

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
John Bohlsen Associates, Inc. :  
Arby's Roast Beef Restaurant :  
: 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 :  
9/1/71 - 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 2nd day of October, 1981, he served the within notice of Decision by certified mail upon John Associates, Inc., Arby's Roast Beef Restaurant the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Bohlsen Associates, Inc.  
Arby's Roast Beef Restaurant  
1600 Dear Park Avenue  
Deer Park, NY 11729

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  
2nd day of October, 1981.

Chance A. Hagelund

Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
John Bohlsen Associates, Inc. :  
Arby's Roast Beef Restaurant :  
: 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 :  
9/1/71 - 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 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Seymour Diamond the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

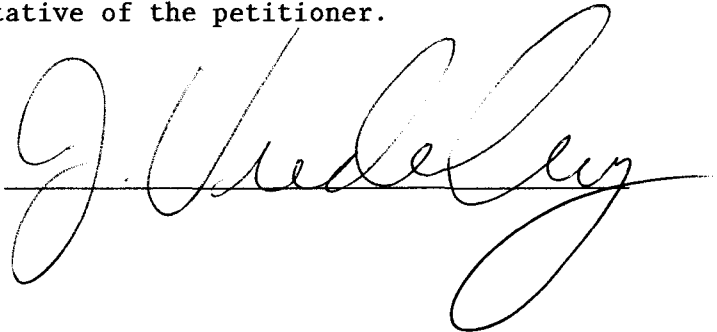
Seymour Diamond  
Diamond Charles & Co.  
216 Merrick Ave.  
Merrick, NY 11566

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  
2nd day of October, 1981.





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

October 2, 1981

John Bohlsen Associates, Inc.  
Arby's Roast Beef Restaurant  
1600 Dear Park Avenue  
Deer Park, NY 11729

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,  
*Kathy Pfaffenbach*

STATE TAX COMMISSION

cc: Petitioner's Representative  
Seymour Diamond  
Diamond Charles & Co.  
216 Merrick Ave.  
Merrick, NY 11566  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
	:	
of	:	
	:	
JOHN BOHLSSEN ASSOCIATES, INC.	:	
ARBY'S ROAST BEEF RESTAURANT	:	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 Period September 1,	:	
1971 through August 31, 1974.	:	

---

Petitioner, John Bohlsen Associates, Inc., Arby's Roast Beef Restaurant, 1600 Dear Park Avenue, Deer Park, New York 11729, 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 period September 1, 1971 through August 31, 1974 (File No. 10025).

A small claims hearing was held before Joseph Chyrywat, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 18, 1979 at 1:00 P.M. Petitioner appeared by Seymour Diamond, P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether paper bags, wrapping paper, napkins, straws, stirers, containers, cups and lids used by a fast food restaurant which sells food for off-premise and on-premise consumption are taxable.

FINDINGS OF FACT

1. Petitioner, John Bohlsen Associates, Inc., Arby's Roast Beef Restaurant, operated three drive-in restaurants selling food and drink for both on-premise and off-premise consumption.

2. On April 18, 1975, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner for tax due of \$6,211.97 for the period September 1, 1971 through August 31, 1974. On October 23, 1975, the Audit Division issued a Notice of Assessment Review reducing the tax due to \$5,202.10.

3. Petitioner executed a consent extending the time within which to issue an assessment of sales and use taxes due for the period in issue, to December 20, 1975.

4. On audit, the Audit Division determined that purchases of paper bags, wrapping paper, containers, cups, lids, napkins, straws and stirers used in the petitioner's fast food operation were subject to sales tax and determined a tax due of \$4,139.57 on such purchases. Additionally, the Audit Division determined a tax due of \$1,062.53 on cleaning supplies and certain fixed assets which the petitioner agreed to and paid.

5. A conference was held for the purpose of resolving the issue regarding the tax due of \$4,139.57 on the purchase of paper products. At the conference it was determined that \$654.06 represented tax due on the purchase of napkins, straws and stirers. The petitioner agreed that such purchases were taxable and paid the tax.

6. The paper bags, wrapping paper, containers, cups and lids at issue were used by petitioner to package food items for sale to customers. Said packaging materials are transferred to the customer along with the food product. Petitioner's business operation is such that the packaging is a critical element of the final product sold to customers.

CONCLUSIONS OF LAW

A. That the paper bags, wrapping paper, containers, cups and lids used by petitioner to package food and drink for sale to its customers were purchased for "resale as such" within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law and therefore not subject to tax. Matter of Burger King, Inc. v. State Tax Commission, 51 NY 2d 614. The tax determined due on such paper products in the amount of \$3,485.51 is cancelled.


B. That the petition of John Bohlsen Associates, Inc., Arby's Roast Beef Restaurant is granted to the extent indicated in Conclusion "A"; that the remaining taxes due of \$1,716.59 plus applicable interest thereon have been paid by petitioner. Accordingly, the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 18, 1975, as revised by the Notice of Assessment Review issued October 23, 1975 is cancelled.

DATED: Albany, New York

OCT 02 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER