

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Automatique New York Inc. & City Vending, 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:
2/67-2/69 & 8/65-8/67.

State of New York
County of Albany

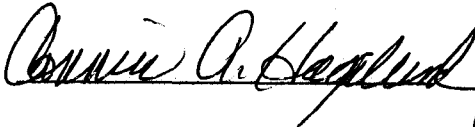
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of May, 1982, he served the within notice of Decision by certified mail upon Automatique New York Inc. & City Vending, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

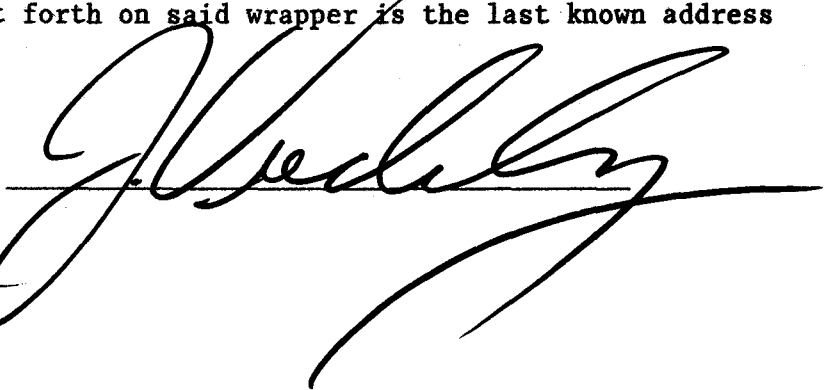
Automatique New York Inc. & City Vending, Inc.
31-10 Thompson Ave.
Long Island City, NY

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
24th day of May, 1982.


Conner A. Haglund



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Automatique New York Inc. & City Vending, Inc. : AFFIDAVIT OF MAILING
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of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 2/67-2/69 & 8/65-8/67.

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 24th day of May, 1982, he served the within notice of Decision by certified mail upon Peter Dwyer the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter Dwyer
Corner, Finn, Dwyer & Charles, Esqs.
32 Court St.
Brooklyn, NY 11201

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
24th day of May, 1982.

Annie R. Haglund

J. Vredenburg

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

May 24, 1982

Automatique New York Inc. & City Vending, Inc.
31-10 Thompson Ave.
Long Island City, NY

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Peter Dwyer
Corner, Finn, Dwyer & Charles, Esqs.
32 Court St.
Brooklyn, NY 11201
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
AUTOMATIQUE NEW YORK, INC.	:	
and	:	DECISION
CITY VENDING, INC.	:	
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 August 1,	:	
1965 to March 31, 1967 and February 28, 1967	:	
to February 18, 1969.	:	

Petitioners, Automatique New York, Inc. and City Vending, Inc., 31-10 Thompson Avenue, Long Island City, New York (now "Automatique, Inc."), 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 August 1, 1965 to March 31, 1967 and February 28, 1967 to February 18, 1969 (File No. 01011).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 18, 1976 at 9:45 A.M., and was continued before Edward L. Johnson, Hearing Officer, at the same offices on July 27, 1977 at 9:15 A.M. Petitioners appeared by Corner, Finn, Dwyer & Charles, Esqs. (Peter Dwyer, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether the determinations in this matter are barred by the applicable statute of limitations, section 1147(b) of the Tax Law.

II. Whether the sales at ten cents or less made by petitioners through vending machines were within the exemption accorded by section 1115(a)(13) of the Tax Law.

III. Whether the State Tax Commission's interpretation of the term "primarily" as used in section 1115(a)(13) of the Tax Law is binding on petitioners.

IV. Whether penalties and interest assessed against petitioners under section 1145(a) should be remitted in whole or in part.

FINDINGS OF FACT

1. On November 27, 1968, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. 90,757,045-A), assessing petitioners a tax deficiency of \$38,378.48, plus penalty and interest of \$11,578.00 for a total allegedly due of \$49,956.48. The Notice had been amended as of February 6, 1969. It detailed the taxes due as follows:

<u>Period Ended</u>	<u>Tax</u>	<u>Penalty and Interest</u>	<u>Total</u>
8/31/65	\$ 1,605.89	\$ 719.78	\$ 2,325.67
11/30/65	3,494.20	1,461.31	4,955.51
2/28/66	3,352.17	1,301.35	4,653.52
5/31/66	4,214.44	1,509.65	5,724.09
8/31/66	4,044.01	1,327.28	5,371.29
11/30/66	3,999.05	1,192.56	5,191.61
2/28/67	4,070.45	1,091.74	5,162.19
5/31/67	4,767.99	1,135.78	5,903.77
8/31/67	<u>8,830.28</u>	<u>1,838.55</u>	<u>10,668.83</u>
Total Due	\$38,378.48	\$11,578.00	\$49,956.48

2. On November 27, 1968, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. 90,757,046-A) against petitioners, assessing additional sales and use taxes allegedly due as follows (amended February 7, 1969):

<u>Period Ended</u>	<u>Tax</u>	<u>Penalty and Interest</u>	<u>Total</u>
8/31/65	\$ 9.24	\$ 1.89	\$ 11.13
11/30/65	334.74	63.30	398.04
2/28/66	941.10	163.85	1,104.95
5/31/66	234.09	37.24	271.33
8/31/66	279.61	40.29	319.90
11/30/66	315.38	40.72	356.10
2/28/67	130.18	14.85	145.03
5/31/67	279.39	27.69	307.08
8/31/67	<u>597.74</u>	<u>50.27</u>	<u>648.01</u>
Total Due	\$3,121.47	\$440.10	\$3,561.57

3. On March 13, 1970, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. 90,741,828) against Automatique New York, Inc. for the period February 28, 1967 to February 28, 1969, assessing additional sales tax as follows:

<u>Period Ended</u>	<u>Tax</u>	<u>Penalty and Interest</u>	<u>Total</u>
2/28/67	\$ 776.26	\$310.50	\$1,086.76
5/31/67	926.70	342.88	1,269.58
8/31/67	35.50	12.07	47.57
2/29/68	<u>100.04</u>	<u>28.01</u>	<u>128.05</u>
Total Due	\$1,838.50	\$693.46	\$2,531.96

4. Automatique New York, Inc. ("Automatique") is a corporation in the food service business. It operated industrial cafeterias, installed and maintained vending machines selling sandwiches, hot and cold beverages, candy, pastries and cigarettes at various locations in New York City and elsewhere in New York State. It had also operated a commissary from August 1, 1965 to May 31, 1967 under the name of Brady Food Service Corp., when the name was changed to Automatique New York, Inc.

City Vending, Inc. ("City") operated a vending machine business in New York City and in Nassau County, as well as a wholesale milk business in Maspeth, Queens, New York. The vending machines sold food, cigarettes, hot and cold beverages, and candy. Petitioner City Vending, Inc. merged with other corporations as of May 31, 1967 under the name of Automatique New York, Inc.

6. The Audit Division conducted a field audit of both City and Automatique for the period August 1, 1965 through August 31, 1967, and an audit of Automatique for the period August 1, 1965 through February 28, 1969. A complete set of double entry books was found including general ledger, fixed asset invoices, expense purchase invoices, daily sales records, cash books, financial statements, and cafeteria and vending machine location lists. Petitioners' gross sales were accepted as recorded based on tests of marked up purchases. The test periods were August 1, 1965 to May 31, 1966 and June 1, 1966 to May 31, 1967.

7. Petitioners paid no sales taxes on items sold through vending machines at 10¢ or less.

8. The Audit Division determined that petitioners, City and Automatique, did not meet the requirement of section 1115(a)(13) for sales tax exemption since they were not primarily engaged in making sales of items at 10¢ or less sold through coin operated machines.

9. Audit schedules and the stipulation of counsel for petitioners and the Audit Division show that during the periods August 1, 1965 through August 31, 1967 and February 28, 1967 through February 18, 1969, petitioner's gross sales at 10¢ or less from coin-operated machines were in excess of fifty percent but not more than sixty percent.

10. Eighty percent of petitioners' total sales in the periods for which the determinations were issued were from vending machine sales.

11. The Audit Division's interpretation of the term "primarily" in section 1115(a)(13) of the Tax Law was not filed with the Secretary of State during the periods covered by the notices of deficiency. It was not a rule or regulation.

12. The Audit Division's administrative interpretation of the word "primarily" as used in section 1115(a)(13) was published on January 6, 1967 in Question 356 and the answer thereto in Sales Tax Information Letter No. 24, and in Sales Tax Information Booklet No. 6, S.T. 216, March, 1970 at page 10. Also, in a different context, the Audit Division had in Sales Tax Information Letter No. 31, on July 31, 1969 at Question 380 and the answer thereto construed the term "primarily" to mean at least 75 percent. Petitioners admittedly had knowledge of these published interpretations of the term "primarily" by the Department of Taxation and Finance.

13. Petitioner paid \$3,121.47 in tax plus \$333.64 in interest for a total of \$3,455.11 on assessment No. 90,757,046-A prior to the formal hearing.

14. Petitioners, City and Automatique, filed no willfully false or fraudulent sales or use tax returns with intent to evade the tax. Petitioners executed no consents extending the limits of time within which additional sales or use taxes could be assessed for the audit periods here involved.

CONCLUSIONS OF LAW

A. That a notice of determination and demand for payment of sales and use taxes due issued pursuant to section 1138 of the Tax Law is an assessment for additional tax due. The notices of determination and demands for payment of sales and use taxes issued by the Audit Division against petitioners City and Automatique were not barred by the three-year statute of limitations set out in section 1147(b) of the Tax Law. The last sentence of section 1147(b)

of the Tax Law expressly states that "if the time to assess additional tax would otherwise have expired on or before December nineteenth, nineteen hundred sixty-nine, the time to assess such additional tax is extended to and including December twentieth, nineteen hundred sixty-nine...". Assessments 90,757,045-A and 90,957,046-A were issued on November 27, 1968. Since the last date for filing assessment No. 90,741,828 was March 20, 1970, that assessment filed on March 13, 1970 was timely filed.

B. That the sales made by petitioners City and Automatique through their coin operated vending machines were not within the exemption accorded under section 1115(a)(13) of the Tax Law. That exemption has been interpreted by the Audit Division charged with its application to mean that 75 percent of the gross sales of the taxpayer must be sales of 10¢ or less to meet the requirement that a retailer is exempt under section 1115(a)(13) of the Tax Law as "primarily engaged in making such sales".

The administrative determination by the Department of Taxation and Finance that "...primarily engaged in making such sales" means that the retailer must have vending machine sales of 10¢ or under for at least 75% of his total governs the application of the exemption afforded by section 1115(a)(13) of the Tax Law.

The Court of Appeals stated in Howard v. Wyman, 28 N.Y.2d 434, 438; 322 N.Y.S.2d 683, 685:

"It is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld. (See e.g. Matter of Mounting & Finishing Co. v. McGoldrick, 294 N.Y. 104, 108, 60 N.E.2d 825, 827; Matter of Colgate-Palmolive-Peet Co. v. Joseph, 308 N.Y. 333, 338, 125 N.E.2d 857, 859.)"

This interpretation by the Department has been published since 1967 and the legislature has not seen fit to change it.

"The administrative interpretation of a statute over a period of time by the agency operating under the statute is entitled to much weight, particularly where the command of the statute is not too plain and room is left for interpretation."

Rabinitzky v. McNamara, 81 N.Y.S.2d 737, 738

C. That the delay in paying the additional sales taxes due on vending machine sales may be deemed excusable due to petitioners' reliance on legal advice. Penalties and interest above the legal minimum are therefore waived.

D. That the petition of Automatique New York, Inc. and City Vending, Inc. is granted to the extent indicated in Conclusion of Law "C" above. The Audit Division is hereby directed to accordingly modify notices No. 90,757,046-A, No. 90,757,045-A, and No. 90,741,828. Except, as so granted, the petition if in all other respects denied.

DATED: Albany, New York

MAY 24 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER