

RECONSIDERED ORDER

BF&R Docket No. 2314834
Petition Filed: 12/7/2023
License No. [REDACTED]
IN RE: ARDEX LP
PETITION FOR Review of Refund for Sales/Use Tax
PERIOD(S) 5/14/2020 TO 3/21/2023

AND NOW, May 16, 2024, pursuant to the Fiscal Code, the Act of 1929, April 9, P.L. 343, as amended, (72 P.S. § 1 et seq), the Board of Finance and Revenue of the Commonwealth of Pennsylvania, based upon the reasons set forth herein, hereby ORDERS the following:

Jurisdiction

This petition comes before the Board of Finance and Revenue pursuant to Section 2704 of the Tax Reform Code of 1971, *as amended*, 72 P.S. § 9704.

Issue

Whether Petitioner has established that it is entitled to a refund of sales/use tax paid on electricity on the basis that it was directly used in manufacturing.

Statement of the Case

Petitioner, Ardex LP, is a producer of cement floor leveler and tile grout in dry powder form. Petitioner filed a Petition for Refund at the Board of Appeals (“BOA”) on May 19, 2023, arguing that it is entitled to a refund of sales/use tax paid on purchases of electricity used directly in manufacturing. Petitioner argued that this electricity is used to power three air compressors and one mixing tower, which mixes ingredients for thin set, underlayment, patch/repair, and other concrete powder products, which are then subsequently bagged and sealed for sale. Petitioner argued that its activities constitute manufacturing, and because the electricity is directly used in manufacturing operations, the electricity is exempt from tax. Petitioner argued that based on its internally prepared electric load analysis, [REDACTED] of the total electricity used for its Duquesne Light/Direct Energy account number [REDACTED] is directly used in powering the mixing tower and related air compressors. In support of its contentions, Petitioner provided some invoices, an appeal schedule, a plant diagram, a manufacturing statement, and an internally prepared electric load study.

Mailed: MARK FLECK
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on May 16, 2024

The BOA denied Petitioner's request in its entirety in a Decision and Order dated October 10, 2023, finding that the mixing of dry powder ingredients does not qualify for either the manufacturing or processing exemptions. The BOA concluded that the mixing of dry powder does not place "personal property in a form, composition or character different from that in which it was acquired," as required by 61 Pa. Code 32.1.

Petitioner filed the instant matter at the Board of Finance and Revenue on December 7, 2023, contesting the decision of the BOA. Petitioner notes that it manufactures bags of cement-based patching products. Petitioner states that each product uses a unique formula and recipe, each bagged cement product bears no resemblance to any of the various ingredients, and each has its own unique and special use.

Petitioner argues that "manufacturing" includes compounding, which is very similar to its operations. Petitioner argues that each product manufactured has a very specific and distinctive name, each with its own characteristics and very specific uses. Petitioner argues that its activities change the form, composition, and character of the ingredients and result in a distinctive product. In support of its contentions, Petitioner has provided product information from its website and an email from its engineering manager, which details some of Petitioner's products and the process used to manufacture them.

At the hearing, counsel for the Department of Revenue conceded that Petitioner's activities constitute "manufacturing," and it deferred to the Board regarding whether the equipment in question was directly used in Petitioner's manufacturing activities.

On April 11, 2024, the Board of Finance and Revenue issued its Decision and Order granting Petitioner's request for relief in part. The Board denied the remainder of Petitioner's request, finding that Petitioner only provided invoices for a portion of the transactions in question. Petitioner filed a Request for Reconsideration with the Board on April 24, 2024. Petitioner indicated that all of the invoices were previously submitted to the BOA. Board staff asked the Department of Revenue to verify whether or not Petitioner submitted these invoices to the BOA by May 6, 2024. The Department of Revenue did not provide a response to this Board. Petitioner has now provided the requested invoices.

Conclusion

Upon reconsideration, the Board of Finance and Revenue concludes that Petitioner is entitled to partial relief. This Board concludes that Petitioner's blending activities constitute the final step in a series of manufacturing activities to create the various final products that Petitioner sells. Petitioner is not entitled to relief for the final electricity invoice claimed, as Petitioner did not provide the subsequent invoice to establish that the tax on that invoice was actually paid.

The Board assigns one or more of the following reason codes in its decision schedule:

E: Exempt.

POP: Petitioner did not provide sufficient proof of payment for the transaction in question.

A schedule is attached to this Order in support of the Conclusion.

Accordingly, the Board enters the following:

ORDER

Upon reconsideration, the Department of Revenue shall issue a refund to Petitioner in the amount of \$ [REDACTED] plus applicable interest, subject to any outstanding liabilities owed by Petitioner.

By Order Of The Board Of Finance And Revenue

**Jacqueline A. Cook, Chair
Designee for Stacy Garrity, State Treasurer**

David R. Kraus, Board Member

Paul J. Gitnik, Board Member

