

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Max Feigenheimer :  
d/b/a Robo Drink : AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of :  
Sales & Use Tax :  
under Article 28 of the Tax Law :  
for the Period 12/1/68 - 11/30/71. :

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of August, 1979, he served the within notice of Determination by mail upon Max Feigenheimer, d/b/a Robo Drink, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Max Feigenheimer  
d/b/a Robo Drink  
2218 Eastern Pky.  
Schenectady, NY 12309

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
17th day of August, 1979.

Victoria Perry

Jay Vredenburg



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

STATE TAX COMMISSION

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

JOHN J. SOLLECITO  
DIRECTOR

Telephone: (518) 457-1723

August 17, 1979

Max Feigenheimer  
d/b/a Robo Drink  
2218 Eastern Pky.  
Schenectady, NY 12309

Dear Mr. Feigenheimer:

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 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,

A handwritten signature in cursive script, likely belonging to John J. Sollecito, the Director of the State Tax Commission.

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
of	:	
MAX FEIGENHEIMER D/B/A	:	DETERMINATION
ROBO-DRINK	:	
	:	
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 December 1, 1968 through	:	
November 30, 1971.	:	

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Applicant, Max Feigenheimer d/b/a Robo-Drink, 2218 Eastern Parkway, Schenectady, New York, filed an application 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 December 1, 1968 through November 30, 1971 (File No. 01454).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on August 15, 1978 at 1:15 P.M. Applicant appeared by Michael Francis Daly, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Ellen Purcell, Esq., of counsel).

ISSUES

I. Whether applicant is primarily engaged in making sales of tangible personal property at ten cents or less through coin-operated vending machines.

II. Whether applicant is liable for sales tax on the total receipts from the sale of items sold at ten cents or less, where he was precluded by sales tax schedules from collecting tax from his customers at the time of each such individual sale.

III. Whether the penalties and interest in excess of the minimum imposed by the Sales Tax Bureau should be cancelled.

FINDINGS OF FACT

1. Applicant, Max Feigenheimer d/b/a Robo-Drink, timely filed New York state and local sales and use tax returns for the period December 1, 1968 through November 30, 1971.

2. On June 19, 1972 as the result of an audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant for \$4,513.89, plus penalty and interest of \$1,313.91, for a total of \$5,827.80.

3. Applicant was engaged in the sale of cigarettes, candy, soda and food items, through coin-operated vending machines located in Schenectady and Albany counties.

4. On audit, the Sales Tax Bureau determined that applicant did not pay sales tax on the receipts from candy and soda sold at ten cents or less. All vending machine sales were detailed by sales tax quarter. Sales of taxable items at ten cents or less constituted the following percentages of gross sales for the respective periods:

<u>Period Ending</u>	<u>Sales at Ten Cents or Less</u>	<u>Gross Sales</u>	<u>Percentage of Sales at Ten Cents or Less</u>
2/28/69	\$16,210.35	\$41,247.60	39%
5/31/69	15,070.50	42,129.50	36%
8/31/69	12,016.25	35,609.35	34%
11/30/69	14,261.55	38,015.20	37%
2/28/70	13,964.30	33,427.10	42%
5/31/70	14,833.20	36,478.80	41%
8/31/70	10,422.20	28,163.20	37%
11/30/70	13,226.40	38,834.65	34%
2/28/71	15,174.25	43,098.60	35%
5/31/71	14,993.80	42,570.85	35%
8/31/71	5,483.00	19,476.85	28%
11/30/71	4,351.00	21,912.90	20%

The Sales Tax Bureau based its determination on the grounds that applicant's vending machine sales at ten cents or less did not constitute 75% of gross sales.

5. Sales Tax Information, Letter No. 24 dated January 6, 1967, and Questions and Answers for Automatic Coin Vending Machine Operators, Booklet No. 6 dated March, 1970, defines the word "primarily" as used in section 1115(a)(13) of the Tax Law to mean that at least 75% of a retailer's receipts are from the sale of items at ten cents or less. Booklet No. 6 states further that "primarily" means 75% or more of the vendor's total receipts, from all sources.

6. Applicant contends that the Sales Tax Bureau's interpretation of "primarily" is arbitrary and capricious, and that it is inconsistent with the definition of the word "predominantly" as used in section 1115(a)(12) of the Tax Law, which means more than 50%.

7. Applicant also contended that the percentage used to determine "primarily" should be based on taxable items sold at ten cents or less, divided by total taxable receipts.

8. Applicant acted in good faith at all times.

#### 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 75% or more of the retailer's gross sales (Matter of K and C Vending Co., State Tax Commission, November 29, 1976).

B. That applicant's sales of items at ten cents or less for the period December 1, 1968 through November 30, 1971, were never 75% or more of gross receipts; therefore, applicant was not "primarily engaged" within the meaning and intent of section 1115(a)(13) of the Tax Law.

C. That the Sales Tax Bureau's definition of the word "primarily" as used in section 1115(a)(13) was not arbitrary or capricious.

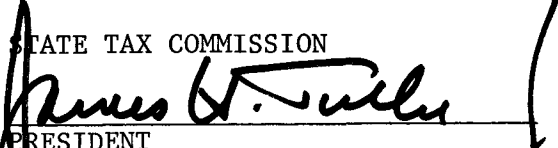
D. That applicant is liable for tax on total receipts from the sale of taxable items, although tax bracket schedules prohibit applicant from collecting the tax from the customer on the individual sale of such items, pursuant to sections 1132(b) and 1133(a) of the Tax Law (Komp v. State Tax Commission, 56 Misc. 824).

E. That the application of Max Feigenheimer d/b/a Robo-Drink is granted to the extent that the interest, in excess of the minimum interest, and the penalty imposed pursuant to section 1145(a) of the Tax Law are waived. The Sales Tax Bureau is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 19, 1972 and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

AUG 17 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER