

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of :

APPLETREE RESTAURANT, INC. :

DECISION

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 December 1, 1974 :  
through November 30, 1977.

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Petitioner, Appletree Restaurant, Inc., 63rd Drive & Queens Boulevard, Rego Park, New York 11374, 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 December 1, 1974 through November 30, 1977 (File No. 25533).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 24, 1983 at 10:45 A.M. Petitioner appeared by Julian Zarny, Director of Taxes. The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

#### ISSUE

Whether frozen yogurt machines purchased by petitioner are equipment or machinery exempt from tax under section 1115(a)(12) of the Tax Law.

#### FINDINGS OF FACT

1. On January 8, 1979, as a result of a field audit covering the period December 1, 1974 through November 30, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Appletree Restaurant, Inc. The Notice asserted additional use tax due of \$352.00 plus penalty and interest of \$142.12 for a total due of \$494.12.

2. On audit, the Audit Division held the purchase of two electro-freeze yogurt machines in the amount of \$8,800.00 subject to use tax of \$352.00 at 4 percent. Petitioner had paid the 4 percent New York City tax to the manufacturer.

3. Petitioner operated restaurants located in Alexander's department stores in the New York City area. Petitioner operated at approximately six locations, two of which also had yogurt stands outside the entrance to the department stores.

Frozen yogurt was made by pouring liquid yogurt and other ingredients into the machines to be mixed with air and frozen. This process changed the yogurt from a liquid state to a frozen dessert. Frozen yogurt was served either in a container for take out or in a glass dish if eaten on the premises.

Petitioner did not prepare and package yogurt for distribution to other stores or supermarkets.

4. Petitioner argued that the yogurt machines used in its operation qualify for the exemption provided by section 1115(a)(12) of the Tax Law in that they are no different from those used to manufacture ice cream. In support of its position, petitioner argued that it was required to be registered with the Department of Health and was required to obtain a Retail Frozen Desserts Manufacturer's License.

Petitioner distinguished the case at hand from Burger King in that the processing of yogurt changes the initial product, a liquid mix, into a finished product, namely a frozen dessert. Petitioner contended therefore that it was engaged in the manufacture of a food product as opposed to the preparation of same.

CONCLUSIONS OF LAW

A. That section 1115(a)(12) of the Tax Law exempts from sales and use taxes machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property for sale by manufacturing or processing.

B. That petitioner processed frozen yogurt to be sold at retail through its restaurants and stands. These sales constituted receipts subject to tax under section 1105(d) of the Tax Law as opposed to section 1105(a) which taxes the receipts from the sale of tangible personal property. That the machinery or equipment at issue herein is therefore not within the exemption provided by Tax Law §1115(a)(12). (Matter of Burger King, Inc. v. State Tax Commission, 51 NY2d 614, 435 NYS2d 689(1980).)

C. That the petition of Appletree Restaurant, Inc. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 8, 1979 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 29 1984

*Rodrich W. Chen*  
PRESIDENT

*Francis Q. Koenig*  
COMMISSIONER

*Mark J. [Signature]*  
COMMISSIONER