

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

American Whipped Products Inc.; Walter Silverfarb,

Harry M. Taxin, Hubert Willson, Ind. & Officers

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Sales & Use Tax :

under Article 28 & 29 of the Tax Law

for the Period 12/1/68-8/31/74.

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 7th day of July, 1980, he served the within notice of Determination by mail upon American Whipped Products Inc.; Walter Silverfarb,, Harry M. Taxin, Hubert Willson, Ind. & Officers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

American Whipped Products Inc.; Walter Silverfarb,
Harry M. Taxin, Hubert Willson, Ind. & Officers
243 Washington St.
Mt. Vernon, NY 10553

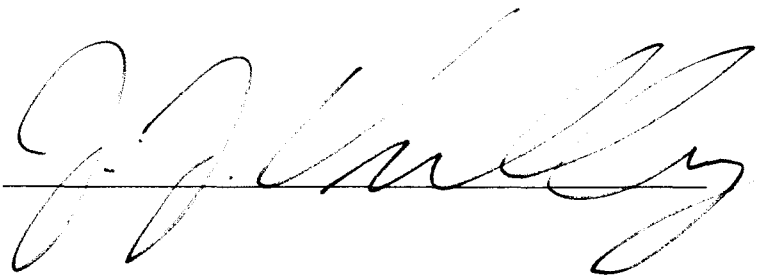
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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

7th day of July, 1980.

Deborah A Bank



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
American Whipped Products Inc.; Walter Silverfarb,
Harry M. Taxin, Hubert Willson, Ind. & Officers : **AFFIDAVIT OF MAILING**
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 12/1/68-8/31/74. :

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 7th day of July, 1980, he served the within notice of Determination by mail upon Howard W. Dragutsky the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Howard W. Dragutsky
Weber, Lipshig & Co.
575 Madison Ave.
New York, NY 10022

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 July, 1980.

Esther A. Brink

J. Vredenburg

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

July 7, 1980

American Whipped Products Inc.; Walter Silverfarb,
Harry M. Taxin, Hubert Willson, Ind. & Officers
243 Washington St.
Mt. Vernon, NY 10553

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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Howard W. Dragutsky
Weber, Lipshig & Co.
575 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
AMERICAN WHIPPED PRODUCTS, INC.	:	DETERMINATION
and	:	
WALTER SILVERFARB, HARRY M. TAXIN	:	
and	:	
HUBERT WILSON,	:	
Individually and as Officers	:	
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 August 31,	:	
1974.	:	

Applicants, American Whipped Products, Inc., and Walter Silverfarb, Harry M. Taxin and Hubert Wilson, individually and as officers, 243 Washington Street, Mt. Vernon, New York 10553, 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 August 31, 1974 (File No. 14134).

A small claims hearing was held before Raymond J. Siegel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 13, 1978 at 1:15 P.M. Applicants appeared by Howard W. Dragutsky, CPA. The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

I. Whether the assessment for the period December 1, 1968 through August 31, 1974, based on the Sales Tax Bureau's test period of one sales tax quarter, was proper.

II. Whether penalty and interest in excess of the minimum statutory rate imposed by the Sales Tax Bureau should be cancelled.

FINDINGS OF FACT

1. Applicant, American Whipped Products, Inc. ("American"), manufactures a non-dairy coffee creamer and other related products.
2. On April 14, 1975, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against American and Walter Silverfarb, Harry M. Taxin and Hubert Wilson, individually and as officers in the amount of \$4,679.95, plus penalty and interest of \$2,001.77, for a total amount due of \$6,681.72. Said notice was issued as the result of a field audit, which disclosed additional sales and use taxes due of \$10,939.30 and a credit or refund due applicant of \$6,259.35 for the period December 1, 1968 through August 31, 1974.
3. American was an unregistered vendor until the initial contact by the sales tax auditor in November of 1972; after that date, American filed State and local sales and use tax returns on an annual basis through May 31, 1974.
4. On audit, the Sales Tax Bureau's auditor found that American maintained adequate books and records. The auditor examined the general ledger, purchase journal, purchase invoices, sales journal, petty cash book and income tax returns.
5. The Sales Tax Bureau's auditor examined refund claims and corresponding bills, and approved a refund in the sum of \$6,259.35, on purchases of electricity, fuel oil and the rental of production machinery.
6. American was unaware of the responsibility for collection of sales tax on outer containers used in sales shipments to customers for the periods prior to July 1, 1974; therefore, it did not collect any sales tax on the outer containers shipped to customers located in New York State.
7. The auditor examined purchases for the three-month period ended November 30, 1972. The test of packaging supply invoices revealed that \$12,227.96

or 27.8% of such supplies consisted of outer containers. The auditor then performed a test of sales for the month of November 1972 and determined that 38.9% of outer containers were shipped to customers within New York State. Applying these percentages to total purchases of packaging supplies for the period December 1, 1968 through August 31, 1974, the auditor arrived at sales tax due on outer containers of \$8,265.10.

8. The test of factory supply purchases revealed that \$203.03 or 18% had been purchased without sales tax having been paid. This resulted in additional tax due on factory supplies purchased for the audit period of \$647.18.

9. The test of repair and maintenance bills revealed that \$1,161.39 or 26% of said purchases were made without payment of the tax. This resulted in additional tax due on repair and maintenance purchases for the audit period of \$862.06.

10. After registering with the Sales Tax Bureau, American issued an exempt-use certificate to Consolidated Edison Co. for electricity used in production, and paid no sales tax on its electricity expense. American's approved claim for refund included a 90% electrical-use factor for production. The auditor assessed 10% of electric expenses for the period of nonpayment of tax to Consolidated Edison Co., which tax amounted to \$616.23.

11. An audit of fixed asset accounts resulted in additional tax due of \$548.73 for the audit period December 1, 1968 through August 31, 1974.

12. American asserted that even if shipments of cartons to retailers are taxable, that its shipments to "institutional" customers (wholesalers and grocery chain stores) should not be subject to tax, as said customers resell the contents in the same cartons. American did not submit any exemption certificates (for the outer containers) from any of its customers, nor did it introduce any documentary evidence to show that its "institutional" customers

were wholesalers.

13. Applicants contended that the manner in which the audit was conducted was not proper, and that errors were made in arriving at the percentages used to determine the sales tax due on outer corrugated containers. Applicants argued against the Bureau's use of a test period, indicating that the three-month period used was not representative of the other quarters in the audit period and that the use of a test period was inappropriate, especially since adequate books and records had been maintained.

14. Applicants acted in good faith at all times and they did not intend to evade the tax.

CONCLUSIONS OF LAW

A. That prior to July 1, 1974, the sales or use tax applied to outer containers and other packaging supplies which were discarded at some trade level, and which did not accompany the contents to the ultimate consumer; accordingly, American's sales of outer containers were taxable under section 1105(a) of the Tax Law and were not specifically exempt by statute prior to July 1, 1974; therefore, applicant was liable for collection of sales tax on outer containers sold to retailers within New York State prior to July 1, 1974.

B. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit. (Chartair Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

C. That applicant American maintained adequate books and records from which the actual tax on outer-containers, factory supplies and repairs and maintenance could have been determined. Therefore, the tax due is reduced to

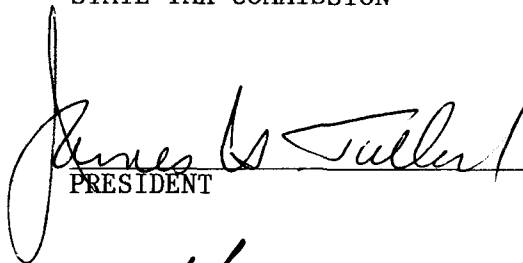
the amounts found due for the period reviewed which is \$326.78, \$12.18 and \$69.68 respectively. All other procedures and results of the sales tax audit are proper and correct.

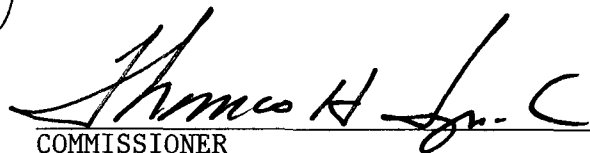
D. That applicants acted in good faith; therefore, the penalty and interest in excess of the minimum statutory rate are cancelled.

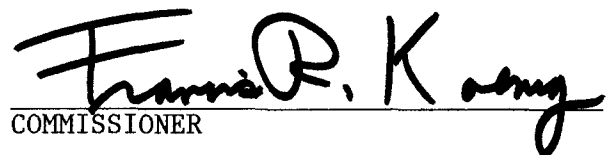
E. That the application of American Whipped Products, Inc. and Walter Silverfarb, Harry M. Taxin and Hubert Wilson, individually and as officers, is granted to the extent indicated in Conclusions of Law "C" and "D" above; that the Audit Division is hereby directed to modify the notice of determination issued April 14, 1975 and issue a refund to American on the net difference between the recomputed tax due and the refund approved as per Finding of Fact "5", plus interest as may be lawfully due.

DATED: Albany, New York
JUL 07 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER