

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

September 28, 1983

Balsam Amusements
1221 Bowery
Brooklyn, NY 11224

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
J. Vincent Gallagher
Twohy, Kelleher & Gallagher
130 Pierrepont St.
Brooklyn, NY 11201
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
BALSAM AMUSEMENTS
for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Periods 1978, 1979 and
1980.

DECISION

Petitioner, Balsam Amusements, 1221 Bowery, Brooklyn, New York 11224, 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 periods 1978, 1979 and 1980 (File No. 30757).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 23, 1982 at 9:15 A.M. with all briefs to be submitted by November 26, 1982. Petitioner appeared by J. Vincent Gallagher, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUES

I. Whether petitioner is entitled to a refund of sales tax paid on its purchases of prizes awarded to amusement game winners.

II. Whether petitioner's request for refund of sales tax remitted on its gross receipts was timely made for the years 1978 and 1979.

III. Whether the perfected petition filed by petitioner was a proper application for such refund requested in Issue II.

FINDINGS OF FACT

1. Petitioner, during the period in issue, operated two amusement games at Coney Island, Brooklyn, New York, for which it charged a fee to participate in the contest and for the chance of winning a prize. One amusement game consisted of a "horse race" whereby a ball was repeatedly rolled aiming at holes designating a certain number of jumps in order to move the participant's horse to the finish line. The other game involved use of a water pistol whereby participants aimed at a balloon trying to fill and burst it. Each game acknowledged only one winner per game even though the participants in each game numbered as many as 17 and 18 players.

2. On February 14, 1980, petitioner, by signature of Joseph C. Balzano, partner, filed an Application for Credit or Refund of State and Local Sales or Use Tax covering the period January, 1978 through December, 1979. Petitioner sought a refund in the amount of \$3,552.71 constituting sales tax paid on its purchases of prizes awarded to the winners in the amusement games it operated because it collected sales tax on its fees charged participants.

3. On June 18, 1980, the Audit Division denied petitioner's claim for refund on the grounds that the merchandise purchased by petitioner was given away as prizes, rather than sold and was therefore purchased at retail.

4. Petitioner, by letter dated August 28, 1980, requested a hearing on said denial.

5. On February 10, 1981, petitioner filed a perfected petition covering the years 1978, 1979 and 1980. Petitioner adjusted its refund claim as follows:

<u>Year</u>	<u>Refund</u>
1978	\$1,839.71
1979	2,397.88
1980	3,823.36
TOTAL	<u>\$8,060.95</u>

In the perfected petition, petitioner conceded that its purchases of the prizes were taxable purchases, and now sought a refund of the tax paid on the gross receipts from the amusement charges on the grounds that "our gross receipts are not taxable under section 1105(f)(1) because our facilities are for entertainment and/or sport." Petitioner cited Bathrick Enterprises v. State Tax Commission, 23 N.Y.2d 664 (1968) and further argued that no transfer of title occurred during the participation in its amusement games.

6. Petitioner requested that its perfected petition be deemed an amendment of pleadings and considered as a proper claim for refund of which the state had notice.

7. The Law Bureau, in its answer to the perfected petition, alleged that petitioner did not make a claim for refund as to sales taxes allegedly collected on gross receipts and has not shown that it refunded to its patrons the sales taxes allegedly and erroneously collected on gross receipts. Further, it was the Audit Division's position that petitioner's gross receipts were taxable under section 1105(f)(1) of the Tax Law.

CONCLUSIONS OF LAW

A. That the purchases of merchandise made by petitioner which were given away as prizes to winners in amusement games constituted purchases at retail within the meaning and intent of section 1101(b)(1) of the Tax Law and were therefore taxable under Tax Law section 1105(a). That the Audit Division properly denied petitioner's claim for refund in the amount of \$3,552.71 on such purchases.

B. That pursuant to section 1139(a) of the Tax Law, an application for refund of any tax paid to the Tax Commission may be made within three years after the date when such amount was payable. Such application shall be in such

form as the Tax Commission shall prescribe. No refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the Tax Commission that he has repaid such tax to the customer.

C. That the perfected petition filed by petitioner was not the proper vehicle to change grounds on which to seek a refund. That petitioner failed to file an application for refund on the grounds that the sales tax was erroneously collected or paid.

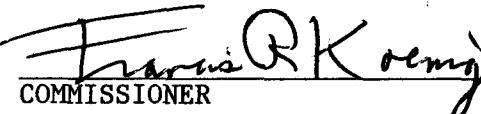
D. That the petition of Balsam Amusements is denied and the refund denial dated June 18, 1980 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 28 1983


PRESIDENT


COMMISSIONER


COMMISSIONER



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Balsam Amusements

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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 Years :
1978, 1979 and 1980.

State of New York
County of Albany

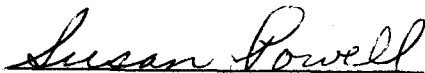
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Balsam Amusements, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Balsam Amusements
1221 Bowery
Brooklyn, NY 11224

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
28th day of September, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Balsam Amusements

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AFFIDAVIT OF MAILING

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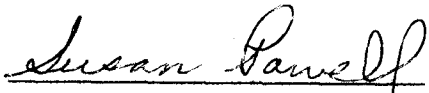
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon J. Vincent Gallagher the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J. Vincent Gallagher
Twohy, Kelleher & Gallagher
130 Pierrepont St.
Brooklyn, NY 11201

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
28th day of September, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



P 481 208 225

RECEIPT FOR CERTIFIED MAIL

INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

Sent to <u>J. Vincent Gallagher</u>	
<u>Twahy, Kelleher & Gallagher</u>	
Street and No.	
<u>130 Pierrepont St.</u>	
P.O., State and ZIP Code	
<u>Brooklyn, NY 11201</u>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

P 481 208 224

RECEIPT FOR CERTIFIED MAIL

INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

Sent to <u>Balsam Amusements</u>	
<u>1221 Bowery</u>	
Street and No.	
P.O., State and ZIP Code	
<u>Brooklyn, NY 11224</u>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	