

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Earlecia, 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:
3/1/70 - 2/28/73.

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 25th day of September, 1981, he served the within notice of Decision by certified mail upon Earlecia, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Earlecia, Inc.
5691 S. Transit Rd.
Lockport, NY 14094

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
25th day of September, 1981.

Annie G. Haglund

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Earlecia, 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 3/1/70 - 2/28/73.

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 25th day of September, 1981, he served the within notice of Decision by certified mail upon Samuel J. Palisano the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Samuel J. Palisano
Jaeckle, Fleischman & Mugel
700 Liberty Bank Bldg.
Buffalo, NY 14202

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
25th day of September, 1981.

Bonnie A. Hagelund

J. Vredenburg

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

September 25, 1981

Earlecia, Inc.
5691 S. Transit Rd.
Lockport, NY 14094

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
Samuel J. Palisano
Jaekle, Fleischman & Mugel
700 Liberty Bank Bldg.
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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|---|---|----------|
| In the Matter of the Petition | : | |
| of | : | |
| EARLECIA, INC. | : | 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 March 1, 1970 | : | |
| through February 28, 1973. | : | |

Petitioner, Earlecia, Inc., 5691 South Transit Road, Lockport, New York, 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 March 1, 1970 through February 28, 1973 (File No. 18497).

A formal hearing was held before L. Robert Leisner, Hearing Officer, at the offices of the State Tax Commission, State Office Building, Buffalo, New York, on May 20, 1974. Petitioner appeared by Samuel J. Palisano, Esq. The Audit Division appeared by Saul Heckelman, Esq., (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether the purchases by petitioner of containers, wrappers, and packaging material and accessories such as straws, napkins and stirrers were purchases of tangible personal property "for resale as such" or as a physical component part of its food products within the meaning of section 1101(b)(4)(i)(A) and thereby exempt from the use tax imposed by section 1110(A), or taxable "purchases at retail."

II. Whether the petitioner's failure to furnish a resale certificate to its vendor conclusively establishes that the purchase of paper goods was subject to tax, even though the purchase was in fact for resale.

FINDINGS OF FACT

1. The petitioner, Earlecia, Inc., timely filed New York State and local sales and use tax returns for the period March 1, 1970 through February 28, 1973.

2. On December 4, 1973, the Audit Division, as the result of an audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1970 through February 28, 1973 against Earlecia, Inc. in the amount of \$2,610.76, plus penalty and interest of \$750.26, for a total of \$3,361.02. The petitioner executed consents extending the period within which an assessment of sales and use taxes could be issued to and including December 20, 1973.

3. The petitioner timely filed a petition for a revision of the determination of the deficiencies in sales and use taxes.

4. Throughout the periods in controversy and continuing up to the present, the petitioner has been primarily engaged in the business of operating two fast food, drive-in restaurants as a franchise of the Burger Chef national chain. The restaurants are located in Lockport and Buffalo, New York.

The petitioner purchased during the periods in controversy certain operating supplies and paper products for use in its business. The operating supplies consisted of cleaning supplies and various sanitary items. The paper products purchased fell into two categories: (1) containers, wrappers and packaging material, including paper cups, lids for cups, hamburger and sandwich wrap, french fry and turnover bags, bags and cardboard trays for multiple orders and

(2) accessories, consisting of straws, napkins and stirrers. The vendor did not collect New York State and local sales or use tax on any of these items. Neither did the petitioner furnish a resale certificate to its vendor. Subsequently, on audit, the petitioner agreed to pay and has paid the full tax due with respect to its purchases of operating supplies during the periods in question. Accordingly, the operating supplies are not involved in this controversy.

Petitioner sells various beverages to its customers in paper cups with lids. Each and every beverage which the petitioner sells is contained in a paper cup with a lid. Upon the purchase of a beverage from petitioner, a purchaser takes title to and possession of the paper cup (and lid) in which the beverage is contained and is free to remove it from petitioner's premises without restriction.

Petitioner sells hamburgers and sandwiches, each of which is packaged in paper wrap, to its customers. Upon the purchase of hamburgers and sandwiches from petitioner, a purchaser takes possession of the paper wrap in which the item is packaged and is free to remove it from petitioner's premises without restriction.

Petitioner sells french fries and turnovers, each of which is packaged in a paper bag, to its customers. Upon the purchase of french fries or a turnover from petitioner, a purchaser takes possession of the paper bag in which the item is packaged and is free to remove it from petitioner's premises without restriction.

In selling its food products, petitioner places a customer's order in a paper bag or a cardboard tray in which the products are packaged and is free to remove it from petitioner's premises without restriction.

In selling its food products, petitioner provides its customers with napkins, beverage stirrers and straws where necessary. Upon the purchase of food products from petitioner, a purchaser takes possession of any napkins, straws or stirrers provided by petitioner as a concomitant to its food products and is free to remove any of such items from petitioner's premises without restriction.

5. The petitioner packages its food products in containers and wrappers as outlined above in accordance with standard operating procedures required by its franchiser.

6. There are no permanent dishes, cups, knives and forks for customer's use in the petitioner's fast food "carry-out" business. The customers carry the food to their cars or tables.

7. Approximately 90 percent of petitioner's sales from the Lockport facility and 75 percent of sales from the Buffalo facility are "take-out" sales for off-premises consumption.

8. The cost of the paper products purchased by petitioners and transferred to its customers as part of its products enters directly into the selling price of petitioner's products and is a significant percentage of the total cost of goods sold by petitioners.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law generally provides a presumption of taxability, placing the burden of proof on the taxpayer, whether he be vendor or vendee. It further provides that where a resale certificate has been furnished to the vendor, "the vendor shall not be required to collect tax" from the purchaser, and "the burden of proving that the receipt ... is not taxable hereunder shall be solely upon the customer." Where no resale certificate has

been furnished, the vendor is not relieved of the presumption of taxability created by the statute. RAC Corp. v. Gallman, 39 App. Div. 2d 57, 331 N.Y.S.2d 945 (3rd Dept., 1972).

There is no support in the sales tax law for treating the vendee's failure to furnish a resale certificate as a substantive bar to the application of the resale exemption if in fact the vendee's purchases were for resale. The sales tax law is not governed exclusively by form but also by the substance of a transaction. RAC Corp. v. Gallman, supra.

B. That the petitioner's purchases of containers, wrappers and packaging material, including paper cups, lids for cups, hamburger and sandwich wrap, and french fry and turnover bags were purchases "for sale as such" within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law; and that therefore the purchases of said items by petitioner is excluded from the sales and use taxes. (Matter of Burger King, Inc. v. State Tax Commission, 51 N.Y.2d 614.)

That the bags and trays for multiple orders purchased by the petitioner are also purchased for resale. The statute broadly defines the term "sale" as "any transfer of title or possession or both, exchange or barter, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration." Section 1101(b)(5). (Emphasis added.) The uncontroverted evidence in the record establishes that a purchaser of the petitioner's product takes both title to and possession of the bags and trays in which the product is packaged and is free to remove it from petitioner's premises without restriction. Earlecia's purchases of bags and cardboard trays were for resale and exempt from tax.

C. That the accessories including napkins, straws and stirrers purchased by petitioner and transferred to its customers with the sale of food and drink

were not purchased for resale to said customers within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law. Petitioner's customers did not purchase the accessories as such or as a physical component part of tangible personal property, but received them only as an incident to the purchase of food and drink. The purchase of the napkins, straws and stirrers by petitioner are accordingly subject to the use tax imposed by section 1110 of the Tax Law.

D. That the penalties imposed pursuant to section 1145(a) of the Tax Law and the interest in excess of the minimum statutory rate are cancelled.

E. That the petition of Earlecia, Inc. is granted to the extent indicated in Conclusions of Law "A", "B" and "D" above; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on December 4, 1973; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 25 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER