

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of

James M. McNearney Distributors, Inc.

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 3/1/73-2/28/76. :

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 14th day of November, 1980, he served the within notice of Determination by mail upon James M. McNearney Distributors, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James M. McNearney Distributors, Inc.  
1707 State St.  
Schenectady, NY 12304

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  
14th day of November, 1980.

*Detorah Bank*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
James M. McNearney Distributors, Inc. :

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Sales & Use Tax :  
under Article 28 & 29 of the Tax Law  
for the Period 3/1/73-2/28/76. :

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 14th day of November, 1980, he served the within notice of Determination by mail upon Raymond A. Dechene the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

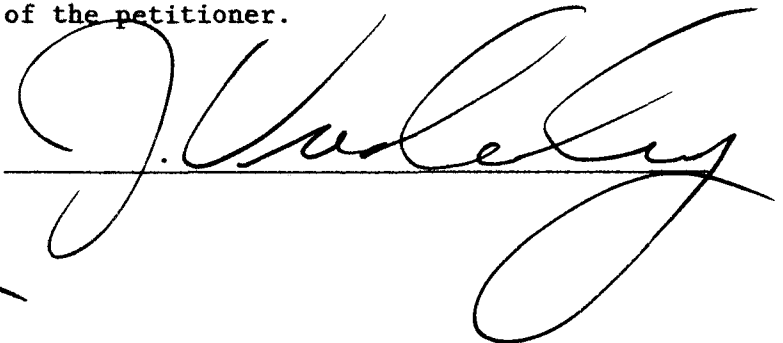
Mr. Raymond A. Dechene  
54 Brockley Dr.  
Delmar, NY 12054

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  
14th day of November, 1980.





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

November 14, 1980

James M. McNearney Distributors, Inc.  
1707 State St.  
Schenectady, NY 12304

Dear Mr. McNearney:

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  
Raymond A. Dechene  
54 Brockley Dr.  
Delmar, NY 12054  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application :  
of :  
JAMES M. MCNEARNEY DISTRIBUTORS, INC. : DETERMINATION  
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 March 1, 1973 :  
through February 28, 1976.

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Applicant, James M. McNearney Distributors, Inc., 1707 State Street, Schenectady, New York 12304, 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 March 1, 1973 through February 28, 1976 (File No. 15122).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Bldg. #9, State Campus, Albany, New York, on August 23, 1979 at 9:15 A.M. Applicant appeared by Raymond A. Dechene, P.A. The Audit Division appeared by Peter Crotty, Esq. (Kathy Sanderson, Esq., of counsel).

ISSUES

I. Whether the construction of a beer cooler constituted a capital improvement to real property or whether on completion, said cooler retained its identity as personal property.

II. Whether a delivery truck purchased by applicant was subject to the local tax imposed by the City of Saratoga Springs.

FINDINGS OF FACT

1. On April 30, 1976, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due

against applicant, James M. McNearney Distributors, Inc., for the period March 1, 1973 through February 28, 1976 in the amount of \$2,087.20, plus penalty and interest of \$490.90, for a total of \$2,578.10.

2. Applicant operated a beer distributorship located at 1707 State Street, Schenectady, New York. Applicant's sales territory included Schenectady County, Saratoga County and the City of Saratoga Springs.

3. On audit, the Audit Division found that applicant failed to pay a sales or use tax on miscellaneous expense purchases and the acquisition of certain fixed assets. The only items at issue are a beer cooler and a delivery truck on which taxes were assessed in the amounts of \$661.05 and \$900.66, respectively.

4. On January 15, 1975, applicant contracted Reimherr and Schmidt, Inc., contractors and engineers, to construct a beer cooler. The beer cooler was erected within the building which applicant leased from James M. McNearney Corp. The cooler is a concrete block structure with dimensions of approximately 15 feet x 30 feet and 30 feet high. One wall is common with the exterior wall of the building. The walls are insulated with 4 inches of styrofoam. The existing floor of the building, which is common with the cooler floor, was replaced so that insulation could be installed underneath. The storage capacity of the cooler is approximately 1,500 one-half barrels of beer.

The total contract price was \$16,526.37. The contractor, Reimherr and Schmidt, Inc., paid the sales tax on purchases of tangible personal property incorporated in the structure.

The Audit Division took the position that the beer cooler remained personal property after completion and thus asserted sales tax on the total contract amount.

5. Applicant issued a Certificate of Capital Improvement to the contractor, Reimherr and Schmidt, Inc.



6. Applicant considered the beer cooler a depreciable capital asset for Federal income tax purposes.

7. The beer cooler was constructed in such a manner that it became a part of the realty. The removal of the cooler from the premises would cause material damage to the cooler itself and render it practically worthless.

8. On September 25, 1975, applicant purchased a delivery truck for \$15,011.00 from Frange Betten Transportation Corp. of Miami, Florida. Applicant did not pay a sales or use tax on this transaction. The Audit Division held applicant liable for both the New York State tax and the local tax imposed by the City of Saratoga Springs on the basis that the vehicle was used in the City of Saratoga Springs in the regular course of business. Applicant conceded that it is liable for the New York State sales tax amounting to \$600.44.

9. Applicant garaged the delivery truck at issue in the City of Schenectady and used it primarily in Schenectady County and Saratoga County (outside the City of Saratoga Springs).

10. Applicant made deliveries with the truck to the City of Saratoga Springs at least one day a week. Applicant had 220 accounts in Saratoga County, of which, 25 were in the City of Saratoga Springs.

#### CONCLUSIONS OF LAW

A. That the beer cooler constituted a capital improvement to real property, the purchase of which is not subject to the New York State sales or compensating use tax.

B. That the delivery truck was not garaged or principally used in the City of Saratoga Springs. Therefore, its purchase was not subject to the sales or use tax imposed by said local taxing jurisdiction. Matter of Xerox Corporation v. State Tax Commission, 71 AD 2d 177; 422 NYS2d 493.

THE UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

WASHINGTON, D. C.

February 1, 1944

MEMORANDUM FOR THE ATTORNEY GENERAL

SUBJECT: [Illegible]

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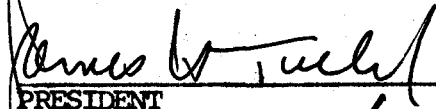


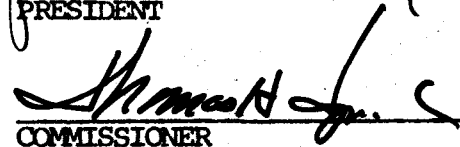
C. That the application of James M. McNearney Distributors, Inc., is granted to the extent that the additional taxes of \$2,087.20 are reduced to \$1,125.93. The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 30, 1976. Except as so granted, the application is in all other respects denied.


DATED: Albany, New York

NOV 14 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

John, W. ...  
...  
... X ...

NOV 4 1980