

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

November 26, 1982

Serve Well Enterprises, Inc.
c/o Michael Cirrito, President
440 North Ave.
New Rochelle, NY 10801

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
Mario Procaccino
250 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE TAX COMMISSION

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 20, 1981 at 9:00 A.M. Petitioner appeared by Mario Procaccino, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether petitioner's sales of food and drink through vending machines were made to the tax exempt organization on whose premises the machines were located.

II. Whether sales through vending machines of items ordinarily exempt from tax under section 1115(a)(1) of the Tax Law were for on premises or off premises consumption.

FINDINGS OF FACT

1. Petitioner, Serve Well Enterprises, Inc., was engaged in the sale of cigarettes, candy, beverages, and food items such as cookies, ice cream and snacks through coin operated vending machines.

2. 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 December 1, 1974 through February 28, 1978 for taxes due of \$26,201.31, plus penalty and interest of \$15,550.59, for a total of \$41,751.90.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period December 1, 1974 through November 30, 1977, to June 20, 1979.

4. Petitioner reported as nontaxable sales on sales tax returns filed for the audit period, (1) all sales of nontaxable food items and (2) vending sales of any nature at certain locations treated as tax exempt.

On audit, the Audit Division presumed that all locations had facilities for consuming the food or beverage near the vending machine and as a result only considered 66 2/3 percent of the nontaxable food items were for off premises consumption. All of the sales deemed nontaxable by reason of (2) above were disallowed on the basis the sales were not made to the tax exempt organizations.

5. Petitioner entered into an agreement with Pilgrim State Hospital to install, operate and service automatic vending equipment and a complete automatic food bank at various locations in the hospital as agreed upon by the parties to the agreement. The hospital had the right to make changes in the locations and the number of machines placed throughout the hospital. The hospital provided

water, electricity, electrical outlets, gas and necessary plumbing at no cost to petitioner. The equipment installed by petitioner was required to meet specifications set forth by the hospital. The hospital also determined the type, quantity and the price of the food and beverage. Petitioner paid the hospital a guaranteed commission of \$45,000.00 on sales of \$178,000.00 annually, prorated monthly. The agreement provides for certain adjustments to the commissions paid depending on whether sales are below or exceed \$178,000.00.

The foregoing agreement is similar to those executed with other State agencies or institutions.

6. The vending machines were for the use of employees, patients, students and visitors. The purchases were made by and paid for by the individual.

7. Petitioner deducted sales tax from the gross vending receipts before applying the commission percentage that the particular institution where the machines were located was entitled.

Petitioner received a letter from Pilgrim State Hospital stating that it was their opinion that patients' funds are in effect State funds that are given to patients for their use and in most cases used for training of patients. In addition, the letter stated that their patient population are wards of the State. Thus, the hospital concluded that as a State agency they are exempt from sales tax and it was inappropriate to deduct sales tax from gross receipts.

Petitioner was furnished a tax exemption certificate from Kingsboro Psychiatric Center in December, 1978 after petitioner deducted sales tax from November's (1978) gross receipts before paying the commission.

8. Petitioner argued that the vending sales were made strictly for the benefit of the tax exempt institution or State agency; that the institutions by

agreement, letter or otherwise stated that no sales taxes were to be paid by them; and that, for such reasons, the sales were exempt from tax.

Moreover, petitioner argued that the institutions or agencies were partners or co-sellers of the vending products since they shared in the profits, had control and dominion as to the manner of operation and directed all actions of petitioner and its employees.

9. On December 14, 1978, the Tax Commission adopted the following audit policy:

"There is rebuttable presumption that 66 2/3 percent of vending machine sales of non-taxable food are considered for off premise consumption. This presumption may be rebutted by a vendor who can submit evidence to prove that the sales for off premises consumption are in excess of 66 2/3 percent."

In a letter dated May 25, 1979 to New York State Automatic Vending Association, the Deputy Director of Technical Services Bureau stated that where no eating facilities are provided, it may be assumed that all vending machine sales are for off premises consumption.

10. The Audit Division visited Westchester Community College and observed eating facilities by the vending machines in the Student Center and the Science Building. The Audit Division did not inspect other locations to ascertain the existence of eating facilities although petitioner requested the Audit Division to verify that such facilities did not exist at other locations.

Petitioner's uncontradicted testimony was that except for the above buildings, tables and chairs, or any other type of facilities were not provided for customers at other locations.

11. Reasonable cause existed for petitioner's failure to pay over the sales taxes in issue.

CONCLUSIONS OF LAW

A. That section 1116(a) of the Tax Law exempts sales by or to certain organizations; that the vending machines were located on the premises of organizations exempt from tax. However, the food and beverages dispensed from said machines were sold directly to and paid for by individuals (patients, students, employees, etc.), not the tax exempt organization. Accordingly, such sales are subject to the tax imposed under section 1105(a) and (d) of the Tax Law (Matter of Bes Corp. v. Tully, 61 A.D.2d 1097, rev'd mem. 46 N.Y.2d 1038).

That the deduction of sales taxes from gross receipts prior to computing the applicable commission due an organization cannot be considered the collection of sales tax from that organization. Therefore, since the tax exempt organization did not pay a sales tax to petitioner and was not the purchaser of food or beverages, the exemption certificates, or reference to tax exempt status in letters or agreements are not valid.

B. That the tax exempt organizations were not "vendors" nor agents of a vendor making sales of food and drink within the meaning and intent of section 1101(b)(8) of the Tax Law (Matter of Faculty-Student Association of State University College at Plattsburgh, Inc., STC, February 20, 1981).

C. That 20 NYCRR 527.8(g) provides that (1) vending machine operations carried on in premises where facilities such as tables, chairs, benches, counters, etc. are provided for customers are considered to be eating establishments selling food or drink for on premises consumption and sales made through such machines are taxable. (2) When food and drink is sold through vending machines and no facilities are provided for customers, such sales are deemed to be for off premises consumption and are taxed accordingly.

D. That except for Westchester Community College, petitioner did not provide eating facilities and therefore, all vending sales were for off premise consumption. Accordingly, sales of food and drink enumerated in section 1115(a)(1) of the Tax Law were not subject to tax.

That the Audit Division properly applied 66 2/3 percent to such sales at Westchester Community College.

E. That the penalty is cancelled and interest shall be reduced to the minimum statutory rate.

F. That the petition of Serve Well Enterprises, Inc. is granted to the extent indicated in Conclusions of Law "D" and "E"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1979; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 26 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Serve Well Enterprises, Inc.	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 12/1/74-2/28/78.	:	

State of New York
County of Albany

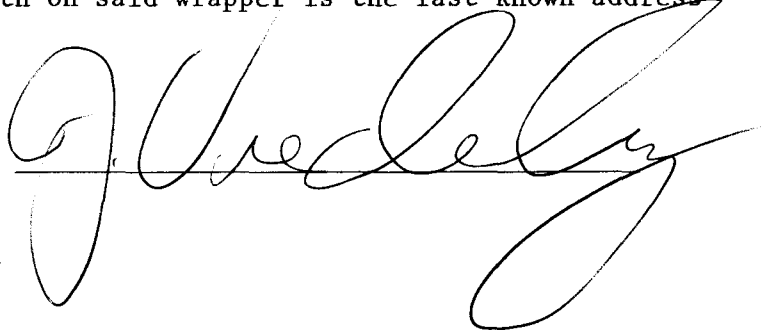
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of November, 1982, he served the within notice of Decision by certified mail upon Serve Well Enterprises, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Serve Well Enterprises, Inc.
c/o Michael Cirrito, President
440 North Ave.
New Rochelle, NY 10801

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
26th day of November, 1982.



ADMINISTRATOR TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Serve Well Enterprises, 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 :
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State of New York
County of Albany

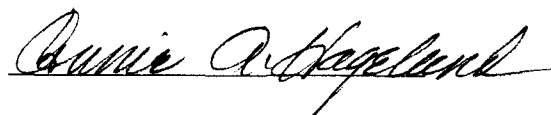
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 26th day of November, 1982, he served the within notice of Decision by certified mail upon Mario Procaccino the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mario Procaccino
250 Broadway
New York, NY 10007

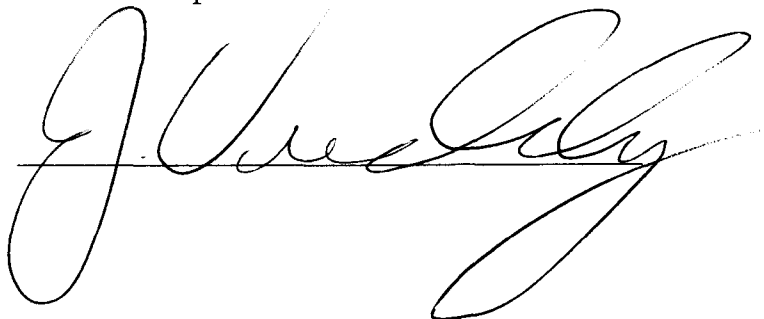
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
26th day of November, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



P 230 844 217
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		<i>Main Proaccino</i>		
STREET AND NO.		<i>250 Broadway</i>		
P.O. STATE AND ZIP CODE		<i>New York, NY 10007</i>		
POSTAGE		\$		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	c		
	OPTIONAL SERVICES	SPECIAL DELIVERY	c	
		RESTRICTED DELIVERY	c	
		RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	c
			SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	c
			SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	c
	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	c		
TOTAL POSTAGE AND FEES		\$		
POSTMARK OR DATE				

P 230 844 216
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		<i>Steve Will Enterprises Inc.</i>		
STREET AND NO.		<i>100 Michael Corinto, Jr.</i>		
P.O. STATE AND ZIP CODE		<i>440 North Ave. New York, NY 10001</i>		
POSTAGE		\$		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	c		
	OPTIONAL SERVICES	SPECIAL DELIVERY	c	
		RESTRICTED DELIVERY	c	
		RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	c
			SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	c
			SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	c
	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	c		
TOTAL POSTAGE AND FEES		\$		
POSTMARK OR DATE				