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SUPREME COURT OF VIRGINIA
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SUPREME COURT OF VIRGINIA

RECORD NO. 770280

WEBSTER BRICK COMPANY, INCORPORATED

Appellant

v.

DEPARTMENT OF TAXATION,
COMMONWEALTH OF VIRGINIA

Appellee

APPENDIX

Charles D. Fox, III
Hunter, Fox & Wooten
P. O. Box 12247
Roanoke, Virginia 24024

APPENDIX

SUBJECT INDEX

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SUPREME COURT OF VIRGINIA

WEBSTER BRICK COMPANY, INC. Plaintiff v. DEPARTMENT OF TAXATION COMMONWEALTH OF VIRGINIA Defendant	)	A P P E N D I X

APPLICATION FOR RELIEF AND CORRECTION
OF ERRONEOUS TAX ASSESSMENT

Webster Brick Company, Inc., a Virginia corporation, plaintiff applicant (hereinafter called plaintiff), by counsel, and pursuant to Section 58-1130 of the 1950 Code of Virginia, as amended, hereby applies to this Honorable Court for relief, correction, exoneration, and refund of taxes erroneously assessed and collected under protest against it by the defendant, Department of Taxation, Commonwealth of Virginia, Sales and Use Tax Division, and in support thereof, does state as follows:

1. The plaintiff, Webster Brick Company, Inc., is a Virginia corporation, organized and incorporated according to the laws of the Commonwealth of Virginia, and is authorized to do business in the Commonwealth of Virginia and has its principal offices located in Webster, Botetourt County, Virginia. Webster Brick Company, Inc., is engaged in the manufacture and sale of bricks.

2. That the Commonwealth of Virginia, Department of Taxation, Sales and Use Tax Division, did, in 1974, conduct an audit of the plaintiff's books to ascertain liability or credit pursuant to the laws of the Commonwealth of Virginia for sales and/or use tax allegedly owed by the plaintiff. The audit covered the period from December 1, 1970, through July 31, 1974. At the conclusion of the audit, the defendant did assess and demand payment from the plaintiff of the sum of Thirteen Thousand Two Hundred Fifty-five and 41/100 Dollars ($13,255.41), which sum was paid by the plaintiff, under protest, by check dated June 5, 1975. The check covered taxes claimed by the defendant, penalty and interest for the above-mentioned audit. The plaintiff, in fact, admits tax liability included in the above amount of Five Thousand Nine Hundred Nine and 94/100 Dollars ($5,909.94), but vigorously protests and demands relief, correction, exoneration and refund of taxes erroneously assessed and included in the above amount totaling Seven Thousand Three Hundred Foty-five and 47/100 Dollars ($7,345.47). A copy of the field report indicating the taxes paid and protested and the taxes paid and not protested and the items to which they refer is attached hereto and made a part hereof.

3. By letter dated June 17, 1974, the Department of Taxation acknowledged receipt of the above-mentioned check and further acknowledged the same as paid under protest.

4. The basis of the application is that:

(a) Taxes were assessed against the plaintiff for dunnage bags in the amount of Three Thousand Two Hundred

Twenty-six and 38/100 Dollars ($3,226.38); and for hay, straw and lumber for dunnage in the amount of Thirty-four and 44/100 Dollars ($34.44). These items are specifically covered under Title 58-441.6, titled "Exclusions and Exemptions," of the 1950 Code of Virginia, as amended, under the portion of that section dealing with packaging material.

(b) Tax liability was assessed on cement, reinforcing steel, rods, wires, all for floors, track foundations, and kiln maintenance tunnel, in the amount of Two Thousand Four Hundred Thirty-three and 13/100 Dollars ($2,433.13); for oil tanks and foundations in the amount of Five Hundred Thrirty-eight and 52/100 Dollars ($538.52); for machinery foundations in the amount of Five Hundred Seventeen and 42/100 Dollars ($517.42); for fire ventilators and motors on the roof apex in the amount of Two Hundred Sixty-seven and 18/100 Dollars ($267.18); for water chemicals, stack chemicals and boiler additions in the amount of Two Hundred forty-one and 17/100 Dollars ($241.17); and for crane and job hoist in the amount of Eighty-seven and 23/100 Dollars ($87.23); all of which items are specifically excluded under Title 58-441.6 of the Code of Virginia, as amended, as being a part of the manufacture and process and the equipment in connection herewith.

5. All relevant information has been previously supplied to the Tax assessing authority pursuant to all requests made of the plaintiff by the said tax assessing authority.

WHEREFORE, the plaintiff moves this Court for relief, correction, exoneration and refund of the taxes

erroneously assessed against it and collected from it by the defendant in the sum of Seven Thousand Three Hundred Forty-five and 47/100 Dollars ($7,345.47), all as provided by Section 58-1134 of the 1950 Code of Virginia, as amended.

Date Filed: July 9, 1975

VIRGINIA,

IN THE CIRCUIT COURT OF BOTETOURT COUNTY

WEBSTER BRICK COMPANY, INC., Plaintiff,	)	
v.	)	O P I N I O N Case No. 1133
DEPARTMENT OF TAXATION, COMMONWEALTH OF VIRGINIA, Defendant.	)	

Plaintiff, Webster Brick Company, Inc. (Webster), filed an application, pursuant to Code §58-1130, for correction of an alleged erroneous assessment of sales and use taxes against it by defendant, the Department of Taxation, and for the refund of taxes paid under protest resulting from said assessment. More specifically, Webster claims that as a result of an erroneous assessment it is entitled to recover from the Commonwealth the sum of $7,345.47, the particulars of which are hereafter stated.

The issue before the court is whether certain purchases made by Webster are exempt under Code §58-441.6 from imposition of the sales tax.

In cases involving tax assessments, "[t]he rule is firmly established in this Commonwealth and elsewhere that the tax assessment made by the proper authorities is prima facie correct and valid and the burden is on the taxpayer to show that such assessment is erroneous." Commonwealth v. Radiator Corp., 202 Va. 13, 18, 116 S.E. 2d 44, 48 (1960)

A general rule of strict construction against the taxpayer is invoked in cases which deal with tax exemptions. Winchester TV Cable v. State Tax Commissioner, 216 Va. 286, 217 S.E. 2d 885 (1975); Commonwealth

v. Progressive Community Club, 215 Va. 732, 213 S.E. 2d 759 (1975); Commonwealth v. Pounding Mill Quarry, 215 Va. 647, 212 S.E. 2d 428 (1975); Golden Skillet Corp. v. Commonwealth, 214 Va. 276, 199 S.E. 2d 511 (1973); Commonwealth v. Research Analysis, 214 Va. 161, 198 S.E. 2d 622 (1973); Commonwealth v. Community Motor Bus, 214 Va. 155, 198 S.E. 2d 619 (1973). In Commonwealth v. Progressive Community Club, supra, the court said:

> "This general rule of strict construction has been applied by us in all cases involving Code §58-441.6 decided since the adoption of the revised Constitution. In Commonwealth v. Community Motor Bus, 214 Va. 155, 157, 198 S.E. 2d 619, 620-21 (1973), which involved the sales and use tax, we said: 'Statutes granting tax exemptions are construed strictly against the taxpayer When a tax statute is susceptible of two constructions, one grantin an exemption and the other not granting it, courts adopt the construction which denies the exemption.' To the same effect, see Commonwealth v. Research Analysis, 214 Va. 161, 163, 198 S.E. 2d 622, 624 (1973), also involving the retail sales tax, where we said: '[W]e must keep in mind that taxation is the rule and not the exception; and that statutory tax exemptions are strictly construed against the taxpayer, with doubts resolved against the exemptions.' In Golden Skillet Corp. v. Commonwealth, 214 Va. 276, 278, 199 S.E. 2d 511, 513 (1973), we stated:
>
> " 'Here, the taxpayer claims to be exempt from the taxes assessed against it, relying upon an exemption contained in the first paragraph of Code §58-441.6. In determining whether the taxpayer is entitled to that exemption, we follow a rule of strict construction. Exemption from taxation is the exception, and where there is any doubt, the doubt is resolved against the one claiming exemption. [Citing case]."
>
> "Maryland's Court of Appeals recently stated the same rule in Perdue, Inc. v. State Dept. of Assess., 264 Md. 228, 232-33, 286 A. 2d 165, 167 (1972), to be:
>
> " 'It is fundamental that statutory tax exemptions are strictly construed in favor of the taxing authority and if any real doubt exists as to the propriety of an exemption that doubt must be resolved in favor of the State. In other words, 'to doubt an exemption is to deny it." ' " 215 Va. at 735, 736, 213 S.E. 2d at 761, 762.

Moreover, the Supreme Court of Virginia has said repeatedly that the construction of a statute by a state official charged with its administration is entitled to great weight. Commonwealth v. Progressive Community Club, 215 Va. 732, 213 S.E. 2d 759 (1975); Commonwealth v.

Research Analysis, 214 Va. 161, 198 S.E. 2d 622 (1973); Commonwealth v. Radiator Corp., 202 Va. 13, 116 S.E. 2d 44 (1960); Miller v. Commonwealth, 180 Va. 36, 21 S.E. 2d 721 (1942).

Therefore, the foregoing principles of law govern the court in the task before it.

The facts in this case are not in dispute, and they will be discussed herein under the several items considered.

I.

Dunnage Bags

Webster purchased what are known as "dunnage bags". They are inflatable bags, made of paper and plastic, which are placed inside railroad cars after the bricks are loaded into the cars. Their purpose is to prevent the cubes of bricks (bricks are stacked in what are called "cubes") from shifting or moving, thereby preventing damage in transit. These bags, when inflated, serve as a cushion or shock absorber. They may be wrapped around two sides of a cube of brick so as to prevent movement in more than one direction. The bags, by themselves, do not restrain the movement of bricks. They are effective only when placed between two stacks of bricks. The witness, Kling, best described their function when he said:

> "A. ... What the bag actually does is compress the bricks so that they cannot move.
>
> "Q. Okay. And the bag is compressed or inflated once everything's loaded into the car, is that correct?
>
> "A. That's correct. That's the final thing."

Webster relies upon the exemption in Code §58-441.6 which reads:

> "Nor shall such terms include materials, containers, labels, sacks, cans, boxes, drums or bags for future use for packaging tangible personal property for shipment or sale."

The Department of Taxation has adopted Sales and Use Tax Circular No. 9 which reads, in part:

> "Virginia Code §58-441.6 provides tax exemption for the purchase of materials, containers, labels, sacks, cans, boxes, drums or bags for future use for packaging tangible personal property for shipment or sale by industrial manufacturers, processors, and miners. In order to qualify for the packaging exemption, containers . . . must restrain movement of the product in more than a single plane of direction."

It appears to the court that the key word in both Code §58.441.6 and Circular No. 9 is "packaging". The Retail Sales and Use Tax Act does not define the word "packaging" as used in said Code section. "Packaging" is defined generally as "1: to make into a package 2: to enclose in a package or covering".[1] (emphasis added)

In its brief, Webster says that the "dunnage bags are used to pack pallets of brick firmly in place inside the railroad cars for transportation." (emphasis added) A synonym for "packing" is "compressing". When you "pack" something you "crowd together", "increase the density" or "compress".[2]

The Tax Commissioner recognized this distinction when he issued Circular No. 9 by providing that "[i]n order to qualify for the packaging exemption, containers ... must restrain movement of the product in more than a single plane of direction." (emphasis added)

In other words the exemption must be a container. A "container" is defines as "one that contains; esp: a receptacle or a flexible covering for the shipment of goods".[3] These dunnage bags, by themselve contain nothing. They relate to packing but not to "packaging".

---

1. Webster's New Collegiate Dictionary 822
2. Webster's New Collegiate Dictionary 822
3. Webster's New Collegiate Dictionary 244

Even if it be conceded that a reasonable argument may be advanced to bring these dunnage bags within the statutory exemption, the court is of opinion that a stronger argument can be made to the contrary. And, as previously stated, "[e]xemption from taxation is the exception, and where there is <u>any</u> doubt, the doubt is resolved against the one claiming exemption." <u>Golden Skillet Corp.</u> v. <u>Commonwealth</u>, 214 Va. 276, 278, 199 S.E. 2d 511, 513; <u>Commonwealth</u> v. <u>Progressive Community Club</u>, 215 Va. 732, 736, 213 S.E. 2d 759, 762. (emphasis added).

Here, the court entertains a serious and substantial doubt, and since the burden is upon Webster, the doubt must be resolved in favor of the Department of Taxation. Therefore, the claimed exemption and refund with respect to the dunnage bags are denied.

II.

<u>Concrete, Rods, Wires, and Reinforcing Steel</u>

The floor of the machine room consists of concrete, rods, wires and reinforcing steel. The floor is constructed so as to support an automatic system of cars which run on tracks. The witness, Kling, described the purpose and use of the floor as follows:

> "The purpose of the concrete is to serve as a base or what not for this equipment. Or serve as a base --- compare it to a conveyor, if you will. Our product is so heavy I cannot move it by conveyor. I have to move it by this trackage system. And the purpose of this system is, of course, to move our product through the plant."

Webster contends that the concrete floor comes within the manufacturer's exemption contained in that portion of Code §58-441.6 which reads:

"The terms 'sale at retail,' 'lease or rental,' 'distribution,' 'use,' 'storage,' and 'consumption' shall not include... machinery or tools or repair parts therefor or replacements thereof, fuel, power, energy, or supplies, used directly in processing, manufacturing, refining, mining or conversion of products for sale or resale;..."

It is obvious that these items (i.e., concrete, rods, wires, and reinforcing steel) are not "...machinery or tools or repair parts therefor or replacements thereof, fuel, power", or "energy". Therefore, the only conceivable argument is that they are "supplies used directly" in manufacturing.

On two occasions the Supreme Court of Virginia has applied the rule of ejusdem generis in determining the meaning of the word "supplies" in statutes. See Virginia Development Company v. Krozer Iron Company, 90 Va. 126 (1893); Rockingham Co-operative Farm Bureau v. Harrisonburg, 171 Va. 339, 198 S.E. 908 (1938).

In Rockingham Co-operative Farm Bureau v. Harrisonburg, supra, the court, in referring to the rule of ejusdem generis, said:

"...This rule means that when a particular class of persons or things is spoken of in a statute and general words follow, the class first mentioned must be taken as the most comprehensive and the general words treated as referring to matters ejusdem generis with such class. The effect of general words when they follow particular words being thus restricted. Standard Ice Co. v. Lynchburg Diamond Ice Factory, 129 Va. 521, 106 S.E. 390. A specific enumeration of words or objects, as a rule, controls general words which follow and limits them in their operation to others of like kind. Gates & Son Co. v. Richmond, 103 Va. 702, 49 S.E. 965." 171 Va. at 339, 198 S.E. at 911.

In Commonwealth v. Progressive Community Club, supra, 215 Va. 732, 213 S.E. 2d 759, the rule of ejusdem generis was invoked to construe a portion of Code §58-446.1. In that case the court held that the general term "institution of learning" which followed the specific word "college" meant an institution similar in nature to a "college" and could not be construed to include all "institutions of learning."

Under this rule the word "supplies" in Code §58-441.6 must be construed to mean items of the same kind, character, class or nature as those specific items which precede it in said section. Applying the rule of ejusdem generis, the items under consideration (i.e., concrete, rods, wires, and reinforcing steel) are not like or similar to machinery, tools or fuel.

Furthermore, §1-63 of the Rules and Regulations of the Department of Taxation states that:

> "The 'used directly' exemption does not apply to materials to be incorporated into real estate construction."

This interpretation is in accord with two federal cases which construed a Virginia statute. See American Woodworking Machinery Company v. Agelasto, 136 F. 399 (4th Cir. 1905) and Building Supplies Corp. v. Willcox, 284 F. 113 (4th Cir. 1922). In both of these cases the court held that "supplies" did not include materials which were a part of the original construction. In Building Supplies Corp. the court said:

> "The general meaning of 'supplies' in other departments of law is supplies furnished for the purpose of operation, as contradistinguished from materials furnished for original construction." 284 F. at 115.

The Sales Tax Act imposes a tax on materials such as the items in question which are purchased by a construction contractor and which become a part of the real estate. See Code §58-441.15. Therefore, had a building contractor used these materials in the construction of the floor of the machine room he would have been required to pay the tax. To allow an exemption as to these supplies to a manufacturer and not to a contractor, where the same materials and construction is involved, would be unjust. As pointed out in Commonwealth v.

Progressive Community Club, supra, the Revisors of the present Virginia Constitution said inter alia that

> "...The basic policy ought to be one of equality in the tax structure, and exemptions, widely applied, undercut this policy..." 215 Va. 735, 213 S.E. 2d at 761.

This policy was approved by the General Assembly of Virginia and by vote of the people.

Code §58-441.6 expressly requires that supplies must be "used directly" in manufacturing brick. The court feels there is a substantial doubt that this statute was intended to include concrete, rods, wires and reinforcing steel which have become a part of the original building. Therefore, this exemption and refund is denied.

III.

Oil Storage Tanks

Webster contends that three large oil storage tanks are exempt from the tax. These tanks have capacities of three hundred thousand gallons, twenty thousand gallons and eighteen thousand gallons, respectively. All three are used for the storage of fuel oil which is used to fire the furnaces which heat the kiln. In addition to heating the kiln it serves to burn the bricks, thereby giving them color. These three tanks are permanently mounted on concrete foundations. The witness, Kling, describes them as follows:

> "Q. There's no question that those tanks are permanently mounted there, is there?
>
> "A. No, sir.
>
> "Q. They're there for good, aren't they?
>
> "A. Well, they could be moved, but for the time being, they're there for good.

"Q. They haven't been moved since they've been installed there, have they?

"A. Never.

"Q. They're on concrete foundations?

"A. As far as I know.

"Q. There's no present intention of anybody at Webster Brick that you know of to move those tanks?

"A. No, sir, there's not.

"Q. Are the lines for feeding the tanks into the kilns, et cetera, underground permanently mounted?

"A. Until they reach the plant, they're buried between the tank and the plant."

Webster contends that, since the fuel oil is exempted under the statute, it logically follows that the tanks which store that fuel oil are likewise exempt. The court disagrees.

These tanks, for the same reasons assigned with respect to the concrete, rods, wires and reinforcing steel, are not "supplies used directly" in processing or manufacturing.

Furthermore, the definition of "used directly" set forth in the Act (Code §58-441.3) provides that the exemption does not apply to items used in "activities such as storage...before or after actual production."

Additionally, these tanks have become a part of the real estate.

IV

Ventilators

Exemption is also claimed on five ventilators which are located i the roof apex of the machine room. Their purpose is to control the exhaust gasses, heat and humidity within the building.

For the same reasons assigned to the items considered under II and III hereof, these ventilators cannot be classified as "supplies used directly" in processing or manufacturing, and they, too, have become a part of the real estate. Also, §1-63 of the Department's regulations provides that:

> "[t]he expenditures concerned with general maintenance, heating and illumination of plant and office buildings are taxable since these functions are only indirectly involved in production." (emphasis added).

Therefore, the exemption claimed for the ventilators is denied.

V.

Crane and Hoist

An exemption is claimed for a crane and hoist which are used exclusively for maintenance of machinery. Mr. Kling testified about their purpose and use as follows:

> "Q. Now the crane and hoist that we talked about, sir. Its purpose is to provide for the maintenance and repair of machines that are used in the production of brick, and are not for anything in connection with the actual bricks themselves, isn't that right?
>
> "A. I agree with you to a point. I agree with your statement that it's to maintain the equipment that makes the brick. But I do disagree in that without that piece of equipment, I am unable to make brick.
>
> "Q. Yes, sir. I understand it may be very important to your brickmaking process to have that machine. But the machine doesn't move bricks itself, does it?
>
> "A. No, sir.
>
> "Q. It's used just to service and maintain the machines that move the brick, isn't that right? or the manufacture of the brick?
>
> "A. That's correct."

The definition of "used directly" found in Code §58-441.3 provides that the exemption does not apply to items used in "activities such as storage or transportation before or after actual production, general maintenance or administration." (emphasis added). And §1-63 of the Department's regulations provides that "machinery and tools used to repair and maintain machinery and tools used directly in production are taxable."

The crane and hoist are clearly taxable.

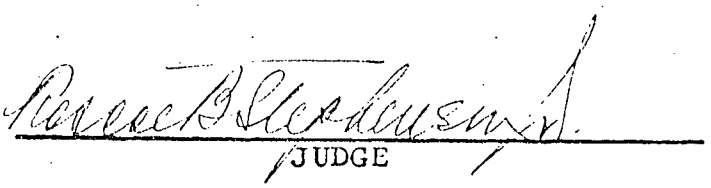
VI

Chemicals Used in Boiler

Mr. Kling testified that these chemicals are put into the boiler for general maintenance purposes. They help to keep the boiler in an operating condition. For the reasons previously stated in II, III, IV and V hereof, these chemicals are not exempt from the tax.

In the final analysis, Webster has failed to carry the burden of proving that any of the items are exempt from the sales tax. Applying the strict construction which is applicable to tax exemption statutes, the court is constrained to find for the defendant.

November 5, 1976



JUDGE

ORDER

This cause came on the 13 day of May, 1976, to be heard upon the application for Relief and Correction of Erroneous Tax Assessment filed by the plaintiff, Webster Brick Company, Inc.; upon the answer of the defendant, Department of Taxation, Commonwealth of Virginia; upon evidence heard ore tenus; upon briefs filed by the parties; and was argued by counsel.

And the court having maturely considered the law and the evidence presented, doth ADJUDGE and ORDER, for the reasons expressed in its written opinion of this date, that none of the items set forth in plaintiff's application are exempt from the Virginia Sales and Use Tax Act, and that the assessment is valid in every respect. Accordingly, the application is dismissed with prejudice and judgment is entered in favor of the defendant, to which ruling the plaintiff, by counsel, excepts.

Date Filed: November 5, 1976

NOTICE OF APPEAL AND
ASSIGNMENTS OF ERROR

The plaintiff hereby gives notice of appeal from the final order entered by this Court herein on the 5th day of November, 1976, and assigns as error the following:

1. The Trial Court's decision was contrary to the law and the evidence in the case.

2. The Trial Court erred in refusing to grant an exemption for the dunnage bags, although plaintiff is entitled to such exemption under the Code of Virginia §58-441.6.

3. The Trial Court erred in refusing to grant an exemption for those materials that were incorporated into the real estate.

4. The Trial Court erred in its finding that plaintiff failed to carry its burden of proof.

Pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, the appellant states that a transcript will be filed pursuant to Rule 5:9.

Date Filed: December 2, 1976

VIRGINIA:

IN THE CIRCUIT COURT OF BOTETOURT COUNTY

WEBSTER BRICK COMPANY, INCORPORATED

vs.

DEPARTMENT OF TAXATION,
COMMONWEALTH OF VIRGINIA

May 13, 1976
10:30 A.M.

BEFORE: The Honorable Roscoe B. Stephenson, Jr.
Judge of the Circuit Court

APPEARANCES:

Charles D. Fox, III, Esquire
Attorney for Plaintiff

J. Durwood Felton, III, Esquire
Attorney for Defendant

View of Premises	3			
In Open Court	8			
	Direct	Cross	Redirect	Recross
[Witness for Plaintiff]				
Wiley B. Kling	9	21	29	30
Plaintiff rests	3			
[No witnesses for Defendant]				
EXHIBITS				
Plaintiff's #1	10			

1 [11:45 a.m.]

2 MR. FOX: Do you wish to proceed with

3 the witness or the view first, Your Honor?

4 THE COURT: How much evidence will there

5 be?

6 MR. FOX: There'll be one witness. And

7 perhaps before -- and as we've indicated, sir, you might

8 like to examine him after we've had the view.

9 MR. FELTON: I'd like to suggest that we

10 put the witness on at one time after the view. It might

11 cure the problem.

12 MR. FOX: I think it might cure it.

13 THE COURT: Do you want to wait and put the

14 witness on after the view?

15 MR. FOX: I think it might be helpful, Your

16 Honor. It will save a lot of time with the witness.

17 [Court recessed for lunch at 12:00 noon]

18 [The Court, counsel and parties moved

19 to Webster Brick Company at 2:00 p.m. for

20 a view. Wiley B. Kling, Treasurer of

21 Webster Brick Company, conducted a tour

22 of the plant]

23 [The Court, counsel and parties at

24 railroad car]

25 MR. KLING: Most of our product is shipped by

1 rail car. The car is loaded with brick, after straw is
2 placed on the floor of the car. Between the cubes of brick
3 we sometimes place wood or cardboard, or any other injury-
4 absorbing material.
5 When the car is completely loaded, a dunnage
6 bag -- a paper dunnage bag is placed between the cubes of
7 brick and inflated, which compresses the car to restrict
8 movement of all the brick.
9 None of the packages in this car will now
10 move in any direction.
11 THE COURT: You're going to testify when
12 you go back, aren't you?
13 MR. FOX: Yeah.
14 MR. KLING: Yes, sir, be glad to.
15 Charlie, that's it.
16 MR. FOX: Yeah.
17 MR. KLING: That's what we're talking about
18 is this bag right here, gentlemen. [Witness indicated]
19 THE COURT: You're only talking about the
20 bag?
21 MR. FOX: The bag and the --
22 MR. KLING: The straw.
23 MR. FOX: -- and the straw.
24 THE COURT: Straw.
25 MR. FOX: This other material -- let me take

1 this off --

2 Your Honor, this other material is waste

3 material.

4 [The Court, counsel and parties

5 moved to oil storage tanks]

6 MR. KLING: The other item -- one of the

7 other items we were talking about this morning was some

8 oil storage tanks.

9 On this hill behind me, there's three

10 silver-painted tanks: a three-hundred-thousand-gallon

11 tank, a twenty-thousand-gallon tank, and an eighteen-

12 thousand-gallon tank. They all three store the same thing,

13 number two fuel oil, which is our primary fuel. Natural

14 gas and number two fuel oil, we alternate between the two,

15 depending upon whichever's available.

16 [Discussion off the record]

17 They're mounted in accordance with OSHA

18 requirements, which means that they have a -- have to have

19 a sand and gravel base, have to have a dike built around the

20 outside in case of a puncture. But generally, they're on

21 a pretty sturdy foundation.

22 THE COURT: On a what?

23 MR. KLING: Pretty sturdy foundation.

24 THE COURT: Concrete?

25 MR. KLING: Yes, sir, because of their weight.

1 It's concrete, and then sand and gravel. And then a dike
2 is built around the entire thing.
3 MR. FELTON: Are they bolted down?
4 MR. KLING: I don't know the answer to that.
5 MR. FELTON: How much do they weigh, do you
6 know?
7 MR. KLING: No, sir. I know that oil is about
8 nine -- well, let's say, eight pounds per gallon, and that
9 the largest tank holds three hundred thousand gallons. So
10 we're talking about two and a half million pounds.
11 MR. FELTON: That tank was brought in in
12 sections and welded up here, I suppose.
13 MR. KLING: I don't know.
14 MR. FOX: As a matter of fact, it wasn't.
15 MR. FELTON: It was not?
16 MR. KLING: I don't know the answer to that.
17 MR. FOX: It was not. I happen to know that,
18 because I got the permit.
19 I don't think that's relevant.
20 [The Court, counsel and parties moved
21 to machine room]
22 MR. KLING: This is known formally as the
23 machine room. One of the items in question was a jib crane
24 with hoist attached. This yellow piece of equipment is the
25 item we're discussing when we talk about the jib crane.

1 It's directly in the center of the machine
2 room with the arm radius reaching to any piece of machinery
3 within the room.
4 MR. FOX: Buddy, as I understand, this concrete
5 is also in question.
6 MR. KLING: That's correct.
7 MR. FOX: The complete concrete floor.
8 MR. FELTON: And the reinforcing rods we're
9 talking about are in the concrete floor, right?
10 MR. FOX: In part, and also over here.
11 There are two separate ends of it. They've been divided,
12 but --
13 THE COURT: I didn't hear what he said, but
14 he can tell me when he gets outside, I guess.
15 MR. KLING: All right. The concrete --
16 the reinforcing rods we're talking about are in this floor
17 here.
18 MR. FELTON: This category, cement, re-
19 inforcing steel rod and wire, as I understand it, all of
20 that goes into making this floor?
21 MR. KLING: Except in one area, and I'll
22 show you.
23 Also concerned with this concrete steel
24 reinforcing that's on your list here, is all the concrete
25 underneath the tracks. All of our car system is controlled

1 with hydraulic and electronic apparatus. It's all buried
2 within this concrete floor. These cars move automatically
3 on electrical and mechanical impulse.
4 MR. FELTON: Is this the wire you're talking
5 about? [Indicated]
6 MR. KLING: No, sir. I'm talking about
7 reinforcing wire.
8 MR. FELTON: The reinforcing -- the -- well,
9 that's all right. We'll --
10 MR. FOX: Where are the ventilators in
11 question?
12 MR. KLING: There are five up-blast ventila-
13 tors located on the roof apex that runs the entire length
14 of the building. There's one there. [Witness indicated]
15 We'll be under another one in a moment. You can see some
16 light coming through it.
17 MR. FELTON: That thing way up there?
18 MR. FOX: Yeah.
19 MR. KLING: Yes, sir, that's correct.
20 [The Court, counsel and parties
21 moved to kiln]
22 MR. KLING: This piece of equipment to our
23 left is a kiln or a furnace -- what have you. It's a
24 brick-burning apparatus. It has not been questioned by
25 the State as being a machine and not real property. The

1 item underneath it has. That's the item I want to show you.
2 It's another item in contention. It's steel, concrete and
3 whatnot.
4 [The Court, counsel and parties
5 moved to tunnel underneath kiln]
6 MR. KLING: In this area you are directly
7 underneath the kiln. The kiln car runs on a track overhead.
8 Now this concrete -- the floor here, the
9 support walls for the kiln, these are items being contested.
10 [The Court, counsel and parties
11 moved out into brickyard]
12 MR. FOX: Would you just point out different
13 brick of different colors.
14 MR. KLING: Basically, I'd like for you
15 folks to notice that the brick are different colors on the
16 face of the brick. They're all the same color on the inside.
17 But we have sand coatings as well as chemical coatings, as --
18 We have another way to change the color,
19 and that is with a firing process a little different tempera-
20 ture, whatnot, but there are various --
21 MR. FOX: That's good.
22 MR. KLING: -- color differences.
23 [In open Court. 2:55 p.m.]
24 WILEY B. KLING,
25 called as a witness by the plaintiff,

1 being first duly sworn, testified as
2 follows:
3 DIRECT EXAMINATION
4 BY MR. FOX:
5 Q. State your name, please, sir.
6 A. My name is Wiley Kling.
7 Q. Mr. Kling, what is your position?
8 A. I'm treasurer of Webster Brick Company.
9 Q. All right. Since you've now been sworn --
10 THE COURT: How do you spell your last name?
11 THE WITNESS: K-l-i-n-g.
12 THE COURT: Thank you.
13 [Question continued]
14 While we were on the view you gave certain
15 facts or you answered certain questions, is that correct?
16 A. That's correct.
17 Q. Were your answers all true --
18 A. Yes, sir.
19 Q. -- that you gave at that time?
20 A. Yes, sir, they were.
21 Q. All right, sir. Now in the course of that
22 view, the first item we saw was the use of certain packing
23 materials, is that correct?
24 A. That's correct.
25 Q. And I hand you now what would be our

1 exhibit --

2 MR. FOX: Whatever number you want to give

3 it, Your Honor. It will be our only exhibit.

4 THE COURT: Number one.

5 THE WITNESS: Okay.

6 [Plaintiff's Exhibit 1 marked for

7 identification]

8 Q. [Continuing] All right. Will you tell us

9 what this is.

10 A. This is an inflatable paper and plastic

11 dunnage bag.

12 Q. All right. Did we see one of these in use

13 on the view?

14 A. We did.

15 Q. And what was it being used for?

16 A. Webster Brick Company uses these -- inflates

17 them between cars of brick -- railroad cars of brick in

18 order to compress the brick and restrain their movement

19 within the rail car.

20 Q. Subject to Mr. Felton's objections, to lead

21 him maybe a little bit -- but I'll try to simplify this.

22 MR. FELTON: If you'll go ahead and get the

23 basics into the evidence, I won't object to leading questions

24 unless they get --

25 MR. FOX: All right.

1 Q. We saw one of these being used in the car,
2 is that correct?
3 A. That's correct.
4 Q. Are they ever used in other ways in the car?
5 in other positions?
6 A. Yes, sir. The position may change. We saw
7 it in a -- to the left-hand of the doorway, for example.
8 But it might be to the right-hand of the doorway, or in the
9 middle.
10 Q. All right. In relation to the cubes of
11 bricks themselves?
12 A. Occasionally it may wrap around a cube of
13 brick. That loading there was for a particular size brick
14 that we saw. Now we make several different sizes of brick,
15 and we put a dunnage bag in each car that's loaded. But
16 it may not be in that exact position or direction.
17 Q. Yeah. Or it could be on, say, two sides of
18 a cube of brick, for example.
19 A. Yes, sir. That it could.
20 Q. All right, sir.
21 THE COURT: Could be what?
22 MR. FOX: Two sides of a cube of brick.
23 THE WITNESS: Let me -- in other words, it's
24 obviously flexible. If a situation were to call for it, for
25 example, this edge might be tucked around a cube of brick.

1 [Witness indicated]

2 Q. Is that -- all right. This bag -- I see

3 it's about eight feet long.

4 A. That would be a fair guess. I don't know.

5 Q. How big is a cube of brick square?

6 A. Okay. I noticed three of them were in

7 that car, side to side, so we're going to say twelve feet,

8 probably, with three of them.

9 Q. With three of them. The cube itself is

10 about four feet?

11 A. Right.

12 Q. So this could wrap around two sides of a

13 cube of brick?

14 A. Yes, sir.

15 Q. It does?

16 A. Oh, easily, yes, sir.

17 Q. That's all I wanted with this.

18 Now we also saw straw being used in the car.

19 A. Correct.

20 Q. All right, sir. Now following that, we went

21 to a brick plant. Items which were in question -- we saw

22 a crane with a --

23 A. Correct.

24 Q. -- a boom with a --

25 A. Hoist.

1 Q. -- mechanized hoist on it?

2 A. Correct.

3 Q. That hoist was used for what purpose?

4 A. Well, this crane that you're speaking of was

5 in the center of our machine room. It's used for the

6 constant maintenance of equipment which it is located

7 amongst.

8 Q. All right. Is it ever used for positioning

9 of that equipment?

10 A. As to setting it in place?

11 Q. Yes.

12 A. Our business, Mr. Fox, is, of course, dealing

13 with brick and mine shale, which is very abrasive. Because

14 of the nature of the abrasiveness of the product we work

15 with, most of those machines have functions and parts that

16 have to be changed continuously. And this is the purpose

17 for this machine.

18 Q. And that means you have -- you must have a

19 crane now for this purpose?

20 A. Correct.

21 THE COURT: Changing parts?

22 THE WITNESS: Yes, sir.

23 Q. These would be the abrasive parts -- the parts

24 that are used to grind the clay with, for example --

25 A. Correct.

1 Q. -- that are meant to be worn out. I guess
2 that's what I'm saying.
3 A. Oh, right. Right. There are parts within
4 the machines that are made of steel, which will wear down
5 to practically nothing in a period of a week -- some in a
6 period of a day, some within a month -- because of the
7 abrasiveness of this material. You know you're going to have
8 to replace it constantly, and that's why the crane is there.
9 Q. All right, sir. Now we also saw some oil
10 tanks up on the hill. I believe you told us they were used
11 to store fuel oil.
12 A. Correct.
13 Q. And what is that fuel oil used for?
14 A. Well, our process is such that once the
15 brick is extruded or formed, we put it in a -- what's in
16 the business is called a kiln. The spelling is k-i-l-n.
17 It's normally called a kiln, or in layman's terms, a
18 furnace.
19 It stays in this furnace for a period of one
20 and a half to three days. These furnaces are fired by means
21 of natural gas or number two fuel oil, which is stored in
22 these tanks.
23 Q. All right. Now that -- is it used for any
24 purpose other than heating the kilns?
25 A. Yes, sir. It heats the kiln but, by doing so,

it burns the brick and gives the brick a color which it would not have otherwise.

Q. Well, now we did not see this, but does the brick actually burn in a flame?

A. No, sir. The flame is not actually -- well, it does in parts -- I -- the brick are set on the car in such a way that heat gets to all the brick equally. The flames will get on the outside of the brick.

Q. All right. Now something that's called "flashing."

A. Yes, sir.

Q. What is that?

A. Flashing is a process, in layman's terms, in which more fuel is put into the kiln than there is oxygen to support the combustion. What it causes is the brick to turn black, which will give you a certain pattern in a wall.

Q. At that point, does the fuel burn?

A. Not completely, no, sir.

Q. The fuel becomes then what? Where does it go?

A. It goes onto the face of the brick and gives the brick its color.

Q. All right. That does happen. All right, sir. This is likewise true with gas when you put it in there?

A. It's also true with gas.

1 Q. All right. And this is a process called
2 "flashing," and it's part of the coloring process of the
3 brick?
4 A. That's correct.
5 Q. The plant we saw -- this is just for general --
6 I'll throw it in here.
7 Is that controlled by a computer or are there
8 other sources? Is that done pretty scientifically?
9 A. The plant we saw is --
10 Q. I mean, the flashing process.
11 A. Yes, sir. Oh, yes, sir.
12 Q. The flashing process.
13 A. The burning process is totally --
14 Q. Electronic.
15 A. -- electronically controlled.
16 Q. All right, sir. Now the next we saw -- we
17 walked across a floor with a lot of rails in it and lots
18 of cars around.
19 A. Correct.
20 Q. Now describe that. Or, again, we'll lead
21 you a little bit.
22 Is this an automated system?
23 A. That's correct, it is.
24 Q. Is everything in that floor -- the floor,
25 I'm calling it -- but is that really an encasement for a

1 system of wires, tracks, what have you, designed to transfer --
2 MR. FELTON: Well, Judge, I'll have to
3 object to his supposition --
4 MR. FOX: Let me come back to that --
5 MR. FELTON: -- of it as really being an
6 encasement. I think he can testify as to what it is --
7 THE COURT: I think he can describe it, but
8 not call it an encasement.
9 MR. FOX: Again, I was leading him, Your
10 Honor. I didn't mean to use the word --
11 THE COURT: It wasn't just to correct the
12 fact of leading, but you were leading him.
13 MR. FOX: All right, sir. I agree.
14 Q. I believe you told us out there that
15 underneath this concrete were what?
16 A. Buried under the concrete in many places
17 that you can't see, and in some places where you can, as
18 we witnessed earlier, is a electronic -- I say electronic --
19 There are electric limit switches which are
20 automatically tripped by these cars, which, in turn, set hy-
21 draulic car movement equipment in motion. The floor is
22 full of hydraulics, as far as that's concerned.
23 Q. All right. Now what is the purpose of
24 the concrete?
25 A. The purpose of the concrete is to serve as a

1 base or whatnot for this equipment. Or to serve as a base
2 for -- compare it to a conveyor, if you will. Our product
3 is so heavy I cannot move it by conveyor. I have to move
4 it by this trackage system. And the purpose of this system
5 is, of course, to move our product through the plant.
6 Q. All right. So we saw up above us -- I believe
7 Mr. Felton said they were fire ventilators.
8 Actually, what we have -- five ventilators.
9 A. Five, that's correct.
10 Q. What are the purpose of those ventilators?
11 A. These are what is known as up-blast ventila-
12 tors. And their purpose is to control the exhaust gasses
13 within the building, as well as the heat, under some tempera-
14 tures, and occasionally, humidity requirements.
15 Q. All right, sir. Now I believe the only other
16 thing we saw -- we went down into -- underneath -- you
17 described it as being --
18 We went down some steps. Where did we go?
19 A. We went into a tunnel which runs the length
20 of the kiln -- the entire kiln, which serves as a passage-
21 way under the kiln, which is actually the foundation for
22 that structure.
23 Q. All right, sir. Is that kiln -- well, we
24 saw above the tracks a brick structure.
25 A. Correct.

1 Q. All right. The structure in below, is that
2 part of the same structure?
3 A. It is.
4 Q. All right. This is a circular structure?
5 I don't know if "circular" is a good word.
6 A. This is a new design, Mr. Fox. The tunnel
7 that we stood underneath is just as much a design of the
8 kiln as is the brickwork that was more visible from the top.
9 Q. All right. So I could describe -- we saw
10 the bottom of something that moved?
11 A. Right. We were standing directly beneath
12 kiln cars which were being burned in the kiln.
13 Q. All right. Now if we were standing there with
14 no cars, what would we see?
15 A. We would see the top of the kiln with the
16 burners attached.
17 Q. And that's the thing we saw the outside of?
18 A. That's correct.
19 Q. All right. The other -- another item we
20 didn't see that we're concerned with were certain chemicals --
21 I believe you're aware of what we're talking about here in
22 this case. What are those chemicals used for?
23 A. As you say, an item we didn't see was our --
24 was a plant located within two hundred yards of the premises
25 we were on. That's the plant that --

Q. Well, just describe how the chemicals are used.

A. Okay. The chemicals are used in a boiler. They're mainly sludge retarded and removable chemicals that are necessary for our boiler that's in continuous use.

Q. In your opinion, are these necessary for the proper operation of that boiler?

MR. FELTON: If Your Honor please, I object to that. The witness --

MR. FOX: Fair enough.

MR. FELTON: -- is just the controller of the company, and certainly doesn't have any chemical expertise.

THE COURT: I'll sustain it.

Q. Let me ask this question: are they used solely in the boiler?

A. Pardon me, I didn't --

Q. Are these chemicals in question used solely in the boiler?

A. Yes, sir.

MR. FOX: I think we've agreed -- Mr. Felton has agreed that if the Judge will find on these facts in principle, you and I can determine the amounts without going into that today.

MR. FELTON: Yes, if you would, Judge. I think, with this on record, that if you will decide these items by category, the tax department and the taxpayer will

1 get together and determine the final amount so you don't
2 have to break them down yourself by the audit papers.
3 MR. FOX: Or spend the next twenty minutes
4 reading the amounts. In fact, we even had a little dispute
5 over one of them. I don't want to get into that now.
6 MR. FELTON: We'll stipulate that the amounts
7 were paid and that were assessed, and that they are the
8 amounts that are set forth in the audit work papers, which
9 are part of the record in the case.
10 MR. FOX: We will likewise stipulate that.
11 That's all I have at this time.
12 CROSS-EXAMINATION
13 BY MR. FELTON:
14 Q. Mr. Kling, these dunnage bags that you
15 testified to, these are inflatable, are they not?
16 A. That's correct.
17 Q. And they don't, of themselves, restrain any
18 movement of any bricks in any direction, do they?
19 A. I don't believe I understand you.
20 Q. Well, now if you had a block of brick, and
21 you put this dunnage bag next to the block of brick without
22 putting any other block of brick on the other side of the
23 dunnage bag, the bag itself wouldn't restrain the movement
24 of that first block of brick at all, would it?
25 A. No, sir. The bag would fall over.

1 Q. Yes, sir.
2 A. That's correct.
3 Q. And that's true even though you wrap the bag
4 around two sides of a block of brick, is it not, sir?
5 A. Considering the weight of the brick --
6 Q. Yes, sir.
7 A. -- and the weight of the bag, you're correct.
8 Q. So the truth is that the bag itself, by
9 itself, without more, doesn't restrain the movement of
10 that brick in any direction, does it, sir?
11 A. By itself, no.
12 Q. Okay. And it's the other bricks, in fact,
13 that are stacked next to brick, that prevent the movement,
14 isn't that correct?
15 A. No, sir.
16 Q. What is it then?
17 A. In fact, when the bag is inserted into the
18 car of bricks and blown up, all of the bricks in the car
19 move to the outside and are highly compressed. What the
20 bag actually does is compress the bricks so that they cannot
21 move.
22 Q. Okay. And the bag is compressed or inflated
23 once everything's loaded into the car, is that correct?
24 A. That's correct. That's the final thing.
25 Q. And what the bag does, in reality, is to

1 keep the bricks from hitting each other in transit and
2 breaking, isn't that correct?
3 A. Not from hitting each other. It keeps them
4 against one another. It keeps them from moving at all.
5 Q. Well, that's what I meant. From moving --
6 and the contact causes the bricks to break.
7 A. But they are in contact with one another,
8 but the point is that they don't move while they're in
9 contact.
10 Q. And that's the purpose for the dunnage bags?
11 A. That's correct.
12 Q. Now the crane and hoist that we talked about,
13 sir. Its purpose is to provide for the maintenance and
14 repair of machines that are used in the production of brick,
15 and are not for anything in connection with the actual
16 bricks themselves, isn't that right?
17 A. I agree with you to a point. I agree with
18 your statement that it's to maintain the equipment that
19 makes the brick. But I do disagree in that without that
20 piece of equipment, I am unable to make brick.
21 Q. Yes, sir. I understand it may be very
22 important to your brickmaking process to have that machine.
23 But the machine doesn't move bricks itself, does it?
24 A. No, sir.
25 Q. It's used just to service and maintain the

1 machines that move the brick, isn't that right? or the
2 manufacture of the brick?
3 A. That's correct.
4 Q. All right, sir. The oil tanks and the
5 foundations that we talked about. The ones that were
6 sitting up on the hill. They're for the purpose of storing
7 fuel oil for your process, are they not?
8 A. Correct. I said prior to this -- and I want
9 to make a statement: number two fuel oil -- sometimes
10 different grades of fuel oil are stored. But it's always
11 fuel oil for burning in the kiln.
12 Q. There's no question that those tanks are
13 permanently mounted there, is there?
14 A. No, sir.
15 Q. They're there for good, aren't they?
16 A. Well, they could be moved, but for the time
17 being, they're there for good.
18 Q. They haven't been moved since they've been
19 installed there, have they?
20 A. Never.
21 Q. They're on concrete foundations?
22 A. As far as I know.
23 Q. There's no present intention of anybody at
24 Webster Brick that you know of to move those tanks?
25 A. No, sir, there's not.

1 Q. Are the lines for feeding the tanks into the
2 kilns, et cetera, underground permanently mounted?
3 A. Until they reach the plant, they're buried
4 between the tank and the plant.
5 Q. Okay. And flashing -- you were talking about
6 the oil going onto the brick. Can you estimate for me how
7 much of the oil is actually consumed in this plant actually
8 ends up in that kind of a usage?
9 A. What you're talking about, sir, is -- is a
10 real technical thing. Ceramic engineers spent years working
11 on it. I could give you my understanding of it.
12 Q. Well, okay.
13 A. My understanding of it is that what actually
14 goes on the brick is carbon, which is a molecule or something.
15 But it's a part of the oil itself. Now as to there being
16 any oil on the brick, the brick is not oily when you're
17 finished with it, but it does have a product of that oil
18 placed upon its face.
19 Q. But of the percentage of oil that you use
20 in the entire process for Webster Brick, there's only a
21 miniscule portion of that that ends up as carbon on those
22 bricks in the last analysis, isn't it?
23 A. Probably so, but there are two colorings
24 that go into effect here. We talked about flashing as
25 putting a black color on the brick.

When a brick goes into this heat and changes from a piece of mud into a brick, it changes color simply by the heat itself, and by the fact that it becomes something else. It becomes inert. So there's a color change due to the heat from this oil, whether we're flashing or not.

Q. But that's not the result of any impregnation of carbon onto the brick from the fuel oil, is it?

A. That's highly technical, sir. I really don't know. It's a result of the heat.

Q. You don't know that it is?

A. The heat causes these bricks to change color and take on a red color that you normally associate with brick. And flashing causes the brick to take on a dark color, which you see in a home frequently where the pattern is variegated.

Q. Certainly. Now the cement reinforcing steel rods and wires in the items that are issues in the case today, these are the items that comprise the floor of that Plant Number Two, are they not, sir?

A. Floor and kiln tunnel.

Q. Yes, sir.

A. Correct.

Q. Of Plant Number Two -- that's a permanent floor, isn't it?

A. That's correct.

1 Q. It's part of the building, is it not?

2 A. Well, I hesitate to answer that. We have

3 similar brick plants other than the one -- we have other

4 brick plants other than the one you saw that does not have

5 near the amount of concrete floor.

6 Q. Well, I understand that.

7 A. Because it's not necessary. Because we don't

8 have automatic car haulage equipment.

9 Q. But that floor supports the entire weight

10 of the building, doesn't it?

11 A. Yes. Were it not for the equipment in there,

12 though, that floor could be a lot of dirt floor right there.

13 Q. I understand. The fact, though, is that it's

14 permanently there, and it's there for flooring so that

15 people can walk and brick can be moved across the floor

16 area, isn't that correct?

17 A. No, sir. Part of your question is correct.

18 It is there permanently. But my earlier point was: we

19 have brick plants where you won't see floor like that. It's

20 not there for the benefit of the people. It's there for

21 the benefit of our automatic car hauling equipment.

22 Q. Well, you use it for transportation of brick

23 across the floor, don't you?

24 A. Yes. And that's the primary purpose, is to

25 haul brick throughout our plant.

1 Q. Sure.

2 A. The fact that we enjoy the ability to walk

3 on it, I think that's incidental to its primary purpose.

4 Q. Now the machinery foundations that you

5 testified to. These are the -- this is a concrete structure

6 underneath the kiln, is that correct?

7 A. Yes, sir.

8 Q. And it, again, is permanent and is a founda-

9 tion for the kiln itself, isn't it?

10 A. That's correct. It serves that purpose also.

11 Q. All right, sir. And the kiln is that brick

12 structure that was on top of these concrete foundations that

13 we saw, is that correct?

14 A. That was part of the kiln, but that's not --

15 that's not all-inclusive now. The kiln is the entire design,

16 with the track -- which we did not see -- with the tunnel --

17 which we did see -- as well as the brick surface which

18 you're talking about.

19 Q. Well, there's no doubt about the kiln being

20 permanent either, is there?

21 A. No, sir. That kiln is permanent.

22 Q. That is permanently attached to the real

23 estate, is it not?

24 A. It is.

25 Q. Just as the floors?

A. Correct.

Q. Just as the foundations are?

A. Correct.

Q. Just as the foundations for the oil tanks are?

A. That's correct.

MR. FELTON: All right, sir.

That's all the questions I have, if Your Honor please.

MR. FOX: Two quick questions.

REDIRECT EXAMINATION

BY MR. FOX:

Q. How about the other dunnage, the straw and the wood we saw there?

A. It's not returned to us, if that's your line of questioning. I don't know what happens to it.

Q. That's not returned.

The other question is on this flooring -- just to clear it up.

Is brick ever moved across that floor, except on rails --

A. No, sir.

Q. -- the rail system?

A. No, sir.

Q. Are people ordinarily on that floor?

1 A. Not in any other capacity.

2 Q. I'm talking about where the rail system is.

3 A. Occasionally people walk across that floor,

4 but there are no work stations in that end of the building.

5 There's nothing to be done other than to observe, or to tour,

6 or to --

7 Q. I'll give you an example. Was our being

8 out there today a regular experience, or a unique thing?

9 A. It was a unique thing for us.

10 MR. FOX: All right, sir. That's all.

11 MR. FELTON: One brief question, if Your

12 Honor please.

13 RECROSS-EXAMINATION

14 BY MR. FELTON:

15 Q. You claim the reason that the bricks are not

16 moved across the floor, other than on tracks, is because of

17 their weight and size, isn't it?

18 A. That's correct.

19 MR. FELTON: That's all I have.

20 [Witness excused]

21 [The defendant presented no witnesses]

22 MR. FOX: We would stipulate the introduction

23 of regulations.

24 THE COURT: Okay. Mr. Felton.

25 MR. FELTON: We would stipulate the introduction

1 of regulations. I will simply record an unmarked copy.
2 Mine are all marked up with my own personal observations,
3 which I'm sure they don't want to hear.
4 THE COURT: All right.
5 MR. FOX: Is that the '70 and the '69?
6 MR. FELTON: These are the '69 regs.
7 MR. FOX: Which month? Would you send me the
8 same one you're reading from, so we'll be sure we're arguing
9 about the same thing.
10 MR. FELTON: Just so the records will be
11 clear, the regulations I'm talking about were issued by the
12 Department of Taxation under date of July 1, 1969. And
13 they're the ones that are currently in force.
14 THE COURT: No more oral argument? You
15 want to make any argument?
16 MR. FELTON: I'll just respond to whatever
17 questions the Court might have. I anticipated addressing
18 the issues in my brief. But if there are particular matters,
19 we'll ask to be heard on them.
20 THE COURT: Do you understand the law to be
21 that machinery which is used for the sole purpose of
22 maintaining manufacturing equipment would not be excluded,
23 is that right?
24 MR. FELTON: The law on that subject is stated,
25 in our position --

1 MR. FOX: Excuse me. The regulations, please,
2 sir.
3 MR. FELTON: Okay. I was going to say, the
4 law on that subject is stated, in our view, in the regulations.
5 Section 1-63 provides likewise, machinery and tools used to
6 repair and maintain machinery and tools used directly in
7 production are taxable.
8 THE COURT: What do you say about that?
9 MR. FOX: Well, Your Honor, we would say the
10 purpose of this -- that is a regulation -- the Court's
11 going to have to look at the statute -- although our State
12 Supreme Court has said that regulations are entitled to
13 great relief. They said four different times -- four
14 different things that the regulations are entitled to.
15 And I'm sure that --
16 THE COURT: You sure the regulations are
17 covered in the statute?
18 MR. FOX: I feel it is. That particular one is.
19 And I also feel that that particular one is
20 covered in the statute.
21 THE COURT: You-all will cover all that in
22 your briefs.
23 MR. FOX: Yes, sir. We will cover that.
24 I might add that the Supreme Court of this
25 State, in treating regulations, has given them four different

1 weights. I'll be very much interested to see which weight
2 Mr. Felton chooses to give it.
3 MR. FELTON: I can't resist the urge, Judge.
4 I think we've only given it one weight, and that's great.
5 MR. FOX: Fair enough.
6 THE COURT: How do you want to handle the
7 briefing of this thing?
8 MR. FELTON: Mr. Wooten and I have dis-
9 cussed the possibility that the Court might be benefitted
10 by a transcript as it sees our briefs. We would suggest --
11 and are perfectly willing to provide one. And maybe to take
12 thirty days for him, and then thirty days for me after filing
13 the transcripts.
14 THE COURT: I'll be glad to look at the
15 transcript.
16 MR. FELTON: Sure.
17 MR. FOX: Yes, sir.
18 THE COURT: Within thirty days for each,
19 after the transcript.
20 MR. FELTON: He files thirty days after the
21 transcript. And I file thirty days after he files.
22 THE COURT: All right. Do you want to
23 reply?
24 MR. FOX: Yes, sir. I would like that printed
25 up, Your Honor, in view of the fact that Mr. Felton has

1 indicated he might be citing certain cases we're not aware
2 of.
3 THE COURT: How long do you want on replies?
4 MR. FOX: Ten days.
5 THE COURT: Thirty, thirty and ten after the
6 transcript?
7 MR. FELTON: Yes, sir.
8 THE COURT: All right.
9 [Court adjourned - 3:25 p.m.]
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STATE OF VIRGINIA)
) To-wit:
COUNTY OF ROANOKE)

I, Ernestine A. Fisher, Court Reporter, of the firm of Tester-Perdue & Associates, hereby certify that the proceedings herein were taken by me in Stenomask and accurately transcribed to the best of my abilities; and that this is a true and correct account of the trial of the case of WEBSTER BRICK COMPANY, INCORPORATED vs. DEPARTMENT OF TAXATION, COMMONWEALTH OF VIRGINIA, tried in the Circuit Court of Botetourt County on the 13th day of May, 1976.

Given under my hand and seal this 2nd day of August, 1976.

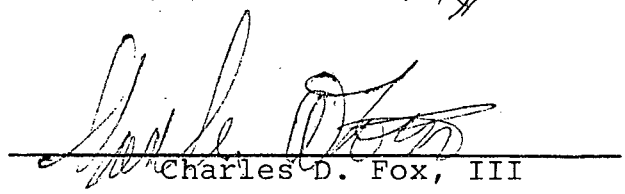
Ernestine A. Fisher
COURT REPORTER

I, George Holt, Clerk of the Circuit Court of Botetourt County, Virginia, hereby certify that the foregoing transcript of evidence of the trial of the case of WEBSTER BRICK COMPANY, INCORPORATED vs. DEPARTMENT OF TAXATION, COMMONWEALTH OF VIRGINIA, was filed with me as Clerk of said Court on the _____ day of _____, 1976.

_____
CLERK

CERTIFICATE

I, Charles D. Fox, III, counsel for Appellant and duly qualified to practice in the Supreme Court of Virginia, do hereby certify that three copies of the foregoing Appendix were mailed to Anthony Troy, Attorney General of the Commonwealth of Virginia, P. O. Box 6-L, Richmond, Virginia, 23282, counsel for Appellee, this 29th day of July, 1977.



Charles D. Fox, III