

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

January 3, 1983

Safety Kleen Corp.
c/o Robert Willmschen
655 Big Timber Rd.
Elgin, IL 60120

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
Michael Rosmarin
Arthur Andersen & Co.
1345 Avenue of the Americas
New York, NY 10019
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SAFETY-KLEEN CORP.	:	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 September 1,	:	
1976 through August 31, 1979.	:	

Petitioner, Safety-Kleen Corp., c/o Robert Willmschen, 655 Big Timber Road, Elgin, Illinois 60120, 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 September 1, 1976 through August 31, 1979 (File No. 28851).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on March 25, 1982, at 10:45 A.M. Petitioner appeared by Michael Rosmarin, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Kevin Cahill, Esq., of counsel).

ISSUE

Whether the placement by petitioner of parts washers on the premises of petitioner's New York State customers subjects those parts washers to use tax under section 1110 of the Tax Law, or whether those parts washers were leased to petitioner's customers and the appropriate sales tax collected thereon by inclusion in the charges made for its services.

FINDINGS OF FACT

1. During the period at issue, petitioner was engaged in the business of providing cleaning solvents to customers in the automotive repair industry.

Upon acquisition of petitioner's service, a parts washer machine assembled by petitioner was placed on the premises of petitioner's customer. Petitioner's service representative called on its customers at regular pre-arranged intervals dependent upon the customer's needs. The service representative removed the used solvent and replaced it with fresh solvent, cleaned the machine and made any necessary repairs. The used cleaning solvent was then taken to a recycling center where it was subsequently returned to petitioner for re-use in petitioner's operation.

Charges billed petitioner's customers were dependent upon the interval between servicing. The parts washers were removed from the customer's premises upon termination of the service. Petitioner did not sell, rent or provide parts washer machines, in its regular course of business, to anyone not obtaining its services.

2. On December 20, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Safety-Kleen Corp. covering the period September 1, 1976 through August 31, 1979. The Notice asserted additional sales and use taxes due of \$14,183.96 plus simple interest of \$1,797.12 for a total of \$15,981.08. The Notice was issued as a result of a field audit.

3. At a pre-hearing conference held with petitioner, tax was cancelled in the amount of \$935.17. Petitioner agreed that tax was due in the amount of \$3,060.34, leaving the amount of tax at issue at \$10,188.45 pertaining strictly to the parts washer machines placed in New York State.

4. On audit, it was the Audit Division's position that the placement of parts washer machines on the premises of petitioner's New York State customers was subject to use tax under section 1110 of the Tax Law. The Audit Division based this determination on the facts that:

- (a) Petitioner billed its customers only for a "service charge" for providing its solvent replacement services.
- (b) No lease agreements existed between petitioner and its customers for the use of the parts washers.
- (c) Billings varied dependent upon customer need as opposed to a set term of a lease payment schedule.

The Audit Division determined that petitioner's cost of machines placed in New York State was \$149,830.00 for the audit period and the use tax due thereon was \$10,188.45.

5. Petitioner argued that the parts washer machines should not be subject to the use tax imposed by section 1110 of the Tax Law because they became a component part of its product for sale.

In support of its position, petitioner contended that it was in the business of leasing the solvents to its customers. Petitioner relies on the recycling of the cleaning solvent in its profit structure. If the recovery rate of the solvent dropped below a 70 percent minimum, petitioner discontinued servicing that customer. Petitioner maintained that the parts washer machines were included in the charges billed its customers and, therefore, the appropriate sales tax collected thereon.

6. Placement of a Safety-Kleen parts washer on a customer's premises was acknowledged on a Machine Placement Form which served as the only contract and contained the following statement:

"Safety-Kleen agrees to furnish the above service, and the Customer agrees that all servicing, repair and maintenance of the cleaning equipment shall be performed by Safety-Kleen only, on the basis as contracted above. All equipment and solvent shall remain the property of Safety-Kleen. Upon cancellation of service, all equipment shall be returned to Safety-Kleen. Customer agrees to pay for replacement of equipment due to loss or damage; with the exception of that occurring through normal wear. Furthermore, Customer agrees to indemnify Safety-Kleen against any loss or claim arising from any personal injury or property damage, however caused, resulting from the placement or use of the machine on his premises."

7. Petitioner also serviced customer-owned machines providing the same services as those provided to customers using petitioner's machines. A comparison of rates charged for comparable models for customer-owned machine service (COMS) and services including the use of a Safety-Kleen machine are as follows:

<u>SERVICE INTERVAL</u>	<u>COMS</u> <u>(PRICE EFFECTIVE 9/28/78)</u>	<u>SAFETY-KLEEN</u> <u>MACHINE SERVICE</u>
		<u>(PRICE EFFECTIVE 12/3/78)</u>
1 Week	\$20.00	\$17.00
2 Week	20.00	17.50
3 Week	20.00	19.25
4 Week	20.00	21.00
5 Week	20.00	23.50
6 Week	20.00	25.00
7 Week	20.00	26.50
8 Week	20.00	28.00

CONCLUSIONS OF LAW

A. That section 1101(b)(5) of the Tax Law defines sale as any transfer of title or possession or both, ...rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration.

B. That petitioner furnished cleaning solvents to its customers as its primary business activity. For those customers who did not own or chose not to use their own parts washer, petitioner provided same. That a differential exists between rates charged for customer-owned machine service and service to Safety-Kleen machines (Finding of Fact "7" above). That differential, however, cannot be systematically identified between a product charge and a charge for the use of the receptacle. In fact, customers using a Safety-Kleen Washer during 1 to 3-week service intervals pay less for the product sold than customers using their own machines.

It is recognized that a company which furnishes a product to its customers must, if it is to remain solvent, include and recover the cost of

any equipment provided in the rate charged for the product. It does not follow, however, that when the product is delivered and billed to the customer, the customer is renting the equipment absent a specified charge for that rental. (Matter of Albany Calcium Light Company, Inc. v. State Tax Commission, 44 NY2d 986).

C. That the parts washers at issue were loans to petitioner's customers with no distinguishable consideration having been billed for same. That the Audit Division properly held the parts washers placed in New York State subject to the use tax imposed by section 1110 of the Tax Law.

D. That the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 20, 1979 pursuant to Finding of Fact "3" at p. 2 and to credit the Notice with any payment(s) received.

E. That except as noted in Conclusion of Law "D" above, the petition of Safety-Kleen Corp. is denied and the Notice, as revised, is sustained.

DATED: Albany, New York

JAN 3 1983

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Safety Kleen Corp.

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 9/1/76-8/31/79.

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 3rd day of January, 1983, he served the within notice of Decision by certified mail upon Safety Kleen Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

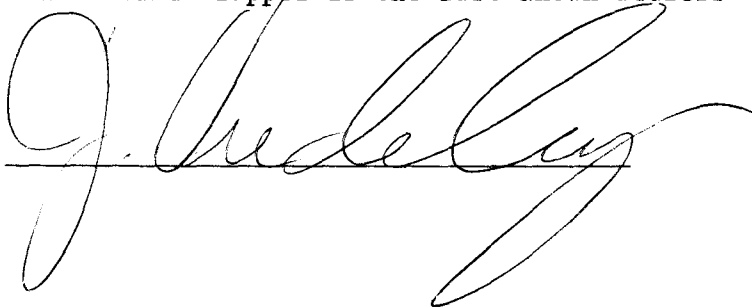
Safety Kleen Corp.
c/o Robert Willmschen
655 Big Timber Rd.
Elgin, IL 60120

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
3rd day of January, 1983.

Kathy Poffenbach



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Safety Kleen Corp. :

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 9/1/76-8/31/79. :

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 3rd day of January, 1983, he served the within notice of Decision by certified mail upon Michael Rosmarin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael Rosmarin
Arthur Andersen & Co.
1345 Avenue of the Americas
New York, NY 10019

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
3rd day of January, 1983.

Kathy Wapfenbach

J. Vredenburg

P 278 401 600
RECEIPT FOR CERTIFIED MAIL

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

SENT TO <i>Michael Rosmarin</i>					
STREET AND NO. <i>Arthur Andersen & Co.</i>					
<i>1345 Avenue of the Americas</i>					
P.O., STATE AND ZIP CODE <i>New York, NY 10019</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					

PS Form 3800, Apr. 1976

P 278 401 599
RECEIPT FOR CERTIFIED MAIL

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

SENT TO <i>Safety Kleen Corp.</i>					
STREET AND NO. <i>c/o Robert Willmschen</i>					
<i>655 Big Timber Rd.</i>					
P.O., STATE AND ZIP CODE <i>Elgin, IL 60120</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					

PS Form 3800, Apr. 1976