

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
William Wrigley, Jr. Company :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation
Franchise Tax under Article(s) 9A of the Tax :
Law for the Years 1975-1980.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 11th day of March, 1987, he/she served the within notice of Decision by certified mail upon William Wrigley, Jr. Company the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Wrigley, Jr. Company
410 North Michigan Avenue
Chicago, IL 60611

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
11th day of March, 1987.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
William Wrigley, Jr. Company : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation Franchise Tax
under Article(s) 9A of the Tax Law :
for the Years 1975-1980.

State of New York :
ss.:
County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 11th day of March, 1987, he served the within notice of Decision by certified mail upon H. Randolph Williams, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

H. Randolph Williams
Baker & McKenzie
Suite 2800, Prudential Plaza
Chicago, IL 60601

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
11th day of March, 1987.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

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

March 11, 1987

William Wrigley, Jr. Company
410 North Michigan Avenue
Chicago, IL 60611

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
H. Randolph Williams
Baker & McKenzie
Suite 2800, Prudential Plaza
Chicago, IL 60601

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WILLIAM WRIGLEY, JR. COMPANY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9A of the Tax Law for the Years 1975	:	
through 1980.	:	

Petitioner, William Wrigley, Jr. Company, 410 North Michigan Avenue, Chicago, Illinois, 60611, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9A of the Tax Law for the years 1975 through 1980 (File No. 39340).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, W. Averell Harriman State Office Building Campus, Albany, New York 12227 on February 24, 1986 at 1:15 P.M., with all briefs to be filed by May 26, 1986. Petitioner appeared by Baker & McKenzie (H. Randolph Williams, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner's activities within New York State during the years at issue constituted the solicitation of orders, as defined by 15 U.S.C. §381 et seq., thereby precluding this State from imposing a tax on petitioner's income.

FINDINGS OF FACT

1. Petitioner is an Illinois corporation which is engaged in the manufacture and sale of chewing gum. Its principal place of business is located in Chicago, Illinois.

2. On September 14, 1979, petitioner filed a timely claim for refund in the amount of \$92,357.69 plus interest for New York State corporation franchise tax paid by it for its taxable year ended December 31, 1975.

3. On October 17, 1979, petitioner filed the following timely claims for refund of franchise tax paid by it:

<u>Period Ended</u>	<u>Amount of Claim</u>
December 31, 1976	\$121,542.79 plus interest
December 31, 1977	100,734.61 plus interest
December 31, 1978	105,784.25 plus interest
December 31, 1979	18,000.00 plus interest

4. In 1981, the Audit Division conducted a field audit of petitioner's franchise tax reports for the periods ended December 31, 1978 through December 31, 1980. As a result of that field audit, the Audit Division proposed to disallow the claims for refund described in Findings "2" and "3" above, and to assert the following deficiencies in the franchise tax:

<u>Period Ended</u>	<u>Amount of Deficiencies</u>
December 31, 1978	(\$214.00) tax reduction
December 31, 1979	\$76,056.00
December 31, 1980	\$30,840.00

5. On January 6, 1982, petitioner timely protested the proposed deficiencies and denial of claims, described in Finding "4" above.

6. On April 12, 1982, the Audit Division issued the following notices of deficiency:

<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
December 31, 1978	\$ 169.00	\$ 54.00	\$ 223.00
December 31, 1979	76,650.00	17,868.00	94,518.00
December 31, 1980	30,964.00	4,586.00	35,550.00

These notices of deficiency constituted a denial of the claims for refund described in Findings "2" and "3" above.

7. On May 11, 1982, petitioner timely filed its petition to redetermine the deficiencies and disallowance of refunds, described in Finding "6" above.

8. The facts relevant to petitioner's claims are the same for all taxable years in question.

9. Petitioner employed approximately 30 sales representatives who operated in New York State. Sales representatives were responsible to a regional sales manager. The regional sales manager, in turn, reported to a district manager who maintained an office in Saddlebrook, New Jersey. Petitioner did not maintain a place of business in New York during the years in question.

10. During the year 1979, petitioner established a program known as "Key Account Manager". An individual assigned to this program was given the duty of trying to increase the sales volume of established high sales volume accounts.

11. Petitioner paid each sales representative a salary, and provided the use of an automobile which was owned by petitioner. Petitioner reimbursed the sales representatives for the operation and maintenance expenses, including storage, of the automobile assigned to each representative. In all cases where a sales representative rented garage space to store the automobile, such space was rented by the representative individually and not in the name of petitioner.

12. Petitioner's sales representatives called upon "direct" customers to increase distribution of petitioner's products. A direct account is one which buys product directly from petitioner and includes wholesalers, large retail chains, and suppliers of vending machines. The goal of a sales representative when he called upon a direct account was to increase distribution of petitioner's products. A sales representative would seek to assure that the direct account carried as close to 100 percent of petitioner's product lines as possible. In order to increase distribution, the sales representative called upon the direct

account to initiate an order, to inform that individual of promotional campaigns and to encourage the optimal display of petitioner's products at the retail level. The direct account could submit an order to purchase petitioner's product, which the sales representative would then submit to the petitioner's district office in Saddlebrook, New Jersey for approval. From Saddlebrook, the order would be forwarded to the Chicago office for processing.

13. Petitioner's sales representatives also called upon "indirect" customers to increase distribution of petitioner's product. An "indirect" account, usually an independently owned retail store, is one which purchases a product from a direct account.

14. The goal of a sales representative when he visited an indirect account was to increase the distribution of petitioner's products through increased purchases by the indirect account from the direct account. When the sales representative visited an indirect account the representative would check displays of petitioner's product for out-of-stock products, out-of-date products, the location of the product and the number of product lines displayed. A sales representative would also explain current promotional and advertising campaigns.

15. Since a fresh product was necessary for continued sales, if a representative found out-of-date product in a display the representative would exchange, on a stick-for-stick basis, the out-of-date product with fresh product drawn from a small stock of product in his possession. Petitioner did not charge the indirect account for this exchange. The supplies of petitioner's products which were held by the sales representatives at any time, therefore, consisted of both salable and unsalable product and had negligible value.

16. On occasion, a sales representative replaced either out-of-date or undisplayed product with stock in an indirect account's storage area.

17. Occasionally, petitioner supplied an indirect account with a display stand on which to display petitioner's product. Petitioner's sales representatives would also participate either alone, or with sales representatives of other companies, in the arrangement of the displays. Petitioner supplied these display stands to a retailer free of charge and did not own the stands or consider the stands to be inventory. The stands were purchased from suppliers throughout the United States and were often shipped directly to a customer.

18. Petitioner had no telephone listing or mailing address in New York State during the taxable years in question.

19. All manufacturing activities by petitioner were performed outside New York State during the taxable years in question.

20. Petitioner maintained no stock of goods, raw materials, or supplies in New York State during the taxable years in question.

21. Petitioner owned no tangible personal property in New York State during the taxable years in question other than its product carried by the sales representatives, and the automobiles which the sales representatives used as transport between customers.

22. All sales by petitioner to New York customers were shipped via a common carrier from outside New York State pursuant to orders accepted by petitioner outside New York State.

23. Petitioner did not repair or service its products after sale.

24. Petitioner's sales representatives gave no technical advice on the use of its products.

25. In accordance with the State Administrative Procedure Act §307(1), petitioners proposed findings of fact have been generally accepted. It is

noted, however, that proposed finding of fact "8" has been rejected as being in the nature of legal argument.

CONCLUSIONS OF LAW

A. That 15 U.S.C. §381 (PL 86-272) states, in pertinent part:

"(a) No State...shall have power to impose...a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person...are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) shall not apply to the imposition of net income tax by any State...with respect to --

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who...is domiciled in, or a resident of, such State."

B. That in order to be exempt from corporation franchise tax, the activities of the employees of the corporation must be limited to solicitation (20 NYCRR 1-3.4 [b][9][iv], effective January 1, 1976). Further, the term solicitation is to be narrowly construed (id.) However, "[s]ome activities incidental to offering tangible personal property for sale or pursuing offers for the purchase of tangible personal property will nevertheless be considered solicitation and will not make the corporation taxable." (Id.)


C. That upon all of the facts and circumstances presented, we find that petitioner's activities constituted solicitation within the meaning of 15 U.S.C. § 381 thereby precluding New York from imposing a tax on petitioner's income. In reaching this conclusion it is noted that in Matter of Gillette Co. v. State Tax Commn., (56 AD2d 475, affd 45 NY2d 846) the Court of Appeals held that activities substantially identical to those of petitioner were exempt from corporation franchise tax. In Gillette, as in this case, petitioner had no place of business, telephone listing or mailing address in New York, all manufacturing activities were performed outside of the State, petitioner maintained no stock of goods, raw materials or supplies in New York, the product carried by the sales representatives was of negligible value, sales representatives advised indirect accounts as to display techniques and all sales by petitioner were shipped via a common carrier from outside New York State pursuant to orders accepted by petitioner outside New York State. It is noted that, under the circumstances presented herein, the replacement of stale product with fresh product did not exceed the limits of solicitation (see United States Tobacco Co. v. Commonwealth, 386 A2d 471 [Pa] which was relied on by the Court in Matter of Gillette Co. v. State Tax Commn., 45 NY2d 846, supra). Moreover, the fact that petitioner owned automobiles which were used in the state is of no consequence (20 NYCRR 1-3.4[b][9][iv][C]; United States Tobacco Co. v. Commonwealth, supra).

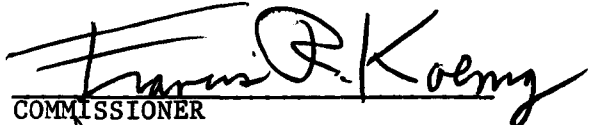
D. That the petition of William Wrigley, Jr. Company is granted, and the notices of deficiency issued April 12, 1982 are cancelled and the claims for refund are granted.

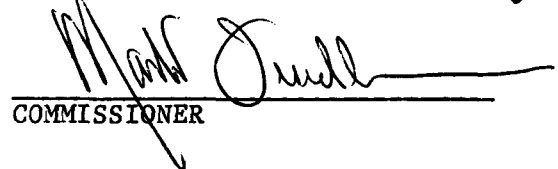
DATED: Albany, New York

STATE TAX COMMISSION

MAR 11 1987


PRESIDENT


COMMISSIONER


COMMISSIONER