

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

K and C VENDING CO.

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Sales & Use :
Taxes under Article(s) 28 & 29 of the :
Tax Law for the ~~Year(s) or~~ Period(s) :
August 1, 1965 through November 30, 1967.

State of New York
County of Albany

Catherine Steele, 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 29th day of November, 1976, she served the within
Notice of Determination by ~~(certified)~~ mail upon K and C Vending Co.

~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: K and C Vending Co.
Starbuck Avenue, P.O. Box 522
Watertown, New York 13601

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)~~
~~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

29th day of November, 1976.

Janet Mack

Catherine Steele



TELEPHONE: (518) **457-3850**

TA-1.12 (1/76)

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
K and C VENDING CO.	:	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 August 1, 1965 through	:	
November 30, 1967.	:	

K and C Vending Co., Starbuck Avenue, P.O. Box 522, Watertown, New York 13601, 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 period August 1, 1965 through November 30, 1967.

A formal hearing was held at the offices of the State Tax Commission, Utica, New York, on March 14, 1972, before L. Robert Leisner, Hearing Officer. The taxpayer was represented by Anthony Catania and the Sales Tax Bureau was represented by Saul Heckelman, Esq., (Alexander Weiss, Esq. of counsel).

ISSUE

Was applicant, K and C. Vending Co., primarily engaged in making sales of tangible personal property through coin operated vending machines at ten cents or less, during the period August 1, 1965 through November 30, 1967?

FINDINGS OF FACT

1. Applicant, K and C Vending Co., filed New York State and local sales and use tax returns for the period August 1, 1965 through November 30, 1967. It remitted to the Sales Tax Bureau the amount of sales tax due as set forth in said returns.

2. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period August 1, 1965 through November 30, 1967, was issued on June 4, 1968, against the taxpayer under Notice No. 90,755,167.

3. The taxpayer applied for a revision of the determination.

4. K and C Vending Co. was a partnership owned and operated by Carl Krickmire and Tony Catania and was engaged, during the period at issue, in the business of selling candy, milk, coffee, cold drinks and cigarettes through coin operated vending machines. The company also operated a cafeteria in the New York Air Brake plant in Watertown, New York.

5. Applicant, through the coin operated vending machines, sold items, except cigarettes, for ten cents or less. The cafeteria food sales were for less than \$1.00 and consequently tax exempt.

6. In reporting taxable sales for the period August 1, 1965 through November 30, 1967, applicant did not report receipts from the cafeteria. Applicant reported only the sales from the coin operated vending machines.

7. In a field audit, the Sales Tax Bureau computed the additional tax due based on the gross receipts from the coin operated vending machines and the cafeteria. Vending Machine sales at ten cents or less constituted the following percentages of gross sales for the respective periods:

<u>Period Ending</u>	<u>Gross Sales</u>	<u>Sales of Ten Cents or Less By Vending Machine</u>	<u>Percentage of Sales of Ten Cents or Less</u>
8/1/65	\$ 8,946.00	\$ 5,554.00	62%
11/30/65	28,924.00	18,303.00	63%
2/28/66	35,547.00	23,105.00	65%
5/31/66	43,604.00	30,207.00	69%
8/31/66	46,714.00	34,887.00	75%
11/30/66	58,209.00	44,417.00	76%
2/28/67	54,229.00	39,755.00	73%
5/31/67	47,287.00	34,414.00	73%
8/31/67	43,358.00	30,364.00	70%
11/30/67	44,601.00	32,500.00	70%

The Sales Tax Bureau had based its determination on the grounds that taxpayer's vending machine sales at ten cents or less did not constitute 75% of gross sales. It was determined on reaudit that the Notice of Determination dated June 4, 1968, should be revised and the sales tax liability for the periods ending August 31, 1966 and November 30, 1966, should be cancelled.

8. Applicant asserted that the addition of nontaxable cafeteria sales to nontaxable vending machine sales should not subject the vending machine receipts to sales tax. At the formal hearing the applicant requested a refund.

CONCLUSIONS OF LAW

A. That in order for a retailer to be primarily engaged in making sales of tangible personal property through coin operated vending machines at ten cents or less, such sales must constitute at least 75% of the retailer's gross sales for a particular quarterly period.

B. That the nontaxable cafeteria sales were properly added to the coin operated vending machine sales to determine gross sales.

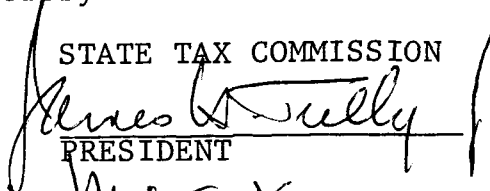
C. That since applicant's vending machine sales at ten cents or less constituted 75% of applicant's gross sales only in the quarterly periods ending August 31, 1966 and November 30, 1966, only in said periods was applicant primarily engaged in making such sales and only in said periods were applicant's receipts from such sales exempt from sales and use tax under section 1115(a)(13) of the Tax Law.


D. That the evidence does not support the claim for refund.

E. That the determination, as modified by the cancellation of applicant's liability for the periods ending August 31, 1966 and November 30, 1966, is sustained and the application for revision of determination and request for refund are hereby denied.

DATED: Albany, New York
November 29, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER