

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

PROCTOR & GAMBLE DISTRIBUTING COMPANY

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

For a Redetermination of a Deficiency or
a Refund of Sales & Use
Taxes under Article(s) 28 & 29 of the
Tax Law for the (Year(s)) Period November 30, 1967
through May 31, 1971

State of New York
County of Albany

Martha Funaro , being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of December , 1972 , she served the within Notice of Decision (or Determination) by (certified) mail upon Proctor & Gamble Distributing Company (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Proctor & Gamble Distributing Company
P. O. Box 599
Cincinnati, Ohio 45201
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative of) 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

8th day of December , 1972.

Lynn Wilson

Martha Funaro



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

NORMAN F. GALLMAN, PRESIDENT

A. BRUCE MANLEY

MILTON KOERNER

BUILDING 9, ROOM 214A
STATE CAMPUS

ALBANY, N. Y. 12227

AREA CODE 518

457-2655, 6, 7

STATE TAX COMMISSION,
HEARING UNIT

EDWARD ROOK

SECRETARY TO
COMMISSION

ADDRESS YOUR REPLY TO

Dated: Albany, New York

December 8, 1972

Proctor & Gamble Distributing Company
P. O. Box 599
Cincinnati, Ohio 45201

Gentlemen:

Please take notice of the **DETERMINATION** of
the State Tax Commission enclosed herewith.

Please take further notice that pursuant to **sections 1138 & 1243**
the Tax Law any proceeding in court to review an adverse decision
must be commenced within **4 Months** after
the date of this notice.

Any inquiries concerning the computation of tax due or refund allowed
in accordance with this decision or concerning any other matter relat-
ing hereto may be addressed to the undersigned. These will be referred
to the proper party for reply.

Very truly yours,

L. Robert Leisner

HEARING OFFICER

cc Petitioner's Representative
Law Bureau

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
PROCTOR & GAMBLE DISTRIBUTING COMPANY	:	DETERMINATION
for a Revision of a Determination or for	:	
Refund of Sales and Use Taxes under Articles	:	
28 and 29 of the Tax Law for the Period	:	
November 30, 1967 through May 31, 1971.	:	

The taxpayer applied for a revision of a determination of sales and use taxes due under Articles 28 and 29 of the Tax Law for the period November 30, 1967 through May 31, 1971 and for refund of taxes paid under such determination. The taxpayer through its tax department submitted the case for decision on the material in the file. The Sales Tax Bureau was represented by Saul Heckelman, Esq.

ISSUE

The issue in this case is whether the containers in which the applicant packed its product are subject to sales tax when it did not have a resale certificate specifically covering such containers and under the circumstances of this case.

FINDINGS OF FACT

1. The applicant, Proctor & Gamble Distributing Company, timely filed New York State sales and use tax returns for the period November 30, 1967 through May 31, 1971.

2. A Notice of Determination of sales taxes due for the period November 30, 1967 through May 31, 1971, was issued on June 1, 1971, against the applicant under Notice No. 90,714,431. The amount of said taxes due was determined to be \$72,434.17 plus interest of \$6,331.02 for a total of \$78,765.18. This amount was paid in full on June 28, 1971.

3. The taxpayer applied for a revision of the determination of the deficiencies in sales tax.

4. The Proctor & Gamble Distributing Company, the applicant herein, is a wholly owned subsidiary of the Proctor & Gamble Company. Applicant is engaged in the distribution of soaps, detergents, toilet goods, food products and paper products which it purchases from its affiliated companies and which it sells to wholesalers and distributors throughout the United States. Applicant also sells directly to the major retail food chains, though applicant has not shown the amount or proportion of such sales.

5. Applicant ships its products to its customers in containers. The customers who are wholesalers deliver the products and containers together as a unit to retailers and thus make a sale of the containers as an incident of the sale of the products. The retailers (including the major retail food chains who are supplied directly by applicant) will unpack the containers and make sales of the products contained therein. It has not been shown by satisfactory evidence nor even alleged by applicant that any of these containers while still unpacked are sold with their contents by the retailer to the ultimate consumer.

6. While applicant has alleged that "a substantial portion of the cartons --- are actually used by ultimate consumers as containers in place of shopping bags, etc.," he has produced no satisfactory evidence thereof nor has he even alleged that the retailers acquired the cartons for such a purpose. There is no evidence that there is a second hand market for the containers here in issue or that the containers are in any way resold as an article of commerce. In the absence of contrary evidence, it must be found that all containers are considered to be waste or rubbish and are disposed of as such and that there is no general custom and practice among the retailers of reselling the empty cartons.

7. Applicant did not state in its bills or invoices any price or charge for the containers separately from the price or charge for the contents thereof. Similarly, the wholesalers and distributors which applicant sells to did not separately state a price for the containers in their bills or invoices to the retailers.

8. Applicant received resale certificates from its customers. These resale certificates did not expressly and specifically state that the tangible personal property covered thereby included the containers or any property of the same general type as containers. On their face, such certificates covered only the contents of the containers.

CONCLUSIONS OF LAW

The applicant is subject to tax. It appears certain that some of applicant's customers made a taxable use of the containers when they treated them as waste or otherwise did not resell them as an article of commerce. If some customers did in fact resell such containers as an article of commerce, the details of such transactions and the amounts thereof are not in evidence. The absence of a retail certificate specifically covering the containers and the failure to state a separate price for such containers is consistent only with the conclusion that applicant made taxable sales. (See Colgate-Palmolive-Peet Co. v. Joseph 308 N.Y. 333). The amendment to section 1132(c) of the Tax Law by chapter 320 of the Laws of 1967 with reference to the burden of proof when a resale certificate is obtained by the vendor does not change this result. That amendment merely insures that the vendor can rely on statements made in the certificate (see 1967 Legislative Annual, page 221) and does not in any way widen the scope of those statements to what they do not clearly specify.

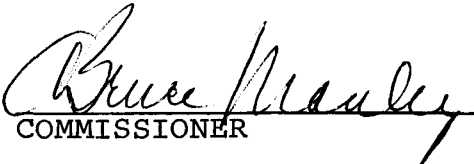
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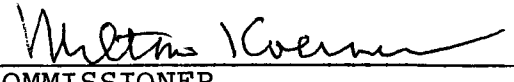
The Notice of Determination of tax due under review is correct in its entirety. A refund is denied.

DATED: Albany, New York
December 8, 1972

STATE TAX COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER

October 15, 1973

Arthur L. Swartz, Esq.
Robert & Holland
1301 Avenue of Americas
New York, New York 10019

Dear Mr. Swartz:

As per your request, please find enclosed
a copy of a determination rendered by the New
York State Tax Commission - Proctor & Gamble
Distributing Company.

Sincerely,

EDWARD ROOK
SECRETARY TO THE
STATE TAX COMMISSION

Enclosure

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March 1, 1961

Arthur B. Rosenberg, Jr.
Robert S. Rosenberg
1001 Avenue of the Americas
New York, New York 10018

Dear Mr. Rosenberg:

As per your request, please find enclosed
a copy of a letterhead memorandum of the
New York State Tax Commission - Division of Taxation

dated and captioned as above.

Sincerely,
[Signature]

Enclosure
[Faint circular stamp with text: "RECEIVED", "MARCH 1 1961", "NEW YORK STATE TAX COMMISSION"]

Very truly yours,
[Signature]