

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

PROSPECT DAIRY, 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 and 29 of the
Tax Law for the ~~Year(s)~~ Periods
8/31/71 through 6/1/72.

State of New York
County of Albany

JANET MACK, 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 30th day of May, 1975, she served the within
Notice of ~~Decision (or~~ Determination) by (~~certified~~) mail upon Prospect Dairy, Inc.

~~(Representative of the)~~ the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Prospect Dairy, Inc.

11 Main Street
Stamford, New York 12167

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 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

30th day of May, 1975.

[Signature]

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

PROSPECT DAIRY, 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 and 29 of the
Tax Law for the ~~Year(s)~~ Periods
8/31/71 through 6/1/72.

State of New York
County of Albany

JANET MACK

, 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 30th day of May , 1975, she served the within

Notice of ~~Decision (or~~ Determination) by ~~(certified)~~ mail upon David T. Garvey, Esq.

(representative of) the petitioner in the within

proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: David T. Garvey, Esq.

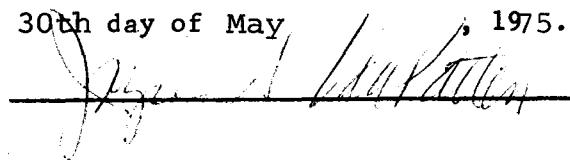
251 River Street
Troy, New York 12180

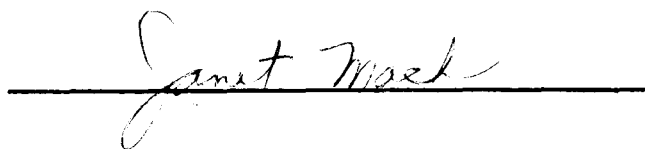
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Post Office Department within the State of New York.

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

30th day of May , 1975.







STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION
HEARING UNIT.

EDWARD ROOK
SECRETARY TO
COMMISSION

STATE TAX COMMISSION
James H. Tully, Jr.
~~XXXXXXXXXXXX~~, PRESIDENT
A. BRUCE MANLEY
MILTON KOERNER

BUILDING 9, ROOM 214-A
STATE CAMPUS
ALBANY, N.Y. 12227

AREA CODE 518

ADDRESS YOUR REPLY TO

MR. WRIGHT 457-2655
MR. LEISNER 457-2657
MR. COBURN 457-2896

DATED: Albany, New York
May 30, 1975

Prospect Dairy, Inc.
11 Main Street
Stamford, New York 12167

Gentlemen:

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

Please take further notice that pursuant to
Section(s) **1139 and 1243** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from 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 relative
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

Enc.

cc: Petitioner's Representative
Law Bureau

AD-1.12 (8/73)

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
PROSPECT DAIRY, INC.	:	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 Periods August 31, 1971 through	:	
June 1, 1972.	:	

Applicant, Prospect Dairy, Inc., 11 Main Street, Stamford, New York 12167, applied 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 periods August 31, 1971 through June 1, 1972.

A formal hearing was held at the offices of the State Tax Commission, Department of Taxation and Finance, Building #9, State Campus, Albany, New York, on October 17, 1974, before L. Robert Leisner, Hearing Officer. The taxpayer was represented by David T. Garvey, Esq. and the Sales Tax Bureau was represented by Saul Heckelman, Esq. (James A. Scott, Esq., of counsel).

ISSUE

Was the bulk transfer of an operating division's assets from Prospect Enterprises, Inc. to Prospect Dairy, Inc., a wholly owned subsidiary exempt from sales tax under section 1101 4 (ii) of the Sales Tax Law?

FINDINGS OF FACT

The taxpayer, Prospect Dairy, Inc., timely filed New York State sales and use tax returns for the periods August 31, 1971 through June 1, 1972.

This is a hearing upon the denial of the taxpayer's refund claim for taxes paid on a transfer of assets between two related corporations.

Prospect Dairy, Inc. (herein Dairy), the applicant, is located in Stamford, New York and engages in processing, distributing and selling milk and milk products. Dairy was and still is a subsidiary corporation of Prospect Enterprises, Inc. (herein Enterprises). Prior to June 30, 1972, Enterprises contained a division known as the Handy Stop Food Shops Division of Prospect Enterprises, (herein Handy).

Handy operates "mom and pop" retail food stores in suburban areas in southern New York. The stores sell grocery items, milk, dairy products and, at some locations, gasoline. The milk and dairy products sold by Handy were purchased by it from Dairy.

On June 30, 1972, the decision was made to move Handy from Enterprises to Dairy. The reason for the decision was that the president of Dairy, Hubert A. Harwood, was conducting and managing the operations of both Dairy and Handy, and the fact that Handy was a division of a separate corporation (Enterprises) made his task cumbersome and difficult. Thus, the conduct of the operations of both, by Mr. Harwood, would be easier and more efficient.

The transfer of Handy to Dairy was effectuated when Prospect transferred all of the assets and liabilities of Handy to Dairy in consideration of 59,600 shares of Class A Common Stock of Dairy which were issued and transferred to Enterprises. At the time of the transfer, the assets of Handy Stop exceeded its liabilities. Subsequent to the transfer, Enterprises still had substantially the same investment in Handy Stop and Dairy as it had before the transfer. Furthermore, the business activities of both Handy and Dairy after the transfer were identical to the activities before the transfer.

A sales and use tax on a transfer of assets in the amount of \$34,438.20 was paid by Prospect Dairy, Inc. (herein Dairy). On November 24, 1972, a refund application was filed for \$17,690.00 based upon the value of the assets consisting of furniture and fixtures transferred. The application was denied in full by letter dated September 24, 1973. Dairy applied for a hearing under 1139(b) of the Tax Law.

The applicant argued that the transaction was not taxable under the Internal Revenue Code and not taxable under section 1101(b) 4(ii) of the Tax Law.

CONCLUSIONS OF LAW

Under section 1101(b)4(ii) of the Tax Law, the transfer must be for stock pursuant to a merger or consolidation or for the stock of a new corporation upon its organization. Prospect does not meet either of these two requirements. Prospect Dairy, Inc. and Prospect Enterprises, Inc. were existing fully operating corporations and,

therefore, the transfer of assets between the corporations is fully taxable.

The taxpayer's refund application is denied.

DATED: Albany, New York

May 30, 1975

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER