STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SKY CHEFS, INC.	:	DECISION DTA NO. 814865
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, 1986 through February 29, 1992.	:	

Petitioner Sky Chefs, Inc., Attn: Tax Department, 524 East Lamar Boulevard, Arlington, Texas 76011, filed an exception to the determination of the Administrative Law Judge issued on November 26, 1997. Petitioner appeared by Price Waterhouse, L.L.P. (Kyle B. Kasner, C.P.A.). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James Della Porta, Esq., and Robert J. Tompkins, Esq. of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument was heard on September 24, 1998 in New York, New York.

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

ISSUES

I. Whether the resale exclusion of section 1101(b)(4)(i)(A) of the Tax Law applied to dry ice purchased by an airline caterer and used by it to maintain prepared food at a constant temperature of 41 degrees Fahrenheit or below.

II. Whether dry ice used to cool food while in transit from an airline caterer's facilities to awaiting aircraft falls within the definition of packaging materials used by a vendor to package tangible personal property for sale, as those terms are used in the Tax Law and regulations.

FINDINGS OF FACT

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

As a result of a field audit of the books and records of petitioner, Sky Chefs, Inc., the Division of Taxation ("Division") issued to petitioner a Notice of Determination of sales and use taxes due, dated December 2, 1994, for the period September 1, 1986 through February 29, 1992 in the amount of $343,052.43 plus interest. No penalties were assessed as a result of the audit.

The entire amount of the tax assessment results from petitioner's failure to pay sales tax on its purchases of dry ice during the audited period.

Petitioner acts as a caterer to airlines in New York and elsewhere. Its facilities in New York State are located at JFK Airport on Long Island. It prepares food at its facilities in accordance with agreements with various airlines and delivers that food to the airline shortly before the scheduled time of the flight departure. Approximately 10,000 to 17,000 meals per day are prepared by petitioner at JFK.

Petitioner is subject to the authority of several Federal government agencies. For purposes of this determination, the most significant regulations governing petitioner were those promulgated by the Food and Drug Administration ("FDA"). Under FDA regulations, prepared food served by an airline must be maintained at a temperature of 41 degrees or lower for all but four hours of the time between completed food preparation and food service by the airline. The

temperature and time regulations are to insure that disease-causing bacteria on the food do not have an opportunity to multiply.

Petitioner received a final order for each flight from six to nine hours before departure. Hot food was placed in a blast chiller after preparation to bring the temperature of the food down below the mandated 41 degrees. Foods were packaged in a refrigerated environment, and, as soon as preparation was completed, the food trays were placed in a cooler where the food was maintained at 41 degrees.

Petitioner uses different methods to determine whether food is above the critical 41 degree temperature and to track the amount of time that this condition continues. Any food which is above 41 degrees for a cumulative period of more than four hours must be destroyed.

Food is delivered to the airline on carts especially equipped to hold the food trays and to move up and down the narrow aisles of an airplane. The carts, which are the property of the airline, are insulated and have compartments where dry ice can be placed to maintain the temperature of the food during delivery time and during the flight.

Approximately two hours before flight departure, petitioner loads the carts in a refrigerated environment and then stores them in a cold holding area with the doors open to keep the cold air circulating through the carts and around the food. At the last possible moment, the dry ice is placed in the carts, the doors are closed and the carts are placed on a truck for delivery to the airline. As one of petitioner's witnesses explained, the dry ice turns the carts into something like individual ice chests. Petitioner's trucks are not refrigerated.

It takes approximately 15 minutes to move the carts from the refrigerated holding area to the trucks and another 15 minutes for the trucks to reach the terminal. Because dry ice dissipates

rapidly, a prolonged delay in flight departure might require petitioner to replenish the dry ice while the carts are sitting in trucks awaiting loading into the aircraft. Although title to the food passes when the carts are loaded onto the airplane, petitioner works in partnership with the airlines to keep the food cold even after it is delivered. Consequently, petitioner's employees will board an airplane to replenish the dry ice if a flight is delayed after the carts are loaded on the airplane. Petitioner was required to replenish the dry ice about once per month.

Prepared food was never delivered to the airlines without the use of dry ice. The dry ice served no purpose other than to maintain the food in the service carts at the required temperature.

There is no evidence that the dry ice used by petitioner for cooling was billed to its customers as a separate charge.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge agreed with the Division's assertion that only items used to hold food for delivery qualify for the resale exclusion. The Administrative Law Judge concluded that the regulation, 20 NYCRR 527.8(f)(2)(iii)(a), which describes items of property which are considered to be purchased for resale when provided to a customer by a caterer is quite clear on its face. Therefore, the Administrative Law Judge stated that it was unnecessary to look to anything else in order to determine whether the dry ice at issue, in fact, was entitled to the resale exclusion. Furthermore, within the same section of the regulation, the Administrative Law Judge noted that the language states that *ice used to chill food or drink before serving* is an example of tangible personal property which does not qualify for the resale exclusion (20 NYCRR 527.8[f][2][i]).

The Administrative Law Judge also rejected petitioner's argument that the dry ice, as a preservative material, is entitled to an exemption from sales tax under Tax Law § 1115(a)(19). In order for the dry ice to be exempt as a preservative material, petitioner would have to consume the dry ice in packing tangible personal property for sale. However, the Administrative Law Judge determined that the court in ***Matter of Servomation Corp. v. State Tax Commn.*** (51 NY2d 608, 435 NYS2d 686) concluded that restaurant food is not tangible personal property for purposes of the Tax Law. Therefore, since petitioner did not sell tangible personal property to its customers, the Administrative Law Judge determined that petitioner was not entitled to the exemption. The Administrative Law Judge also noted that there were no provisions in the Tax Law that allowed an abatement of interest on the assessment. Thus, the Notice of Determination issued to petitioner was sustained in full.

ARGUMENTS ON EXCEPTION

Petitioner disagrees with the Administrative Law Judge's conclusion that the dry ice was not purchased by it for resale. Petitioner argues that the dry ice qualifies for the resale exclusion due to the fact that it is necessary to *contain* the temperature of the food and such dry ice is physically transferred to its customer. Petitioner states that the dry ice is used to contain food, as described in 20 NYCRR 527.8(f)(2)(iii)(a), because the dry ice keeps the food within certain temperature limits during delivery. Moreover, petitioner states that the Administrative Law Judge misinterprets ***Matter of Burger King v. State Tax Commn.*** (51 NY2d 614, 435 NYS2d 689) and ***Matter of Celestial Foods of Massapequa Corp. v. New York State Tax Commn.*** (63 NY2d 1020, 484 NYS2d 509) in concluding that the resale exclusion applies only to physical containers. Lastly, petitioner disagrees with the Administrative Law Judge's conclusion that the

dry ice is not purchased as wrapping and packaging material for the sale of tangible personal property since prepared food and drinks are not tangible personal property.

The Division argues, in opposition, that the Administrative Law Judge's interpretation of ***Burger King*** is correct. The Division states that there is no authority to support petitioner's argument to expand the principle enunciated in ***Burger King***. Additionally, the Division asserts that petitioner's interpretation of the *necessary to contain* language in the regulation at 20 NYCRR 527.8(f)(2)(iii)(a) is without merit. The Division argues that the regulation clearly indicates that the resale exemption is provided to items that hold food for delivery. Therefore, since the dry ice does not hold the food for delivery, the Division states that petitioner is not entitled to the resale exemption.

The Division also urges that petitioner's alternative argument be rejected. The Division alleges that dry ice cannot be characterized as the packing of tangible personal property based upon the decision in ***Servomation*** as discussed by the Administrative Law Judge in her determination. Since there exists no authority in statute or case law which supports an exemption for dry ice used by a caterer to chill food during delivery to such caterer's customers, the Division requests that the determination of the Administrative Law Judge be sustained.

OPINION

In order to determine whether the dry ice at issue is entitled to the resale exclusion, it is necessary to address the principles espoused in ***Matter of Burger King v. State Tax Commn.*** (***supra***). Both parties argue that ***Burger King*** supports their position. Petitioner argues that ***Burger King*** is not a *container* case but rather a *packaging* case. Petitioner states that although the facts in ***Burger King*** involved containers, the language used by the court refers to packaging

materials that are exempt from sales tax as a critical element. Petitioner emphasizes the following sentences from the case:

> All the more is this so in the case of ***Burger King***, whose packaging, as we have seen, 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 (***Matter of Burger King v. State Tax Commn.***, ***supra***, 435 NYS2d, at 693).

Petitioner notes that the above-quoted language uses the word *packaging* and not just *containers* and, thus, petitioner argues that the Administrative Law Judge misinterprets the case to apply to physical containers only. We disagree.

In ***Burger King***, the court was focusing on whether wrappers for hamburgers, cups for beverages and sleeves for french fries were purchased for resale. As mentioned by the Administrative Law Judge, the court specifically looked to *container cases* in order to resolve the issue presented in ***Burger King***. The court summarized the *container cases*, in pertinent part, as follows:

> The nub of these 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" (***Matter of American Molasses Co. v. McGoldrick***, 281 NY 269, 273), were nonetheless sales for resale as such. The cartons, although *"not inseparable"* from the contents, were, in this context, being resold "*as containers"* (***see***, ***Matter of Colgate-Palmolive-Peet Co. v. Joseph***, 308 NY 333, 339 [emphasis in original]) (***Matter of Burger King v. State Tax Commn.***, ***supra***, 435 NYS2d, at 692).

Therefore, it is quite apparent that the court did rely on the container cases for its analysis and its conclusion that Burger King purchased its packaging (i.e., wrappers, cups and sleeves) from its

suppliers for *resale as such* to its customers and, thus, was entitled to the resale exclusion (***Matter of Burger King v. State Tax Commn.***, ***supra***, 435 NYS2d, at 693).

The pertinent regulation at issue in this case provides:

> Tangible personal property which is necessary to contain an item of food or drink for delivery to the customer and which is transferred to the customer with the sale of the food or drink may be purchased for resale by caterers. Such property includes disposable containers, wrappers, cups, dinner plates, trays, platters and the accompanying lids (20 NYCRR 527.8[f][2][iii][a]).

Petitioner argues that the dry ice is *necessary to contain* the food which it delivers to the airlines in the context of maintaining the temperature within the proper limits. We agree with the Administrative Law Judge that the dry ice at issue does not fall within the meaning and intent of this regulation.

The regulation sets forth an illustrative list of items which it considers to qualify for the exclusion: disposable containers, wrappers, cups, dinner plates, trays, platters and accompanying lids. These items are all physical containers and petitioner has not pointed us to any authority which would convince us to expand the regulation to something other than physical containers. Therefore, we find that the dry ice is not entitled to the resale exclusion found in Tax Law § 1101(b)(4)(i)(A).

Turning to petitioner's alternative argument, it claims that the dry ice is entitled to the exemption provided for in Tax Law § 1115(a)(19) for wrapping and packaging material used in packing tangible personal property for sale. Petitioner relies on 20 NYCRR 528.20(b) which defines *preservative materials* as a type of packaging material and argues that dry ice is such a

preservative material. However, petitioner misreads Tax Law § 1115(a)(19) under which 20 NYCRR 528.20(b) was promulgated.

In order to qualify for exemption under that section of the Tax Law, the dry ice would have to be used in packing tangible personal property for sale. As stated by the court in ***Matter of Servomation Corp. v. State Tax Commn.*** (***supra***) and, as explained by the Administrative Law Judge in her determination, prepared food for sale is not tangible personal property within the meaning and intent of the Tax Law. Accordingly, petitioner cannot claim exemption under Tax Law § 1115(a)(19).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sky Chefs, Inc. is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Sky Chefs, Inc. is denied; and

4. The Notice of Determination dated December 2, 1994 is sustained.

DATED: Troy, New York
March 18, 1999

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner