

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
	:	
of	:	
	:	
KLEIN'S BAILEY FOODS, INC.,	:	
KLEIN'S ELMWOOD FOODS, INC.,	:	
KLEIN'S PLAZA FOODS, INC.	:	DECISION
and KLEIN'S FOODS, INC.	:	DTA NOS. 800955-
	:	800958/801015
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1977	:	
through November 30, 1983.	:	
_____	:	

Petitioners, Klein's Bailey Foods, Inc, Klein's Elmwood Foods, Inc., Klein's Plaza Foods, Inc. and Klein's Foods, Inc., 2050 Elmwood, Buffalo, New York 14207, filed an exception to the determination of the Administrative Law Judge issued on November 13, 1987 with respect to their petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1977 through November 30, 1983 (File Nos. 800955, 800956, 800957, 800958, 801015). Petitioners appeared by Robshaw, Abramowitz & Tobia, P.C. (John A. Collins, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Each of the parties submitted a letter in support of their position on the exception. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation's denial of exemption from imposition of sales and use taxes with respect to certain purchases of electricity consumed in the operation of petitioners' supermarkets was proper.

II. Whether the Division of Taxation may raise objections to the Administrative Law Judge's determination without filing an exception.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. These facts may be summarized as follows.

Petitioners each owned and operated supermarkets in the City of Buffalo, New York at all times relevant herein. Petitioners filed refund claims and also claimed credit on sales tax returns filed with respect to sales tax paid on certain purchases of electricity consumed in the operation of their respective stores. Petitioners' refund claims asserted that the electricity at issue was consumed in production and was therefore exempt from sales tax pursuant to Tax Law section 1115(c).

On February 2, 1984, the Division of Taxation issued notices of determination and demand for payment of sales and use taxes due to each of the four petitioners.

The Division disallowed, in full, exemption from sales tax with respect to purchases of electricity used by certain equipment in petitioners' produce departments and certain equipment in petitioners' deli/bakery departments. The Division's denial of the exemption was premised upon the Division's position that such electricity was not consumed directly in the production process. Among the items denied an exemption were a range and oven used in the deli/bakery department by petitioner, Klein's Foods, Inc., in its Genesee Street store.

We find as additional facts that the purpose of the oven was to bake frozen pies which were sold as whole pies in an unheated state and that the oven was used for this purpose for approximately three hours a day. The purpose of the range was to cook chickens and salads. All of these items were sold for off premises consumption.

OPINION

The Administrative Law Judge sustained the Division of Taxation's determination as it pertained to certain equipment. The petitioners are taking exception to the Administrative Law Judge's denial of an exemption from sales tax for electricity used by coolers, a conveyor, a rotary bin, wrappers and scale/pricers in the produce departments, and a range, revolving oven, wrappers and scale/pricers used in the deli/bakery departments.

Petitioners first exception is to the Administrative Law Judge's findings of fact "13" and "14" insofar as they found that the Division of Taxation disallowed an exemption from sales tax for electricity used by scale/pricers and wrappers used in a deli/bakery department. We hold that the Administrative Law Judge correctly found that the Division of Taxation had denied an exemption with respect to this equipment.

The rest of petitioners' exceptions are to conclusions of law and involve section 1115(c) of the Tax Law, which exempts from sales and use tax electricity used directly and exclusively in the production of tangible personal property. Section 1115(c) provides, in part:

" . . . Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing, processing, assembling, generating, refining, mining, extracting, farming, agriculture, horticulture or floriculture, shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten."

Thus, to qualify for the exemption, the petitioners must show that the electricity was used directly and exclusively in the production for sale of tangible personal property by processing. Direct use has been interpreted by regulation to mean electricity must "during the production phase of the process either (i) operate exempt production machinery or equipment or (ii) create conditions necessary for production or (iii) perform an actual part of the production process." (20 NYCRR 528.22[c][1].) Processing has been defined by regulation to mean any service on tangible personal property which effects a change in the nature, shape or form of the property. (20 NYCRR 531.2[e].)

Among the items of equipment at issue is an oven. At the hearing, petitioners established that this oven was used approximately three hours a day to bake frozen pies which the petitioners sold as whole pies in an unheated state. We find that the baking of frozen pies effected a change in the nature of tangible personal property and, thus, constituted the production of tangible personal property by processing within the meaning of section 1115(c). We note that this conclusion is in accord with the Division's regulations, which allow the production exemption for electricity used in the flash freezing of T.V. dinners where the freezing takes place at a plant other than where the dinners were packaged. (20 NYCRR 528.22[a][3] example 5.) Accordingly, the petitioners are entitled to an exemption from sales tax for electricity to operate the oven for three hours per day, utilizing the kilowatt-hours figure set forth in the survey prepared for petitioners by Energy & Value Consultants, Inc.

The oven was also used to cook chicken for off-premises consumption. However, the petitioners failed to prove that this use of electricity was entitled to exemption because the petitioners failed to establish that the chicken was not sold subject to tax under section 1105(d)(i) of the Tax Law. Section 1105(d)(i) imposes tax on certain sales of prepared food, for off premises consumption, where the food is sold heated or in certain quantities or forms (20 NYCRR 527.8[e]). Food sold subject to tax under section 1105(d)(i) is not tangible personal property (Matter of Burger King, Inc. v. State Tax Commn., 51 NY2d 614, 621). Thus, electricity used in the production of such taxable food fails to meet the requirement of section 1115(c) that it be used in the production of tangible personal property. Pursuant to section 3000.10(d)(4) of the Rules of Practice and Procedure, "[t]he burden of proof shall be upon the petitioner, except as otherwise provided by law." (20 NYCRR section 3000.10[d][4].) Since the petitioners failed to show that the chickens were not sold as food taxable under section 1105(d)(i), the petitioners failed to prove they were entitled to exemption for the electricity used to cook the chickens.

The petitioners also asserted an exception with regard to the denial of an exemption from sales tax for electricity used by a range. This exception must be rejected on the same basis as the electricity used to cook the chickens. The range was used to make salads which were sold for off-premises consumption. However, again the petitioners failed to show that these salads were not sold as food taxable under section 1105(d)(i) and, as a result, the petitioners are not entitled to an exemption pursuant to section 1115(c) for the electricity used by the range in order to make these salads.

The Administrative Law Judge's denial of exemption pertaining to electricity used by the scale/pricers and wrappers in the deli/bakery must be sustained on the same basis. The Division of Taxation has stated that such machinery, if used to slice meat which is sold by weight, may be within the production process. (TSB-M-83[8]S Revised.) However, the petitioners failed to demonstrate what percentage of use of these machines was attributable to the production of meats sold by weight. Thus, this determination of the Administrative Law Judge must also be sustained.

Finally, the petitioners have taken exception to the denial of an exemption for electricity used by certain equipment in their produce departments: scale/pricers, wrappers, a conveyor, a rotary bin, coolers and a shrink tunnel. The Administrative Law Judge denied the exemption for the produce equipment citing APOG Foods, Inc. v. State Tax Commn. (TSB-H-86[198]S); Josal Foods, Inc. v. State Tax Commn. (TSB-H-86[206]S). We sustain the Administrative Law Judge's determination on the basis that petitioners did not demonstrate that this equipment was used within the produce department in the production of tangible personal property. Petitioners did not demonstrate what portion, if any, of the electricity was used to process, i.e., to effect a change in the nature, shape or form of the produce. (20 NYCRR 531.2[e].)

The final issue in this case is raised by the Division of Taxation. The Division has sought to object to a portion of the Administrative Law Judge's determination, although the Division did not file an exception within the 30 day time period required by the Tribunal's Rules of Practice and Procedure (20 NYCRR 3000.11[a]), nor did the Division file a request for an extension to file an

exception within such time period. Instead, 89 days after the Administrative Law Judge's determination was issued, the Division filed a letter with the Tax Appeals Tribunal replying to petitioners' brief and attempted to raise for the Tribunal's review an aspect of the Administrative Law Judge's determination not excepted to by the petitioners, i.e., the acceptance by the Administrative Law Judge of the energy survey prepared for petitioners by Energy & Value Consultants, Inc. The Division has denoted this aspect of their letter a "cross-exception".

The Rules of Practice and Procedure do not provide for a cross-exception nor for any exception outside the 30 day time period, unless an extension of this period has been requested. Accordingly, we hold that by failing to file an exception within the 30 day period, or requesting an extension, the Division waived its right to require the Tribunal to review any portion of the Administrative Law Judge's determination. While we agree with the Division of Taxation that the Tribunal has the power to review any aspect of the Administrative Law Judge's determination (Tax Law section 2006.7; 20 NYCRR 3000.11[e]), we see no reason why the Tribunal should exercise this discretion in this case.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of the petitioners is granted to the extent that the use by petitioner, Klein's Foods, Inc., of an oven for three hours a day to bake pies is held to be an exempt use of electricity, and except as so granted, is in all other respects denied;
2. The determination of the Administrative Law Judge is modified as indicated by paragraph "1" above, but except as so modified, is in all other respects affirmed; and
3. The petitions of the petitioners are granted to the extent indicated in paragraph "1" above and in conclusion of law "K" of the Administrative Law Judge's determination and the Division of Taxation is directed to recompute each petitioner's sales tax liability in accordance therewith, and except as so granted, the petitions are in all other respects denied.

Dated: Albany, New York
August 4, 1988

/s/ John P. Dugan
John P. Dugan
President

/s/ Francis R. Koenig
Francis R. Koenig
Commissioner