

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 10, 2005

94535

In the Matter of JOHN GALLIN
& SON, INC.,
Petitioner,

v

MEMORANDUM AND JUDGMENT

ANDREW ERISTOFF, as Acting
Commissioner of Taxation
and Finance of the State
of New York, et al.,
Respondents.

Calendar Date: January 10, 2005

Before: Cardona, P.J., Crew III, Peters, Spain and
Carpinello, JJ.

Cunningham & Cunningham L.L.P., New York City (Gerard W.
Cunningham of counsel), for petitioner.

Eliot Spitzer, Attorney General, Albany (Julie S. Mereson
of counsel), for Acting Commissioner of Taxation and Finance,
respondent.

Crew III, J.

Proceeding pursuant to CPLR article 78 (initiated in this
Court pursuant to Tax Law § 2016) to review a determination of
respondent Tax Appeals Tribunal which sustained a sales and use
tax assessment imposed under Tax Law articles 28 and 29.

In August 1999, petitioner, a general contractor engaged in
the business of reconstructing interior office space in the New
York metropolitan area, applied for a refund of sales taxes paid

to subcontractors for floor covering installed during the reconstruction of existing office spaces in various buildings. The Division of Taxation denied the request and, following a hearing, an Administrative Law Judge sustained the denial, finding that the installations did not qualify as capital improvements as defined by Tax Law § 1101 (b) (9) (iii). Respondent Tax Appeals Tribunal affirmed that determination, prompting this CPLR article 78 proceeding.

Tax Law § 1101 (b) (9) (iii) provides that floor covering installed as the initial floor covering in new construction, an addition to existing construction or total reconstruction of existing construction shall constitute a capital improvement exempt from sales tax pursuant to Tax Law § 1105 (c) (3) (iii). In interpreting Tax Law § 1101 (b) (9) (iii), the Division of Taxation promulgated 20 NYCRR 541.14 (b) (2), which provides, in pertinent part, that total reconstruction of an existing building means "the complete rehabilitation or replacement of most of the major structural elements of an existing building or structure." Thus, reconstruction of several floors, but not all, of a multi-storied structure, as is the case here, does not constitute total reconstruction of existing construction as defined by the regulation.

Petitioner contends that the Division has misinterpreted the statute and that total reconstruction of an entire floor from "slab to slab" qualifies as "total reconstruction," thus qualifying as a capital improvement and thereby exempting the cost of floor covering applications from sales tax. Petitioner's alternative statutory interpretation of Tax Law § 1101 (b) (9) (iii) is certainly not unreasonable, but that does not satisfy its burden here (see Matter of Astoria Generating Co. v General Counsel of N.Y. State Dept. of Env'tl. Conservation, 299 AD2d 706, 707 [2002]). Rather, to prevail over the administrative construction, petitioner must demonstrate that its interpretation is the only reasonable construction of the statute (see Matter of Federal Deposit Ins. Corp. v Commissioner of Taxation & Fin., 83 NY2d 44, 49 [1993]). We find nothing irrational in the Division's interpretation of the statute as reflected in 20 NYCRR 541.14 (b) (2) and, as such, the determination must be confirmed (see Dental Socy. of State of N.Y. v New York State Tax Commn.,

110 AD2d 988, 989 [1985], affd 66 NY2d 939 [1985]).

Cardona, P.J., Peters, Spain and Carpinello, JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:



Michael J. Novack
Clerk of the Court

