

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

Burger King, Inc., ^{of} formerly Edgmore, Inc.
Davmor Industries, Inc., Edgmore, Inc.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Sales and Use :

Taxes under Article(s) 28 & 29 of the :
Tax Law for the Year(s) or Period(s) :
3/1/70 thru 11/30/72; 6/1/70 thru :
11/30/72; bulk sale 1/30/70

State of New York
County of Albany

John Huhn , 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 7th day of December , 1977 , she served the within

Notice of Determination by ~~(certified)~~ mail upon Edgmore, Inc., Davmor
Industries, Inc., Edgmore, Inc.

~~(representative of)~~ the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Burger King, Inc.
Davmor Industries, Inc.
Edgmore, Inc.
7360 North Kendall Drive
Miami, Florida 33156

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 Postal Service within the State of New York.

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

Sworn to before me this

7th day of December , 1977

Janet Mack

John Huhn

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

Burger King, Inc., formerly Edgmore, Inc.

Davmor Industries, Inc., Edgmore, Inc.

For a Redetermination of a Deficiency or :

a Revision of a Determination or a Refund
of Sales and Use :

Taxes under Article(s) 28 & 29 of the
Tax Law for the Year(s) or Period(s) :

3/1/70 thru 11/30/72; 6/1/70 thru

11/30/72; bulk sale 1/30/70

State of New York

County of Albany

AFFIDAVIT OF MAILING

John Huhn , 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 7th day of December , 1977 , she served the within
Notice of Determination by (~~certified~~) mail upon Ernest D. Gustafson

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Ernest D. Gustafson
The Pillsbury Company
608 Second Avenue South
Minneapolis, Minnesota 55402

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 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

7th day of December , 1977.

Janet Mack

John Huhn



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

December 7, 1977

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

Burger King, Inc.
Davmor Industries, Inc.
Edgmoor, Inc.
7360 North Kendall Drive
Miami, Florida 33156

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) **1138 & 1243** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

John J. Sollecito
Director

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :

of :

BURGER KING, INC. :

(formerly EDGMOR, INC.) :

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1970 through November 30, 1972. :

In the Matter of the Application :

of :

DAVMOR INDUSTRIES, INC. :

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1970 through November 30, 1972. :

DETERMINATION

In the Matter of the Application :

of :

EDGMOR, INC. :

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for a Bulk Sale on January 30, 1970. :

Applicants, Burger King, Inc., Davmor Industries, Inc. and Edgмор, Inc., all of 7360 North Kendall Drive, Miami, Florida 33156, filed applications for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law. The application of Burger King, Inc. pertains to taxes assessed for the period March 1, 1970 through November 30, 1972 (File No. 01805); the application of Davmor, Inc. pertains to taxes assessed for the period June 1, 1970 through November 30, 1972 (File No. 01806); and the application of Edgмор, Inc. pertains to taxes assessed on a certain bulk sale which took place on January 30, 1970.

A formal hearing was held on June 9, 1975 at 2:30 P.M., at the offices of the State Tax Commission, State Office Building, Buffalo, New York, before L. Robert Leisner, Hearing Officer. Applicants appeared by Ernest D. Gustafson, Tax Accountant. The Sales Tax Bureau appeared by Saul Heckelman, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether applicant Burger King, Inc. owes sales tax on the purchase of certain paper products used for "on premises" consumption in its restaurants.

II. Whether applicant Davmor, Inc. owes sales tax on the sale of certain machinery used by restaurants to prepare food and drink.

III. Whether applicant Edgмор, Inc. owes sales tax on the purchase in bulk of certain machinery used by it to prepare food and drink in its restaurants.

FINDINGS OF FACT

1. On July 27, 1973, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant Burger King, Inc. ("Burger King") for the period March 1, 1970 through November 30, 1972, on the purchase of certain paper products used in its fast-food operations in the sum of \$10,591.38, plus penalty and interest of \$1,992.55, for a total due of \$12,583.93.

2. On August 30, 1973, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant Davmor Industries, Inc. ("Davmor") for the period June 1, 1970 through November 30, 1972, on the sale of certain machinery used to prepare food and drink in the sum of \$5,332.81, plus penalty and interest of \$1,312.72, for a total due of \$6,645.53.

3. On August 14, 1970, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant Edgмор, Inc. ("Edgмор"), the purchaser in a January 30, 1970 bulk sale of certain machinery used in the preparation of food and drink. (The seller, ECM Enterprises, Inc., was also named in said notice but did not apply for revision of the determination). The notice was in the amount of \$1,607.03, plus penalty and interest of \$160.70, for a total due of \$1,767.73.

4. Burger King, a wholly owned subsidiary of the Pillsbury Company, did not pay sales tax on the purchase of certain paper products used in its fast-food restaurants. During an audit, the Sales Tax Bureau established that 35% of the paper products purchased were consumed on restaurant premises, and issued an assessment based on said percentage. Said applicant conceded that the outer bags, napkins, and drinking straws which did not surround or become containers of the food or drink were taxable. Said products constituted 30% of the paper products used on premises. Burger King contended that the remainder of the paper products consumed on premises, i.e., the wrappers for sandwiches, the cups holding coffee, soda and malteds, the sleeves holding french fries and other such items were physical components of the food or drink purchased for resale and were, therefore, exempt from the imposition

of sales tax. Burger King, after applying a 30% factor (representing all of the concededly taxable paper items) to the 35% audit factor of paper products consumed on the premises, contended that only 10 1/2% of all the paper products purchased were taxable.

5. Davmor, a wholly owned subsidiary of Burger King, is a manufacturing concern that produces restaurant equipment and sells said equipment only to fast-food restaurants in the Burger King chain. Davmor failed to collect sales tax on the fryers, ovens, broilers, coffee urns, milk shake machinery and other similar equipment sold to Burger King and its franchisees, arguing that the proceeds of said sales were exempt from sales tax because such machinery and equipment were used solely in the processing of food and drink and that the sales thereof were thus exempt under section 1115(a)(12) of the Tax Law.

6. At the time of the aforementioned audit, Edgmor was 100% owned by Burger King and was merged into Burger King on May 21, 1973. On January 30, 1970, Edgmor purchased two self-service restaurants from ECM Enterprises, Inc. Edgmor, as purchaser, agreed to remit to the State of New York any sales or use tax due on the bulk sale. Edgmor paid the sales tax on all tangible personal property purchased, except the inventory acquired for

resale and the machinery and equipment used in the preparation of food and drink. It was the failure to pay the sales tax on the purchase of said machinery that was the basis for the Sales Tax Bureau's assessment. Said applicant contended that the fryers, ovens, broilers, coffee urns, milk shake machinery and other similar equipment which it purchased were used solely in the processing of food and drink and were, therefore, also exempt from sales tax by virtue of section 1115(a)(12) of the Tax Law.

CONCLUSIONS OF LAW

A. That the wrappers for sandwiches, the cups holding coffee, soda and malteds, the sleeves holding french fries, and other paper products purchased by applicant Burger King and transferred to its customers with the sale of food and drink, were not purchased for resale to said customers within the meaning and intent of section 1101(b)(4)(i) of the Tax Law. Said subsection provides, in pertinent part, that the term "retail sale" means the sale of tangible personal property for any purpose other than "... (A) for resale as such or as a physical component part of tangible personal property...". Burger King's patrons did not purchase the wrappers, cups, sleeves and other paper products "as such", but received said items only as an incident to the purchase of food and drink. No separate consideration was paid for the items in

question and they were not reuseable. Thus, the items were used or consumed by Burger King when it served the food or drink (See: Sta-Ru Corp. v. Mahin, 356 N.E. 2d 67, Sup. Ct., Ill., 1976).

Moreover, Burger King's patrons did not purchase the wrappers, cups, sleeves and other paper products as physical component parts of tangible personal property. As aforestated, these items were received by the patrons as an incident to the purchase of food and drink. Even assuming that such an item became a "physical component part" of the food or drink (which would appear to be a dubious interpretation of the statute), food or drink sold by a restaurant, tavern or other such establishment is not "tangible personal property" as such term is used in Article 28 of the Tax Law. Receipts from the sale of such food or drink are not taxable under section 1105(a) of the Tax Law, i.e., as the retail sale of tangible personal property, but under a separate provision, section 1105(d), which recognizes that the sale of such food or drink is a hybrid transaction involving both the sale of tangible personal property and a service. It is clear that the legislature intended this distinction. Compare, for example, section 1105(d)(ii)(C) which exempts food or drink sold through coin operated vending machines at ten cents or less from tax under section 1105(d), and section 1115(a)(13) which exempts receipts from the sale of tangible

personal property sold through coin operated vending machines at ten cents or less from tax under section 1105(a).

Similarly, section 1115(a)(19), which was added to the Tax Law in 1974, subsequent to the periods at issue, and exempts from tax receipts from cartons, containers, and wrapping and packaging materials and supplies, and components thereof for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to the purchaser, is inapplicable to the wrappers, cups, sleeves and other paper products such as those in question. Said exemption is limited to materials and supplies transferred with tangible personal property, as such term is used in section 1105(a) of the Tax Law, and does not apply to materials and supplies transferred with food or drink taxable under section 1105(d).

Prior determinations such as Matter of Servomation of Western New York, Inc., et al., State Tax Commission December 15, 1975 and Matter of Wavco, Inc., et al., State Tax Commission September 17, 1976, are hereby overruled to the extent that they are inconsistent herewith.

B. That receipts from the sales by applicant Davmor Industries, Inc. and the purchase in bulk by applicant Edgmor, Inc. of ovens, fryers, broilers, coffee urns, milk shake machinery and other similar

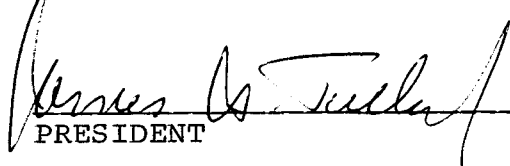
equipment, were not exempt from the imposition of sales tax under section 1115(a)(12) of the Tax Law. During the years in controversy, said section exempted machinery or equipment for use or consumption directly and exclusively in the production of tangible personal property by manufacturing, processing and other specified methods. As noted in Conclusion of Law A above, however, food or drink served in restaurants, taverns or other such establishments is not "tangible personal property" under Article 28 of the Tax Law, but is a hybrid transaction treated under a specific provision of the statute, section 1105(d). In addition, the machinery and equipment at issue were not used for the purpose of manufacturing or processing, but were merely used to prepare food and drink already manufactured or processed at a manufacturing plant. For the purposes of section 606(a)(2) of the Tax Law (the income tax investment credit), kitchen equipment used in the preparation of food is not considered equipment used for the production of goods by processing. (Petition of John F. Mahoney and Sarah Mahoney, State Tax Commission, April 1, 1976). Likewise, the machinery and equipment upon which tax was assessed were not used or consumed in manufacturing or processing, within the meaning and intent of section 1115(a)(12) of the Tax Law. Exemptions from taxation should be strictly construed. If there be any ambiguity, "all doubt must

be resolved against the exemption" (Matter of City of Lackawanna v. State Board of Equalization and Assessment of the State of New York, 16 N.Y. 2d 222,230 (1965)). Therefore, receipts from the transactions involved are subject to sales tax under section 1105(a) of the Tax Law.

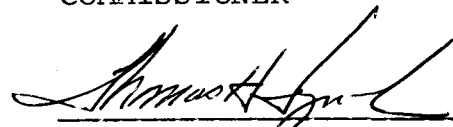
C. That the applications of Burger King, Inc., Davmor Industries, Inc. and Edgmoor, Inc. are denied; and the Sales Tax Bureau is hereby directed to revise the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued against Burger King, Inc. to include tax due on paper products used or consumed off Burger King's premises.

DATED: Albany, New York
December 7, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER