

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Bamberger Polymers, Inc. :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation :  
Franchise Tax under Article 9-A of the Tax Law for :  
the Fiscal Years Ended 12/31/72 - 6/30/76. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York }  
County of Albany }

ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon Bamberger Polymers, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bamberger Polymers, Inc.  
c/o Samuel Licht  
3003 New Hyde Park Rd.  
New Hyde Park, NY 11040

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
18th day of January, 1984.

David Parchuck

William G. Hoppe

Authorized to administer oaths

pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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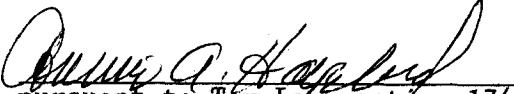
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon Stanley C. Ruchelman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stanley C. Ruchelman  
Touche, Ross & Company  
1633 Broadway  
New York, NY 10019

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
18th day of January, 1984.

  
pursuant to Tax Law section 174

Authorized to administer oaths

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

January 18, 1984

Bamberger Polymers, Inc.  
c/o Samuel Licht  
3003 New Hyde Park Rd.  
New Hyde Park, NY 11040

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Stanley C. Ruchelman  
Touche, Ross & Company  
1633 Broadway  
New York, NY 10019  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

BAMBERGER POLYMERS, INC.

DECISION

for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ended December 31, 1972, December 31, 1973, June 30, 1974, June 30, 1975 and June 30, 1976.

Petitioner, Bamberger Polymers, Inc., 3003 New Hyde Park Road, New Hyde Park, New York 11040, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended December 31, 1972, December 31, 1973, June 30, 1974, June 30, 1975 and June 30, 1976 (File No. 25219).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 30, 1982 at 11:00 A.M. with all briefs to be submitted by April 29, 1983. Petitioner appeared by Touche, Ross & Company, C.P.A.'s (Stanley C. Ruchelman, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether petitioner's wholly-owned subsidiary is a tax exempt domestic international sales corporation thereby requiring petitioner to file its corporation franchise tax reports on a consolidated basis with such subsidiary.

FINDINGS OF FACT

Petitioner and the Department of Taxation and Finance stipulated to the following facts, numbered one through thirteen.

1. Petitioner is a domestic corporation duly organized and existing under the laws of the State of New York.

2. Petitioner has as its wholly-owned subsidiary, Bamberger Polymers International Corp. ("International"), a corporation duly organized and existing under the laws of the State of New York.

3. International filed a valid election in January 1972 under IRC Sec. 922 to be treated for Federal purposes as a Domestic International Sales Corporation (DISC).

4. The U.S. Congress promulgated the DISC provisions in the Internal Revenue Code to encourage export of U.S. products, giving these corporations favorable tax treatment for so doing.

5. The New York State Tax Commission submitted legislation in response to the Federal provisions which provided beneficial tax treatment and to encourage DISCs to locate in New York State.

6. The Commission recognized the need for different treatment of DISCs which purchase property from shareholder-manufacturers (tax exempt DISCs) and those DISCs which purchase their inventory from independent unrelated parties (taxable DISCs).

7. Tax Law section 208, subdivision 9(i) defines a tax exempt DISC to be a DISC:

"...[W]hich during any taxable year or reporting year (1) received more than five percent of its gross sales from the sale of inventory or other property which [it] purchased from its stockholders, (2) received more than five percent of its gross rentals from the rental of property which [it] purchased or rented from its stockholders or (3) received more than five percent of its total receipts other than sales and rentals from its stockholders."

8. Tax Law section 209, subdivision 6 provides that:

"For any taxable year of a DISC, not exempt from tax under paragraph (i) of subdivision nine of section two hundred eight of this article, the taxes imposed by subdivision one of this section shall be computed only under either clause two or clause four of paragraph (a) of subdivision one of section two hundred ten of this chapter, whichever is greater, and paragraph (b) of such subdivision."

9. The legislative history in support of the New York State legislation pertaining to the taxation of DISC corporations is comprised, in part, of a series of letters and memoranda embodied in a microfiche file, entitled "N.Y.S. Governor, Bill Jacket, 1972, Chapter 778". Among the documents is a letter signed by Norman Gallman, New York State Commissioner of Taxation, dated June 1, 1972.<sup>1</sup>

10. Petitioner and International are distributors of plastic resins manufactured by unrelated parties and acted as such during all times relevant to this proceeding.

11. Neither petitioner nor International engage in manufacturing activities nor is either related to a person or corporation engaged in the manufacture of the type of resin distributed.

12. International was formed to carry on the export business previously carried on by petitioner. After International was formed, the petitioner continued to carry on its distribution activities to customers located within the U.S.

13. For Federal income tax purposes, International computed its income during all times relevant to this proceeding under the arm's-length method of section 482 of the Internal Revenue Code and not under either of the special pricing methods of section 994 of the Internal Revenue Code.

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<sup>1</sup> Copies of the letters and memoranda, sixty-nine pages in all, were attached to the stipulation and are part of the record herein.

In addition to the stipulated facts, supra, we make the following findings of fact.

14. On March 16, 1979, the Audit Division issued five notices of deficiency against petitioner alleging tax deficiencies under Article 9-A of the Tax Law of \$4,387.00 plus interest, \$20,900.00 plus interest, \$222.00 plus interest, \$51,220.00 plus interest and \$3,309.00 plus interest for the taxable periods ended December 31, 1972, December 31, 1973, June 30, 1974, June 30, 1975 and June 30, 1976, respectively.

On March 16, 1979, the Audit Division also issued five statements of audit adjustment against petitioner for each period at issue, respectively. The statements of audit adjustment explained that the deficiencies were based on a recent field audit.

15. During the periods at issue, petitioner did not file combined tax reports with International. Rather, petitioner considered International a taxable DISC and filed a separate Form CT-3, New York State Corporation Franchise Tax Report for this subsidiary for each of the periods at issue. International's corporation franchise tax was computed on the basis of business and investment capital or the flat fee minimum (whichever was greater). The deficiencies described in Finding of Fact "14", supra, resulted primarily<sup>2</sup> from the Audit Division's inclusion of International in combined tax reports with petitioner. Furthermore, the Audit Division gave petitioner a credit for taxes paid by International in calculating the alleged deficiencies.

16. Petitioner and International purchase plastic resins from major chemical companies in the United States and sell those resins to manufacturers

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<sup>2</sup> The Audit Division also made certain adjustments to petitioner's property factor and entire net income which were not challenged herein.

who generally convert them into casings for toys or housewares. When International was formed, it attempted to purchase resins directly from the major chemical companies. However, the chemical companies preferred to do business with petitioner, and International was unable to purchase inventory directly from suppliers under favorable credit terms. As a result, petitioner, during the periods at issue, made all purchases for International and itself which were carried in a common pool of inventory. Two types of purchases were made by petitioner on behalf of International. Under the first type, the purchase order was placed with the supplier by petitioner on behalf of International for direct shipment to International's customer. Under the second method, shipments of the merchandise were made to petitioner who kept those items in a "common pool" with its own purchases. International's purchases were identifiable via specific lot identification. The inventory was not fungible.

17. The Audit Division determined that any of the indirect "common pool" purchases that remained with petitioner in excess of one month constituted purchases made by International from petitioner. The auditor made test checks for such purchases for each of the years at issue and found that the "percentages ran well above the five percent that the regulation calls for to be considered tax-exempt DISC".

18. All purchases on behalf of International were recorded by petitioner on its books and records. When the item purchased was shipped by the supplier directly to International's customer, petitioner increased its own purchase account, then immediately reduced such purchase account by the same amount. When the item purchased was not shipped by the supplier directly to International's customer, the item was carried in the "common pool" until sold by International or year end, whichever came earlier. At that time, petitioner reduced its



purchase account. An increase in the purchase account was reflected by a "debit" entry and a decrease in the purchase account was reflected as a "credit" entry on the books and records of petitioner.

19. Petitioner transferred inventory at cost to International. Petitioner argued that the transfer was not treated nor was it intended to be treated as a sale. However, petitioner conceded that International effected purchases from unrelated manufacturers through petitioner. Furthermore, through a procedure identified by petitioner's witness as an "account current", petitioner is reimbursed for the product sold by International by the actual transfer of funds from International to petitioner (at a rate equal to the cost to petitioner of the inventory transferred to International).

20. Since petitioner's overall corporate tax liability is decreased if it is permitted to file separate tax reports for itself and International, petitioner argued, what at first blush seems quite curious, that International is a taxable DISC and not a tax-exempt DISC. In support of this position, petitioner contended that in order for a DISC to be exempt from New York corporate franchise taxes as a separate entity, it must be related to a manufacturer from whom it purchases its products.

21. Included in petitioner's brief are proposed findings of fact, all of which have been incorporated into this decision with the exception of its proposed finding of ultimate fact which petitioner has failed to prove. Included in the Audit Division's brief are proposed findings of fact, all of which have been incorporated into this decision.

#### CONCLUSIONS OF LAW

A. That Tax Law §208.9(i) provides that a DISC will be exempt from New York corporate franchise taxes if during any taxable year it receives "more

than five percent of its gross sales from the sale of inventory purchased from its stockholders...".

Petitioner argued that additional conditioning language should be read into this unambiguous provision. It would have us impose an additional requirement that the inventory purchased by a DISC from its stockholders must be manufactured by its stockholders in order for the DISC to be considered a tax exempt DISC for New York corporate franchise tax purposes. However, since the law described above is unambiguous, we will not read into it such conditioning language. Furthermore, the legislative history does not justify a construction of this provision which is contrary to its plain meaning. See McKinney's Statutes §94 and Curtis v. Brookdale Hospital Center, 62 A.D.2d 749.

B. That pursuant to Findings of Fact "18", "19" and "20", it was reasonable for the Audit Division to conclude that International received more than five percent of its gross sales from the sale of property which it purchased from petitioner. Although petitioner denied that the transfer of inventory to International was a sale of inventory by it to International, in fact, petitioner was reimbursed for such inventory by the actual transfer of funds from International to it. Therefore, it is reasonable to conclude that International "purchased" a substantial part, if not all, of its inventory from petitioner. Furthermore, it cannot be concluded that International purchased its product from unrelated suppliers merely because it paid petitioner at the same rate which petitioner paid the unrelated suppliers. Nor can it be said that a transaction is not a "purchase" merely because the seller does not make a profit.

C. That International is a tax exempt domestic international sales corporation thereby requiring petitioner to file its corporation franchise tax

reports on a consolidated basis with such wholly-owned subsidiary. Tax Law §208.9(i)(B).

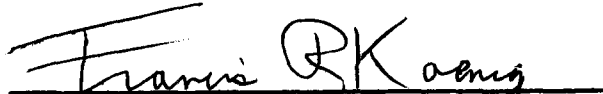
D. That the petition of Bamberger Polymers, Inc. is denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER