

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
PEPSICO, 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 Year 1976.	:	

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Petitioner, PepsiCo, Inc., Purchase, New York 10577, 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 year 1976 (File No. 23870).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 19, 1981 at 10:45 A.M. Petitioner appeared by Cravath, Swaine & Moore (Henry W. de Kosmian, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the assessment of sales and use tax arising from petitioner's purchase of an airplane is barred by the Statute of Limitations.

II. Whether the assessment of sales and use tax arising from petitioner's purchase of an airplane violates the commerce clause of the United States Constitution.

III. Whether reasonable cause exists for remission of penalties and interest.

FINDINGS OF FACT

1. On October 31, 1977 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, PepsiCo, Inc. ("PepsiCo") for the period December 20, 1976 pursuant to sections 1138 and

1252 of the Tax Law. The tax assessment, in the amount of \$273,000.00, plus penalty and interest of \$54,600.00, for a total due of \$327,600.00 was issued because PepsiCo did not pay use tax on a 1975 Grumman Gulfstream airplane.

2. PepsiCo is a company that provides consumer goods and services throughout the world. Its world headquarters are located in Purchase, New York.

3. On October 16, 1975 PepsiCo paid Grumman American Aviation Corporation \$3,900,000.00 upon delivery of a Grumman Gulfstream airplane in Charlotte, North Carolina. The airplane was purchased in order for PepsiCo's executives to be able to travel with greater speed to certain locations which were not frequently serviced by common carriers.

4. By a check dated November 13, 1975, PepsiCo paid the State of North Carolina \$120.00 in sales and use tax arising from the purchase of the airplane.

5. The airplane first entered New York on April 7, 1976 in order to pick up Brian L. Moline who was in White Plains, New York. Mr. Moline was a pilot employed by PepsiCo. Upon picking up Mr. Moline, the airplane was flown to San Antonio, Texas for flight training. However, because of severe weather warnings in the San Antonio area, the airplane landed in Dallas, Texas for the night.

6. On April 16, 1976 the airplane was flown from Savannah, Georgia to White Plains, New York.

7. On April 20, 1976 the airplane was flown from White Plains, New York to Las Vegas, Nevada and then back to White Plains, New York. The purpose of the flight was to transport the Chief Executive Officer of PepsiCo to Las Vegas for a business meeting.

8. On April 21, 1976 the airplane was flown from White Plains, New York to Nassau, Bahamas with eleven passengers for a business meeting.

9. On April 22, 1976 the airplane was flown from Nassau, Bahamas to Savannah, Georgia for maintenance work on the airplane. Thereafter, the airplane was flown to Miami, Florida to pick up two individuals and then flown back to Nassau, Bahamas to attend a business function. Thereafter, the airplane was flown, without passengers, to Pittsburgh, Pennsylvania for the evening.

10. On April 23, 1976 the airplane picked up two people in Pittsburgh, Pennsylvania, and brought them to Nassau, Bahamas. The airplane was then flown to Washington, D.C.; Dallas, Texas; and then to Nassau, Bahamas.

11. On April 25, 1976 the airplane was flown from Nassau, Bahamas to White Plains, New York in order to bring thirteen people back from a meeting in Nassau. On the following day the airplane was flown to Savannah, Georgia to continue flight training for PepsiCo's pilots.

12. PepsiCo's pilots spent until April 29, 1976 in flight training at which time the pilots were found qualified to fly the airplane by the Federal Aviation Administration.

13. On May 2, 1976 the airplane was flown to the Westchester County Airport. This airport has been the principal base of the airplane since this date.

14. During the period May 2, 1976 through December 20, 1976 the airplane was engaged in seven flights in which there was a take-off from a New York airport followed by a landing at a New York airport. These flights are summarized as follows:

<u>DATE</u>	<u>TRIP</u>	<u>PURPOSE</u>
July 7, 1976	White Plains, N.Y. to Newburgh, N.Y. to White Plains, N.Y.	to qualify a new copilot on the airplane

July 11, 1976	White Plains, N.Y. to North Myrtle Beach, S.C. to John F. Kennedy Airport to White Plains, N.Y. to North Myrtle Beach, S.C. to White Plains, N.Y.	transport passengers
August 19, 1976	White Plains, N.Y. to John F. Kennedy Airport to Kansas City, Mo.	transport passengers
August 27, 1976	New Orleans, LA. to Miami, FL. to Fort Myers, FL. to Monticello, N.Y. to White Plains, N.Y.	transport passengers
September 2, 1976	White Plains, N.Y. to Rochester, N.Y. to Elmira, N.Y. to White Plains, N.Y.	transport passengers
September 29, 1976	White Plains, N.Y. to White Plains, N.Y.	flight training and to qualify a new pilot on the aircraft
October 6, 1976	White Plains, N.Y. to White Plains, N.Y.	maintenance test flight

15. The airplane has been principally used in interstate and international flights.

16. PepsiCo filed a New York State quarterly Return for Part-Quarterly Filers for the period March 1, 1976 through May 31, 1976. Pepsico did not pay sales and use tax on the return arising from the purchase of the airplane because it was advised by Mr. Luppesco, PepsiCo's Vice-President in charge of tax, that New York State sales and use tax would be inapplicable since the airplane would be used virtually exclusively in interstate commerce.

17. The parties stipulated at the hearing that the tax assessment was erroneously computed at the seven percent rate applicable to White Plains rather than the five percent rate applicable to Westchester County.

CONCLUSIONS OF LAW

A. That subdivision (b) of section 1147 of the Tax Law provides in part:

"...no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return... For purposes of this subdivision, a return filed before the last day prescribed by law or regulation for the filing thereof or before the last day of any extension of time for the filing thereof shall be deemed to be filed on such last day."

B. That the New York State Quarterly Return for Part-Quarterly Filers of PepsiCo for the period March 1, 1976 through May 31, 1976 was due June 20, 1976 (Tax Law §1136(b)). Since the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued within three years of June 20, 1976, the assessment was not barred by the Statute of Limitations.

C. That for the taxable period in issue, aircraft which are based in New York State are subject to New York State sales and compensating use tax (Tax Law §1110; see Matter of Xerox v. State Tax Comm. of State of N.Y., 71 A.D.2d 177).

D. That the constitutionality of the laws of the State of New York is presumed at the administrative level of the State Tax Commission.

E. That PepsiCo acted in good faith; therefore, the penalty and interest in excess of the minimum statutory rate are cancelled.

F. That in accordance with the stipulation of the parties noted in Finding of Fact "17", the tax assessment should have been computed at the five percent rate applicable to Westchester County.

G. That in view of Finding of Fact "4", petitioner is entitled to a credit of \$120.00 against its New York State sales and use tax liability arising from its purchase of the airplane (Tax Law §1118(7); 51 N.Y. Jur. Sales and Use Taxes §42).

H. That the petition of PepsiCo, Inc. is granted to the extent of Conclusions of Law "E," "F" and "G"; that the Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 31, 1977; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 1982

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Pepsico, 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 Year :  
1976. :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

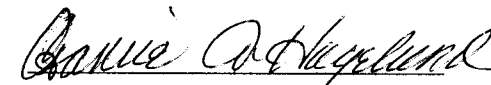
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of November, 1982, he served the within notice of Decision by certified mail upon Pepsico, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Pepsico, Inc.  
Purchase, NY 10577

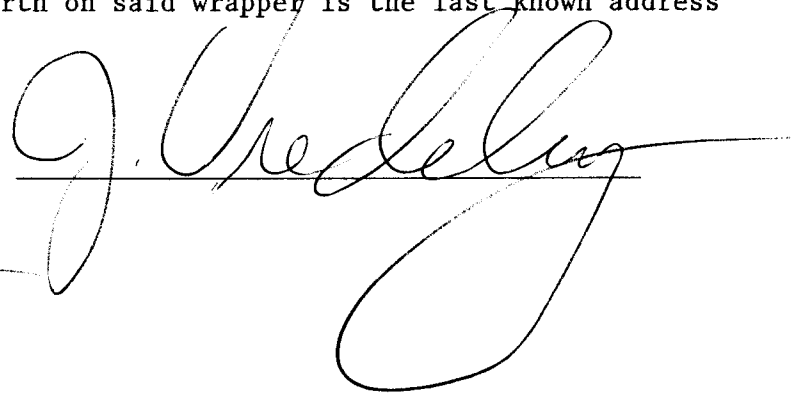
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
9th day of November, 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 :  
Pepsico, 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 Year :  
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County of Albany

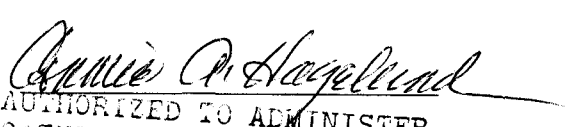
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of November, 1982, he served the within notice of Decision by certified mail upon Henry de Kosmian the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Henry de Kosmian  
Cravath, Swaine & Moore  
One Chase Manhattan Plaza  
New York, NY 10005

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  
9th day of November, 1982.

  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174





**P 230 844 174**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO		<i>PepsiCo Inc.</i>	
STREET AND NO.		<i>Purchase NY 10577</i>	
P.O., STATE AND ZIP CODE			
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

**P 230 844 175**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

PS Form 3800, Apr. 1976

SENT TO		<i>Henry de Rosman</i>	
STREET AND NO.		<i>Robert L. L. &amp; Moore</i>	
P.O., STATE AND ZIP CODE		<i>Care Chase Manhattan</i>	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	¢
		SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

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

November 9, 1982

Pepsico, Inc.  
Purchase, NY 10577

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  
Henry de Kosmian  
Cravath, Swaine & Moore  
One Chase Manhattan Plaza  
New York, NY 10005  
Taxing Bureau's Representative