

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ciotoli Cider Mill, Inc. :
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 6/1/75-11/30/78. :
:

AFFIDAVIT OF MAILING

State of New York
County of Albany

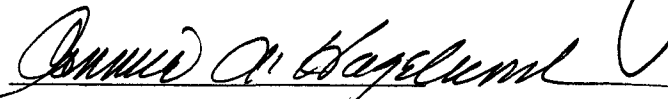
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Ciotoli Cider Mill, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

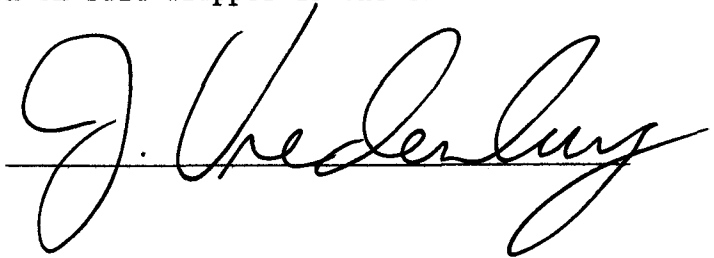
Ciotoli Cider Mill, Inc.
2 S. Nanticoke Ave.
Endicott, NY 13760

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 December, 1982.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ciotoli Cider Mill, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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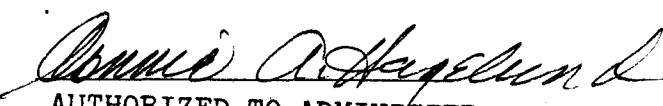
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Joseph L. Nestor the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

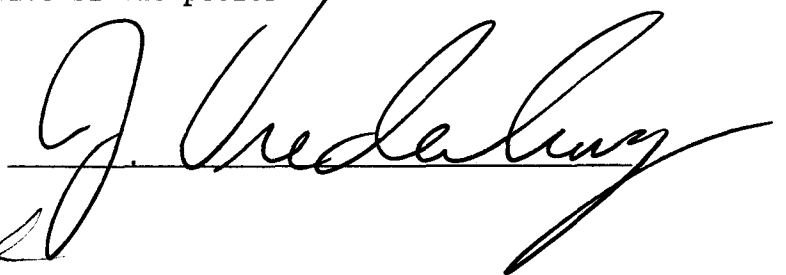
Joseph L. Nestor
Nestor & Shamulka
14 Washington Ave., P.O. Box 338
Endicott, NY 13760

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 December, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

December 14, 1982

Ciotoli Cider Mill, Inc.
2 S. Nanticoke Ave.
Endicott, NY 13760

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 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
Joseph L. Nestor
Nestor & Shamulka
14 Washington Ave., P.O. Box 338
Endicott, NY 13760
Taxing Bureau's Representative

STATE TAX COMMISSION

1. On June 20, 1979, 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 petitioner covering the period June 1, 1975 through November 30, 1978 for taxes due in the amount of \$6,352.92, plus interest in the amount of \$1,232.05, for a total due of \$7,584.97.

2. During the period at issue, petitioner operated a retail store which made sales of doughnuts, cider, apples and candy apples for off-premises consumption. Petitioner is licensed by the Broome County Health Department as required for food processing involving the production of cider, doughnuts and candy apples in the kitchen on its premises. During the spring and summer, petitioner sells beverages to patrons of plays produced by the State University at Binghamton and performed on property leased from petitioner.

3. On audit, the Audit Division disallowed nontaxable sales of candy apples on the basis that such apples were candy and not food exempt under section 1115(a)(1) of the Tax Law. The auditor also assessed tax on certain fixed assets and expense purchases made during the audit period; these are not at issue. Petitioner only contests the assessment of \$6,241.50 on sales of candy apples.

4. At the hearing, petitioner presented evidence of a test performed at the chemistry laboratory at the State University at Binghamton indicating that the weight of an average candy apple consists of 77.7 percent apple, 20.2 percent coating and 2.1 percent stick. The coating consists of a candy coating substance, sugar and water.

5. Petitioner contended that the characterization of an apple as food is not changed merely as a result of applying a candy coating. Petitioner further asserts that the doughnuts it makes and sells are sugar coated, yet they are not subject to sales tax, and by analogy an apple which is sugar coated should likewise be exempt from the tax. Petitioner further contended that determination of taxability of items for sales tax purposes should be strictly construed in favor of the taxpayer.

6. The Audit Division contends that because the nontaxability of food is an exemption rather than an exclusion, the statute should be construed strictly in favor of the State.

CONCLUSIONS OF LAW

A. That section 1115(a)(1) of the Tax Law provides, in part, that receipts from the sale of food, not including candy and confectionery, are exempt from sales tax.

B. That section 1142(1) of the Tax Law authorizes the Tax Commission to make appropriate regulations for the carrying out of the Tax Law, and section 1142(7) of the Tax Law authorizes the Commission to publish lists of foods which are found to be exempt from tax under section 1115(a) of the Tax Law.

C. That pursuant to its authority under section 1142(1) of the Tax Law, the Tax Commission issued regulation section 20 NYCRR 528.2(a)(4) (Sales and Use Tax Regulations) which specifically includes glazed or sugar-coated fruits in the category of candy and confectionery and section 20 NYCRR 528.2(a)(2) specifically includes baked goods in the category of "food" and "food products".

D. That pursuant to its authority under section 1142(7) of the Tax Law, the Tax Commission has published lists of taxable and exempt foods which have consistently and specifically included candy apples as a taxable food and bakery goods as exempt foods.

E. That in construing tax statutes, the basic rule is to not extend the meaning of the statute beyond the "clear import of the language used" and, in case of doubt, to construe the statute "more strongly against the Government and in favor of the citizen" (Grumman Aircraft Engineering Corp. v. Board of Assessors of the Town of Riverhead, 2 N.Y.2d 500, 510 (1957)). However, where exemptions from taxation are in issue, they "will be construed against a

taxpayer unless it would defeat the settled purpose of the statute" (G & B Publishing Co. v. Department of Taxation and Finance, 57 A.D.2d 18, 21 (1977)).

F. That unless the construction given statutes and regulations by the administering agency is irrational or unreasonable, such interpretation should be upheld (Howard v. Wyman, 28 N.Y.2d 434, 438 (1971); G & B Publishing Co., supra at 21).

G. That section 1115(a)(1) of the Tax Law clearly involves an exemption from the sales tax and, accordingly, construing the statute in favor of the State, it cannot be said that regulation section 20 NYCRR 528.2(a)(4) (Sales and Use Tax Regulations) which includes sugar-coated fruits in the definition of candy is so irrational or unreasonable as to defeat the purpose of the statute. Candy-coated apples are, therefore, candy or confectionery for sales tax purposes and subject to sales tax.

H. That the petition of Ciotoli Cider Mill, Inc. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1979 is sustained.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER