STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
UPSTATE FARMS COOPERATIVES, INC. F/K/A UPSTATE MILK COOPERATIVES, INC.	:	DECISION DTA NO. 816340
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, 1993 through August 31, 1995.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on October 7, 1999 with respect to the petition of Upstate Farms Cooperatives, Inc. f/k/a Upstate Milk Cooperatives, Inc., 7115 West Main Street, LeRoy, New York 14482-9352. Petitioner appeared by Harter, Secrest & Emery, LLP (William M. Colby, Esq. and Christopher M. Potash, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (James Della Porta, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception and petitioner filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the Division of Taxation's request, was heard on July 13, 2000 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal rendered its decision on January 11, 2001. Petitioner filed a petition for judicial review pursuant to Civil Practice Law and Rules Article 78 with the Appellate Division, Third Department of the New York State Supreme Court.

On January 31, 2002, the Appellate Division in ***Matter of Upstate Farms Coop. v. Tax Appeals Tribunal*** (290 AD2d 896, 736 NYS2d 786) annulled our decision and remanded this matter to the Tax Appeals Tribunal for a decision on petitioner's alternate claim that its purchases of milk crates were exempt as purchases for resale under Tax Law § 1101(b)(4).[1] The record in this matter being complete and the parties already having been provided an opportunity to present arguments and briefs on this issue, the Tribunal will decide this issue herein (20 NYCRR 3000.17[e][1]).

ISSUES

I. Whether petitioner's purchases of milk crates for use in its delivery of milk and other products to its customers were exempt from sales tax under Tax Law section 1115(a)(19).

II. Whether petitioner's purchases milk crates are for "resale as such" and exempt from sales and use tax as purchases for resale under Tax Law § 1101(b)(4).

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[1]The Court stated: "With regard to petitioner's alternate claim in its petition that its purchases of milk crates were exempt as purchases for resale under Tax Law § 1101(b)(4), the ALJ determined that this claim was moot after concluding that petitioner was entitled to the "packaging material" exemption under Tax Law § 1115(a)(19). Thus, the ALJ never rendered a decision on the purchase for resale exemption which could have been final pursuant to Tax Law § 2010(4). Although having the authority to decide the issue or remit the case to the ALJ (***see***, 20 NYCRR 3000.17[e][1], [2]; ***see also***, Tax Law § 2006[7]), the Tribunal did neither, ruling only that petitioner was not entitled to the "packaging material" exemption (Tax Law § 1115[a][19]) and declining to consider the purchase for resale exemption (Tax Law § 1101[b][4]), because neither party took an exception to the ALJ's ruling of that issue (***see***, 20 NYCRR 3000.17[b])" (***Matter of Upstate Farms Coop. v. Tax Appeals Tribunal***, ***supra***, 736 NYS2d, at 790). The Court noted that since the Administrative Law Judge sustained petitioner's claim for exemption under Tax Law § 1115(a)(19), petitioner would not have been aggrieved to file an exception to the Administrative Law Judge's failure to consider the alternate claim for the "purchase for resale" exemption. "Thus, we find that since petitioner never waived or abandoned the purchase for resale issue, the Tribunal, having reversed the ALJ's determination on the packaging material exemption, should have either addressed the purchase for resale exemption itself or remitted the matter to the ALJ for further proceedings on the issue" (***Matter of Upstate Farms Coop. v. Tax Appeals Tribunal***, ***supra***, 736 NYS2d, at 790).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "7," "11," "12" and 13" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioner, which is owned by approximately 430 small dairy farmers in the western part of New York State, processes and distributes milk and dairy products to various retailers, including the Wegman's supermarket chain, and to institutional customers, such as hospitals and nursing homes. Petitioner operates three milk bottling plants located in Buffalo, Rochester and Jamestown, respectively. During the two-year period at issue,[2] petitioner had gross sales of approximately $50,000,000.00, none of which were subject to sales tax. However, on audit, the Division of Taxation ("Division") determined that certain *purchases* made by petitioner were subject to sales tax.

The Division issued two statements of proposed audit adjustment against petitioner. One dated January 21, 1997 asserted sales and use taxes due of $27,463.19 plus interest on petitioner's purchases of certain fixed assets and recurring expenses for the three-year period June 1, 1993 through May 31, 1996, which has not been contested by petitioner. The second dated February 6, 1997 asserted sales and use taxes due of $59,077.39 plus penalty and interest on petitioner's purchases of milk cases[3] and dollies totaling $738,467.63 for the two-year period September 1, 1993 through August 31, 1995.

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[2] Although the period audited consisted of the three-year period, June 1, 1993 through May 31, 1996, petitioner has contested tax determined due by the Division of Taxation during only the two-year period at issue, September 1, 1993 through August 31, 1995.

[3]The milk cases at issue also have been referred to as milk crates in the record.

The Division issued a Notice of Determination, dated March 24, 1997, against petitioner asserting sales and use taxes due in the total amount of $59,077.39, which corresponds to the amount asserted due in the second statement of audit adjustment noted above, plus interest. The notice did *not* assert any penalties against petitioner. Tax asserted due was detailed by sales tax quarters as follows:

Tax Period Ended	Tax Asserted Due
November 30, 1993	$14,198.04
February 28, 1994	8,712.46
May 31, 1994	3,920.88
August 31, 1994	3,436.33
November 30, 1994	1,634.56
February 28, 1995	12,712.32
May 31, 1995	9,641.39
August 31, 1995	4,821.41
Total	$59,077.39

Of the total sales and use taxes asserted due by the Notice of Determination dated March 24, 1997 of $59,077.39, the parties stipulated that $56,311.81 relates to petitioner's purchases of milk cases, and $2,765.58 relates to petitioner's purchases of dollies used to deliver milk. Petitioner contested only $56,311.81 of the total tax asserted due by the Notice of Determination

of $59,077.39, thereby conceding that sales and use tax of $2,765.58 is due on its purchases of dollies.[4]

At its three milk bottling plants, petitioner processes and then packages milk in cartons and jugs.[5] These cartons and jugs are then packed in milk cases for delivery to petitioner's customers. The milk cases, with the cartons and jugs packed in them, are left with petitioner's customers upon delivery. They are not unpacked and immediately removed by petitioner's personnel.

The Division's auditor prepared a schedule which details petitioner's purchases of the milk cases at issue in this proceeding as follows:

Vendor	Invoice Date[6]	Invoice Amount	Tax Alleged Due
Langer Manufacturing Co.	09/24/93	$170,811.92	$13,664.95
Langer Manufacturing Co.	12/29/93	108,905.81	8,712.46
Langer Manufacturing Co.	09/15/94	20,432.04	1,634.56

[4] A listing of petitioner's invoices prepared by the Division's auditor shows that he determined sales and use taxes due of $2,785.58 on the following purchases of dollies:

Invoice Date	Vendor	Invoice Amount	Tax Due
October 11, 1993	Cannon Equipment	$ 6,663.59	$ 553.09
March 14, 1994	Cannon Equipment	13,243.41	1,059.47
December 9, 1994	Various	14,662.78	1,173.02
Totals		$34,569.78	$2,785.58

There is no explanation in the record for the $20.00 difference between the total of $2,785.58 shown in this footnote and the $2,765.58 conceded due by petitioner on its purchases of dollies.

[5] Petitioner also packages juice products in cartons and jugs which are also packed into milk cases for delivery to its customers.

[6] The invoices are listed in the same order as in a worksheet prepared by the auditor which was introduced into evidence. Although grouped by year, they were not always listed in chronological order.

Langer Manufacturing Co.	07/21/94	35,724.72	2,857.98
Langer Manufacturing Co.	07/12/94	7,229.40	578.35
Langer Manufacturing Co.	05/27/94	13,988.40	1,119.07
Erie Crate & Mfg. Co.	05/06/94	10,220.90	817.67
Erie Crate & Mfg. Co.	03/30/94	11,558.40	924.67
Langer Manufacturing Co.	12/21/94	55,579.72	4,446.38
Langer Manufacturing Co.	12/12/94	88,661.48	7,092.92
Langer Manufacturing Co.	04/05/95	120,517.39	9,641.39
Langer Manufacturing Co.	06/30/95	60,267.67	4,821.41
Totals		$703,897.85	$56,311.81

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

> Petitioner also introduced into evidence photocopies of four sample sales invoices. These invoices each account for cases delivered to the customer as well as cases returned by the customer to petitioner at a refund of deposit of $2.00 per case. The cases had been purchased by petitioner for approximately $4.50 each for wire metal milk cases and $2.00 each for plastic milk cases. For example, an invoice dated May 7, 1994[7] to a customer, Top Lube, Inc., for shipments to a Buffalo store named Win Mart shows a billing of $88.00 for 44 cases delivered to the customer and a credit of $94.00 for 47 cases returned by the customer to petitioner.
>
> Petitioner would deliver the milk cases filled with its milk products to its customers. Petitioner also would pick up any of its empty milk cases from prior deliveries to such customers at that time (***see***, Hearing Tr., p. 63).
>
> The metal cases are durable, "hefty duty", multiple use cases (Hearing Tr., p. 97). The plastic milk cases are also reusable but

[7]This invoice is dated within the audit period. Two of the four other invoices are dated outside the audit period.

> do not last as long as the metal cases. Both metal and plastic milk cases wear out with multiple deliveries over time.[8]

The charge of $2.00 per case represented a deposit which petitioner was required to charge its customers pursuant to a regulation of the Department of Agriculture and Markets promulgated at 1 NYCRR 42.4. Such charges were not included in the gross sales reported by petitioner in the sales tax returns filed for the period at issue.

In its general ledger, petitioner has accounts which keep track of milk cases delivered to its customers as well as cases returned by them. Petitioner introduced into evidence an analysis entitled "Consolidated Case Deposits," based upon its general ledger, which shows that as of the end of June 1993, petitioner had deposits on milk cases with a negative balance of $296,496.32. On a monthly basis, running from July 1993 until June 1996, this balance varied based upon the number of cases returned by and delivered to customers. In the course of this three-year period, the balance ranged from a negative $338,455.99, as of October 1993, to a negative $217,068.29 as of August 1995. As of June 1996, this analysis showed a balance of a negative $228,339.00.[9]

For income tax purposes, petitioner depreciated the cost of the milk cases, which were carried on petitioner's balance sheet as an asset.

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

> Petitioner did not have any written agreement with its customers specifying ownership of the milk cases. Petitioner

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[8]We modified finding of fact "7" of the Administrative Law Judge's determination to more fully set forth the description of the milk cases.

[9] Petitioner's analysis of milk case deposits also has a column labeled "adjustments" which was not explained in the record. Also unexplained is why the varying balance amounts are dollar and cents amounts not evenly divisible by $2.00 in light of the $2.00 deposit per milk case.

offered no documentary evidence such as invoices, delivery tickets or contracts, which reflected that ownership of the milk cases was being transferred to its customer upon delivery of its milk products. Petitioner's invoices or delivery tickets were silent as to whether its customers were required to return the milk cases in which the milk containers were delivered to them. However, petitioner did maintain a record of the number of milk cases in the possession of its customers and that number was reflected on petitioner's customer invoices (***see***, Hearing Tr., p. 46).

If a customer did not return milk cases to petitioner, petitioner would not and did not force their return (***see***, Hearing Tr., pp. 45, 95). Petitioner's director of finance, Edward Luongo, testified that petitioner's customers sometimes used the milk cases, while in their possession, for store display purposes. When petitioner would run low on milk cases, it sometimes sent its salesmen to see if they could retrieve empty milk cases from customers (***see***, Hearing Tr., p. 74). Mr. Luongo testified that since a new metal milk case costs approximately $4.50, it is more economical for petitioner to seek the return of a milk case in exchange for the $2.00 deposit than to purchase new milk cases. Nevertheless, based upon Mr. Luongo's credible testimony, it was not petitioner's policy to *compel* customers to return milk cases. Since litigation is expensive, Mr. Luongo indicated that it probably would not make economic sense to use litigation as a way to recover milk cases. However, Mr. Luongo acknowledged that if a customer had a large number of milk cases, petitioner might feel differently (Hearing Tr., p. 75). In practice, Mr. Luongo testified that the return rate was "relatively high." In fact, the milk cases delivered and the milk cases returned to petitioner are nearly the same, though not exact.

Mr. Luongo testified that although petitioner keeps records of the milk cases that are on deposit and those that are returned, in his opinion, the milk cases are sold to petitioner's customers (***see***, Hearing Tr., pp. 40, 46). Mr. Luongo testified that petitioner did not consider that it had a "right" to recollect milk cases (Hearing Tr., p. 44). Nevertheless, when petitioner runs low on milk cases, Mr. Luongo testified he would ask his salesmen, in a bantering way: "Where are they? You know, why aren't they coming back? Where are those things? Are they losing them? Are they eating them?" (Hearing Tr., p. 81 [lines 6-8]) Mr. Luongo acknowledged that he had never had a customer indicate to him

> that the customer thought it was the owner of the subject milk cases (***see***, Hearing Tr., p. 100). [10]

We modify finding of fact "12" of the Administrative Law Judge's determination to read as follows:

> The Division introduced into evidence a determination dated April 5, 1982 by the Commissioner of the Department of Agriculture and Markets concerning proposed amendments to sections 42.4 and 42.5 of the rules and regulations of the said Department, which would increase from 50¢ to $2.00 per case, the minimum milk case deposit to be collected by milk dealers for milk cases delivered in New York City, Long Island and Westchester County. This determination included a finding which set forth the regulatory purpose for requiring a deposit on milk cases as follows:
>
> > The rules and regulations for a deposit on milk cases [were] instituted to improve accountability of cases and thereby reduce the cost to the industry of replacing them. The loss of cases had become a serious problem to milk dealers resulting in increased costs for marketing milk and ultimately higher prices to consumers . . . .
>
> In his conclusion to the determination increasing the minimum deposit to $2.00 per case, the Commissioner stated, in pertinent part, that:
>
> > A case deposit representing a high proportion of the cost of a new case is beneficial to a milk processor because it returns to him a large part of the value of the lost case and also *encourages customers to return them*.
> >
> > * * *
> >
> > The minimum case deposit should most appropriately be at a level that nearly represents the

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[10]We modified finding of fact "11" of the Administrative Law Judge to more fully and accurately reflect the record. We note, in particular, that Mr. Luongo did not testify that petitioner "did not have the right to compel" return of the milk cases. Rather, Mr. Luongo only testified that petitioner did not and would not compel their return.

> cost of a replacement case. This would best *assure dealers* that their *customers would safeguard and return milk cases* to them (Exhibit "L," p. 3, emphasis added).[11]

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

> The regulations of the Department of Agriculture and Markets at 1 NYCRR 42.3 also require milk dealers like petitioner to put its name on its milk cases. Petitioner's name appears on each of its milk cases in compliance with this regulation (***see***, Hearing Tr., p. 63). Mr. Luongo explained his view of the purposes for this requirement as follows:
>
> > Let's take Wegman's . . . They may have dairy cases that have been delivered from other processors in there too, so it's a way of kind of keeping those things sorted somewhat. And . . . we believe that milk cases sometimes end up in the hands of individuals . . . That's what we think . . . But it's an indication that those things [milk cases] shouldn't be taken. They're not for your personal use. So I think those are the two practical purposes [for having the dealers names on the milk cases]. One is to keep them organized at the store level for the customer, and one is to hopefully prevent theft (Hearing Tr., p. 93).[12]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Initially, the Administrative Law Judge noted that sales tax is imposed upon "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided" (Tax Law

[11]We modified finding of fact "12" of the Administrative Law Judge's determination to more fully set forth the record.

[12]We modified finding of fact "13" of the Administrative Law Judge's determination to reflect that petitioner's name appears on the milk cases.

§ 1105[a]), and all sales of tangible personal property are presumptively subject to tax pursuant to Tax Law § 1132(c) "until the contrary is established."

Tax Law § 1115(a) enumerates a list of items of tangible personal property which are exempt from the imposition of sales tax on the receipts from the sale of such items. Among the items included in Tax Law § 1115(a)(19) are the following:

> Cartons, containers, and wrapping and packaging materials and supplies, and components thereof for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to the purchaser.

The Administrative Law Judge concluded that the milk cases at issue are properly viewed as "containers," i.e., "receptacle[s] . . . for the shipment of goods" (Webster's Ninth New Collegiate Dictionary 282 [1983]). The milk cases receive and contain the cartons and jugs of milk produced by petitioner, which are then shipped to its customers. Second, the milk cases are used by petitioner to pack cartons and jugs of milk, i.e., "tangible personal property" (Tax Law § 1101[b][6]). Therefore, the Administrative Law Judge found the crucial question to be answered, in deciding whether the exemption at issue is applicable to the milk cases, is whether the milk cases are *actually transferred* by petitioner to its customers.

The Administrative Law Judge pointed out that the term *actually transferred*, as used here, means that the packaging material is physically transferred to the purchaser *for whatever disposition the purchaser wishes* (20 NYCRR 528.20[b][4]).

The Administrative Law Judge found that petitioner did not have the right under any written agreement, invoice or delivery ticket, to require its customers to return the milk cases. From this fact, the Administrative Law Judge inferred that the milk cases were actually transferred by petitioner to its customers.

The Administrative Law Judge concluded that although petitioner's name was on the milk cases and the $2.00 per case deposit refund was an incentive for its customers to return the cases, petitioner could not compel their return. Therefore, petitioner's purchases of milk cases must be treated as exempt from sales tax under Tax Law § 1115(a)(19), because they were "actually transferred" to its customers.

In light of the above, the Administrative Law Judge found it unnecessary to determine whether petitioner *sold* the milk cases to its customers. Further, based on his conclusion, the Administrative Law Judge did not address the issue of whether petitioner's purchases of the milk cases were purchases for resale.

ARGUMENTS ON EXCEPTION

The Division objects to the Administrative Law Judge's finding that petitioner had no right to compel its customers to return the milk cases. The Division also disagrees with the conclusion that petitioner actually transferred its milk cases to its customers. Thus, the Division states that the milk cases are not exempt from sales tax under Tax Law § 1115(a)(19).

The Division's main contention is that petitioner's milk cases do not qualify for the packaging exemption set forth in Tax Law § 1115(a)(19) because petitioner has not proven that its customers could dispose of the milk cases in any fashion they wished. Put another way, the Division urges that petitioner has not proven that it had actually transferred the cases to its customers for purposes of the exemption, which requires that the packaging material be physically transferred to the purchaser *for whatever disposition the purchaser wishes* (20 NYCRR 528.20[b][4]). The customers, the Division urges, had no right to sell, lease or transfer

the cases to a third party, so they did not have a right to dispose of the cases in any way they wished.

Petitioner continues to argue, as it did below, that its milk cases were actually transferred to its customers, that it could not compel return of the milk cases and that the purchase of the milk cases is exempt from sales tax pursuant to Tax Law § 1115(a)(19). Petitioner points to Example 1 in the regulations at 20 NYCRR 528.20(b), which provides that a soda bottle, returnable for deposit, nonetheless is actually transferred to the purchaser and, therefore, may be purchased without payment of tax under the exemption provided by Tax Law § 1115(a)(19). Petitioner also argues that its purchases of milk cases were purchases for resale, relying on the Appellate Division decision in ***Matter of Nehi Bottling Co. v. Gallman*** (39 AD2d 256, 333 NYS2d 824, ***affd*** 34 NY2d 808, 359 NYS2d 44).

The Division counters that ***Matter of Nehi Bottling Co. v. Gallman*** (***supra***) did not establish a general proposition that the exchange of property for a deposit constitutes a sale for the purposes of sales tax. In any event, the Division argues, the ***Nehi Bottling*** decision is distinguishable, because, *inter alia*, the milk cases were used by petitioner for transporting its products and, therefore, were not purchased solely for resale to its customers.

OPINION

Under Tax Law § 1105(a), sales tax is imposed upon "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article." All sales of tangible personal property are presumptively subject to tax pursuant to Tax Law § 1132(c) "until the contrary is established."

Exemptions from tax are strictly construed (***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 371 NYS2d 715, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027). When the issue to be decided is whether the taxpayer is entitled to an exclusion or an exemption from tax, the taxpayer is required to prove that its interpretation of the statute is the only reasonable interpretation or that the Division's interpretation is unreasonable (***Matter of Grace v. New York State Tax Commn***., ***supra***; ***Matter of Blue Spruce Farms v. New York State Tax Commn***., 99 AD2d 867, 472 NYS2d 744, ***affd*** 64 NY2d 682, 485 NYS2d 526). These principals of statutory construction also apply to the interpretation of regulations (***see, Matter of Cortland-Clinton, Inc. v. New York State Dept. of Health***, 59 AD2d 228, 399 NYS2d 492). The burden of proof to show entitlement to an exemption is on the petitioner (***Matter of Young v. Bragalini***, 3 NY2d 602, 170 NYS2d 805; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451; 20 NYCRR 3000.15[d][5]).

Tax Law § 1115(a)(19) provides a list of items of tangible personal property the purchase of which is exempt from the imposition of sales tax, including:

> Cartons, containers, and wrapping and packaging materials and supplies, and components thereof for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to the purchaser.

The Division's regulations, in pertinent part, provide:

> The sale of cartons, containers, and wrapping and packaging materials . . . for use and consumption by a vendor in packaging or packing tangible personal property for sale, and *actually transferred by the vendor to the purchaser*, is exempt from sales and use tax.
>
> Example 1: A manufacturer sells goods in bulk and ships them in corrugated cardboard cartons to a retailer. The retailer after using the cartons as

> temporary storage and containers removes the goods and discards the cartons. The cartons are not subject to tax (20 NYCRR 528.20[a][1], emphasis added).

The term "*Packaging material* includes, but is not limited to: bags, barrels, baskets, binding, bottles, boxes . . . cartons . . . crates . . . and wrapping paper actually transferred with the product to the purchaser" (20 NYCRR 528.20[b][1]). A *purchaser*, for purposes of this regulation, is "any person purchasing tangible personal property from a vendor, whether or not he is the ultimate consumer" (20 NYCRR 528.20[b][3]).

The term *"actually transferred* means that the packaging material is physically transferred to the purchaser, *for whatever disposition the purchaser wishes."*

> Example 1: A returnable soda bottle may be returned for a refund of deposit or disposed of otherwise. Such a bottle is actually transferred to the purchaser and may be purchased without payment of tax (20 NYCRR 528.20[b][4], second emphasis added).

However, returnable containers purchased at retail by a person who does not transfer ownership of the container, are subject to tax. "*Title* to the container *remains in the seller when possession* of the container *is transferred to one who purchases commodities* contained therein *and then returns the container* to the seller *for refilling* (20 NYCRR 528.20[c][1], emphasis added). "Cartons or other packaging materials purchased by a vendor for his own use or consumption are subject to tax" (20 NYCRR 528.20[c][2]).

We agree with the Administrative Law Judge that the milk cases at issue are properly viewed as containers, i.e., "receptacle[s] . . . for the shipment of goods" (Webster's Ninth New Collegiate Dictionary 282 [1983]). The milk cases receive and contain the cartons and jugs of milk produced by petitioner which are then shipped to its customers. Second, the milk cases are

used by petitioner to pack cartons and jugs of milk, i.e., tangible personal property (Tax Law § 1101[b][6]). Therefore, we agree with the Administrative Law Judge that, in determining whether the exemption at issue is applicable to the milk cases, it must be determined whether petitioner has proven that its milk cases were actually transferred to its customers. However, unlike the Administrative Law Judge, we find that it must also be determined whether the milk cases are a type of container intended to be covered by the exemption in Tax Law § 1115(a)(19).

Tax Law § 1115(a)(19) was enacted by Chapter 581 of the Laws of 1974. The sponsor's Memorandum in Support of this legislation states, in pertinent part, with regard to the then proposed exemption: "[t]he exemption would be limited to packaging materials actually transferred to the purchaser. *No exemption would exist,* therefore, *for durable, costly containers returned to the vendor for refilling*" (Exhibit "J," p. 10, emphasis added). We note that nearly identical language is contained in the Governor's message approving this legislation (***see***, Exhibit "K").

There does not appear to be any dispute that petitioner uses its milk cases to deliver milk and other products to its customers or that most of these cases, when emptied, are returned to petitioner to be re-used for the same purpose.

Part 42 of Title 1 of the Rules and Regulations of the Department of Agriculture and Markets governing the conduct of milk dealers is unambiguous:

> *Every milk dealer who sells, delivers or furnishes milk . . . in packaged form* to another milk dealer or other person for sale . . . [in New York] in a *milk case which is owned by the supplying dealer* shall assess or collect a deposit . . . . The deposit shall be held by the supplying dealer until the milk case is returned to him . . . (1 NYCRR 42.5[a]).

A customer is only entitled to a refund for the return of a milk case that is "in useful condition allowing for normal wear and breakage" (1 NYCRR 42.5[c]).

This regulation imposes a duty upon milk dealers, as owners of milk cases, to charge their customers a deposit for the milk cases. The evidence supports the conclusion that petitioner complies with this regulation by charging its customers a deposit for its milk cases. The fact that petitioner is charging a deposit on its milk cases is also evidence of its ownership, since the regulation only authorizes a deposit to be charged where the milk case "is owned by the supplying dealer" (1 NYCRR 42.5[a]).

Regulations of the Department of Agriculture and Markets define a milk case as *"a rigid multi-use container* used for packing and transporting or delivering cartons, bottles, jugs or other receptacles for packaging milk and milk products, and which is *made of* wood, *metal, plastic* or other rigid materials" (1 NYCRR 42.2[e], emphasis added). Those regulations also provide:

> each milk case used for the sale or delivery of milk and milk products to wholesale customers in the State of New York shall have the *name or other business identification of the person who is the owner clearly printed, embossed, inscribed* or otherwise permanently *marked on each such milk case* (1 NYCRR 42.3, emphasis added).

The record supports the conclusion that petitioner's milk cases are durable, rigid, multi-use containers made of metal or plastic and that petitioner's name is permanently affixed thereon.

As noted in the findings of fact, the Commissioner of Agriculture and Markets stated that the proposed increase in the per case deposit amount represented a high proportion of the cost of a new case because the goal was to compensate a milk processor for part of the value of a lost milk case as well as to encourage customers to return cases. It is petitioner's ownership of the milk cases that the Agriculture and Markets regulations are attempting to protect. Petitioner is

required to affix its name to the cases. Petitioner is required to assess and collect a deposit for its milk cases. While petitioner's invoices and delivery tickets do not set forth the framework between it and its customers, the above regulations fill that void.

More importantly, it is the very nature of the milk cases, as defined in the Agriculture and Markets regulations, when read in conjunction with Tax Law § 1115(a)(19) and 20 NYCRR 528.20, that makes clear that they do not come within the purview of the subject sales tax exemption, i.e., the milk cases are, by definition, rigid, durable, plastic or metal, multi-use containers (***see***, 1 NYCRR 42.2[c]). As noted above:

> [r]eturnable containers, such as drums, barrels, or acid carboys, when purchased at retail by a person who does not transfer ownership of the container, are subject to tax. Title to the container remains in the seller *when possession of the container is transferred to one who purchases commodities contained therein and then returns the container to the seller for refilling* (20 NYCRR 528.20[c], emphasis added).

The crucial element in the examples given in this regulation is their character as a durable, rigid and re-useable container. Petitioner's milk cases are used by petitioner to deliver its milk and milk products to its customers. When the milk cases are emptied, they are, for the most part, returned to petitioner to be refilled again and the process begins anew.

We find the legislative history, as reflected in the bill jacket of Chapter 581 of the Laws of 1974, instructive. As noted earlier, in the sponsor's memorandum in support of this legislation which enacted the exemption from tax contained in Tax Law § 1115(a)(19), it is stated, in pertinent part, that: "[t]he exemption would be limited to packaging materials actually transferred to the purchaser. *No exemption would exist, therefore, for durable, costly containers returned to the vendor for refilling*" (Exhibit "J," p. 10, emphasis added). Similar language was

included in the Governor's message approving this legislation (Exhibit "K"). It is clear from this language that the Legislature and the Governor did not intend that the subject exemption should extend to durable, returnable containers such as the milk cases involved here.

Further, petitioner did not carry its burden of establishing that the milk cases were actually transferred to its customers for whatever disposition they wished. Petitioner's own witness, Edward Luongo, testified that it had a high rate of return on its milk cases. "The deliveries and returns are generally close. They're not exact. Sometimes a case returned is more, sometimes its less" (Hearing Tr., p. 59). Mr. Luongo's testimony was credible that when petitioner ran low on milk cases, he would send petitioner's salesmen to its customers in an attempt to retrieve empty cases. Mr. Luongo's testimony, without more, was insufficient to show that the cases were actually transferred to petitioner's customers. A mere belief on Mr. Luongo's part that the milk cases were actually transferred to customers, or his opinion that petitioner did not consider itself to have the right to recollect its milk cases, is insufficient to carry petitioner's burden. The fact that petitioner had a *policy* of not compelling the return of milk cases is not the same thing as not having the right to do so. Petitioner has shown that it had that policy, but it has not proven that it did not have a right to have its cases returned to it.

Our conclusion that petitioner did not actually transfer the cases to its customers is based in large part on the regulations of the Department of Agriculture and Markets governing the conduct of milk dealers. Those regulations, as detailed above, make it quite clear that it is the milk dealers that own the milk cases, and it is the milk dealers that those regulations were promulgated to protect. We also found the following as indicia of petitioner's continued ownership of the milk cases: (1) Petitioner depreciates the cases on its income tax returns. As

the Division correctly states in its brief, "[o]ne cannot depreciate an asset one does not own" (Division's brief, p. 8); (2) Petitioner's billing statements list the number of milk cases in the possession of its customers. It would be counterintuitive for petitioner to keep an inventory of milk cases owned by someone else; and (3) Petitioner's placement of its name on the milk cases and charging a deposit to its customers is only authorized by Agriculture and Markets regulations for the owner of the milk cases.

We conclude that petitioner purchases the milk cases here for *its use* in delivering milk to its customers. The milk cases are emptied and then returned to petitioner to be refilled and re-used to deliver products to its customers. Such durable, refillable containers are not the type of containers contemplated within the meaning and intent of the exemption provisions in Tax Law § 1115(a)(19) and 20 NYCRR 528.20(a)(1). Further, these milk cases are not exempt for the reason that petitioner has failed to provide sufficient proof that they are actually transferred to petitioner's customers (***cf., Matter of Liquid Carbonic Indus. Corp***., Tax Appeals Tribunal, December 9, 1999).

Based on the above law and regulations, we conclude that petitioner remains the owner of the milk cases.

The Appellate Division agreed, stating, in pertinent part:

> Petitioner's compliance with these [milk] regulations further supports the conclusion that petitioner did not transfer ownership of the milk crates but, rather, merely temporarily transferred possession of them to the retailers who were only purchasing the jugs or cartons of milk contained in the crates . . . . As such, the Tribunal's determination that the reusable, returnable milk crates were "devices used to facilitate delivery of [petitioner's milk] product" (20 NYCRR 528.20[c][3]) and were subject to sales tax as purchases for petitioner's own use and consumption (20 NYCRR 528.20[c][2]) and not exempt as "packaging materials"

> within the meaning of Tax Law section 1115(a)(19) was neither erroneous nor arbitrary or capricious [citations omitted]" (***Matter of Upstate Farms Coop. v. Tax Appeals Tribunal*** (***supra***, 736 NYS2d, at 789).

The issue to be next addressed is whether petitioner's purchases of milk crates are exempt from sales tax as purchases for resale pursuant to Tax Law § 1101(b)(4).

The sales tax is imposed upon "[t]he receipts from every retail sale of tangible personal property" except as otherwise provided by Article 28 of the Tax Law (Tax Law § 1105[a]). A "retail sale" is defined, in pertinent part, as a "sale of tangible personal property to any person for any purpose, other than (A) for *resale as such* . . . ." (Tax Law § 1101[b][4][i][A], emphasis added). There is a statutory presumption that all receipts for property or services are subject to tax and the burden to prove otherwise rests with the taxpayer (Tax Law § 1132[c]; ***see, Matter of Savemart, Inc. v. State Tax Commn.***, 105 AD2d 1001, 482 NYS2d 150, ***appeal dismissed*** 64 NY2d 1039, 489 NYS2d 1029).

Petitioner maintains that its purchases of milk cases are for "resale as such" to its customers and, thus, exempt from tax pursuant to Tax Law § 1101(b)(4)(i)(A). The Court of Appeals has held that an item is purchased for resale, for purposes of Tax Law § 1101, when the purchaser acquires the item for the purpose of resale (***see, Matter of Albany Calcium Light Co. v. State Tax Commn.***, 44 NY2d 986, 408 NYS2d 333; ***Matter of Micheli Contr. Corp. v. New York State Tax Commn.***, 109 AD2d 957, 486 NYS2d 448). Any resale which is purely incidental to the primary purpose of the business is not a purchase for resale as such (***see, Matter of Laux Advertising v. Tully***, 67 AD2d 1066, 414 NYS2d 53; ***Matter of Custom Mgt. Corp. v. New York State Tax Commn.***, 148 AD2d 919, 539 NYS2d 550). Thus, petitioner must prove that it sold the milk cases to its customers to collect the $2.00 fee and that the primary purpose of

the cases was not for the packaging and the delivery of milk and milk products, in order to qualify for the resale exemption.

Section 1101(b)(5) of the Tax Law defines "Sale, selling or purchase," in pertinent part, as "[a]ny transfer of title or possession or both . . . rental, lease or license to use or consume . . . by any means whatsoever *for a consideration* . . ." (emphasis added). The Tax Law does not separately define a "resale." "It appears then that the Legislature does not consider a sale and resale as discrete concepts and thus a purchaser who acquires an item for the purpose of sale or rental . . . purchases it for resale within the meaning of the statute" (***Matter of Albany Calcium Light Co. v. State Tax Commn.***, ***supra***, 408 NYS2d, at 334). In ***Albany Calcium Light***, the petitioner used cylinders to deliver gas to its customers and charged a demurrage fee when customers retained gas cylinders beyond a certain time period. The Court of Appeals found that petitioner did not acquire the cylinders with the expectation of collecting these fees, which were purely *incidental to its primary business of selling gas* to its customers, and held that the petitioner's original purchase of metallic cylinders was not for resale as such, and not exempt from sales tax as a purchase for resale (***Matter of Albany Calcium Light Co. v. State Tax Commn., supra***).

We have found that: (i) petitioner *uses* the milk cases to deliver its products; ii) when petitioner delivers milk products to its customers using the milk cases, petitioner retains ownership of the cases; (iii) most, if not all, of these cases are recovered by petitioner for further use in providing milk to its customers; (iv) the $2.00 deposit per milk case charged to its customers was determined by State regulations (1 NYCRR 42.4), and not by petitioner based on its costs of doing business; (v) the $2.00 per case deposit for metal wire cases is less than

petitioner's per unit cost of $4.50 per case; (vi) the deposit charges were not included in the gross sales reported by petitioner in its filed sales tax returns; and (vii) petitioner depreciated the cost of the milk cases, which were carried on petitioner's books as an asset.

Based on all of these factors, we conclude that petitioner did not purchase milk cases solely for the purpose of resale as such. This conclusion is buttressed by the fact that petitioner uses and re-uses the milk cases in delivering its products. Such self use militates against petitioner's claim that its purchases of milk cases are solely for resale. Petitioner is not in the business of selling milk cases, it is in the business of selling milk. To the extent that milk cases are provided to petitioner's customers, it is incidental to petitioner's primary business purpose of selling milk and milk products (***Matter of Albany Calcium Light Co. v. State Tax Commn., supra***). For all of the above reasons, we find petitioner's reliance on ***Matter of Nehi Bottling Co. v. Gallman*** (***supra***) misplaced.

Finally, section 1101(b)(5) of the Tax Law defines a sale, in pertinent part, as "[a]ny transfer of title or possession or both . . . rental, lease or license . . . by any means whatsoever *for a consideration* . . . ." While petitioner provided the subject cases to its customers when making milk deliveries, we do not find any consideration was given for the transfer of the cases. The customers pay for the milk and milk products. The deposit that is paid is not in consideration for the temporary transfer of the cases, but is a set amount mandated by State regulations. The deposit amount does not even cover petitioner's cost to purchase the metal wire milk cases. Presumably, if petitioner were selling these cases, it would set a price sufficient to cover its costs of doing business, plus profit. But as we have already noted, petitioner does not set the price for

the cases, the State's regulations do that. Thus, we conclude that the milk crates are not purchased by petitioner for resale as such and are not exempt from sales and use tax.

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

1. The exception of the Division of Taxation is granted;

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

3. The petition of Upstate Farms Cooperatives, Inc. f/k/a Upstate Milk Cooperatives, Inc. is denied; and

4. The Notice of Determination dated March 24, 1997 is sustained.

DATED: Troy, New York
May 2, 2002

/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