personal property. He is providing a service as a . . . contractor, and is not acting as a vendor of personal property.” *Katz*, 472 A.2d at 430. In such circumstances, the seller is making use of the property and is subject to use tax. *See id.*; *Enerquin*, 670 A.2d at 928. Also, on this point, MRS’s sales tax instructional bulletin number 4 provides that when a contractor performs a construction contract, he or she is generally

purchasing materials and incorporating those materials into real property. Title to the materials passes to the contractor's customer after they are incorporated into real property. The contractor, as the last user of the materials as tangible personal property, pays a sales or use tax when purchasing the materials.

....

[However,] [i]t is possible for contractors and their customers to arrange for title to pass to the customer before the materials are incorporated into real property. Although it is preferred that this arrangement be in writing, the contractor's business practice of invoicing all customers for time, materials, and sales tax, is sufficient evidence to support the intent that title passes to the customer before affixing the materials to real property.

Maine Revenue Services, *Sales, Fuel & Special Tax Division Instructional Bulletin No. 4: Contractors and Subcontractors* §§ 1, 2 (June 9, 2016) (“Bulletin 4”).

In the present case, the Contract does not expressly state when title to the Equipment passed from the Seller to the Company and it does contain other indicia of title to the Equipment such as a reference to an insurable interest or risk of loss. There was also no separate bill-of-sale showing a transfer of the Equipment to the Company. The Company argues, however, that the following circumstances support a finding that title to the Equipment passed after installation into real estate:

- The Contract did not provide that title to the Equipment would pass prior to installation
- The Company did not take delivery or possession of the Equipment prior to its being incorporated into realty
- Billing was progressive Under the Contract and was not associated with any particular product or service

Conversely, MRS contends that the following factors show that title to the Equipment passed prior to installation into real estate:

- The Seller was a registered retailer of the type of tangible personal property at issue in this case
- The scope of the Contract comprised the transfer of Equipment as well as installation
- The Contract expressly allocated liability for sales tax to the Company
- The Seller separately stated the cost of the Equipment and the corresponding tax on its invoices
- The sum of the invoices equaled the total contract price, including the tax

We find it unnecessary to determine whether the Equipment passed to the Company before or after installation into real property. The Contract provided that the total contract price included sales tax and required the Company to pay the amount of tax accruing thereunder. The evidence shows that the Company paid the tax. Because the Seller was a registered Maine retailer, the Company may have paid sales tax on its purchase of the Equipment or may simply have paid the Seller the amount accruing from the Seller's installation (use) of the Equipment into the Company's real estate. Under the facts presented, we find that the Company has not shown that the tax for which it seeks a refund was "erroneously or illegally collected." *See John Swenson Granite, Inc. v. State Tax Assessor*, 685 A.2d 425, 428 (Me. 1996) ("In the interests of not exalting form over substance, and in recognition that 'the use tax is a necessary compliment [sic] to the sales tax,' *Katz v. State Tax Assessor*, 472 A.2d 428, 429-30 (Me. 1984), we conclude that a use tax applies . . . even though the sales tax did not."). Accordingly, we uphold MRS's denial of the Company's refund request in full.

III. Decision

Based on the evidence presented and the applicable law, we find that the Company has not met its burden of showing that it is entitled to a refund of the sales tax that it paid. We therefore uphold the denial of the Company's refund request. No adjustment is warranted.

The Board may, in limited circumstances, reconsider its decision on any appeal. If either party wishes to request reconsideration, that party must file a written request with the Board within 20 days of receiving this decision. Contact the Appeals Office at 207-287-2864 or see the Board's rules, available at <http://www.maine.gov/boardoftaxappeals/lawsrules/>, for more information on when the Board may grant reconsideration. If no request for reconsideration is filed within 20 days of the date of this proposed decision, it will become the Board's final administrative action. If either party wishes to appeal the Board's decision in this matter to the Maine Superior Court, that party must do so within 60 days of receiving this decision. During the 60-day period in which an appeal may be filed with the Superior Court, the Company may contact Maine Revenue Services at 207-624-9595 for the amount of tax that is currently due, together with any interest or penalties owed. After that 60-day period has expired, Maine Revenue Services will contact the Company with an updated amount of tax and any interest or penalties due at that time.

Issued by the Board: September 23, 2019