

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Continental Can Company, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Stock Transfer Tax :
under Article 12 of the Tax Law for the Periods :
12/15/70, 11/9/71 & 1/31/74. :
_____ :

State of New York :

ss.:

County of Albany :

David Parchuck/Connie Hagelund, 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 28th day of January, 1986, he/she served the within notice of Decision by certified mail upon Continental Can Company, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Continental Can Company, Inc.
c/o Continental Group, Inc.
1 Harbor Plaza
Stamford, CT 06902

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
28th day of January, 1986.

David Parchuck

Connie Hagelund

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Continental Can Company, Inc.	:	
for Redetermination of a Deficiency or Revision	:	AFFIDAVIT OF MAILING
of a Determination or Refund of Stock Transfer	:	
Tax under Article 12 of the Tax Law for the	:	
Period 12/15/70, 11/9/71 & 1/31/74.	:	

State of New York :

ss.:

County of Albany :

David Parchuck/Connie Hagelund, 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 28th day of January, 1986, he served the within notice of Decision by certified mail upon Dwight W. Ellis III, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dwight W. Ellis III
Wilkie, Farr & Gallagher
153 E. 53rd St.
New York, NY 10022

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
28th day of January, 1986.

David Parchuck

Connie Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

January 28, 1986

Continental Can Company, Inc.
c/o Continental Group, Inc.
1 Harbor Plaza
Stamford, CT 06902

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) 279A 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 90 days 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
Dwight W. Ellis III
Wilkie, Farr & Gallagher
153 E. 53rd St.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
CONTINENTAL CAN COMPANY, INC.	:	DECISION
for a Hearing to Review a Determination of	:	
Stock Transfer Tax under Article 12 of the	:	
Tax Law for the Periods December 15, 1970,	:	
November 19, 1971 and January 31, 1974.	:	

Petitioner, Continental Can Company, Inc., c/o Continental Group, Inc., 1 Harbor Plaza, Stamford, Connecticut 06902, filed a petition for a hearing to review a determination of stock transfer tax under Article 12 of the Tax Law for the periods December 15, 1970, November 19, 1971 and January 31, 1974 (File No. 32062).

On September 29, 1983, petitioner, by its representative, Willkie, Farr & Gallagher, waived a formal hearing before the State Tax Commission and requested the Commission to render its decision on the Department of Taxation and Finance file, the stipulation executed by Willkie, Farr & Gallagher (Dwight W. Ellis, III, of counsel) on behalf of petitioner and by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel) and exhibits and memoranda of law to be submitted by September 20, 1985. After due consideration of the record, the State Tax Commission hereby renders the following decision.

ISSUES

I. Whether petitioner is liable for additional stock transfer tax on transfers of stock which took place pursuant to plans of merger.

II. Whether petitioner paid stock transfer tax on transfers of stock arising from the merger of Tee-Pak, Inc., an Illinois corporation, into Tee-Pak, Inc., a Delaware subsidiary of petitioner.

III. Whether the penalty asserted against petitioner should be remitted.

FINDINGS OF FACT

1. Petitioner, Continental Can Company, Inc. ("Continental"), a New York corporation, is currently known as Continental Group, Inc.

2. Petitioner's representative and the Audit Division's representative entered into a stipulation which provides, in relevant part, as follows:

a. As the result of Continental's filing a petition with the Department of Taxation and Finance in 1973, seeking approval for keeping certain stock transfer books in Canada, the Department initiated an audit of the stock transfer books and records of Continental and several of its subsidiaries for the period of September 1, 1966 through February 28, 1974.

b. Upon concluding its audit, the Department issued to Continental a Notice of Determination of Tax Due under Article 12 of the Tax Law, dated December 5, 1974, asserting a stock transfer tax deficiency of \$77,276.05. In addition, the Department sought to impose a penalty of \$19,500.00 upon Continental.

c. The contested determination relates to three transactions in which Continental transferred its treasury stock in connection with the triangular mergers of one or more non-New York corporations into one of Continental's Delaware subsidiaries.

d. In each merger, the shareholders of the corporation or corporations that were merged into the Continental subsidiary received Continental

treasury stock upon surrender of the certificates that had evidenced the shareholders' interests in the merged corporation or corporations.

(1) In connection with the merger of Tee-Pak, Inc., an Illinois corporation, into Tee-Pak, Inc., a Delaware subsidiary of Continental ("Tee-Pak Merger"), shareholders of the Illinois corporation received 1,284,945 shares of Continental treasury stock.

(2) In connection with the merger of Great Plains Bag Corporation and Great Plains Leasing Company, Inc., both of which were Iowa corporations, into Great Plains Bag Corporation, a Delaware subsidiary of Continental ("Great Plains Merger"), shareholders of the Iowa corporations received 218,576 shares of Continental treasury stock.

(3) In connection with the merger of Holmes Lumber Company, Inc., a South Carolina corporation, into Holmes Lumber Company, Inc., a Delaware subsidiary of Continental ("Holmes Lumber Merger"), the sole shareholder of the South Carolina corporation received 64,000 shares of Continental treasury stock.

e. In each of the mergers, the taxable event for purposes of Article 12 of the Tax Law was the issuance of Continental treasury shares and the record transfer of such shares on the books of Continental's New York transfer agent.

f. For purposes of Article 12 of the Tax Law, Continental, relying upon the opinion of its counsel, treated each of the mergers as constituting a "single taxable sale" within the meaning of Tax Law section 270-a(2) and thus qualifying for the maximum tax rate applicable on the date of the merger in question as set forth in Tax Law section 270-a(2).

g. The Great Plains Merger was effective as of November 19, 1971. The maximum amount of tax payable on a single taxable sale qualifying under Tax Law section 270-a(2) and made during the period between July 1, 1971 and June 30, 1972 was \$750.00. In connection with the Great Plains Merger, Continental paid a tax of \$750.00 by stock transfer stamps, such amount being calculated at the Tax Law section 270-a(2) maximum tax rate. In calculating the alleged deficiency asserted in connection with the merger, the Audit Division credited this payment against the asserted deficiency.

h. The Holmes Lumber Merger was effective as of January 31, 1974. The maximum amount of tax payable on a single taxable sale qualifying under Tax Law section 270-a(2) and made on or after July 1, 1973 was \$350.00. In connection with the Holmes Lumber Merger, Continental paid a tax of \$350.00 by stock transfer stamps, such amount being calculated at the Tax Law section 270-a(2) maximum tax rate. In calculating the alleged deficiency asserted in connection with the merger, the Audit Division credited this payment against the asserted deficiency.

i. The Tee-Pak Merger was effective as of December 15, 1970. The maximum amount of tax payable on a single taxable sale qualifying under Tax Law section 270-a(2) and made during the period between July 1, 1970 and June 30, 1971 was \$1,250.00. Continental treated the transfer of its treasury stock in connection with the Tee-Pak Merger as a single taxable sale qualifying for the \$1,250.00 rate under Tax Law section 270-a(2). Although a tax in the amount of \$1,250.00 was apparently paid with respect to the merger by affixing stock transfer stamps in that amount to a memorandum of the transfer pursuant to Tax Law section 270.4 and entering

the number of the memorandum in the Tax Stamp Record maintained by Bankers Trust Company, which was then serving as Continental's New York transfer agent, Continental subsequently changed transfer agents and has not been able to locate the memorandum to which the stamps in question were actually affixed.

j. The mergers were effected in substantially the same manner and using substantially similar documents. In each case, a single transferor, Continental, transferred shares of one class of stock issued by one issuer. The transfer in each case was consummated by the execution of a contract by and among Continental, its Delaware subsidiary and the corporation or corporations to be merged. The contract for each merger set forth the terms and conditions under which the merger would take place and under which Continental would transfer its shares. In each merger, the contract governed the transfer of every Continental share. There was no separate or distinct consideration given for any of the Continental shares nor were there separate or distinct negotiations with the persons who received such shares.

3. On or about February 22, 1984, the Audit Division reduced the amount of tax asserted to be due to \$29,079.35, plus penalty of \$7,300.00, for a total of \$36,379.55. The Audit Division reduced the asserted deficiency in order to comply with the holding in Boston Stock Exchange v. State Tax Comm., 429 U.S. 318 (1977).

4. With respect to the Tee-Pak Merger, the Audit Division asserted that a tax of five cents was due on the transfer of 169,411 shares to individual Tee-Pak shareholders. Moreover, a maximum tax of \$1,250.00 each was asserted for separate, multiple share transfers to thirteen individual stockholders.

Further, the Audit Division has declined to give petitioner any credit for tax allegedly paid since petitioner had not established that tax stamps were affixed to the transfer documents.

5. With respect to the Great Plains Merger, the Audit Division has asserted a tax due of five cents each with respect to the transfer of 72,176 shares and a maximum tax of \$750.00 on each of two multiple share transfers.

6. The Audit Division currently asserts that no additional tax is due with respect to the Holmes Lumber Merger on the basis that a maximum tax is applicable for the transfer of 64,000 shares and this tax has been paid.

CONCLUSIONS OF LAW

A. That during the periods in issue, Tax Law section 270-a(2) provided, in relevant part:

"Where any sale made within the state and subject to the tax imposed by this chapter relates to shares or certificates of the same class and issued by the same issuer the amount of tax upon any such single taxable sale shall not exceed...during the period beginning on July first, nineteen hundred seventy and ending on June thirteenth, nineteen hundred seventy-one, the sum of one thousand two hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-one and ending June thirteenth, nineteen hundred seventy-two, the sum of seven hundred fifty dollars; ...and on and after July first, nineteen hundred seventy-three, the sum of three hundred fifty dollars..." (emphasis added).

B. That, generally, Article 12 of the Tax Law imposes tax upon transfers of stock and other certificates of shares (Tax Law §270; 58A N.Y. Jur., Taxation, §753). The tax is imposed on each share (Tax Law §270[2]). In contrast, the merger agreement was not a taxable event for purposes of the stock transfer tax. Rather, the taxable event was the transfer of the shares of stock. Accordingly, the merger agreements did not constitute a "single taxable sale" within the meaning of Tax Law section 270-a(2) and the Audit Division properly computed the tax due on the transfers of stock.

C. That the payment of stock transfer tax is denoted by an adhesive stamp or stamps affixed in the manner prescribed by Tax Law section 270.4. Petitioner has not established that the requisite stamps were affixed as required by said section. Accordingly, the Audit Division properly concluded that petitioner was not entitled to be given credit for the tax allegedly paid on the Tee-Pak Transfers.

D. That Tax Law section 277 provides, in pertinent part:

"Any person, firm, company, association or corporation, or business conducted by a trustee or trustees that shall violate any of the provisions of section two hundred seventy, section two hundred seventy-a or section two hundred seventy-two of this chapter shall, in addition to the other penalties provided for in this article, be subject to a penalty of one dollar for each and every share of stock or of other interest taxable under this article so sold or transferred, or transferred or entered upon the books of the corporation or trustees, as the case may be, without the payment of the tax by this article imposed thereon. Such penalty may be compromised by the tax commission."


E. That in view of the fact that petitioner relied upon the reasonable advice of counsel, the penalty imposed is cancelled.

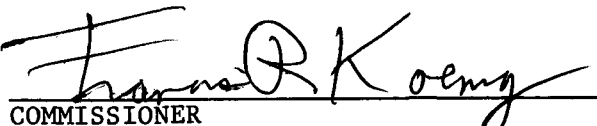
F. That the petition of Continental Can Company, Inc. is granted only to the extent of Conclusion of Law "E" and the Notice of Deficiency, as adjusted per Finding of Fact "3", is to be modified accordingly; the Notice of Deficiency, as so modified, is in all other respects sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER