

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

August 4, 1982

Servomation Ko-Ed, Inc.  
777 3rd Ave.  
New York, NY 10017

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  
Arthur Warren Scullin  
Servomation Corp.  
777 3rd Ave.  
New York, NY  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
SERVOMATION KO ED, 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 Period December 1, 1968	:	
through February 29, 1972.	:	

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Petitioner, Servomation Ko Ed, Inc., 777 Third Avenue, New York, New York 10017, filed a petition for the revision of a determination or for refund of sales and use taxes under Articles 28 & 29 of the Tax Law for the period December 1, 1968 through February 29, 1972 (File No. 01939).

A formal hearing was held on November 13, 1973. A decision of the Commission was issued on December 15, 1975. A petition was made to the Appellate Division of the Supreme Court of the State of New York on April 14, 1976. That court rendered a decision (see Matter of Servomation Corp. v. State Tax Commission, 60 A.D.2d 374 [December 29, 1977]) and entered an order on January 10, 1978 which remitted this matter to the State Tax Commission for a hearing on the disputed assessment.

A second formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 22, 1978 and continued to conclusion on February 5, 1979.

The petitioner appeared by Roy Brackett, Director of Taxes and Arthur Warren Scullin, Assistant Director of Taxes. The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

### ISSUES

I. Whether the Commission is bound as a matter of law to decide this case completely in favor of petitioner because of a stipulation concerning a prior decision of the Commission.

II. Whether the paper products purchased by petitioner are purchased for its own use so as to be subject to the use tax imposed by section 1110 of Article 28 of the Tax Law; or whether such paper products are "for resale as such or as a physical component part of tangible personal property" within the meaning of section 1101(b)(4) of the Tax Law, so as to qualify as an exempt purchase for resale.

### FINDINGS OF FACT

1. a. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued on September 17, 1973 (pursuant to a consent dated March 29, 1973 extending the limitation period to September 20, 1973) to Servomation Ko Ed, Inc. for the period December 1, 1968 through February 29, 1972. Said notice stated taxes due of \$25,428.45, plus penalty and interest of \$8,482.57, for a total of \$33,911.02. This was later adjusted to reflect simple interest of \$8,255.08 and the total was thereby reduced to \$33,683.53.

b. The notice of determination is based upon an audit performed prior to June 1973 using sampling methods which found tax due of \$45,056.22 on additional taxable sales, and expense and equipment purchases. After discussion, petitioner agreed to and paid the amount of \$19,627.77. This included sales tax on cafeteria sales. The amount of \$25,428.55 in tax is computed on taxable purchases of \$484,789.00, of which \$198,177.00 is due to the purchase of fixed assets and parts for fixed assets and \$286,612.00 is due to the purchases of

commissary supplies. The fixed assets and parts refer primarily to coin operated machines which mix and dispense coffee in petitioner's vending operations. The commissary supplies refer to paper products used in petitioner's cafeteria operations. The amount of the assessment for such supplies was arrived at by an audit of petitioner's account number 5750, which totaled \$506,382.00 for the audit period and a finding that 56.6 percent of that total was due to taxable purchases. The percentage of 56.6 was arrived at by an inspection of invoices for the month of February 1972. Of the total invoices of \$4,355.81, it was concluded that \$1,717.77 represented items such as cups and plates to be dispensed through a vending machine, \$8.25 represented other items attributable to vending machine sales, \$2,459.53 represented items such as cups and plates attributable to manual (cafeteria) sales, and \$118.00 represented items such as lids and bags for "take out" sales. Of those amounts, only the amounts of \$8.25 and \$2,459.53 were included by the field auditor in the total amount assessed. The \$8.25 item is a single invoice from "Lilly Tulip". The \$2,459.53 item is made up of an invoice of \$492.82 from "Lilly Tulip", \$1,672.71 from Garden City Paper Products, and \$294.00 from Thompson Industries.

c. The amounts alleged to be taxable by the Audit Division under the notice of determination and at issue here thus included a small amount of tax attributable to the purchase of paper items other than cups and plates which are attributable to the petitioner's vending machine sales and a larger amount of tax attributable to the purchase of paper items such as cups and plates which are attributable to the petitioner's cafeteria sales.

d. The notice of determination in this case has never included amounts of tax attributable to the purchase of paper items such as cups and

plates dispensed through vending machines nor items such as lids and bags for take out sales.

2. a. A petition was filed, by a letter dated September 20, 1973, for a hearing before the State Tax Commission to review the determination of tax due.

b. The matter was by agreement consolidated for hearing and for decision with the cases, involving the related corporations and related issues, of Servomation of Western New York, Inc. and Servomation of Northeastern New York, Inc.

c. A hearing was duly held in the consolidated cases by the State Tax Commission at its offices at 65 Court Street, Buffalo, New York on November 13, 1973 before L. Robert Leisner, Hearing Officer. The petitioner appeared by D. Roy Brackett, Director of Taxes and the Audit Division appeared by Saul Heckelman, Esq. (James Scott, Esq., of counsel).

d. A stipulation with respect to the cases was entered into. The parties agreed explicitly to the statement of the hearing officer that "the Northeastern case and the Ko Ed, Inc. case would be determined by the outcome of the Western New York case;" and further statement of the hearing officer that "(w)ith respect to the other two cases, they are being treated as having been held, the evidence is deemed the same and we will hold any determination to conform to the ultimate determination in this case."

e. The facts testified to in the combined hearing concerned solely Servomation of Western New York, Inc. Servomation of Western New York, Inc. does business primarily through vending machines. It also operates a cafeteria at Niagara University where, petitioner has stated, both china plates, and some paper products (napkins) are used. Petitioner stated on the record that it did not contest any use tax on the purchase of either china plates or

paper napkins so long as they were used at the Niagara University cafeteria. The hearing officer at the hearing stated that any decision by the Commission in the case would probably require a recomputation to be made by the tax auditor in the case.

3. a. A decision in the consolidated cases was issued on December 15, 1975 under the name "Matter of the Petitions of Servomation of Western New York, Inc.; Servomation of Northeastern New York, Inc.; Servomation Ko Ed, Inc.".

b. That decision found and concluded that the purchase of the coffee machines was taxable as the purchase of property for use in petitioner's business and was not exempt as the purchase of production machinery under section 1115(a)(12) of the Tax Law.

c. With respect to the purchase of paper goods, the issue was stated to be "(a)re paper cups and containers for coffee, cold drinks and soup purchased by Servomation subject to a sales tax?" And again restated as "whether purchases of paper cups, plates and containers for hot and cold drinks and foods were subject to sales tax or exempt because they were part of the food and drink sold." The decision recited that "(t)he parties agreed that various items such as plastic stirrers, paper napkins, etc. do not become part of the product sold and stipulated that such items are taxable." It was found as a fact that the coffee cups, beverage cups, plates, etc. were used as containers for the food and passed to the ultimate consumer. It was concluded that:

"(t)he containers, wrappers, and packaging material purchased by the applicant are resold within the meaning of the statute as a physical component part of tangible personal property... The uncontroverted evidence in the record establishes that a purchaser of the applicant's product takes both title to and possession of the paper container or wrapper in which the product is packaged and is free to remove it from applicant's premises without restriction. Servomation's purchases of containers, wrappers and packaging material were for resale and exempt from tax."

4. a. After the commission determination, the petitioner was told that it owed a tax of \$14,908.26 on its purchases of paper products of \$286,612.00.

b. Petitioner was also told that the Commission's determination could not be extended to "all paper products used in serving food" and in particular could not extend to "containers, wrappers and packaging materials purchases... for on-site use."

5. a. A Notice of Petition to the Supreme Court of the State of New York was commenced by the service of a Notice of Petition dated April 14, 1976 seeking review of the Commission's determination "to the end that a judgment may be granted herein modifying, correcting and reversing so much of such determination...as decided adversely to the petitioner, and establishing such taxes in the proper amounts together with such other and further relief as may be just and proper in the premises,...".

b. The petition to the court stated, in part, that:

"the Respondent...has failed to abide by the stipulation...that the Respondent has illegally...refused to modify its determination...with respect to purchases and uses of certain paper products exempt from such taxes...in that such paper products and other purchases by Servomation Ko Ed, Inc. were similar in kind and use as those determined by the Respondent to be exempt from tax in the Servomation of Western New York, Inc. case."

And petitioner requested a judgment "(d)irecting the Respondent State Tax Commission to honor its stipulation on the record to the effect that the notice of determination against your Petitioner's predecessor subsidiary Servomation Ko-Ed, Inc. be revised in accordance with so much of such determination as held that purchases of certain products and materials for resale are exempt from sales and use taxes."

c. The issue was decided by the Appellate Division of the Supreme Court of the State of New York on December 29, 1977 (60 A.D.2d 374). The opinion of the Court stated:

"We find no formal determination in the record explaining respondent's refusal to abide by the stipulation. Even accepting respondent's argument that the controverted supplies would be taxable given the nature of Ko Ed's operations, the stipulation lulled petitioner into believing that it would not be necessary to litigate this issue. Thus, petitioner was denied his lawful right to a hearing."

d. The order of the Appellate Division of the Supreme Court, Third Department was entered on January 10, 1978 and stated "ORDERED that the determination is modified annulling so much of it as sustains the assessment against Servomation Ko Ed for purchases of packaging supplies and the matter is remitted for a hearing on the disputed assessment, and, as so modified, confirmed without costs."

6. a. A re-hearing of the issue took place on August 22, 1978 and February 5, 1979.

b. The petitioner now argues that "The issue of the 'paper products' should not have been before the Appellate Court for a decision." Petitioner further argues that the doctrine of res judicata as applied to the prior determination "should preclude a second hearing by the State Tax Commission in the same issue." And petitioner further states that a second hearing can not be justified on the basis of newly discovered evidence since "all the facts are the same now as they were at the original hearing."

7. a. The determination in issue involves purchases made for a food service operation such as that at "Plant Number 16" of the Fairchild-Edison Company on Edison Street in Copiague, New York.

b. At this location, petitioner had vending machines serving such items as hot coffee. Also at this location, petitioner had a menu, a grill, a



counter for food display, a cash register and other equipment for the manual sale of prepared food as a cafeteria. The location was equipped with tables, chairs and waste receptacles. Disposable cups and plates and other paper products were used in conjunction with both the machine and the manual sales. Few if any customers left the immediate premises before consuming the food.

c. The paper cups and plates are typically used by petitioner to package and deliver its proposed food items to the consumer, who then typically uses them to carry the prepared food items to a table either on the premises or at another location where they are used by the customer as utensils in the consumption of said prepared food items. Thereafter, presumably either the petitioner or the consumer disposes of said cups and plates as waste.

d. Petitioner's operations were very extensive. It operated food service operations at 30 locations, of which 24 involve some sort of manual food service operation.

e. Petitioner has stated that its own tests of all of its operations show that for its vending machine operations, sixty percent of its sales are taken off of the premises for consumption, while for its manual food service operations only twenty percent are taken off the premises for consumption. Petitioner has not offered in evidence any corroboration of these figures generally or as specifically related to the location or assessment here in issue.

f. The petitioner has stated that "the paper products...became an integral part of the tangible personal property sold to the ultimate consumer." Petitioner has further stated that "We are selling one product to the consumer." Petitioner has specifically denied that its transactions can be divided into separate parts for food, labor and paper utensils.

CONCLUSIONS OF LAW

A. That the order of the Appellate Division annulled in its entirety the previous determination of the Commission concerning paper products and remitted the case for "a hearing". This necessarily implies that evidence as to the facts of the case can and must be (and has been) taken by the Commission. Since the petitioner has now had the opportunity to submit evidence and has in fact submitted evidence, the stipulation is now completely superfluous.

B. That petitioner's purchases of paper cups and plates which were attributable to its cafeteria sales were purchased "for resale as such" within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law and that therefore the purchases of said items by petitioner are not subject to tax. (Burger King Inc. V. State Tax Commission, 51 N.Y.2d 614).

C. That petitioner has not furnished sufficient information as to the character and use of the "other" items purchased for use in connection with vending machine sales. Petitioner has therefore not sustained the burden of proof and such items are taxable.

D. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit. (Chartair, Inc v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.) In the absence of evidence as to petitioner's insufficiency of record keeping, the use of a test period was not warranted. Accordingly, petitioner's tax liability is limited to the actual amount found due for the period February, 1972.

E. That the petition of Servomation Ko Ed, Inc. is granted to the extent indicated in Conclusions of Law "B" and "D" above. The Audit Division is

directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 17, 1973. Except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

AUG 04 1982

STATE TAX COMMISSION

**ACTING**

PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Servomation Ko-Ed, 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	:	
Period 12/1/68 - 2/29/72.	:	

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon Servomation Ko-Ed, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Servomation Ko-Ed, Inc.  
777 3rd Ave.  
New York, NY 10017

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  
4th day of August, 1982.

  


STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Servomation Ko-Ed, 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 :  
Period 12/1/68 - 2/29/72. :  
\_\_\_\_\_

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon Arthur Warren Scullin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur Warren Scullin  
Servomation Corp.  
777 3rd Ave.  
New York, NY

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  
4th day of August, 1982.

Annice A. Haglund

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Servomation Ko-Ed, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Sales and Use  
Tax under Article 28 & 29 of the Tax Law for the :  
period 12/1/68 - 2/29/72.

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 29th day of October, 1982, he served the within notice of Decision by certified mail upon Arthur Warren Scullin, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur Warren Scullin  
Box 10203  
Stamford, CT 06904

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  
29th day of October, 1982.

*Annie A. Hegedus*

NOTARIAL TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

*J. Vredenburg*

REQUEST FOR BETTER ADDRESS

Requested by <i>C. Hagelund</i>	Unit <i>Cal</i>	Date of Request <i>8-16-82</i>
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number <i>34-0926639</i>	Date of Petition <i>Dec. 8-4-82 Formal Rep. copy</i>
Name <i>Information Co-Ed. Inc.</i>	
Address <i>Rep address 777 3rd Ave. New York, NY.</i>	

Results of search by Files

<input checked="" type="checkbox"/> New address:	<i>on envelope Box 10203 Stamford Ct. 06904</i>
<input type="checkbox"/> Same as above, no better address	
<input type="checkbox"/> Other:	

Searched by	Section	Date of Search

PERMANENT RECORD

FOR INSERTION IN TAXPAYER'S FOLDER

**P 230 842 674**  
**RECEIPT FOR CERTIFIED MAIL**

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

PS Form 3800, Apr. 1976

SENT TO		<i>Arthur Warren Seidler</i>	
STREET AND NO.		<i>Sevomatic Corp</i>	
P.O., STATE AND ZIP CODE		<i>777 3rd Ave. New York NY 10017</i>	
POSTAGE		<i>New York NY 10017</i>	
CERTIFIED FEE		c	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	SPECIAL DELIVERY	c
		RESTRICTED DELIVERY	c
			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 230 842 673**  
**RECEIPT FOR CERTIFIED MAIL**

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

PS Form 3800, Apr. 1976

SENT TO		<i>Sevomatic Corp - Ed Inc.</i>	
STREET AND NO.		<i>777 3rd Ave.</i>	
P.O., STATE AND ZIP CODE		<i>New York NY 10017</i>	
POSTAGE		\$	
CERTIFIED FEE		c	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	SPECIAL DELIVERY	c
		RESTRICTED DELIVERY	c
			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			



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

August 4, 1982

*remailed*  
OCT 29 1982

Servomation Ko-Ed, Inc.

~~777 3rd Ave.~~

~~New York, NY 10017~~

*Box 10203  
Stamford Ct 06904*

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  
Arthur Warren Scullin  
Servomation Corp.  
777 3rd Ave.  
New York, NY  
Taxing Bureau's Representative

STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS

~~Arthur Warren Scullin  
Servomation Corp.  
777 3rd Ave.  
New York, NY~~

A vertical strip of eight small, square images showing a sequence of a person's face from a neutral expression to a full smile.

THE