TAX COURT OF NEW JERSEY

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# Corrected Opinion Notice

**Date: September 30, 2019**

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Office of the Attorney General

**From: Lynne E. Allsop**

**Re: LISCIO'SITANLIAN BAKER, INC. V. DIRECTOR, DIV. OF TAXATION**
**Docket number: 009658-2017**

**The attached corrected opinion replaces the version released on September 27, 2019 The Opinion has been corrected as noted below:**

Various typographical errors.

NOT FOR PUBLICATION WITHOUT APPROVAL OF
THE TAX COURT COMMITTEE ON OPINIONS

Corrected 9/30/19 – various typographical errors

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| LISCIO'S ITALIAN BAKERY, INC.,<br><br>Plaintiff,<br><br>v.<br><br>DIRECTOR, DIVISION OF TAXATION,<br><br>Defendant. | : | TAX COURT OF NEW JERSEY<br>DOCKET NO. 009658-2017<br><br>Approved for Publication<br>In the New Jersey Tax<br>Court Reports |

Decided: September 27, 2019

Michael A. Gruin for plaintiff
(Stevens & Lee P.C., attorneys).

Anthony D. Tancini for defendant
(Gurbir S. Grewal, Attorney General of New Jersey, attorney).

SUNDAR, J.T.C.

This opinion decides whether the mobile baking pan racks ("Racks") used by plaintiff in its business of manufacturing baked products are subject to use tax. The amount of tax in dispute is $19,319.65 (exclusive of interest and penalties). Plaintiff claims that the Racks are indispensable to the manufacturing process, and therefore, are exempt under N.J.S.A. 54:32-8.13(a), which statute exempts from tax (sales or use), receipts from sales of "machinery, apparatus, or equipment" (hereinafter "MAE") which is used or consumed "directly and primarily in the production of tangible personal property by manufacturing, processing, assembling or refining." Defendant claims that the exemption does not apply to the Racks because they are trolleys akin to dollies, used for the convenience of plaintiff to manually transport the to-be-baked products from one area to another since they are too heavy to be carted or carried by foot.

*

For the reasons explained below, and based on the evidence presented, the court finds that the Racks fit within the meaning and intent of N.J.S.A. 54:32B-8.13(a) and the implementing regulation. Therefore, plaintiff's purchases of the Racks are exempt from use tax.

**FACTS**

Certain facts were stipulated (information and documents), while others were provided by testimonial evidence of plaintiff's co-owner, and of its quality assurance manager. Also submitted, as undisputed evidence, was a short video presentation of a portion of plaintiff's daily production activities.

*A. The Production Process*

Plaintiff ("Liscio's) is a New Jersey S corporation. It owns and operates a production plant in Glassboro, New Jersey wherein it makes and sells (wholesale and retail) almost 250 varieties of baked products such as bread, sandwich breads, rolls and other specialty items, totaling 600,000 pieces each day. This plant is the main facility which measures about 110,000 square feet, and is open 363 days a year. Of the more than 400 employees of Liscio's, 90% work at this plant.

The production process of a baked item involves several steps and phases, from preparing the dough, to shaping, proofing, refrigerating or de-activating, re-activating, and finally baking it. Each process is a required step in the production of a quality baked product, and is performed in a continual cycle or loop, essentially as a back-to-back operation.

Liscio's uses a variety of equipment in the production process. Several pieces are undisputed as being MAE such as the industrial mixer, the cutter (which cuts the dough into pieces), and the conveyor systems which transport (1) bread boards (large wooden boards) from one stage of the production to another, (2) the prepared dough into the oven loaders, and (3) the

baked products into the packaging area. The Racks, which also involves an element of manual labor, are the sole item of contention in this litigation.

Similarly, the production process involves a mix of mechanical and manual steps. The dough is initially prepared using an industrial size mixer which functions mechanically. A machine slices the dough into various pieces. Those pieces are mechanically (i.e., by a machine) dropped onto bread boards which are passing on a conveyor belt. Employees stationed at the end of the conveyor system manually flatten or shape the dough pieces. Other employee/s then manually remove/s (unloads) each bread board from the conveyor belt onto one of the several brackets or slots in a Rack.[1] Each Rack, with bread boards (loaded with dough pieces) are then manually wheeled by an employee to different areas of the plant for various processes depending on the type of the product being produced. Some bakery products, depending on the type of crust, go directly from proofing to baking. Some require retardation in between. Some require seeding before proofing. Some must be "designed."

In all cases, however, the dough pieces are moved via the Racks to another area of the plant for the proofing process. The proofer is a large heat-and-humidity controlled enclosed space with a door, Liscio's production process requiring 95 degrees heat and 95% humidity. The temperature (heat and humidity) activates the dough and causes the yeast to ferment and convert to ethanol, which causes the dough to rise. The proofing also helps to age the dough for additional flavor. The proofer door remains closed during the activation process. Without proofing, the dough remains flat or the same shape as rolled, i.e., lacks sponginess, and is virtually useless in production. No bakery product is made without undergoing proofing. Sometimes a roll of dough

[1] Depending on the type of product, some bread boards are unloaded after the dough is sliced, and placed on wheeled tables, where employees manually shape or seed the dough.

is proofed multiple times. Duration of proofing can vary from 45 minutes to two hours. Employees visually gauge the size/shape of the dough to determine whether more proofing is required, and whether it is adequate to proceed to the next stage of the production process.

The Racks hold the prepared and processed dough within the proofer box. Without the correct size and spacing within the Racks, the dough's ability to breathe and rise will be negatively impacted, and the dough could lump together or overflow.

After proofing, the Racks with the risen dough pieces are moved into the refrigeration unit for staging (however, depending on the type of bakery product, some products may need to skip this stage). Refrigeration serves as the retardation process so that the rise of the dough slows down. Without prompt refrigeration, the yeast will continue to expand the dough causing dough spillage and overflow, and the product can rise to a larger size than desired. Here, also, employees do a visual test on the shape/size of the product to ensure adequacy (for instance, if the dough is too small, it could be re-sent for proofing).

The Racks themselves do not have any sensors, timers, or flashers to indicate the adequacy of the rise of the dough, or the dough's readiness for removal to the next stage of production either from the proofer rooms or the cooler rooms. They do not contain any heating elements to provide the temperature and humidity to commence and continue the dough's rising. Nor do they contain any cooling elements which provide the temperature to slow down the chemical process. While there are some timers which are used in the production process, these are not a part of the Racks. However, mobility is vital due to the time-sensitive nature of any bakery product; therefore, the Racks are crucial in helping prevent loss of time in the production process.

The cooled items on the Racks are then moved to the next stage, which is re-activation. After this, the Racks are wheeled to the next staging area where the bread boards are manually

removed and loaded onto another conveyor belt which separates the prepared dough into one assembly line for baking (sending into the oven loader, which then empties into the ovens), and the emptied bread boards onto another assembly line where an employee manually removes the bread boards for cleaning and re-stacking on the Racks. The Racks with the cleaned bread boards are then wheeled into another area for re-use in the next production loop. On the other side of the ovens is another conveyor system which transports the baked product into the packaging area. The Racks are not used there.

The Racks are also not used before the creation of the dough (mixing of raw materials) and after the final product is created. Rather, they are used from the time the dough is formed and until it is sent into the ovens, in a continual loop. At any given time during the 8-hour day, about 30-40 Racks are stationary for about 20-30 minutes, which is at the end of the loop when the bread boards are unloaded for cleaning. The Racks are stationary at this time only because they are awaiting commencement of the next production loop, i.e., they are in a staging stance as opposed to being used for storage or being un-used.

The Racks are free-standing, and have four heavy duty swivel casters on them making them easy to turn. These wheels are made of hard rubber, which ensures that they will not deflate or pop off if the Racks are moved over a stray screw or nail on the floor. Additionally, it ensures safety since the wheels stop on slippery surfaces. The controlled movements also help avoid the Racks from being bumped into one another while in transit. The Racks have no brakes.

The Racks can be single or two-tiered (i.e., single pan Rack or double). The tops of the Racks are covered, an important requirement since they prevent exposure of the dough to any condensation that could accumulate on the proofer rooms' ceiling due to the temperature changes. The Racks have steel brackets or slats or slots which are welded onto railings. The high-grade

welding is of industrial strength and stabilizes the Racks. Additionally, welding ensures that there are no spaces or niches where bacteria can be trapped and can grow, causing food contamination. Since Liscio's does not have an in-house FDA-certified welder, it requires proof grade welding as a criterion from the outside vendor during manufacture of the Racks. The bottom of each Rack has a stainless steel base plate.

A double Rack stands about 6 feet in height, 2½ feet wide and 3 feet deep. It can hold two boards next to each other on the same level. Between each bracket or slot is a space of either 3 or 6 inches (depending on the type of product being baked). This spacing is essential to ensure proper airflow, which enhances the proofing or retardation processes. A double Rack weighs about 175-200 pounds, and can hold about 120 pieces of bakery items, although it takes only one individual to push a Rack. The Racks are continually maintained in-house. Any issues are tagged and then fixed, and the wheels are greased on a monthly basis. Additionally, the Racks are periodically inspected as part of the stringent inspections by food safety agencies.

During the audit period, Liscio's had about 200 Racks, all purchased from a third-party vendor located in California.[2] Liscio's provided the required criteria to the vendor by way of blueprints (created in-house), which the vendor then replicated for Liscio's approval. Once approved, the vendor manufactured and shipped the Racks to Liscio's at a price of $400 for a single Rack, and $625 for a double Rack (prices increased for a double Rack from 2011 to 2013, from $495 to $625). The custom-made Racks were a considerable improvement from the prior standard or sustainer racks Liscio's had used. The mass-produced standard racks were purchased from a wholesale restaurant supplier and were made of standard strength aluminum without quality

[2] No sales tax was charged by the vendor because it was delivered to Liscio's in New Jersey.

grade welding. They did not hold up well under varying temperatures; as a result, they would bend or buckle, could not hold a large quantity of dough, the wheels would deflate or break. They were not rust-proof, which was of concern for food safety. They also lasted only a few months. In contrast, the custom-made Racks use stainless steel material which keep food safe, withstand varying temperatures, and last over two to three years.[3] The custom-made specialized Racks cannot be replaced or replicated by the standard mass-produced ones.

*B. Use Tax Audit*

The Division of Taxation ("Taxation"), the agency headed by defendant, audited Liscio's for tax periods January 1, 2010 through December 31, 2013. Among others, Taxation assessed use tax of $19,319.65 for purchase of the Racks (plus shipping charges) based on a sampling of invoices from 2011 to 2013. Three of those invoices included purchases of stainless steel "pan" dollies (at $175 each in 2011 and $229 in 2013), and aluminum "transit cabinets" (at $229 each). The audit report cited to N.J.S.A. 54:32B-8.13(a), the controlling statute on exemptions, and to N.J.A.C. 18:24-4.2, which defined and explained some of the terms in the statute. The audit report quoted an example of taxable items used in a bakery "as bakery pans, racks to transport pans, shelving, benches, tables and bakery tools used in connection with a bakery," while examples of tax-exempt items would be "an oven, freezer or refrigerator, or mixer." The latter are exempt since they "directly and primarily cause and sustain a substantial change in raw materials to a finished product," while the former "are not considered production equipment within the scope of the pertinent definitions and would be taxable." The audit report concluded that the Racks were taxable as "fixed assets," and that they were not exempt as "production equipment" since "they

[3] Third-party food inspection agencies such as the American Institute of Baking also require stainless steel be used for food safety purposes.

are not designed to be used, in manufacturing, converting, processing, fabricating, assembling, or refining tangible personal property."

Liscio's administratively protested the assessment, contending the Racks are exempt production equipment. Taxation's conference report noted the issue as being the use tax imposed on "Racks and Sheet pans,"[4] with Liscio's contending that the Racks were "part of the manufacturing process." The conferee made the following "findings:"

> [Liscio's] uses Sheet pans and racks at this location exclusively to prepare various types of breads. The dough is form placed on a sheet, then transported on racks to [sic] proofed at 60 degrees, then transported on racks to be refrigerated at 40 degrees, then fermented to a proofer for heat steam to activate the size, then transported to the floor to sit for a while then loaded into an oven to be baked. [Liscio's] presented pictures and videos to describe and explain its usage. This conferee determine [sic] that the equipment used was exclusively for preparing, fermenting and baking a variety of breads to a finished product.

Nonetheless, the conferee concluded that the Racks "were not exempt from tax" under N.J.A.C. 18:24-4.2, since they "were determined not to be used directly in the refining of a finished product," and "were not complex devices."

Taxation consequently issued a final determination leaving the audited use tax assessment on the Racks unchanged. No amount was demanded since Liscio's had paid the disputed use tax plus interest and penalty. This appeal followed.

[4] It is unclear what the conferee meant by "sheet pans." The sampled invoices which were the basis for the use tax did not include any sheet pans; rather, the specification details simply noted the "pan" capacity of a Rack, or the Transit Cabinet's ability to "accommodate[e]" full sheet pans.

**FINDINGS**

The only disputed issue is whether the Racks are exempt from use tax under N.J.S.A. 54:32B-8.13(a). Liscio's argues for exemption, and Taxation argues against the same.[5]

An assessment of sales or use tax "is presumptively correct." Quest Diagnostics v. Dir., Div. of Taxation, 21 N.J. Tax 484, 490 (Tax 2004), aff'd, 387 N.J. Super. 104 (App. Div. 2006). Because of the presumption of taxability, claims of exclusion or exemption are "strictly construed" against the claimant. Urso & Brown, Inc. v. Dir., Div. of Taxation, 19 N.J. Tax 246, 254-255 (Tax 2001), aff'd, 353 N.J. Super. 248 (App. Div. 2002).

Thus, Liscio's must show that the Racks fit within N.J.S.A. 54:32B-8.13(a). This statute exempts from tax (sales or use) the "[s]ales of [MAE] for use or consumption directly and primarily in the production of tangible personal property by manufacturing, processing, assembling or refining." See also N.J.A.C. 18:24-4.4(a) (exemption extends to the "purchase, rental, lease or use of" MAE). Note that the exemption is not lost if the end product is not sold to a final consumer, but is used to produce other tangible personal property. GE Solid State v. Dir., Div. of Taxation, 132 N.J. 298 (1993). However, the exemption does not apply if the purchase is for a "use" that is "incidental to the activities described" in the statute. N.J.S.A. 54:32B-8.13(a).

It is undisputed that the bakery products are being made by Liscio's through a "manufacturing" process. The court also finds that the Racks are being actively "used" for, and during, Liscio's baking production process. Credible testimony showed that the Racks were used, continually, from the time the raw material was mixed to form the dough until the dough was "sent" to the ovens. See also N.J.A.C. 18:24-4.4(b) (limiting the meaning of the term "production"

[5] Liscio's does not dispute that if use tax is due, the amount of the assessment is correct. Taxation waived the penalty associated with the assessment (including interest on such penalty).

as including only "those operations commencing with the introduction of raw materials into a systematic series of manufacturing . . . operations, and ceases when the product is in the form in which it will be sold to the ultimate consumer).[6]

Were the Racks being used "directly and primarily in the production of" the bakery items? Liscio's argues that they are an indispensable part of its production process, adapted to, and used in every step of the five-phase production. Taxation contends that the Racks are not directly involved in making bakery products; rather they are used simply in the manual transportation and storage of the dough.

The terms "directly and primarily" are defined and interpreted by Taxation's regulations in a restrictive manner. The term "directly" includes only that MAE "when it is used to initiate, sustain, or terminate the transformation of raw materials into finished products." N.J.A.C. 18:24-4.4(c). In deciding whether these actions are satisfied, Taxation will consider (a) "[t]he physical proximity of the" MAE "to the production process in which it is used;" (b) the time between when the MAE is used and "the time of use of other property used before and after it in the production process;" and, (c) the "active causal relationship between the use of the" MAE "and the production of a product." N.J.A.C. 18:24-4.4(c)(1)-(3). The regulations further restrict the exemption by providing that simply because an MAE must be used due to "law or practical necessity" and is thus deemed "essential" in the production process, it does not mean that the MAE satisfies the

[6] Although not controlling since this is a trial de novo, of note is Taxation's conclusion in its conference report that Liscio's "uses" the Racks "exclusively to prepare various types of breads" and that the conferee "determine[d] that the equipment used was exclusively for preparing, fermenting and baking a variety of breads to a finished product." The conferee's conclusion was based on the "pictures and videos" that Liscio's provided "to describe and explain . . . usage" of the Racks.

"directly" requirement of the statute. N.J.A.C. 18:24-4.4(c)(3). Thus, for example, "property used to prevent accidents, which may be required by law, is not considered directly used." Ibid.

The term "primarily" is not exactly defined. Rather, the regulations explain "primary use" in the context of an MAE having multiple uses. Thus, if "a single unit . . . is put to use in two different activities, one of which is a 'direct use' and the other of which is not," an exemption is allowed only where the property is used "more than 50 percent of the time directly in manufacturing, processing, assembling, or refining operations." N.J.A.C. 18:24-4.4(d). For instance, if a machine is used 60% of the time for manufacturing and 40% for loading, it is exempt. Id., Example 1.

Under the plain meaning of the terms in N.J.A.C. 18:24-4.4(c), and based on the credible evidence presented, the court is satisfied that the Racks are used to "sustain" Liscio's production process, thus, are used directly in the production process. The normal meaning of the word "sustain" is support. See also Black's Law Dictionary 1676 (10th ed. 2014) (sustain means "To support or maintain, esp. over a long period").[7] The court finds that the Racks are a vital support in the production process of the baked items. They are no different than the mechanical conveyor belts, transporting products from one stage of production to another (indeed, they do much more as credibly explained by Liscio's). Verily, the product (bakery item) does not touch the Racks (rather, the bread boards do), but then neither do the conveyor belts touch the product. Yet both transport the bread boards which hold the dough pieces. Thus, although the Racks make it easier to maneuver large quantities of dough, this fact does not disqualify the same from exemption. Nor

[7] "Generally, in the absence of statutory or administrative definitions, words should be given their generally accepted meaning, according to the approved usage of the language." Urso & Brown, 19 N.J. Tax at 262 (quotation omitted). Thus, "dictionary definitions" can be considered. Ibid.

does the fact that they are manually moved. Neither the statute nor the regulations require use of total automation for an exemption qualification.

Additionally, the Racks are custom designed to fit the exacting specifications of Liscio's as to height and size, without which the chemical process which the dough undergoes (activation, fermentation, expansion, retardation) could not be actively managed and controlled. The Racks provide and facilitate the requisite airflow and spacing, and prevent potential rust leaks or condensation drips on the dough, supporting the chemical process which the dough is undergoing in the proofer and the cooler rooms. Without this, the very product being produced would be jeopardized. The spacing and depth of, and the roof on the Racks, all ensure the dough has the proper environment for transformation.

Further, although the dough pieces are stationary on the bread boards, the Racks are not being used to simply transport the dough pieces through each stage of production. Rather, the dough pieces are undergoing chemical changes at each stage: fermentation, retardation, re-activation. Thus, the dough pieces are still a work-in-progress while in the Racks.

As well, the Racks are continually in use, and used in all phases of the production process, commencing from when the dough is formed until the activated, fermented, expanded and retarded dough is ready-to-bake and conveyed onto the oven loader. The Racks are placed next to the conveyor systems, in the proofer and cooler rooms respectively, and in areas where the baked products must be exposed, in ambient temperatures, for the specific time periods. No time is wasted or lost between when the Racks are used and when the finished ready-to-bake dough is placed on the conveyor systems.

Moreover, as noted above, the Racks numbering about 200 are continually moved in a loop, with only a 30-minute staging time until the next step of the loop begins. They are custom-made

to fit the exacting specifications required by Liscio's, those specifications being crucial to the vitality of the management and control of the dough's chemical process. All these facts amply satisfy the regulatory examples of factors to be considered in determining whether a piece of MAE is directly used in the production process.

Taxation points out, hypothetically, if the dough pieces were placed on built-in shelves or stand-alone tables in either the proofer or cooler rooms, they would rise and cease rising just as they would do on the Racks. But this point does not require a conclusion that the Racks are not used directly in the production process. To the contrary, if the built-in shelves were considered part of the proofer and cooler rooms (and presuming that these shelves were made to the same exacting specifications as the Racks), and since Taxation concedes that these rooms or units qualify for exemption as directly used in the production process, then there is no reason why the Racks should not be deemed part of the proofer and cooler rooms, thus, tax-exempt. Manual labor would be attendant even if stationary shelving were used since Liscio's employees would still have to enter into either rooms, remove the bread boards, and then transport the same to another production station, just as is being done in the current process. The sole difference would be the mobility between the built-in shelves and the Racks, which mobility, as noted above does not destroy or render irrelevant the Racks' integral role in the production process. As credibly explained, using tables or shelves as a substitute for the Racks would not further the manufacturing process for several reasons: (a) mobility, which is crucial to the manufacturing process, particularly because of timing and the individual processes involved for certain types of items; (b) the volume of products being produced daily; and (c) keeping the dough contaminant free.

Taxation contends that since the Racks have no timers, sensors, flashers, or signals which would alert an employee that the dough is ready to be removed and transported to the next stage

of production, they cannot directly be part of the production process. This argument lacks merit. For the most part, as Liscio's credible testimony established, the readiness of the dough for the next production stage is measured visually (i.e., performed manually by employees with several years of experience). There was no evidence provided to show that the proofers or the coolers were all set up with the timers, flashers, and the like. Yet, there is no dispute that these units qualify for exemption as directly used in the production process.

The court also disagrees with Taxation that the Racks are not being "primarily" used in the production process simply because they are also being used to stack the cleaned and empty bread boards during certain times of the day. The only down-time during an 8-hour work day was when about 40-50 Racks of the 200 or so, are waiting in line to be used for the next production loop, during which time the cleaned bread boards were stacked on the Racks. Even then, the down time was only for about 30 minutes. This fact, however does not transform the Racks into merely passive storage devices, not used "primarily" in Liscio's production phases of the bakery items. See also supra n.6.

In sum, the court is satisfied that based on the credible proofs adduced, the Racks are actively, continually, directly, and primarily used in the production of Liscio's bakery items. They are not used for incidental or ancillary activities such as transportation or storage of bakery items either before or after their production. The manner in which they are used demonstrates that they are integral to, and integrated into, the production process and indeed, indispensable in the manufacture of the 250 varieties of bakery items totaling about 600,000 pieces a day. Cf. Urso & Brown, 19 N.J. Tax 259-60 (finding that the prototypes prepared only for a "specific customer" prior to receiving orders, were used only as a "sales device," and were "unnecessary for, and

generally not used in, plaintiff's manufacturing process" and therefore not exempt under N.J.S.A. 54:32B-8.13(a)).

The next issue is whether the Racks are MAE. The statute does not define MAE, but the regulations do as follows:

> [MAE] means any complex, mechanical, electrical or electronic device, mechanism or instrument which is adapted to the accomplishment of a production process, and which is designed to be used, and is used, in manufacturing, converting, processing, fabricating, assembling, or refining tangible personal property for sale.
>
> [N.J.A.C. 18:24-4.2]

The court finds that the Racks fit within the plain meaning of both an "apparatus" and "equipment." The dictionary meaning of the former is "a set of materials or equipment designed for a particular use," or "an instrument or appliance designed for a specific operation," and "is considered a synonymous cross-reference to equipment." Panta Astor, Inc. v. Dir., Div. of Taxation, 8 N.J. Tax 464, 472 (Tax 1986). "Equipment" means "the implements used in an operation or activity," or an apparatus. Id. at 472-73.

Additionally, under the regulations, the Racks are a "mechanical . . . device," or a "mechanical . . . mechanism," or a "mechanical . . . instrument" since they are moved by heavy-duty swivel caster wheels. They are "adapted to the accomplishment of a production process," as they are custom-manufactured with specifications as to size and material. The sizing ensures proper airflow, without which the dough's rising or retardation will not be controlled. The Racks are composed of high-grade stainless steel to withstand the varying temperatures in the production process, and are rust-proof to prevent food contamination. The caster wheels are designed to safely increase mobility, withstand considerable weight, and accommodate large quantities of dough

through the entire chemical and production process. The Racks would thus qualify for exemption as an apparatus or equipment under N.J.S.A. 54:32B-8.13(a), and as a mechanical device, mechanism or instrument under N.J.A.C. 18:24-4.2.

Taxation correctly notes that the Racks themselves do not change the dough or have any temperature controls embedded in them which cause the changes in the raw dough. Rather, climate-control equipment in the proofer rooms and refrigeration units are separately installed in each room. However, this argument ignores the specific nature and manufacturing process involved in Liscio's business, wherein the physicality, composition, and mobility of the Racks are crucial to producing uniformly quality end products for the reasons explained above.

Taxation next contends that the Racks are not "complex" as required by the regulations. The enabling statute, N.J.S.A. 54:32B-8.13(a), does not condition the MAE to be "complex," nor imposes this as a requirement.[8] Cf. GE Solid State, 132 N.J. at 306 (regulations cannot, "under the guise of interpretation," exceed the statutory scope; thus, where the plain language of N.J.S.A. 54:32B-8.13(a) does not require the manufactured product be "for sale" to the ultimate consumer for the exemption to apply, the regulations cannot add this qualification).

The statute's omission of the term "complex," does not necessarily mean that its inclusion in the regulation is improper. An MAE can undoubtedly be complex. However, it does not follow that only an MAE which is "complex" is tax-exempt. The placement of the punctuation, the

[8] In contrast, N.J.S.A. 54:4-1.15, a local property tax statute as to what comprises real property and personal property, defines MAE broadly to include "any machine, device, mechanism, instrument, tool, tank or item of tangible personal property used or held for use in business." The implementing regulation, N.J.A.C. 18:12-10.1, defines MAE as "any machine, device or mechanism, instrument, tool or other item of property directly used in the manufacture, assembly, refining or processing of property . . . The term includes, but is not limited to, that machinery, apparatus or equipment described in N.J.A.C. 18:24-4.2."

comma after the word "complex," evidences this interpretation. If "complex" was intended to qualify the terms "mechanical, electrical or electronic," there would be no need to use a comma separating the other terms. Thus, "any complex, mechanical, electrical or electronic device, mechanism or instrument," means there can be four types of a device, mechanism or instrument: either complex, or mechanical, or electrical, or electronic. In other words, a complex device, mechanism, or instrument is exempt. A mechanical device, mechanism, or instrument is exempt. An electrical device, mechanism, or instrument is exempt. An electronic device, mechanism, or instrument is exempt. Cf. Weinacht v. Board of Chosen Freeholders, 3 N.J. 330, 335 (1949) ("Usually when a series of items is separated by commas, the two concluding items are joined by a conjunction . . . and the comma is omitted; this does not ordinarily combine the last two items into a single one but leaves undisturbed their status as separate and distinct items along with the ones earlier enumerated"); Xcel Corp. v. Dir., Div. of Taxation, 4 N.J. Tax 85, 89-90 (Tax), aff'd, 5 N.J. Tax 480 (App. Div. 1982) ("It is an elementary rule of grammar that commas are used to set off nonrestrictive appositives, which are nouns that immediately follow and provide additional but nonessential information about another noun in the sentence," thus, where "the words 'chemicals and catalysts'" are setoff "with commas," and the antecedent phrase is "materials," (i.e., "materials, such as chemicals and catalysts"), then "cloth filter pads" qualify as "materials, provided they are 'used to induce or cause a refining or chemical process'" under N.J.S.A. 54:32B-8.20).[9]

[9] N.J.S.A. 54:32B-8.20 exempts from sales or use tax, receipts "from sales of materials, such as chemicals and catalysts, used to induce or cause a refining or chemical process, where such materials are an integral or essential part of the processing operation, but do not become a component part of the finished product." The taxpayer argued that the "controlling word is the more general 'materials,'" while Taxation argued "that the controlling words are the more specific 'chemicals and catalysts.'" Xcel Corp., 4 N.J. Tax at 88.

This reading is also supported by Panta Astor, Inc., where the court concluded that a silk screen, which was assembled by the taxpayer, then treated, layered, washed and colored is a "complex . . . instrument which is adapted to the accomplishment of a production process, and which is designed to be used, and is used, in . . . processing . . . tangible personal property for sale." 8 N.J. Tax at 471. That court, as here, clearly did not view the term "complex" as qualifying the successive terms "mechanical, electrical or electronic" since it did not find that the silk screen was either mechanical, or electrical or electronic, and that it was also complex.

Taxation contends that the Racks are no different from the parts used in pretzel warmers which this court determined as taxable because they were not "complex." J&J Snack Food Sales Corp. v. Dir., Div. of Taxation, 27 N.J. Tax 532 (Tax 2013) (citations omitted), aff'd, 2015 N.J. Super. Unpub. LEXIS 2201, *1 (App. Div. 2015).[10] The court is unpersuaded. In that case, the court did not require any complexity for the exemption to apply. Rather, it was "not persuaded that the . . . Warmer parts are [MAE]" and "[a]lthough the assembly process takes 19 steps, the Warmer parts are not shown to have been a 'complex, mechanical, electrical or electronic device, mechanism or instrument . . . .'"). 27 N.J. Tax at 552 (citation omitted). The court's finding was not based on the lack of complexity of the warmer parts.

More importantly, that case is inapposite. There, the warmers were used after the production stage, i.e., after the pretzels were baked, ibid., whereas here the Racks are used only during the production process. There, the warmers were loaned or sold by the pretzel manufacturer to retailers as a business strategy to market their products. Id. at 552-553. Here, there are no such transactions. Finally, there the court found that even presuming the warmers are MAE, they were

[10] The publisher has yet to formally publish the Appellate Division's opinion although it was approved for publication in the Tax Court Reports.

"at most, for an incidental use, namely as a sales/marketing device, when compared to [taxpayer's] primary manufacturing activity (manufacturing and/or producing frozen pretzels)," and "N.J.S.A. 54:32B-8.13(a) does not exempt incidentally used purchases." Id. at 553. Here, the court does not find that the Racks were incidentally used in Liscio's production process.

Even if the word "complex" is somehow controlling for an MAE to qualify for exemption, here, the court finds that the Racks would so qualify. They are not assembled by screwing in, or locking in certain parts by Liscio's. Rather, each Rack is made of industrial strength casters, a stainless steel roof, bottom sheet, and railings, and heavy duty brackets which are welded to the railings, such welding being top grade to prevent food contamination. They must be constructed to meet the specific spacing and height requirements of Liscio's. The Racks cannot be replicated or replaced with standard, mass-produced racks sold by restaurant supply stores. In other words, they are custom-made to Liscio's exacting specifications and are not simply an "off the rack" product sold wholesale. Although a Rack needs one employee to move it, it is not light-weight. Cf. id. at 539 and n.3 (pretzel warmers were created by assembling purchased parts which involved screwing in certain parts, manually attaching the same with other parts, then plugging the warmers into an electric outlet to test if the lights worked).

Taxation contends that the Racks are mere transportation and storage devices, and thus cannot be MAE. The court has already disagreed with this stance in the context of the "directly and primarily" used analysis portion of N.J.S.A. 54:32B-8.13(a). There is no reason why the same analysis should not apply here. When conveyor belts which transport dough pieces both before and after they are proofed, retarded, or shaped/stylized, are exempt from tax, it is difficult to agree that the Racks should not be exempt even when they perform the same type of product transportation. Moreover, the Racks are directly used in the proofer and refrigeration stages of

production when the dough undergoes chemical changes, and thus more directly assist the production process unlike the conveyor belts. Without these industrial strength Racks, made to specific size requirements, the dough's rising would be uncontrolled, which would jeopardize the creation of a uniformly quality end product that Liscio's aims to produce.

Further, using conveyor belts at every station in the plant would simply not work, as evidenced by credible testimony (and visual presentation). Standardization, or single line manufacturing (as would be done to produce sandwich bread) is impossible because of the variety of baked products produced by Liscio's, each of which can require different processes: some require proofing, some require stretching, some require slicing on the top, some require seeding, some require signatures (such as lines, scores, or stars as on Kaiser rolls), and due to the volume produced each day, the dough has to be sent to different areas within the plant. A mechanical conveyor system simply could not be used as a substitute for the Racks without jeopardizing the quantity and quality of the manufacturing process and the manufactured products.

Exemption statutes must be strictly construed. Nonetheless, the practicalities, actualities, and individual needs of a particular manufacturing process should not be ignored or minimalized, nor should legislative intent be sacrificed. See, e.g., GE Solid State, 132 N.J. at 309 (explaining the intent behind the MAE exemption as being the encouragement and sustainment of New Jersey's "industrial base," without which the State's "economic health" would be jeopardized; such exemption allowing New Jersey to compete with other states which exempted from sales tax "[p]roduction machinery and related equipment;" and would "foster a tax policy" for a "a healthy economy characterized by high employment and income levels stemming from the attraction, retention and expansion of business and industry throughout the state") (citations and internal quotation marks omitted).

Here, limiting the exemption only to conveyor systems but not to the Racks which not only perform the identical transportation function, but are also directly and primarily used in production of the bakery items, actively and continually throughout the production process, unduly and unreasonably restricts the MAE exemption based on the facts and evidence presented to the court. Also unduly restrictive is Taxation's focus on how the Racks are manually moved from one production stage to another, which view relegates the Racks to a mere transportation device. Ignoring the totality of the production process and the realities of a particular industry would result in an exemption only where a production plant is 100% automated. Such a result is not the statute's intent.

In sum, based on the evidence presented, the court is satisfied that the Racks qualify for exemption as MAE, which vitally support the production of bakery items.

Taxation points out that the Racks are taxable because Liscio's did not dispute the use tax assessed on the dollies and transit cabinets, which were also purchased from the same California vendor and were used to transport food from one area of the plant to another. The dollies sit low to the ground, are flat-bottomed, with welded rails on the side to hold pans in, and wheeled with a hand rail for pushing. The pans are used to hold and convey hot dog and burger buns from one area to another. The dollies are made of stainless steel, with a handle, and extra wide casters, capable of carrying 3,200 pounds. The transit cabinets are used to store products which should not be "air hit," i.e., stay cool but with no air flow on top. They are also on wheels and similar to a single rack but have steel all the way around, are made of aluminum, can hold full sheet pans of 18"x26," and have a reinforced full door and heavy duty latch (to secure the door during transport).

However, the fact that Liscio's did not dispute the use tax on the dollies or transit cabinets does not prove the Racks are taxable. While the two items share certain common physical traits

with the Racks (wheeled, manually maneuverable, transports or temporarily holds bakery items), the court has no evidence that they were directly used through the production process in the same manner as the Racks. There was no testimony whether these two items were used post-production (after the bakery items were baked) or otherwise. There was nothing to show the location of these two items at the different stations in the plant where the raw dough was being converted in different stages. Without such proof, the court cannot infer that because Liscio's paid use tax on the dollies and the transit cabinets, the Racks must also be taxed.

Finally, Taxation relies upon an article it published captioned "Treatment of Sales Tax for Bakery Items." See 13 State Tax News 93 (July/Aug. 1984). After summarizing N.J.S.A. 54:32B-8.13(a) and N.J.A.C. 18:24-4.2, the article states:

> For example, sales of items such as an oven, freezer or refrigerator, or mixer used by a bakery would be exempt from tax as qualifying production equipment under these definitions. These items directly and primarily cause and sustain a substantial change in raw materials to a finished product. However, sales of certain items such as bakery pans, racks to transport pans, shelving, benches, tables and bakery tools used in connection with a bakery are not considered production equipment within the scope of the pertinent definitions and would be taxable.[11]

The court is unpersuaded that the article's ban on exemptions for "racks to transport pans" should control or influence the result here. First, it is only an example. Second, the court is not granting a broad exemption to any rack used to transport food items. Rather, the exemption here is being granted based solely on the credible evidence presented by which Liscio's has persuaded the court that the 200+ Racks are used directly and primarily in the production of its 250 varieties of bakery items each and every working day at the factory or plant, and that the Racks qualify for

[11] This quote was included in full in Taxation's auditor's report (excerpted supra at pp. 7-8) but without attributing a citation to the source.

an MAE tax exemption. Third, while Taxation's interpretation of a statute via a regulation is entitled to deference, an article it publishes is "not an authoritative pronouncement, nor does it have the binding effect of a statute or regulation." Ambrose v. Dir., Div. of Taxation, 198 N.J. Super. 546, 553 (App. Div. 1985). Thus, the "court's standard of review is considerably broader than it would have been had there been a formal regulation promulgated under the [Administrative Procedures Act]." Kushner v. Dir., Div. of Taxation, 22 N.J. Tax 353, 370 (Tax 2005).

**CONCLUSION**

For the aforementioned reasons, the court reverses Taxation's final determination imposing use tax plus interest on Liscio's purchases of Racks. Taxation must refund the same pursuant to the refund statutes.