

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DUNKIN' DONUTS MID-ATLANTIC DISTRIBUTION CENTER, INC.	:	DECISION DTA No. 811188
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1987 through November 30, 1990.	:	

Petitioner Dunkin' Donuts Mid-Atlantic Distribution Center, Inc., 1607 Imperial Way, P.O. Box 506, Thorofare, New Jersey 08086, filed an exception to the determination of the Administrative Law Judge issued on September 23, 1993. Petitioner appeared by Klieman, Lyons, Schindler, Gross & Pabian (Jay M. Pabian, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James P. Connolly, Esq., of counsel).

Petitioner appended a statement to its exception. The Division of Taxation filed a brief in opposition to the exception. Petitioner was allowed until January 11, 1994 to file a reply brief, which date began the six-month period for the issuance of this decision. No reply brief was filed.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUE

Whether petitioner has shown by clear and convincing evidence that its receipts from the sale of wax tissue paper to individual donut shops in New York should be exempt from sales and use tax as a "sale for resale as such" under Tax Law § 1101(b)(4)(i)(A), where such wax tissue paper is used in the packaging of donuts and muffins for sale and is transferred, as part of each sale, to the customer.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Dunkin' Donuts Mid-Atlantic Distribution Center, Inc., is a Delaware corporation having its principal office and place of business in New Jersey. Petitioner is the main distributor to Dunkin' Donut franchises of various products, including napkins, straws, coffee filters, uniforms, wax tissue paper, wax coated bags and boxes.¹ At all relevant times, petitioner distributed such products to donut shops located within the State of New York.

On April 12, 1991, the Division of Taxation ("Division") issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1987 through November 30, 1990 in the amount of \$36,764.12 plus interest.

The above notice of determination was issued following an audit of petitioner's books and records. The audit methods and procedures are not raised as an issue, and no issue is raised concerning the dollar amount of tax asserted as due after audit.

As a result of the audit, the Division determined additional taxable sales of \$1,727,558.00, based on petitioner's failure to collect sales tax on certain sales of tangible personal property, including napkins, straws, coffee filters, uniforms and wax tissue paper. Tax asserted on this amount resulted in additional tax due of \$131,159.93. Petitioner consented and agreed to fixing a portion of this sales tax liability in the amount of \$94,395.81. This portion of the assessment related to tax asserted on receipts arising from the sale of napkins, straws, coffee filters and uniforms and is not in dispute in this proceeding.

The tax asserted by the above-referenced notice of determination, which is the subject of this proceeding, arose from petitioner's failure to charge sales tax on its sales of wax tissue paper (hereinafter "wax paper") to donut shops.

¹There is no disagreement concerning the boxes and the wax coated bags. The parties agree that these items are sold by petitioner "for resale as such" and are excluded from tax under Tax Law § 1101(b)(4)(i)(A).

Petitioner timely filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") with respect to the subject notice of determination.

On or about October 11, 1991, petitioner mailed a check to the Division in the amount of \$46,280.50 representing full payment of the disagreed tax liability, including interest.

On November 21, 1991, petitioner filed an Application for Credit or Refund in the amount of \$46,280.50.

BCMS issued a Conciliation Order (CMS No. 118250) to petitioner, dated June 19, 1992, sustaining the notice of determination.

The Division denied the refund application by letter dated August 20, 1992. Petitioner thereafter timely brought this proceeding challenging the denial of refund and the underlying notice of determination.

The parties stipulated that donut shops use the wax paper to line the top and/or bottom of boxes in which donuts are placed. The wax paper is also used to pick up individual donuts and/or muffins and place them in bags or boxes, such that the donut and or muffin is partially covered and partially separated from other donuts and or muffins, in the same bag or box.

A donut shop employee filling an order may use the same piece of wax paper to pick up all of the donuts for a particular customer.

The food items, the wax paper and the bag or box are all transferred to the customer as part of the sale.

Petitioner produced no resale certificates at audit or in this proceeding.

The donut shops factor in the cost of the wax paper when computing the selling price of their food products.

OPINION

The Administrative Law Judge determined, based on his reading of Matter of Burger King v. State Tax Commn. (51 NY2d 614, 435 NYS2d 689) and related cases, that:

"[t]here is no evidence in the record to support petitioner's argument that the wax paper [it uses] serves the 'identical function' of the wax paper in Burger King. The wax paper in Burger King was used to wrap or contain individual hamburgers to be sold to customers. Petitioner has produced no evidence that the wax paper in this case is used to 'wrap' or 'contain' or 'encompass' the food products sold by the donut shops. On the contrary, the parties stipulated that the donut shops use the wax paper to line the top and/or bottom of boxes in which donuts are placed. The wax paper is also used to pick up individual donuts and/or muffins and place them in bags or boxes, such that the donut and or muffin is partially covered and partially separated from other donuts and or muffins. This is not a function which is 'identical' to that for which the wax paper was used in Burger King" (Determination, conclusion of law "D").

On exception, petitioner argues that its wax paper is used to wrap and package food items and serves the identical function as the wax paper wrappers for hamburgers in Burger King. Petitioner asserts that while the Court in Burger King looked to the container cases for guidance, its holding makes no reference to "wrap" or "contain" or "encompass" in connection with the resale exclusion granted in Burger King. Moreover, asserts petitioner, "the Burger King decision does not lend itself to the conclusion that packaging materials must completely 'wrap' or 'contain' or 'encompass' the food items sold to customers" (Exception, Statement A, p. 2).

On exception, the Division presents arguments to support the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

First, we reject petitioner's assertion that wax paper need not "wrap" or "contain" or "encompass" the product to fall within the Burger King holding that "wrappers for hamburgers, cups for beverages and 'sleeves' for french fries" were purchased for resale and thus were exempt from the sales tax.

As the Division notes, the lynchpin of the Court's decision in Burger King was the application of the so-called container cases to the "modern-day economic and social phenomenon . . . known as the 'fast food restaurant'" where the use of paper or plastic goods is

"[k]ey to imparting [the] vaunted service features of speed, sanitation and portability."²

In Burger King, the Court stated:

"[t]he nub of [the container] cases is that a sale is not one at retail when a supplier sells containers to a wholesaler or manufacturer, who then sells his product packed in these containers either to a retailer or to an ultimate consumer. The courts reasoned that the containers, although bought to be resold as 'an incident to the sale of the contents' [cite omitted] were nonetheless sales for resale as such. The cartons, although 'not inseparable' from the contents, were, in this context, being resold 'as containers' [cite omitted].

"All the more is this so in the case of Burger King, whose packaging . . . is such a critical element of the final product sold to customers. So regarded, the packaging material is as much a part of the final price as is the food or drink item itself

". . . It follows that Burger King purchases its packaging from its suppliers for 'resale as such' to its customers and thus is entitled to the exclusion of section 1101(subd. [b], par. [4], cl. [i], subcl. [A]), of the Tax Law" (Matter of Burger King v. State Tax Commn., *supra*, 435 NYS2d 689, 692-693).

As the Division also points out, the holding in Burger King was honed by the decision of the Court in Celestial Food of Massapequa Corp. v. New York State Tax Commn. (63 NY2d 1020, 484 NYS2d 509) where the Court made it quite clear that "[o]nly when, as in Burger King, such items are necessary to contain the product for delivery can they be considered a critical element of the product sold, and excluded from sales tax" (Celestial Food of Massapequa Corp. v. New York State Tax Commn., *supra*, 484 NYS2d 509, 510, emphasis

²The Court in Burger King stated:

"[i]ndeed, it is appropriate here to comment on the modern-day economic and social phenomenon which, not without cause, has come to be known as the 'fast food restaurant'. Its universal proliferation on our national scene has made it common knowledge that such restaurants, for better or worse, are designed to mass-produce uniform, popular-priced food and drink products for consumption on ready demand on a conveyor-like, assembly-line basis. The amount of service it incorporates in its operation may be different from that of other types of restaurants, but, if anything, may be more significant. For its method of doing business requires that the food and drink it serves be in a form available for delivery whenever the unheralded patron chooses to arrive. The goal is streamlined movement of bagged food in sanitary form from restaurant to customer, who takes it in its ready-to-eat state without pause to wherever, on or off the premises, she or he wishes to consume it. Key to imparting these vaunted service features -- of speed, sanitation and portability -- is the use of paper or plastic goods in its preparation, storage and delivery (see, generally, Levitt, Production Line Approach to Service, Harv. Business Rev., Sept.-Oct., 1972)" (Matter of Burger King v. State Tax Commn., *supra*, 435 NYS2d 689, 692-693).

added).

Next, we reject petitioner's assertion that there is no difference between the use of the wax paper here, and the use of the wrappers in Burger King. Specifically, petitioner asserts that "[w]hen a hamburger is placed in a bag, the bag (not the wax paper) serves as the container. A single hamburger could certainly be purchased in a small bag by itself without the wax paper. When an individual hamburger and/or donut is placed in a bag, there is no real distinction between the functions of the wax paper"³ (Exception, Statement A, p. 2). In our view, the factual differences between the use of the wax paper here and the individual hamburger wrappers in Burger King thwart petitioner's attempt to analogize the two. The fact of the matter is that in Burger King individual hamburger wrappers were at issue, i.e., each hamburger was individually wrapped in a wrapper. Here, there is no evidence that the wax paper is used by the donut shops to wrap the donuts, i.e., that the paper serves this same wrapping function. Instead, the wax paper is used by the donut shops to line the top and/or bottom of boxes in which donuts are placed. The wax paper is also used to pick up individual donuts and/or muffins and place them in bags or boxes, such that the donut and/or muffin is partially covered and partially separated from other donuts and/or muffins. One piece of paper may be used to pick up all of the donuts for a particular customer.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. is denied; and

³Petitioner apparently equates the use of the hamburger wrapping necessary to keep the lettuce, pickles, relish, meat and other elements of a "Whopper" in place with the use of wax paper to separate different types of donuts.

4. The Notice of Determination dated April 12, 1991 is sustained.

DATED: Troy, New York
May 19, 1994

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner