

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

December 14, 1982

Wehrle Drive Supermarkets, Inc.
770 Wehrle Dr.
Amherst, NY 14223

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) 1139 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
Joseph H. Zalucki
166 Lafayette St.
Schenectady, NY 12305
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WEHRLE DRIVE SUPERMARKETS, 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 March 1, 1977	:	
through March 31, 1980.	:	

Petitioner, Wehrle Drive Supermarkets, Inc., 770 Wehrle Drive, Buffalo, New York 14223, 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 March 1, 1977 through March 31, 1980 (File No. 30089).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Bldg. #9 , State Campus, Albany, New York, on September 15, 1981 at 1:15 P.M. Petitioner appeared by Joseph H. Zalucki, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Harry Kadish, Esq., of counsel).

ISSUE

Whether electricity used by petitioner to produce hot water is exempt from state and local sales and use taxes under section 1115(c) of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Wehrle Drive Supermarkets, Inc. (a/k/a Supermarkets, Inc. and hereinafter referred to as "Wehrle"), filed an application for credit or refund of state and local sales tax for the period March 1, 1977 through March 31, 1980. Said application, dated May 6, 1980, claimed a credit or refund in the amount of \$2,319.00.

2. Via a letter dated May 20, 1980, the Audit Division advised petitioner that "...your claim for a refund of sales tax is hereby denied, in part, in the amount of \$499.71" since "[E]lectricity used to run a hot water heater is taxable". The balance of the claim, in the amount of \$1,819.29, was refunded to petitioner.

3. During the period in question, petitioner operated a retail supermarket which included full service meat, produce, deli and bakery departments. Petitioner paid to its local utility company a seven percent (7%) state and local sales tax on all electricity consumed in its daily operation.

4. Petitioner's application for credit or refund dated May 6, 1980 was based on a study performed by Mr. Jonsson, a professional engineer, wherein the production equipment used in the meat, produce, deli and bakery departments were listed. From there, the kilowatts used by each piece of equipment was computed and totaled for the periods in question. The sales tax paid on the kilowatts used to power the above mentioned equipment forms the basis of petitioner's application for credit or refund.

5. Included in Mr. Jonsson's study, and petitioner's application for credit or refund, were the kilowatts consumed by an eighty-two (82) gallon electric hot water heater. The hot water produced by said heater, the majority of which was consumed in the meat department, was used by petitioner in the following manner:

- a) to clean and sanitize the equipment used in the meat, produce, deli and bakery departments, and

- b) to clean the surrounding areas such as walls, ceilings, floors, cutting tables and utensils

6. At the hearing held herein, Mr. Jonsson, a professional engineer, contended that warm water was used to wash and clean meat products before being

butchered. No credible documentary or other evidence was adduced at the hearing to support this contention.

7. Petitioner argues that the hot water heater, and the hot water produced by said heater, were used directly and predominantly in the production of tangible personal property by processing and that the electricity used to run the hot water heater was consumed directly and exclusively in the production process in accordance with section 1115(c) of the Tax Law. Petitioner asserts that if it did not maintain sanitary conditions it would be in violation of the laws, rules and regulations of other State regulatory agencies, thereby risking the possibility of being closed. Also, if the machinery used in the meat, produce, deli and bakery departments were not cleaned on a regular basis they would not function properly or would cease to function altogether.

CONCLUSIONS OF LAW

A. That section 1115(c) of the Tax Law provides an exemption for electricity ...for use or consumption directly and exclusively in the production of tangible personal property...for sale, by...processing.

B. That 20 NYCRR 528.22(c) defines the term "directly" to mean that the electricity must, during the production phase of a process, either:

- (i) operate exempt production machinery or equipment, or
- (ii) create conditions necessary for production, or
- (iii) perform an actual part of the production process.

C. That electricity consumed in the production of hot water which is used in petitioner's meat, produce, deli and bakery departments for the purpose of sanitation is not used "directly" in production.

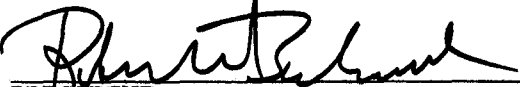
D. That the petition of Wehrle Drive Supermarkets, Inc. for refund is denied in its entirety and the notice of partial disallowance dated May 20, 1980 is hereby sustained.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION

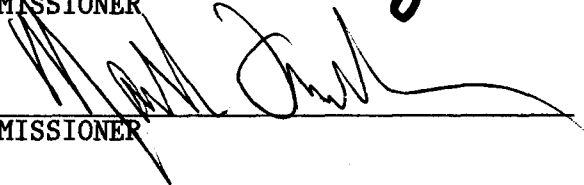
ACTING PRESIDENT

A handwritten signature in cursive script, appearing to read "Robert B. ...", written over a horizontal line.

COMMISSIONER

A handwritten signature in cursive script, appearing to read "Francis R. Koenig", written over a horizontal line.

COMMISSIONER

A handwritten signature in cursive script, appearing to read "John ...", written over a horizontal line.

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Wehrle Drive Supermarkets, 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 3/1/77-3/31/80.	:	

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 14th day of December, 1982, he served the within notice of Decision by certified mail upon Wehrle Drive Supermarkets, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Wehrle Drive Supermarkets, Inc.
770 Wehrle Dr.
Amherst, NY 14223

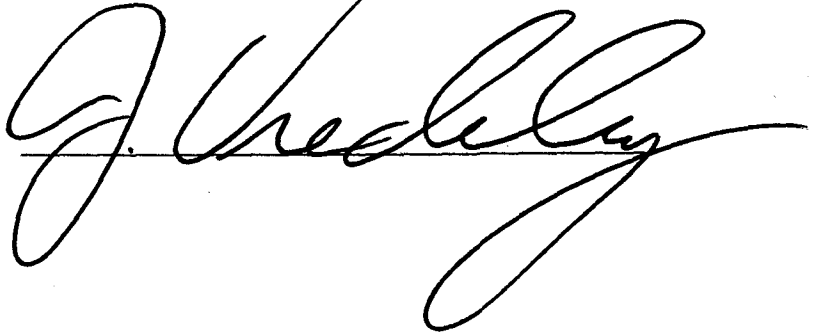
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
14th day of December, 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 :
Wehrle Drive Supermarkets, 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 3/1/77-3/31/80. :

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 14th day of December, 1982, he served the within notice of Decision by certified mail upon Joseph H. Zalucki the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph H. Zalucki
166 Lafayette St.
Schenectady, NY 12305

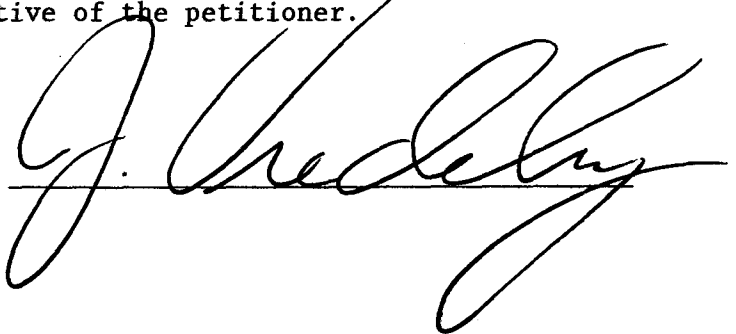
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
14th day of December, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



P 230 844 318
RECEIPT FOR CERTIFIED MAIL

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

PS Form 3800, Apr. 1976

SENT TO		Joseph H. Zalucki	
STREET AND NO.		166 Lafayette St	
P.O., STATE AND ZIP CODE		Schenectady N.Y. 12305	
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 230 844 317
RECEIPT FOR CERTIFIED MAIL

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PS Form 3800, Apr. 1976

SENT TO		Wehrle Drive Supermarkets, Inc.	
STREET AND NO.		770 Wehrle Dr	
P.O., STATE AND ZIP CODE		Amherst N.Y. 14223	
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			