

State Tax Commission

Mr. Rook

Dairylea Cooperative, Inc.

*this has approved  
Jesse Hoff  
see State Tax  
Comm. 1959-19*

Attached is a memorandum from Mr. Heckelman requesting your consent to waiver of sales tax penalty in the amount of \$4,051.68 and acceptance of interest in the amount of \$2,674.28.

A hearing was held on December 2, 1968, when the Law Bureau was conducting hearings. At the repeated request of the taxpayer, this office requested a determination and it was forwarded to the Commission. On February 28, 1972, we mailed the notice of determination.

A copy of the determination which was prepared by Mr. Sies is attached hereto.

Mr. Heckelman recommends cancellation of the penalty. In view of the fact that this is a "container" case in which the law was not clear, that the Appellate Division appears to have assumed that no penalty or interest was being charged (see Mr. Heckelman's memorandum), and in view of the lapse of time between the hearing and the determination, I concur with Mr. Heckelman's recommendation.

If you agree, kindly endorse Mr. Heckelman's memorandum.

---

EDWARD ROOK  
SECRETARY TO THE  
STATE TAX COMMISSION

October 10, 1973  
Attachment

Page 1 of 1

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

10/10/10

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of :  
DAIRYMEN'S LEAGUE CO-OPERATIVE :  
ASSOCIATION, INC. :  
AFFIDAVIT OF MAILING  
OF NOTICE OF DECISION  
BY (CERTIFIED) MAIL

For a Redetermination of a Deficiency or  
a Refund of Sales and Use :  
Taxes under Article(s) 28 & 29 of the  
Tax Law for the ~~(years)~~ periods ending  
August 31, 1965 through November 30, 1967.

State of New York  
County of Albany

Rae Zimmerman , 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 28th day of February , 1972, she served the within  
Notice of Decision (or Determination) by (certified) mail upon Charles  
B. Chernofsky, Esq. (representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
Charles B. Chernofsky, Esq.  
wrapper addressed as follows: Dairymen's League Co-Operative Association, Inc.  
c/o Dairylea Cooperative Inc.  
1250 Broadway  
New York, New York  
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

28th day of February , 1972

Martha F. Farrow

Rae Zimmerman

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

DAIRYMEN'S LEAGUE CO-OPERATIVE  
ASSOCIATION, INC.

For a Redetermination of a Deficiency or  
a Refund of Sales and Use

Taxes under Article(s) 28 & 29 of the  
Tax Law for the (Year(s)) periods ending  
August 31, 1965 through November 30, 1967.

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

State of New York  
County of Albany

Rae Zimmerman, 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 28th day of February, 1972, she served the within  
Notice of Decision (or Determination) by (certified) mail upon Dairymen's League  
Co-Operative Association, Inc.

(representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: Dairymen's League Co-Operative  
Association, Inc.  
c/o Dairy Lea Cooperative Inc.  
1250 Broadway  
New York, New York  
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

28th day of February, 1972.

Martha F. Farrow

Rae Zimmerman

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

DAIRYMEN'S LEAGUE CO-OPERATIVE  
ASSOCIATION, INC.

For a Redetermination of a Deficiency or  
a Refund of Sales and Use  
Taxes under Article(s) 28 & 29 of the  
Tax Law for the ~~(Weeks)~~ periods ending  
August 31, 1965 through November 30, 1967

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

State of New York  
County of Albany

Rae Zimmerman, 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 22nd day of February, 1972, she served the within Notice of Decision (or Determination) by (certified) mail upon Dairymen's League Co-Operative Association, Inc. (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Dairymen's League Co-Operative Association, Inc.  
100 Park Avenue  
New York, New York 10017  
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

22nd day of February, 1972.

Martha Furuta

Rae Zimmerman

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of :  
DAIRYMEN'S LEAGUE CO-OPERATIVE : AFFIDAVIT OF MAILING  
ASSOCIATION, INC. : OF NOTICE OF DECISION  
BY (CERTIFIED) MAIL

For a Redetermination of a Deficiency or  
a Refund of Sales and Use :  
Taxes under Article(s) 28 & 29 of the :  
Tax Law for the ~~(years)~~ periods ending :  
August 31, 1965 through November 30, 1967.

State of New York  
County of Albany

Rae Zimmerman, 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 22nd day of February, 1972, she served the within  
Notice of Decision (or Determination) by (certified) mail upon Charles B.  
Chernofsky, Esq.

(representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: Charles B. Chernofsky, Esq.  
Dairymen's League Co-Operative  
Association, Inc.  
100 Park Avenue  
New York, New York 10017  
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

22nd day of February, 1972.

Martha Fararo

Rae Zimmerman



STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE

BUILDING 9, ROOM 214A

STATE CAMPUS

ALBANY, N. Y. 12226

AREA CODE 518

457-2655, 6, 7

STATE TAX COMMISSION  
HEARING UNIT

EDWARD ROOK  
SECRETARY TO  
COMMISSION

STATE TAX COMMISSION

NORMAN F. GALLMAN, ACTING PRESIDENT

A. BRUCE MANLEY

MILTON KOERNER

ADDRESS YOUR REPLY TO

Albany, New York

**February 22, 1972**

**Dairymen's League Co-Operative  
Association, Inc.**

**100 Park Avenue**

**New York, New York 10017**

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

Please take further notice that pursuant to **sections 1138 and 1243 of**  
the Tax Law any proceeding in court to review an adverse decision  
must be commenced within **four 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,

**Lawrence A. Newman**  
HEARING OFFICER

cc Petitioner's Representative  
Law Bureau

STATE OF NEW YORK  
STATE TAX COMMISSION

-----  
IN THE MATTER OF THE APPLICATION :  
OF :  
DAIRYMEN'S LEAGUE :  
CO-OPERATIVE ASSOCIATION, INC. : DETERMINATION  
FOR REVISION OF A DETERMINATION OF SALES AND/OR :  
USE TAXES UNDER ARTICLE 28 OF THE TAX LAW FOR THE :  
TAXABLE PERIODS ENDING AUGUST 31, 1965 THROUGH :  
NOVEMBER 30, 1967 :  
-----

Dairymen's League Co-operative Association, Inc., having filed an application for a hearing and for revision of a determination of sales and/or use taxes under Article 28 of the Tax Law for the tax periods August 1, 1965 through November 30, 1967 and a hearing having been held at the office of the State Tax Commission at 80 Centre Street, New York, New York, on the 2nd day of December, 1968, before Solomon Sies, Hearing Officer, and the taxpayer having been represented by Charles B. Chernofsky, Esq., and the matter having been duly considered,

The State Tax Commission hereby finds:

(1) At all of the times hereinafter mentioned, Dairymen's League Co-operative Association, Inc. was and still is a domestic corporation organized under the laws of the State of New York, maintaining its ice cream branch for the manufacture of ice cream, ice cream products and desserts at Wurz Avenue, Utica, New York.

(2) The applicant herein filed New York State and local sales and use tax returns under Articles 28 and 29 of the Tax Law for the tax periods ending August 31, 1965 through November 30, 1967. As a result of a field audit with respect to the aforementioned sales and/or use tax returns of the taxpayer, a Notice of Determination was issued by the Department of Taxation and Finance on July 16, 1968



(Notice No. 90,755,385) against the applicant imposing additional sales and use taxes on (a) shipping supplies, including three-gallon corrugated containers, (b) plant and office supplies, (c) repairs to equipment and (d) utility purchases of gas and electricity in the total amount of \$4,979.14. The applicant paid a portion of the assessment, namely, \$2,520.09, leaving a balance due of \$2,459.05 which represents the tax due with respect to the sale of the three-gallon containers included in item (a) of the Notice of Determination.

(3) On August 20, 1968, Dairymen's League Co-operative Association, Inc. filed an application for a hearing and for revision with respect to the Notice of Determination and Demand for Payment of Sales or Use Taxes due as more fully set forth in finding (2) above. The applicant is only contesting that portion of the Notice of Determination imposing a tax in the amount of \$2,459.05 with respect to the sale of the three-gallon ice cream containers.

(4) The applicant, Dairymen's League Cooperative Association, Inc., purchased the three-gallon containers from Sealright Corporation. The containers are corrugated containers with a metal reinforcement band on the top and bottom. (Photographs of such a container were introduced in evidence as Taxpayer's Exhibits 1 and 2.) At its plant, the applicant packed in these three-gallon containers ice cream which it sells in bulk. The sealed three-gallon containers were then shipped in a refrigerated truck to the applicant's customers, principally ice cream parlors or stores and bakeries. The entire container with its contents, when received by the applicant's customer, i.e., the ice cream parlor or store or bakery, is placed in a freezer compartment and the ice cream is scooped out from the container. When the customer (ice cream parlor or store or bakery) has emptied the three-gallon container it purchased from the applicant, the container is then discarded as waste material. The applicant's customer is not billed separately for the container, but is only billed for the ice cream with the container.

(5) Section 1101(b)(1) of the Tax Law defines a purchase at retail as follows:

"(1) Purchase at retail. A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision."

Paragraph (4) of the same section defines a retail sale and provides in part as follows:

"(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, . . ."

Section 1105(a), in effect during the tax periods in issue, imposed a sales tax of 2% upon:

"(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1133(a) of the Tax Law with respect to the liability for the tax provides, in part, as follows:

"(a) Every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. . . ."

(6) The three-gallon containers in which the ice cream was packed for sale by the applicant to its customers did not constitute an integral part, inseparable from their contents but remained tangible personal property.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby,

DECIDES:

(A) That the sales by the applicant of the three-gallon containers to its customers were not sales of tangible personal property for resale as such or as a physical component part of tangible personal property.

(B) That, therefore, the sale by the applicant of the three-gallon containers to its customers constituted a "retail sale" in accordance with the provisions of Section 1101(b)(4)(i) of the Tax Law.

(C) That in accordance with the provisions of Section 1133(a) of the Tax Law, the applicant is liable for the sales tax which it should have collected from its customers with respect to the three-gallon containers.

(D) Accordingly, the Notice of Determination imposing additional sales and/or use taxes (Notice No. 90,755,385) is correct and does not include any tax or other charge which could not have been lawfully demanded. The application of the taxpayer, Dairymen's League Co-operative Association, Inc. for revision of the determination is therefore denied.

Dated: Albany, New York this 22d day of February, 1972

STATE TAX COMMISSION

*Norman Halloran*  
President

*Robert Nealey*  
Commissioner

*Milton Koerner*  
Commissioner

STATE OF NEW YORK  
Department of Taxation and Finance

STATE CAMPUS  
ALBANY, N. Y. 12227



Charles B. Chernofsky, Esq.  
Dairymen's League Co-Operative  
Association, Inc.  
100 Park Avenue  
New York, New York

40017

☐ Mr.

☐ Mrs.

☐ Miss

NEW YORK, N.Y. 10017

James H. H.

Thompson

2/25/72

Re: *Chernofsky, Esq.*  
*100 Park Avenue*  
*New York, N.Y.*  
*10017*  
*2/25/72*  
*State of New York*  
*Department of Taxation and Finance*  
*Albany, N.Y.*

STATE OF NEW YORK  
Department of Taxation and Finance  
STATE CAMPUS  
ALBANY, N. Y. 12227



NEW YORK, NEW YORK 100

Dairymen's League Co-Operative  
Association, Inc.  
100 Park Avenue  
New York, New York 10017

2/27/72  
Remailed 40

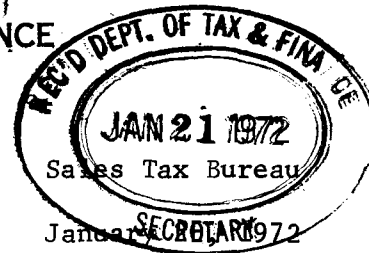
C/O Dairymen's Cooperative Inc.  
1250 Broadway  
New York, N.Y.

*Handwritten notes:*  
L. J. ...  
L. J. ...  
2nd Floor

1892

## DEPARTMENT OF TAXATION AND FINANCE

## MEMORANDUM



TO : Mr. Edward Rook


OFFICE: Sales Tax Bureau

FROM : Fred W. Tierney

DATE : January 1972

SUBJECT: Formal Hearing  
Dairymen's League Cooperative Association, Inc.

As per your telephone conversation with Mr. Smith, enclosed is a copy of the January 12, 1972 letter from Mr. Chernofsky. Also enclosed are copies of the prior correspondence, memo, and the current acknowledgement.

  
Fred W. Tierney  
Director, Sales Tax Bureau

Enclosures

January 20, 1972

Mr. Charles R. Chernofsky  
Assistant General Counsel  
Dairyland Cooperative Inc.  
1230 Broadway  
New York, New York 10001

Dear Mr. Chernofsky:

Your letter of January 12, 1972, concerning the Mutual Determination in the matter of Dairyman's League Cooperative Association, Inc., has been referred to Edward Rock, Secretary, State Tax Commission.

Mr. Rock will reply to your letter, and any further correspondence on the subject should be addressed to him.

Very truly yours,

Fred W. Tierney  
Director, Sales Tax Bureau

cc: Mr. Rock





3

January 12, 1972

Mr. Fred W. Tierney  
Director, Sales Tax Bureau  
State of New York  
Department of Taxation and Finance  
State Campus  
Albany, New York 12227

Re: Notice No. 90,755,385  
Identification No. 13-0616030-14  
(Formerly Dairymen's League Co-  
operative Association, Inc.)

Dear Mr. Tierney:

I have received no further communication regarding a Formal  
Determination to be issued as the result of the December 2,  
1968 hearing on the above matter.

Please advise me as to when the Determination will be issued.

Very truly yours,

*Charles B. Chernofsky*  
Charles B. Chernofsky  
Assistant General Counsel.

CBC:et

RECEIVED  
DEPT. OF TAX & FINANCE  
SALES TAX BUREAU  
JAN 14 1972

Noted for  
File

*Per Mr. Cook -  
Acknowledge and refer to him  
K Smith  
1-20-72*

State of New York  
Department of Taxation and Finance  
Sales Tax Bureau  
State Campus  
Albany, New York 12226

October 25, 1971

Re:

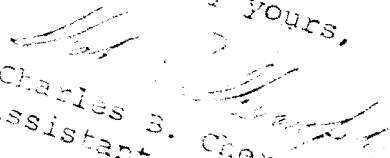
Notice No. 92,755,385  
Identification No. 12-20-11-11  
(Formerly Dairymen's League Co-operative  
Association, Inc.)

Gentlemen:

On December 2, 1968 a hearing was held on the above Notice and  
Petitioner's brief was filed on December 4, 1968.

Since that date I have sent numerous requests to the Hearing  
Examiner, Solomon Sies, for a decision. It is now almost three  
years later and no decision has been handed down.  
Would you please investigate this matter.

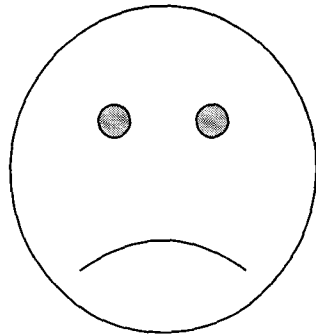
Very truly yours,

  
Charles B. Chernofsky  
Assistant General Counsel.

CBC:et

RECEIVED  
DEPT. OF TAX & FINANCE  
SALES TAX BUREAU  
OCT 27 1971

# **CORRECTION FOLLOWS**



3

January 12, 1972

Mr. Fred W. Tierney  
Director, Sales Tax Bureau  
State of New York  
Department of Taxation and Finance  
State Campus  
Albany, New York 12227

Re: Notice No. 90,755,385  
Identification No. 13-0616030-14  
(Formerly Dairymen's League Co-  
operative Association, Inc.)

Dear Mr. Tierney:

I have received no further communication regarding a Formal  
Determination to be issued as the result of the December 2,  
1968 hearing on the above matter.

Please advise me as to when the Determination will be issued.

Very truly yours,



Charles B. Chernofsky  
Assistant General Counsel.

CBC:et

*Per Mr. Cook -*

*Acknowledge and refer to Mr.*

*K. Smith*

*1-20-72*

RECEIVED  
DEPT. OF TAX & FINANCE  
SALES TAX BUREAU  
JAN 14 1972

Relet 101  
For

RSR:FW

3

January 12, 1972

Mr. Fred W. Tierney  
Director, Sales Tax Bureau  
State of New York  
Department of Taxation and Finance  
State Campus  
Albany, New York 12227

Re: Notice No. 90,755,385  
Identification No. 13-0616030-14  
(Formerly Dairymen's League Co-  
operative Association, Inc.)

Dear Mr. Tierney:

I have received no further communication regarding a Formal Determination to be issued as the result of the December 2, 1968 hearing on the above matter.

Please advise me as to when the Determination will be issued.

Very truly yours,



Charles B. Chernofsky  
Assistant General Counsel.

CBC:et

*Per Mr. Cook -  
Acknowledge and refer to him  
K Smith  
1-20-72*

RECEIVED  
DEPT. OF TAX & FINANCE  
SALES TAX BUREAU  
JAN 14 1972

Refer to  
For

2  
FCU File Copy please RETURN

Mr. Saul Hochman

Sales Tax Bureau

Fred W. Tierney

October 20, 1971

Whitelys Cooperative Inc.  
(Formerly Dairymen's League Co-operative  
Association, Inc.)

Enclosed in our communication of October 22, 1971, attached you will find a copy of the letter received from Mr. Charles B. Chernofsky, Assistant General Counsel of the above-mentioned sales tax waiver and my reply to him.

---

Fred W. Tierney  
Director, Sales Tax Bureau

Attachments

RSR:fw



October 28, 1971

Mr. Charles B. Chernofsky  
Quixote Cooperative Inc.  
New York, New York 10001

Dear Mr. Chernofsky:

Reference is made to your letter of October 25, 1971 concerning the Federal Determination to be issued as the result of a hearing held on December 2, 1968.

This matter has been reviewed and information received indicates the determination which is in the final stages of completion will be forwarded to the tax commission for approval and issuance within the very near future.

Very truly yours,

Fred D. Hickey  
Director, Sales Tax Bureau

cc: Mr. Saul Macdonald

RSR:fw

October 25, 1971

State of New York  
Department of Taxation and Finance  
Sales Tax Bureau  
State Campus  
Albany, New York 12226

Attention: Mr. Frederick W. Tierney

Re: Notice No. 90,755,385  
Identification No. 12-0611230-14  
(Formerly Dairymen's League Co-operative  
Association, Inc.)

Gentlemen:

On December 2, 1968 a hearing was held in the above Notice and  
Petitioner's brief was filed on December 4, 1968.

Since that date I have sent numerous requests to the Hearing  
Examiner, Solomon Sies, for a decision. It is now almost three  
years later and no decision has been handed down.

Would you please investigate this matter.

Very truly yours,



Charles B. Chernofsky  
Assistant General Counsel.

CBC:et

**RECEIVED**  
DEPT. OF TAX & FINANCE  
SALES TAX BUREAU  
OCT 27 1971

RECEIVED  
et