

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Grand Union 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 6/1/72 - 5/31/75. :

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 16th day of July, 1982, he served the within notice of Decision by certified mail upon Grand Union Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Grand Union Co.  
100 Broadway  
Elmwood Park, NJ 07407

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  
16th day of July, 1982.

*Annice P. Haglund*

*J. Vredenburg*

STATE OF NEW YORK

STATE TAX COMMISSION

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of :  
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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 16th day of July, 1982, he served the within notice of Decision by certified mail upon John W. Sinon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John W. Sinon  
101 Hillside Ave.  
Williston Park, NY 11596

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  
16th day of July, 1982.

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

July 16, 1982

Grand Union Co.  
100 Broadway  
Elmwood Park, NJ 07407

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  
John W. Sinon  
101 Hillside Ave.  
Williston Park, NY 11596  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
THE GRAND UNION COMPANY  
for Revision of a Determination or for Refund  
of Sales and Use Taxes under Articles 28 & 29  
of the Tax Law for the Period June 1, 1972  
through May 31, 1975.

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DECISION

Petitioner, The Grand Union Company, 100 Broadway, Elmwood Park, New Jersey 07407, 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 June 1, 1972 through May 31, 1975 (File Nos. 19033 and 22434).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 28, 1980. Petitioner appeared by John W. Sinon, Esq. The Audit Division appeared by Ralph Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the utility usage of petitioner was exempt, in whole or in part, pursuant to section 1115(c) of the Tax Law.

II. Whether additional credits claimed in the perfected petition were timely asserted.

FINDINGS OF FACT

1. It was stipulated and agreed to between the parties that the following constitutes a true and correct statement of the facts, together with the exhibits annexed thereto:

a. By Notice dated May 17, 1977, the Department of Taxation and Finance Sales Tax Bureau notified The Grand Union Company ("Grand Union") that based upon an audit for the period June 1, 1972 through May 31, 1975, there was an additional tax due of \$54,939.51 plus penalty and interest pursuant to Section 1138 of the Tax Law (Exhibit A).

b. By letter of June 23, 1977, Grand Union advised the Department that it was not in accord therewith and requested a hearing (Exhibit B).

c. On October 21, 1977, Grand Union's representatives, Maurice Heffernan of Retail Associates, and Howard Schwin, Director of Energy Conservation for Grand Union, met with the Department's Robert Cichy to discuss and submit for approval Grand Union's inventory schedule of electrical appliances (Exhibit D). This schedule was approved for use in the inventory of the meat preparation appliances at all of Grand Union's New York stores.

The actual electrical usage of kilowatt hours and dollar costs were summarized and posted to an individual store worksheet. Each worksheet was posted with the meat preparation kilowatt hours usage and computed for the total electrical yearly cost. The exempt electrical cost for refrigeration and meat preparation by year, was posted to a tax code worksheet for conversion to the sales tax credit. As a result, Grand Union submitted a claim for additional sales tax credit in the amount of \$142,449.81 as an offset against the Department's previous Notice of Determination, dated May 17, 1977, as follows:

|                                        |                     |
|----------------------------------------|---------------------|
| Store Meat Preparation                 | \$ 40,581.50        |
| Store Cooling & Heating                | 35,161.42           |
| Closed Stores (Exempt Electrical Cost) | 18,327.77           |
| Bakeries                               | 2,431.04            |
| Meat Refrigeration Warehouses          | 45,948.08           |
|                                        | <u>\$142,449.81</u> |

d. Finally, Grand Union received a letter dated June 1, 1978 from Richard E. Blair of the Department's Central Sales Tax Section advising that

Grand Union's October 21, 1977 claim for refund of sales tax was denied in part in the amount of \$68,543.64 and that the balance of the claim, \$73,906.17, less \$54,939.51 of previous assessment left a credit of \$18,966.66, plus interest of \$4,754.94 for a total credit of \$23,721.80 (Exhibit E).

e. On June 13, 1978, Mr. Heffernan discussed by telephone the Department's June 1, 1978 letter and again sought a hearing; thereafter on June 22, 1978, Mr. Blair wrote to Grand Union explaining the \$39,545.48 figure referred to in the June 1, 1978 letter, as "electricity used in air conditioning the plant and office" i.e., electricity used in cooling and heating of supermarkets, and breaking down the \$39,545.48 as \$35,161.42 for open stores and \$4,384.06 for the closed stores (Exhibit F).

f. By letter dated July 6, 1978, John and Maurice Heffernan sought reinstatement of refund in the amount of \$39,545.48 (Exhibit G).

g. Thereafter, on August 9, 1978 Maurice and Patrick Heffernan met and had discussions with Michael A. Mancini, a conferee, with respect to a pre-hearing conference and it was agreed that petitioner would submit a re-evaluation of the refund claim for Grand Union Company and that Mr. Mancini would hold the scheduling of a pre-hearing conference in abeyance until the re-evaluation was submitted and reviewed by the Audit Division; and that if the issues were not resolved, Mr. Mancini would reschedule the pre-hearing conference. This was confirmed by Mr. Mancini's letter dated August 10, 1978, to Maurice Heffernan (Exhibit H).

h. On August 31, 1978, Maurice Heffernan commenced the re-evaluation by visiting Grand Union's Store in Amsterdam, New York, together with the Department's representatives, Lawrence F. Keeley, Walter Hoffman and Frank Hughes. Finally, after submitting sales for all stores, Mr. Keeley, who was

with the Department's Central Sales Tax Section, notified Maurice Heffernan by letter dated January 19, 1979 of twenty (20) stores selected for examination. Mr. Heffernan was requested to determine the amount of electricity which qualified for exemption from sales and use tax and was informed that the Department would require a separate calculation of the amount of electricity used in an exempt manner for each store (Exhibit I).

i. Maurice Heffernan and Patrick Heffernan continued the re-evaluation of each store and the detailed survey with respect to electrical usage. On April 19, 1979, Maurice Heffernan submitted his report and the detailed survey of electrical usage for the selected stores to Mr. Keeley.

j. Thereafter, meetings with respect thereto were held by Maurice Heffernan and the Department's representatives. Since the dispute was not resolved at said meetings, Maurice Heffernan, by letter dated June 18, 1979, to Mr. Michael A. Mancini, requested that he schedule a pre-hearing conference regarding the re-evaluation (Exhibit K).

k. However, several months passed by and it was not until October 1, 1979 that Grand Union received a letter dated October 1, 1979 from Mr. Mancini advising that a pre-hearing conference on the Sales and Use Tax for the years 1972 through 1975 would be held October 30, 1979 to attempt to resolve the disagreement without the need for a hearing (Exhibit L).

l. The pre-hearing conference was held on October 30, 1979 and no final settlement was reached. On Tuesday, October 30, 1979, Maurice, Patrick and John Heffernan of Retail Associates met with Mr. Mancini, Robert Ireland and other representatives of the Audit Division. The matter could not be resolved (Exhibit M).

m. By letter dated February 1, 1980, the Secretary to the State Tax Commission, notified Maurice Heffernan that Grand Union's protest with respect to (a) field audit - \$54,939.51 and (b) refund denied - \$39,545.48 would be forwarded for a hearing provided a Perfected Petition was filed (Exhibit N).

n. Grand Union's Perfected Petition was filed with the Department of Taxation and Finance on February 29, 1980 (Exhibit O).

o. After several months passed, the Department, on or about June 20, 1980 served its Answer consisting of a General Denial and four (4) alleged Affirmative Defenses (Exhibit P).

p. Petitioner made a demand (Exhibit Q) for a Bill of Particulars of the affirmative defenses upon the Department. The Department's Bill of Particulars (Exhibit R) was served following a Motion by Petitioner for Preclusion (Exhibit S), which was then withdrawn by petitioner.

q. The parties reserved the right to furnish details with respect to the facts by supplemental statement, testimony or otherwise.

2. Petitioner, The Grand Union Company, owns and operates supermarkets located throughout the State of New York.

3. An audit of sales tax returns filed by the petitioner for the period June 1, 1972 through May 31, 1975 disclosed the following:

a. An additional tax was determined to be due in the amount of \$139,892.29 on purchases of supplies used in New York.

b. Petitioner had paid tax in the amount of \$3,854.35 on purchases of fixed assets which were not subject to tax.

c. Petitioner had paid tax of \$9,855.90 on charges by Phelps Time Recording Lock Corp. for services which were not subject to tax.

d. Petitioner had paid tax on its purchases of electricity of which 7.26 percent of the electricity was used in meat processing (refrigeration) which amounted to \$71,242.53.

4. As the result of the audit it was determined that an additional tax in the amount of \$54,939.51 was due.

|                                        |              |
|----------------------------------------|--------------|
| Additional tax due, supply purchases   | \$139,892.29 |
| Less tax credit for meat refrigeration | (71,242.53)  |
| Less tax credit for fixed assets       | (3,854.35)   |
| Less tax credit for Phelps Time Lock   | (9,855.90)   |
| BALANCE DUE                            | \$ 54,939.51 |

5. Among those items (on petitioner's October 21, 1977 claim for credit or refund) for which credit or refund was denied by the Audit Division on June 1, 1978 and which petitioner contests herein were charges for electricity used in heating and cooling petitioner's stores and for electricity used in the preparation of meals.

6. On April 19, 1979, petitioner submitted its re-evaluation study of electrical usage for the twenty selected stores (see stipulation items "h" and "i"). It analyzed the use of electrical power and computation of taxability was made based on "Formula 39", a formula found in a sales tax information letter issued on August 19, 1974 entitled "Electricity Used In The Production Of Tangible Personal Property For Sale". In "1(a)" of the Bill of Particulars, (Exhibit "R") it was acknowledged by counsel for the Audit Division that the third paragraph of Sales Tax Information Letter No. 39 "indicates that the Sales Tax Bureau may accept a computation by a taxpayer of electricity used in production of tangible personal property for sale".

7. Petitioner's computations based on the use of the formula contained in Sales Tax Information Letter No. 39, show that 71.9 percent of the electricity used in petitioner's stores is consumed in the production of meat.

8. The perfected petition (see stipulation item "n") contained the re-evaluation of sales tax exemption totaling \$756,143.54. A deduction of \$25,704.30 was made which was the amount of refund denied on October 21, 1977 and \$71,242.53 originally given credit on audit plus \$15,989.95 which represented store meat preparation (sales tax on electrical machinery) leaving a balance of \$643,206.77. The amount sought in the Perfected Petition was \$643,206.77 plus the \$25,704.30 (originally denied) for a total of \$668,911.07.

9. Petitioners computed an electrical usage of 1.7842 kilowatt hours per pound of meat for the total preparation and storage use at the store level. The factor was used on each store's meat shipment to arrive at the total kilowatt hours usage. That was then multiplied by the actual store kilowatt hour cost and converted to the sales tax refund by applying the actual sales tax rate for each store.

|                                                                                                                               |               |
|-------------------------------------------------------------------------------------------------------------------------------|---------------|
| Exempt Kilowatt usage                                                                                                         | 12,015,883.40 |
| Minus store factors considered collectively, night lights, exact light door openers, gondolas, resistor computers, compactors | 171,285.10    |
| Non taxable usage                                                                                                             | 11,844,601.30 |
| Divided by pounds of prepared meats                                                                                           | 6,638,302.00  |
| Kilowatt hours per pound average                                                                                              | 1.7842        |

10. By using the formula contained in Sales Tax Information Letter No. 39, the average kilowatt hours per pound computed by petitioner was 2.1228.

|                                                 |                       |
|-------------------------------------------------|-----------------------|
|                                                 | <u>Kilowatt Hours</u> |
| Total Usage                                     | 20,168,220.00         |
| Minus Lighting                                  | 4,000,910.66          |
| Minus 50% of other air conditioning, heat, etc. | 2,075,711.47          |
| Non taxable usage                               | 14,091,597.87         |
| Divided by meat total                           | 6,688,302.00          |
| Average Kilowatt Hours Per Pound                | 2.1228                |

11. Testimony elicited at the hearing showed that for the fiscal year ended March 31, 1978, petitioner's meat sales totalled \$176,621,645.00 while petitioner's total dollar sales for that year amounted to \$950,348,599.00.

12. A Consent Extending the Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 & 29 of the Tax Law was signed by Grand Union for the periods June 1, 1972 through May 31, 1975 pursuant to which amounts of sales tax due were to be determined on or before June 20, 1977. Other consents were signed for the same periods with the amount of sales tax due to be determined on March 20, 1976, September 20, 1976, December 20, 1976 and March 20, 1977.

13. Petitioner argued that the Department, by acting as though it waived its right to assert the Statute of Limitations, deceived the petitioner into deferring taking steps to file a perfected petition for a hearing; and that it was solely the Department's negligent and/or misleading conduct and statements on which petitioner relied in changing its petition to its detriment. Petitioner has offered no documentary or substantial evidence that any action by the Audit Division caused petitioner to defer taking action to obtain the refund requested in its perfected petition of February 22, 1980.

#### CONCLUSIONS OF LAW

A. That sections 1139 and 1147(c) of the Tax Law provide, in part:

"Section 1139. Refunds

(a) In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven... Such application shall be in such form as the tax commission shall prescribe...the time for filing such application...shall be further extended, as provided in subdivision (c) of section eleven hundred

forty-seven, where a taxpayer has consented in writing to the extension of the period for assessment of additional tax.

(b) If an application for refund or credit is filed with the tax commission as provided in subdivision (a) of this section, the tax commission may grant or deny such application in whole or in part and shall notify the taxpayer by mail accordingly. Such determination shall be final and irrevocable unless the applicant shall, within ninety days after the mailing of notice of such determination apply to the tax commission for a hearing..."

"Section 1147. Notices and limitations of time

\* \* \*

(c) Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period. If a taxpayer has consented in writing to the extension of the period for assessment, the period for filing an application for credit or refund pursuant to section eleven hundred thirty-nine shall not expire prior to six months after the expiration of the period within which an assessment may be made pursuant to the consent to extend the time for assessment of additional tax."

B. That pursuant to section 1147(c) of the Tax Law, petitioner's claim for refund dated October 21, 1977 was timely, but the additional claim for refund in the amount of \$643,206.77 asserted in the perfected petition of February 22, 1980 was not made within the period provided by sections 1139(a) and 1147(c) of the Tax Law.

C. That the doctrine of estoppel sought to be enforced by petitioner is not applicable. Exceptional facts did not exist as would require its application in order to avoid manifest injustices (Matter of Wolfram v. Abbey, 55 A.D.2d 700; see 21 NY Jur, Estoppel, Sec. 76 et seq.). "'[T]he general rule that estoppel cannot be employed against the State or governmental subdivision is

particularly applicable with respect to the Tax Commission' (Matter of Turner Constr. Co. v. State Tax Comm., 57 A.D.2d 201, 203)." (Matter of Sheppard-Pollack, Inc. v. Tully, 64 A.D.2d 296,298.

D. That Sales Tax Information Letter No. 39, (dated August 19, 1974) contains in pertinent part the following language:

"The formula set forth below has been developed for the purpose of determining the percentage of electricity used for taxable purposes when a single electric meter is used both for exempt production purposes and taxable non-production purposes. This formula may be used by those manufacturers who have issued Exempt Use Certificates to utility companies in order to determine the taxable portion of electricity to be reported as use tax due on their quarterly returns; and it may also be used by manufacturers who have paid sales tax to utility companies on all use of electricity as the basis for claiming refund or credit directly from the Sales Tax Bureau on the portion of electricity used for exempt production purposes.

When claiming a refund or credit of sales tax paid on the exempt portion of electricity, an engineer's estimate showing his computations will be acceptable to the Bureau. In lieu of an engineer's estimate, computations by competent personnel, using the following formula, will be accepted." (Emphasis added)

E. That while petitioner does engage in some production activities (i.e. meat preparation), it is for the most part involved in retail selling and not manufacturing. The formula contained in Sales Tax Information Letter No. 39 is to be utilized by those businesses for the most part engaged in production by manufacturing. Since petitioner is primarily involved in retailing as opposed to manufacturing, it may not avail itself of the use of the formula found in information letter No. 39.

F. That petitioner did, in fact, submit figures showing the electrical equipment and usage for production purposes in its different stores. (See Finding of Fact "1. c.")). In view of the availability of these figures, it is unnecessary to use the formula found in information letter No. 39 as a means to compute the tax exempt portion of electricity used by petitioner's stores.

G. That in order to be within the exemption from tax contained in section 1115(c) of the Tax Law, electricity must be used "directly and exclusively in the production of tangible personal property...". Electricity used in heating and cooling of petitioner's stores is used generally for retailing operations and is not used directly by and exclusively in the production of meat for sale. Accordingly, that portion of the June 1, 1978 refund denial addressed to electricity used in heating and cooling of petitioner's stores was proper. (See Matter of Fonda Manufacturing Corp., State Tax Commission, August 25, 1978).


H. That sales by petitioner of prepared food are subject to tax pursuant to section 1105(d) of the Tax Law. (See also 20 NYCRR 527.8(e)(2)(i)). Furthermore, such sales are a hybrid transaction involving both the corporeal property of the food and the service of preparing it, and equipment for preparing such food is not used exclusively in the production of tangible personal property for sale (Matter of Burger King, Inc. v. State Tax Commission, 51 N.Y. 2d 614). Accordingly, electricity for the equipment used to prepare meals is not used exclusively in the production of tangible personal property for sale, is not within the exemption contained in section 1115(c) of the Tax Law and is subject to tax pursuant to section 1105(b) of the Tax Law. Therefore that portion of the June 1, 1978 refund denial addressed to electricity used in preparing meals was proper.

I. That the petition of The Grand Union Company is hereby denied and the Audit Division's June 1, 1978 action of granting in part and denying in part petitioner's October 21, 1977 claim for credit or refund is hereby sustained.


DATED: Albany, New York

JUL 16 1982

STATE TAX COMMISSION

  
ACTING PRESIDENT

  
COMMISSIONER

  
COMMISSIONER