

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

HENRY & HENRY, 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)
12/1/68 thru 11/30/71.

State of New York
County of Albany

Donna Scranton, 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 5th day of August, 1976, she served the within
Notice of Determination by ~~certified~~ mail upon Henry &
Henry, Inc. (~~representative of~~) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Henry & Henry, Inc.
Northland at Bailey
Buffalo, 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 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

5th day of August, 1976

Donna Scranton

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
HENRY & HENRY, 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 ~~Years(s)~~ or Period(s) :
12/1/68 thru 11/30/71.

State of New York
County of Albany

Donna Scranton, 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 5th day of August, 1976, she served the within Notice of Determination by ~~(certified)~~ mail upon Hilary P. Bradford (representative of) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows: Hilary P. Bradford
Cohen, Swados, Wright, Hanifin & Bradford
70 Niagara Street
Buffalo, New York 14202
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

5th day of August, 1976.

Donna Scranton

Janet Mack



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

TAX APPEALS BUREAU

STATE CAMPUS
ALBANY, N.Y. 12227

STATE TAX COMMISSION

ADDRESS YOUR REPLY TO

August 5, 1976

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

Henry & Henry, Inc.
Northland at Bailey
Buffalo, New York

GENTLEMEN:

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

Please take further notice that pursuant to
Section(s) **1139 & 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.

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. They
will be referred to the proper party for reply.

Very truly yours,

PAUL B. COBURN
SUPERVISING TAX
HEARING OFFICER

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
HENRY & HENRY, INC.	:	DETERMINATION
	:	
for Revision of a Determination or for	:	
a Refund of Sales and Use Tax under	:	
Articles 28 and 29 of the Tax Law for	:	
the Period December 1, 1968 through	:	
November 30, 1971.	:	

Applicant, Henry & Henry, Inc., Northland at Bailey, Buffalo, New York, has filed an application for revision of a determination or for refund of sales and use tax under Articles 28 and 29 of the Tax Law for the period December 1, 1968 through November 30, 1971.

The taxpayer filed a timely application for a refund of the alleged deficiency paid under protest by the applicant. A formal hearing was requested and scheduled for July 22, 1974, at 2:15 p.m. Prior to the formal hearing, applicant advised the State Tax Commission, in writing, that it waived a formal hearing and requested that the State Tax Commission decide the case upon the entire record contained in the file.

After due consideration of the said record, the State Tax Commission renders the following decision.

ISSUE

Were the containers used by the applicant, Henry & Henry, Inc., to ship its products to store customers within New York State during the period from December 1, 1968 through November 30, 1971, subject to sales tax?

FINDINGS OF FACT

1. On October 3, 1972 the Sales Tax Bureau issued a Notice of Determination and Demand against applicant, Henry & Henry, Inc., imposing additional sales tax for the period December 1, 1968 through November 30, 1971, in the sum of \$7,050.97 plus penalty and interest of \$741.71 for a total of \$7,792.68, which sum was paid by the applicant under protest.

2. During the period from December 1, 1968 through November 30, 1971, applicant, Henry & Henry, Inc., manufactured a line of some 200 food products consisting of fillings, toppings and related items. The company's sales were made largely to bakeries, fast food, and ice cream stores, all of which serve the public.

3. During said period the containers in which the applicant, Henry & Henry, Inc.'s, products were shipped, were not billed to customers, nor did the customers resell the containers.

CONCLUSIONS OF LAW

A. That the sale by applicant, Henry & Henry, Inc., to retail food merchants of containers packed with food products during the

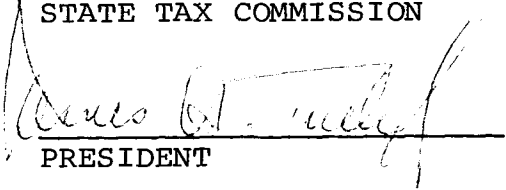
period from December 1, 1968 through November 30, 1971, constituted a retail sale of the said containers to said retailers in accordance with the meaning and intent of section 1101(b)(4) of the Tax Law, since the retailer did not resell the containers with the contents therein. Dairylea Cooperative, Inc. v. State Tax Commission, 41 A.D. 2d 312; 342 NYS 2d 761 (3rd Dept., 1973).

B. That sales of food were given a general specific exemption, but the statute in effect during the period in issue did not specifically exempt the containers of foods from the imposition of a sales tax. The sale of the containers with topping inside was a retail sale of the containers to the ultimate consumer.

C. That the application of Henry & Henry, Inc., for a refund of sales tax for the period from December 1, 1968 through November 30, 1971, is hereby denied.

DATED: Albany, New York
August 5, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER