STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Prophet Foods Co. :

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 3/1/73-2/29/76. :

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 19th day of September, 1980, he served the within notice of Decision by mail upon Prophet Foods Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Prophet Foods Co.
c/o Eugene W. Bronski, Vice President
2301 W. LaFayette Blvd.
Detroit, MI 48216

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
19th day of September, 1980.

Arthur Bank

J. Vredenburg

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

September 19, 1980

Prophet Foods Co.
c/o Eugene W. Bronski, Vice President
2301 W. LaFayette Blvd.
Detroit, MI 48216

Gentlemen:

Please take notice of the Decision 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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|---|---|---|
| In the Matter of the Petition | : | |
| of | : | |
| PROPHET FOODS COMPANY | : | DECISION |
| for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods March 1, 1973 to February 29, 1976. | : | |

Petitioner, Prophet Foods Company, 2301 West Lafayette Blvd., Detroit, Michigan, 48216, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods March 1, 1973 to February 29, 1976 (File No. 16558).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Campus, Albany, New York, on May 2, 1978 and July 27, 1978. Petitioner appeared by Eugene W. Bronski, Esq. The Audit Division appeared by Peter Crotty, Esq. (Laurence Stevens and Barry Bresler, Esqs., of counsel).

## ISSUE

I. Whether payments for management fees and subsidy payments are taxable receipts from the sale of food and drink.

II. Whether certain sales were made to an instrumentality or agency of the United States government.

## FINDINGS OF FACT

1. On September 15, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Prophet Foods Company for the periods March 1, 1973 to February 29, 1976 in the amount of $56,116.18, plus penalty and interest of $18,450.70, for a total of $74,566.88.

2. Petitioner executed a consent extending the time within which to issue an assessment of sales and use taxes for the audit period to December 20, 1976.

3. Petitioner acknowledged and conceded liability for sales and use taxes on purchases in the amount of $20,131.36, capital expenditures in the amount of $1,426.87, and $8,007.93 attributed to various sales at sites around the State. The total conceded to be owing by petitioner is $29,572.40. Contested is $26,543.78.

4. Petitioner is a food service management company which operates twenty-three facilities within New York State. Contracts are made with clients for the operation of cafeteria and/or vending facilities at the clients' establishments for which the clients are charged management fees and cost reimbursement. Reynolds Metals, Avon Products and Ayerst Laboratories were provided with these food services, as were the Knolls Atomic Power Laboratory in Niskayuna and Kesselring Research Laboratory in West Milton, New York.

5. Petitioner was furnished by the companies with the facilities, utilities, equipment, linen and cleaning. Petitioner took responsibility for all aspects of the cafeteria and dining room operations, hired its own employees, provided management skills and, with these companies, determined fair price for the products sold. Profit, if any, was remitted to the companies. The sales tax levied on receipts from management fees, cost reimbursement and subsidiary payments amounted to $6,950.94.

6. Petitioner timely filed New York State sales and use tax returns for the periods in issue. Sales tax was collected at some locations but not at the Knolls Atomic Power Laboratory at Niskayuna and the Kesserling Research Laboratory at West Milton, New York. These were operated by General Electric for the U.S. Department of Energy. An Exempt Use Certificate was issued to petitioner by

the General Electric Company Knolls Atomic Power Laboratory as purchaser in which it was stated that the "Purchaser, user, or consumer is the United States of America". The amount of tax levied as the result of these sales was $19,592.84. The actual purchasers were employees of General Electric and an occasional Federal employee, all of whom paid for the food out of their own pockets.

7. Petitioner offered no documentary or other substantial evidence that sales to employees who used its services were sales to an agency or instrumentality of the United States.

CONCLUSIONS OF LAW

A. That section 1105 of the Tax Law provides, in part, that a tax will be imposed upon the following:

> "(d) (i) The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers..."

Therefore, management fees and subsidy payments are receipts from the sale of food and drink and are subject to the imposition of sales tax within the meaning and intent of said section. (In the Matter of Stouffer Management Service, Inc., State Tax Commission, June 3, 1977). (See also: Stouffer Management Food Service, Inc. v. Tully, 98 Misc. 2d 1128, Aff'd 414 N.Y.S.2d 948, motion for leave to appeal denied 45 N.Y.2d 774).

B. Section 1116 of the Tax Law provides, in part, as follows:

> Sec. 1116. Exempt organizations. (a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following...shall not be subject to the sales and compensating use taxes imposed under this article:
>
> ***
>
> (2) The United States of America, and any of its agencies and instrumentalities, insofar as it is immune from taxation where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons;...

The general Election Laws only forbid public [illegible] to participate in such [illegible] "[illegible] or [illegible] in the [illegible] of [illegible]". The [illegible] of the [illegible] or [illegible] of [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] employees, all of [illegible] for the [illegible] of [illegible] [illegible].

The [illegible] of [illegible] [illegible] or of an [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

That there was no sale by petitioner to the United States, or to any of its agencies or instrumentalities. Therefore, the sales at issue were not exempt from tax.

C. That the petition of Prophet Foods Company is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on September 15, 1976 is sustained.

DATED: Albany, New York

SEP 19 1980

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

SEP 1 3 1980

TA-36 (9/76) State of New York - Department of Taxation and Finance
Tax Appeals Bureau

REQUEST FOR BETTER ADDRESS #9

Dec. For. 9, 19 28-29.

| Requested by | Unit | Date of Request |
|---|---|---|
| J. Uedaling | Tax Appeals Bureau Room 107 - Bldg. 9 Campus Albany, New York 12227 | |

Please find most recent address of taxpayer described below; return to person named above.

| Social Security Number | Date of Petition |
|---|---|
| 38-1206635-C | 76-09-21 |

Name: Prophet Foods Co

Address: c/o Eugene W. Browski, V.P.
2301 W. La Fayette Blvd.
Detroit, Michigan 48216

Results of search by Files

☐ New address: $

☐ Same as above, no better address

☐ Other: ~~Dayhound Food Management~~
Dayhound Tower Tax Dept H3268
~~Phoen~~ Phoenix AZ 85077

| Searched by | Section | Date of Search |
|---|---|---|
| | | |

PERMANENT RECORD

FOR INSERTION IN TAXPAYER'S FOLDER

TA-26 (4-76) 25M

STATE OF NEW YORK
Department of Taxation and Finance
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

Prophet Foods Co.
c/o Eugene W. Bronski, Vice President
2301 W. LaFayette Blvd.
Detroit, MI 48216

remailed
11/6/80

STATE OF NEW YORK
STATE TAX COMMISSION

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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 November, 1980, he served the within notice of Decision by mail upon Prophet Foods Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Prophet Foods Co.
c/o Greyhound Food Mgt.
Greyhound Tower Tax Dept. #3268
Phoenix, AZ 85077

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 November, 1980.

Deborah A Bank