

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
DUNKIN' DONUTS MID-ATLANTIC DISTRIBUTION CENTER, INC.	:	DETERMINATION 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.	:	

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Petitioner, Dunkin' Donuts Mid-Atlantic Distribution Center, Inc., 1607 Imperial Way, P.O. Box 506, Thorofare, New Jersey 08086, filed a petition 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 by its duly appointed attorney and representative, Klieman, Lyons, Schindler, Gross & Pabian (Jay M. Pabian, Esq., of counsel),<sup>1</sup> and the Division of Taxation by William F. Collins, Esq. (James P. Connolly, Esq., of counsel), signed a waiver of hearing and consented to have the matter determined based upon stipulated facts, documents and briefs. On April 6, 1993, the Division of Taxation submitted its documentary exhibits, including the parties' joint stipulation of facts. On May 13, 1993, petitioner submitted a single exhibit, i.e., an affidavit of petitioner's Vice President and General Manager. Petitioner submitted a brief on

June 11, 1993. The Division of Taxation submitted a responding brief on July 13, 1993. Petitioner submitted a reply brief on July 28, 1993. After due consideration of the evidence and briefs filed herein, Carroll R. Jenkins, Administrative Law Judge, renders the following

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<sup>1</sup>Mr. Pabian is a Massachusetts attorney who appears in this case by special permission of the Tax Appeals Tribunal granted September 29, 1992.

determination.

### 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

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.<sup>2</sup> 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

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<sup>2</sup>There 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).

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 (Finding of Fact "2"), 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.

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.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that the wax paper used by donut shops to package their food products for delivery to customers is a "critical element" of the final product sold by the donut shops, and based on the Court of Appeals decision in Matter of Burger King v. State Tax Commission (51 NY2d 614, 435 NYS2d 689) is excluded from sales tax under Tax Law § 1101(b)(4)(i)(A).

The Division argues that this resale exclusion is applicable only to a restaurant's purchase of packaging which has a "container function" and is necessary to provide a restaurant's food product to the customer.

#### CONCLUSIONS OF LAW

A. 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 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, 152, lv denied 65 NY2d 604, 493 NYS2d 1025).

B. Petitioner maintains that its sales of wax paper to donut shops were for "resale as such" and thus exempt from tax under 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, 987, 408 NYS2d 333; Micheli Contr. Corp. v. New York State Tax Commn., 109 AD2d 957, 958, 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, if the donut shops' sales of the wax paper is incidental to their primary purpose of selling food products, their purchases of wax paper would not be for "resale as such".

C. In Burger King v. State Tax Commn. (*supra*), the Court of Appeals held that a fast food restaurant's purchases of packaging materials for wrapping or containing the food it sells came within the resale exclusion of Tax Law § 1101(b)(4)(i)(A). In that case, wax paper used to wrap hamburgers, sleeves for french fries, and cups for beverages were recognized as items purchased for "resale as such" because they were a "critical element" in the delivery of the product sold. Petitioner claims that the wax paper used to package a donut shop's food products are "as much a critical element of the final product sold to customers as was the paper packaging" in Matter of Burger King.<sup>3</sup> Petitioner argues that the wax paper sold by donut shops is used to "wrap and package food items" and:

"[S]erves the identical function as the wax paper wrappers for hamburgers in Burger King. In both instances, the wax paper promotes sanitation . . . thereby serving as a critical element of the final product sold to customers. Second, the Court's holding in Burger King contains no reference that the packaging materials must 'support or encompass' the final product sold to customers."<sup>4</sup>

D. There is no evidence in the record to support petitioner's argument that the wax paper in this case 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

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<sup>3</sup>Petitioner's Brief, p. 3.

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Id. at 5.

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. Further, petitioner's argument that the use of wax paper promotes sanitation (and there is no evidence in the record one way or the other), and is therefore a "critical element" in the delivery of the product is also without merit. The promotion of sanitary conditions in fast food establishments, while desirable, was not the basis of the holding in Burger King. Contrary to petitioner's argument, it was indispensable to the Court's decision in Burger King that the packaging materials and containers were actually transferred to Burger King's customers and that food and beverages could not be purchased without some container. In effect, petitioner is seeking to have the Burger King decision extended to any packaging materials used in providing its food products to customers, whether or not those packaging materials are necessary to contain the product.

E. In Matter of Celestial Food of Massapequa Corp. v. New York State Tax Commn. (63 NY2d 1020, 484 NYS2d 509 [1984]), the Court refused to enlarge its holding in Burger King to include within the resale exclusion napkins, stirrers and other plastic utensils provided by a restaurant to its customers. The Court stated:

"Although the cost of such items may well be taken into account by the restaurateur when setting the price of food, so are other amenities a restaurant patron expects, such as service, utilities and fixtures, which do not become a part of the product being sold merely because their cost is a factor in determining the price a customer pays. Only 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." (Id. at 1022, 484 NYS2d at 510 [emphasis added].)

To paraphrase the Court in Celestial Food, petitioner's argument in favor of enlarging the scope of the "critical element" doctrine to encompass wax tissue paper used in dispensing food products by donut shops would give rise to "potentially limitless application" (id., 484 NYS2d at 509-510).

F. Petitioner has failed to prove by clear and convincing evidence that the wax paper is a "critical element" in the delivery of the food products sold by donut shops. The wax paper is

not used to individually wrap donuts and muffins for delivery to customers, as was the case in Burger King. Rather, it is used to line donut boxes or partially separate donuts and muffins. While a customer could not purchase a cup of coffee unless the coffee is first put into a cup, one could purchase a box of donuts without it being lined with wax paper. It is "[o]nly when . . . such [packaging] items are necessary to contain the product for delivery" that they can be considered a "critical element of the product sold, and excluded from sales tax" (Matter of Celestial Food of Massapequa Corp. v. State Tax Commn., *supra* at 1022, 484 NYS2d at 510 [emphasis added]; see also, Matter of Helmsley Enterprises, Tax Appeals Tribunal, June 20, 1991).

G. The wax paper may facilitate the hygienic dispensing of food, but it is not a "critical element" of the food products sold by the donut shops. Any resale of the tissue paper by the donut shops was incidental to their primary purpose of selling muffins and donuts. Accordingly, the wax paper was not sold to the donut shops for "resale as such", and accordingly, the receipts from petitioner's sales of wax paper to the donut shops are subject to sales and compensating use tax (Matter of Laux Advertising v. Tully, *supra*; Matter of Custom Mgt. Corp. v. New York State Tax Commn., *supra*).

H. The petition of Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. is denied and the notice of determination dated April 12, 1991 is sustained.

DATED: Troy, New York  
September 23, 1993

/s/ Carroll R. Jenkins  
ADMINISTRATIVE LAW JUDGE