

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

May 27, 1983

Ponderosa Systems, Inc.
P.O. Box 578
Dayton, OH 45401

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 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
Eugene Steiner
Steiner and Steiner
90 State Street
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Ponderosa Systems, Inc.,	:	
Ernest Trefz, d/b/a MacPeekskill Company,	:	
Hampshire Country Club, Inc.,	:	
Longley's Inc., B. G. Foods, Inc.,	:	
Hager, Inc.,	:	
Renaissance Restaurant Co.,	:	
and	:	AFFIDAVIT OF MAILING
K-Mart Corporation	:	
	:	
for Revision of a Determination or a Refund of	:	
Sales & Use Taxes under Articles 28 & 29 of the	:	
Tax Law for the Years 1976 - 1980.	:	

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Ponderosa Systems, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ponderosa Systems, Inc.
P.O. Box 578
Dayton, OH 45401

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
27th day of May, 1983.

David Parchuck

William A. Highland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Ponderosa Systems, Inc.,	:	
Ernest Trefz, d/b/a MacPeekskill Company,	:	
Hampshire Country Club, Inc.,	:	
Longley's Inc., B. G. Foods, Inc.,	:	
Hager, Inc.,	:	
Renaissance Restaurant Co.,	:	
and	:	AFFIDAVIT OF MAILING
K-Mart Corporation	:	
for Revision of a Determination or a Refund of	:	
Sales & Use Taxes under Articles 28 & 29 of the	:	
Tax Law for the Years 1976 - 1980.	:	

State of New York
County of Albany

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Ponderosa Systems, Inc.
P.O. Box 578
Dayton, OH 45401

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Sworn to before me this
27th day of May, 1983.

David Parchuck

James A. Delaney
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ponderosa Systems, Inc., :
Ernest Trefz, d/b/a MacPeekskill Company, :
Hampshire Country Club, Inc., :
Longley's Inc., B. G. Foods, Inc., :
Hager, Inc., :
Renaissance Restaurant Co., :
and :
K-Mart Corporation :
AFFIDAVIT OF MAILING :
for Revision of a Determination or a Refund of :
Sales & Use Taxes under Articles 28 & 29 of the :
Tax Law for the Years 1976 - 1980. :

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Ernest Trefz, d/b/a MacPeekskill Company, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ernest Trefz
d/b/a MacPeekskill Company
157 Golden Hill St., Box 310
Bridgeport, CT 06601

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
27th day of May, 1983.

David Parchuck

James D. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Ernest Trefz
d/b/a MacPeekskill Company
157 Golden Hill St., Box 310
Bridgeport, CT 06601

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 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.

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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
Eugene J. Steiner
Steiner & Steiner
90 State Street
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ponderosa Systems, Inc., :
Ernest Trefz, d/b/a MacPeekskill Company, :
Hampshire Country Club, Inc., :
Longley's Inc., B. G. Foods, Inc., :
Hager, Inc., :
Renaissance Restaurant Co., :
and :
K-Mart Corporation :
: AFFIDAVIT OF MAILING
:
for Revision of a Determination or a Refund of :
Sales & Use Taxes under Articles 28 & 29 of the :
Tax Law for the Years 1976 - 1980. :
:

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Hampshire Country Club, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Hampshire Country Club, Inc.
Hammocks Rd.
Mamaroneck, NY 10543

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
27th day of May, 1983.

David Parchuck

James O. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Hampshire Country Club, Inc.
Hammocks Rd.
Mamaroneck, NY 10543

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 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.

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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
Eugene J. Steiner
Steiner & Steiner
90 State Street
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Ponderosa Systems, Inc., :
Ernest Trefz, d/b/a MacPeekskill Company, :
Hampshire Country Club, Inc., :
Longley's Inc., B. G. Foods, Inc., :
Hager, Inc., :
Renaissance Restaurant Co., :
and :
K-Mart Corporation :
AFFIDAVIT OF MAILING :
for Revision of a Determination or a Refund of :
Sales & Use Taxes under Articles 28 & 29 of the :
Tax Law for the Years 1976 - 1980. :

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Longley's Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Longley's Inc.
c/o Steiner & Steiner
90 State St.
Albany, NY 12207

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
27th day of May, 1983.

David Parchuck

James A. Delaney

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Longley's Inc.
c/o Steiner & Steiner
90 State St.
Albany, NY 12207

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 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.

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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
Eugene J. Steiner
Steiner & Steiner
90 State Street
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Ponderosa Systems, Inc.,	:	
Ernest Trefz, d/b/a MacPeekskill Company,	:	
Hampshire Country Club, Inc.,	:	
Longley's Inc., B. G. Foods, Inc.,	:	
Hager, Inc.,	:	
Renaissance Restaurant Co.,	:	
and	:	AFFIDAVIT OF MAILING
K-Mart Corporation	:	
for Revision of a Determination or a Refund of	:	
Sales & Use Taxes under Articles 28 & 29 of the	:	
Tax Law for the Years 1976 - 1980.	:	

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon B. G. Foods, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

B. G. Foods, Inc.
520 Secaucus Rd.
Secaucus, NJ 07094

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
27th day of May, 1983.

David Parchuck

James A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

B.G. Foods, Inc.
520 Secaucus Rd.
Secaucus, NJ 07094

Gentlemen:

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Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Eugene Steiner
Steiner and Steiner
90 State Street
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Ponderosa Systems, Inc.,	:	
Ernest Trefz, d/b/a MacPeekskill Company,	:	
Hampshire Country Club, Inc.,	:	
Longley's Inc., B. G. Foods, Inc.,	:	
Hager, Inc.,	:	
Renaissance Restaurant Co.,	:	
and	:	AFFIDAVIT OF MAILING
K-Mart Corporation	:	
for Revision of a Determination or a Refund of	:	
Sales & Use Taxes under Articles 28 & 29 of the	:	
Tax Law for the Years 1976 - 1980.	:	

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Hager, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Hager, Inc.
1044 Northern Blvd.
Roslyn, NY 11576

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
27th day of May, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Hager, Inc.
1044 Northern Blvd.
Roslyn, NY 11576

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 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.

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Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Eugene J. Steiner
Steiner & Steiner
90 State Street
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Ponderosa Systems, Inc.,	:	
Ernest Trefz, d/b/a MacPeekskill Company,	:	
Hampshire Country Club, Inc.,	:	
Longley's Inc., B. G. Foods, Inc.,	:	
Hager, Inc.,	:	
Renaissance Restaurant Co.,	:	
and	:	AFFIDAVIT OF MAILING
K-Mart Corporation	:	
for Revision of a Determination or a Refund of	:	
Sales & Use Taxes under Articles 28 & 29 of the	:	
Tax Law for the Years 1976 - 1980.	:	

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Renaissance Restaurant Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Renaissance Restaurant Co.
Powerhouse Rd.
Roslyn Heights, NY 11577

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
27th day of May, 1983.

David Parchuck

James A. Angelini

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Renaissance Restaurant Co.
Powerhouse Rd.
Roslyn Heights, NY 11577

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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Eugene J. Steiner
Steiner & Steiner
90 State Street
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Ponderosa Systems, Inc.,	:	
Ernest Trefz, d/b/a MacPeekskill Company,	:	
Hampshire Country Club, Inc.,	:	
Longley's Inc., B. G. Foods, Inc.,	:	
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and	:	AFFIDAVIT OF MAILING
K-Mart Corporation	:	
	:	
for Revision of a Determination or a Refund of	:	
Sales & Use Taxes under Articles 28 & 29 of the	:	
Tax Law for the Years 1976 - 1980.	:	

State of New York
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon K-Mart Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

K-Mart Corporation
3100 W. Big Beaver Rd.
Troy, MI 48084

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.

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David Parchuck

James A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

K-Mart Corporation
3100 W. Big Beaver Rd.
Troy, MI 48084

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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Eugene J. Steiner
Steiner & Steiner
90 State Street
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
PONDEROSA SYSTEMS, INC.,	:	
ERNEST TREFZ, d/b/a MACPEEKSKILL COMPANY,	:	
HAMPSHIRE COUNTRY CLUB, INC.,	:	
LONGLEY'S INC., B.G. FOODS, INC.,	:	DECISION
HAGER, INC.,	:	
RENAISSANCE RESTAURANT CO.,	:	
AND	:	
K-MART CORPORATION	:	
for Revision of a Determination or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of	:	
the Tax Law for the Years 1976 through 1980.	:	

Petitioners, Ponderosa Systems, Inc., Ernest Trefz, d/b/a MacPeekskill Company, Hampshire Country Club, Inc., Longley's Inc., B.G. Foods, Inc., Hager, Inc., Renaissance Restaurant Co., and K-Mart Corporation, c/o Steiner & Steiner, Esqs., 90 State Street, Albany, New York 12207, filed petitions for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the years 1976 through 1980 (File Nos. 31238, 33818, 33819, 33820, 33821, 33822, 33829 and 33950).

A consolidated formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York on August 17, 1982 at 9:15 A.M., with all briefs to be submitted by December 23, 1982. Petitioners appeared by Steiner & Steiner, Esqs., (Eugene J. Steiner, Esq., and Donald Zee, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq., (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether applications for credit or refund of sales and use taxes allegedly paid, and subsequent protests of the denials of said applications, were timely filed by petitioners or by properly authorized representatives of petitioners.

II. Whether certain machinery, equipment and replacement parts, as well as utilities to power such items, allegedly purchased by petitioners and used in the preparation of food and drink offered for sale, qualify for exemption from sales and use tax under sections 1115(a)(12) and 1115(c) of the Tax Law.

III. Whether, in the event the above items qualify for exemption from tax, petitioners have substantiated the purchase of said items and the payment of tax thereon and thus are entitled to credit or refund with respect to such taxes.

IV. Whether the imposition of sales and use tax upon the purchase by petitioners of the machinery and equipment, replacement parts and utilities, as described above, constitutes an arbitrary and capricious exercise in law making, is without rational purpose or basis, and thus is constitutionally violative of the right to equal protection under the law.

V. Whether the imposition of tax on the purchase of the items as described above leads to a constitutionally impermissible pyramiding of tax or double taxation, inasmuch as the tax on such purchases may be passed along to the ultimate consumer in the form of higher product prices.

FINDINGS OF FACT

1. On various dates, as specified in the following findings of fact, each of the individual petitioners herein sought credit or refund of sales and use taxes for various periods. The basis upon which each of the petitioners predicates its claim is the assertion that certain equipment or machines and

replacement parts (with a useful life of more than one year or more), as well as the utilities used to power the equipment or machinery, are exempt from tax since they are (allegedly) used directly and predominately in the manufacturing or processing of tangible personal property for sale.

On various dates, the Audit Division denied each individual petitioner's claim for credit or refund, on the general basis that the machinery, equipment, replacement parts and utilities at issue are used in the processing of restaurant food and thus do not qualify for exemption from tax. Certain procedural issues as well as certain additional grounds for denial of the claims for credit or refund have been raised with respect to various of the individual petitioners. Accordingly, findings of fact addressing specific procedural items and specific grounds for denial concerning individual petitioners will be presented first, followed by findings of fact addressing the factual basis upon which refund or credit is claimed and upon which said claim, in general, was denied.

2. On June 13, 1980, the Audit Division issued to petitioner Ponderosa Systems, Inc. ("Ponderosa") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$35,699.87 plus interest. This Notice pertained to the period September 1, 1976 through August 31, 1979, and was based on an audit of Ponderosa's books and records by the Audit Division. On December 5, 1979, Ponderosa had signed a consent allowing sales and use taxes for the period September 1, 1976 through August 31, 1979, to be assessed at any time on or before March 20, 1980. A second, similar consent covering the same period and allowing assessment on or before June 20, 1980 was signed by Ponderosa on February 19, 1980.

3. On July 16, 1976, the Audit Division received from Ponderosa an Application for Credit or Refund of State and Local Sales and Use Tax (hereinafter

"Form ST-137") dated July 7, 1976, seeking credit or refund for the "prior three years" in an estimated amount of \$2,000.00. On December 19, 1980, Ponderosa filed a second Form ST-137 pertaining to the period September 1, 1976 through November 30, 1979, and seeking refund or credit of "\$1.00 or any amount legally refundable".

4. By a letter dated March 11, 1981, the Audit Division denied in full Ponderosa's claims for credit or refund, premising such denial on Ponderosa's failure to provide documentation in support of the amount of refund claimed as well as failure to substantiate payment of the tax.

5. By a letter dated June 8, 1981, Arnold Standard Review Corporation (hereinafter "Arnold Standard"), on behalf of Ponderosa, protested the above denial of Ponderosa's claims. This letter was stamped as received by the Audit Division on June 12, 1981, bore a Pitney Bowes postage meter stamp dated June 8, 1981, and bore a United States Postal Service cancellation stamp dated June 10, 1981.

6. No substantiation of either payment of tax or of the amount of refund to which Ponderosa alleges it is entitled has been provided.

7. On July 26, 1976, the Audit Division received from MacPeekskill Company ("MacPeekskill"), a Form ST-137 dated July 16, 1976, seeking credit or refund of tax in an amount estimated at \$600.00 for the "prior three years". On September 20, 1979, MacPeekskill filed a second Form ST-137 seeking "\$1.00 or any amount legally refundable" for the period June 1, 1976 through August 31, 1979. A third Form ST-137, filed by MacPeekskill in the amount of \$143.50, was received by the Audit Division on April 14, 1980. Attached to this third Form ST-137 were invoices, receipts and workpapers in support of the amount of

refund or credit claimed (\$143.50). This third Form ST-137 was neither signed nor dated by petitioner nor by any representative.¹

8. The above claims for credit or refund filed by MacPeekskill were denied in full by the Audit Division on March 17, 1981. These denials were protested by Arnold Standard, on behalf of petitioner, by a letter dated June 12, 1981.

9. Petitioner Hampshire Country Club, Inc. ("Hampshire"), filed a Form ST-137 seeking "\$1.00 or any amount legally refundable" for the periods June 1, 1977 through August 31, 1980. This application was dated September 19, 1980, bore a Pitney Bowes postmark of September 22, 1980 and a United States Postal Service postmark of September 24, 1980.

10. The above Form ST-137 was denied in full by the Audit Division by a letter dated March 24, 1981. Arnold Standard, on behalf of petitioner, protested this denial by a letter dated June 16, 1981.

11. The Audit Division asserts petitioner has provided neither documents nor computations in support of the above application, nor has petitioner substantiated payment of the tax. The Audit Division further asserts that the

¹ The perfected petition notes an amount at issue of \$2,694.62, in addition to the amount of \$143.50 stated on the third Form ST-137. No information concerning this additional amount was provided at the hearing. Additional attached receipts, invoices and workpapers pertained, with one exception, to tax paid on charges for the installation of safety glass in doors. No further explanation of these items or the reason for their inclusion was offered.

above application was not timely filed with respect to periods prior to September 1, 1977.²

12. On September 20, 1979, Arnold Standard, on behalf of petitioner Longley's Food, Inc. ("Longley's"), filed a Form ST-137 seeking a "\$1.00 or any amount legally refundable" for the period June 1, 1976 through August 31, 1979.

13. The above claim for refund or credit was denied in full by the Audit Division by a letter dated March 24, 1981. Arnold Standard protested this denial, on behalf of Longley's, by a letter dated June 16, 1981 and received by the Audit Division on June 19, 1981.

14. The Audit Division issued the above denial on the basis that petitioners had not supplied documents supporting computation of the amount of refund or credit claimed or substantiating payment of the tax.³

15. On September 20, 1979, Arnold Standard, on behalf of petitioner B.G. Foods, Inc. ("B/G"), filed a Form ST-137 seeking "\$1.00 or any amount legally refundable" for the period June 1, 1976 through August 31, 1979.

On November 1, 1979, a second Form ST-137 pertaining to the same period was filed by Arnold Standard on behalf of B/G, seeking refund or credit in the amount of \$2,267.23. Attached to this second Form ST-137 were workpapers detailing the computations by which the above amount (\$2,267.23) was calculated.

16. The Audit Division denied the above claims for credit in full by a letter dated March 30, 1981. By a letter dated June 12, 1981 and received by

² The perfected petition dated December 8, 1981 specifies an amount at issue of \$2,594.60. No information as to the computation or substantiation of this amount was provided at the hearing.

³ The perfected petition specifies an amount at issue of \$13,098.95. However, no information concerning the calculation of this amount or substantiating the payment of this amount was provided at the hearing.

the Audit Division on June 19, 1981, Arnold Standard, on behalf of petitioner B/G, protested this denial.

17. The Audit Division's denial of the above claims is based, in part, on the assertion that petitioner B/G has failed to provide documents supporting either its calculation of the amount of refund or credit claimed or substantiating payment of the tax.

18. On December 13, 1979, petitioner Hager, Inc. ("Hager") filed a Form ST-137 seeking \$32,457.37 for the period September 1, 1976 through September 30, 1979.

19. By a letter dated April 9, 1981, the Audit Division denied the above claim for credit or refund in full. By a letter dated June 12, 1981, Arnold Standard, on behalf of petitioner Hager, protested this denial.

20. On March 7, 1980, petitioner Renaissance Restaurant Co. ("Renaissance") filed a Form ST-137 seeking "\$1.00 or any amount legally refundable" for the period December 1, 1976 through February 28, 1980.

21. By a letter dated March 30, 1981, the Audit Division denied the above application in full, asserting as part of its basis for denial that petitioner had provided no documents in support of either its computation of the amount of credit or refund claimed or in substantiation of the payment of tax. By a letter dated June 12, 1981, Arnold Standard, on behalf of petitioner Renaissance, protested the above denial of petitioner's claim for credit or refund.

22. On June 23, 1980, petitioner K-Mart Corporation ("K-Mart") filed a Form ST-137 seeking \$27,760.70 for the period September 1, 1976 through May 31, 1980. On August 6, 1980 and on September 9, 1980, K-Mart filed additional Form ST-137's seeking \$8,636.34 and \$13,648.09, respectively, for the period April 1, 1976 through December 31, 1978. Attached to the above three claims for credit

or refund were workpapers explaining the computations used by petitioner in arriving at the above claimed amounts of credit or refund.

23. By a letter dated March 30, 1981, the Audit Division denied each of the above claims in full. By a letter dated June 26, 1981, Arnold Standard, on behalf of petitioner K-Mart, protested this denial.

24. The Audit Division asserts that the two Form ST-137's for the period April 1, 1976 through December 31, 1978 are duplicative, and further that no refund or credit may be granted for any period prior to the quarter commencing June 1, 1977.

25. The Audit Division asserts that Arnold Standard was not a proper party duly authorized to file claims on behalf of petitioners herein or to protest the denial of those claims, and thus the claims and/or protests as filed by Arnold Standard on behalf of petitioners herein are null and void.

26. Various powers of attorney were executed by the individual petitioners with respect to the matters at issue herein as follows:

<u>Name of Petitioner</u>	<u>Date of Petitioner's Power Appointing Arnold Standard</u>	<u>Date of Petitioner's Power Appointing Steiner & Steiner, Esqs.</u>
Ponderosa	1/15/80	3/29/82
MacPeekskill	No power in evidence	2/ /82
Hampshire	11/10/81	1/26/82
Longley's	11/12/81	1/27/82
B/G	9/20/79	1/11/82
Hager	11/3/81	1/26/82
Renaissance	10/22/81	2/1/82
K-Mart	11/24/81	1/26/82

The power of attorney from petitioner MacPeekskill appointing Steiner & Steiner, Esqs., although proper in both form and manner of execution (acknowledgement before a notary), bore only the date February, 1982, with no particular day of appointment evident. The power of attorney dated September 20, 1979, whereby petitioner B/G purports to appoint Arnold Standard was neither witnessed nor

acknowledged before a notary public. Finally, individual powers of attorney, dated December 30, 1981, were executed by Arnold Standard appointing Steiner & Steiner, Esqs. to represent each of the petitioners except Hager, for whom no such power was introduced in evidence.

27. Each of the powers of attorney, including those executed prior to as well as after the filing of protests, contained language indicating that representation was to be for sales tax with respect to the particular items and periods at issue herein, and each allowed full power of substitution. Robert Arnold testified that it is the general policy of Arnold Standard to obtain powers of attorney from those clients for whom Arnold Standard was to perform work and that, to the best of his recollection, such powers of attorney were obtained from the petitioners herein and were filed with the Audit Division. Petitioners assert that such powers, including those appointing Steiner & Steiner, Esqs., constitute ratification of all prior actions taken by petitioners or by Arnold Standard on behalf of petitioners with respect to the items at issue herein.

28. In addition to the various procedural issues raised, as detailed, the principal substantive issue raised by each of the petitioners herein involves the claimed exemption from sales and use taxes as noted in Finding of Fact "1" supra.

29. At the hearing, the parties stipulated that testimony concerning the operation of petitioner MacPeekskill's business, insofar as related to the issue of exempt machinery and utilities, would be binding on each of the other petitioners and that the decision of the Commission with respect to petitioner MacPeekskill and the issue of exempt machinery and utilities would be binding

on each of the other petitioners.⁴ No stipulation was reached with respect to the various procedural issues described previously.

30. Petitioner MacPeekskill owns and operates thirty-two McDonalds Restaurants. Petitioner utilizes certain items of machinery or equipment and replacement parts (with a useful life of more than one year) in the conduct of its business. These items include, but are not limited to, ovens, fryers, broilers, coffee urns, toasters, milk shake machines, ice cream makers and dispensers. In addition, petitioner purchases utilities to provide the power necessary to operate the various machines and equipment.

31. Petitioner utilizes the various machines and equipment in preparing the food and drink it offers for sale. Petitioner asserts that the machines and equipment, as well as the utilities necessary to power them, are integral to the production, manufacturing, fabricating and/or processing of a "raw product" (e.g. uncooked hamburger patties, unheated rolls, ground coffee, milk shake liquid, etc.) into a finished product, constituting tangible personal property, to be sold. Petitioner asserts further that each of the various machines and equipment is designed specifically for and used only in the preparation of specific items of food or drink offered for sale. Finally, petitioner concedes that elements of service (such as packaging, weighing, delivery and a comfortable environment or place for sale of the item) are added to the product, but asserts that such service occurs after preparation of the foods utilizing the various machines and equipment, is completed.

⁴ The exact nature of each petitioner's restaurant operation differs in that some of the operations are fast-food establishments which allow for on and off premises consumption and others are the traditional sit-down restaurants.

32. The Audit Division asserts, by contrast, (and in addition to the issues of procedure and substantiation previously described) that the activities performed by the various machines and equipment in the preparation of the food and drink sold by petitioner do not constitute the production, manufacturing, fabricating or processing of tangible personal property offered for sale.

CONCLUSIONS OF LAW

A. That section 1139(a) of the Tax Law in pertinent part provides:

"[i]n the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission...Such application shall be in such form as the tax commission shall prescribe."

Section 1139(b) of the Tax Law in pertinent part further provides:

"[i]f an application for refund or credit is filed with the tax commission..., the tax commission may grant or deny such application in whole or in part and shall notify the taxpayer by mail accordingly. Such determination shall be final and irrevocable unless the applicant shall, within ninety days after the mailing of notice of such determination apply to the tax commission for a hearing."

B. That the applications for credit or refund (Forms ST-137) filed by all petitioners were timely in all cases, except that the applications of petitioners Hampshire and K-Mart do not extend to periods prior to September 1, 1977, and June 1, 1977, respectively, since any earlier dates for these petitioners would be beyond the three (3) year limitation specified by section 1139(a) of the Tax Law.

C. That the protests of the Audit Division's denials of the claims for credit or refund, filed by either petitioners or by Arnold Standard Review

Corporation on behalf of petitioners, were filed within the ninety (90) day period specified by section 1139(b) of the Tax Law and are thus timely in all instances.

D. That powers of attorney executed and filed by petitioners and appointing either Arnold Standard Review Corporation or Steiner & Steiner, Esqs., as detailed more fully in Findings of Fact "26" and "27" are valid and proper. Furthermore, the powers of attorney executed by Arnold Standard Review Corporation, which appoint Steiner and Steiner, Esqs., as representatives, under the authority of substitution contained in powers given to Arnold Standard are valid. Mr. Arnold testified that it was Arnold Standard Review Corporation's policy to obtain powers of attorney from those clients for whom it was engaged to do work. Finally, each of the powers of attorney involved herein contains language specifying that acts to be undertaken on behalf of the various petitioners are limited to matters of sales and use taxes for the particular periods involved, and thus, though post-dating some of the acts undertaken on behalf of some of the petitioners, signal a ratification of such acts by the petitioners and are valid. Accordingly, those claims for credit or refund and those protests of denial filed by Arnold Standard Review Corporation are not null and void.

E. That section 1115(a)(12) of the Tax Law in pertinent part provides:

"(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property,...".

Section 1115(c) of the Tax Law further provides exemption from tax for "[f]uel, gas, electric, refrigeration and steam service...for use or consumption directly

and exclusively in the production of tangible personal property,..., for sale, by manufacturing, (or) processing,...".

F. That the above exemption from tax on machinery, equipment and utilities, etc., has been held inapplicable to such items as used in the production of restaurant food and drink. [Mtr. of Burger King v. Tax Comm., 51 N.Y.2d 614; See also 20 NYCRR 528.13(c)(2)(Example 6)]. Furthermore, neither calculations of the amount of refund alleged to be due nor substantiation of the payment of tax has been provided by petitioners Ponderosa, Hampshire, Longley's or Renaissance, and documents (invoices) provided as substantiation by petitioner MacPeekskill appear, at least in part, to pertain to expenditures for items other than for those upon which credit or refund is claimed or would be in any event allowable. Finally, petitioner B/G has offered no testimony, documents or other means of substantiating the computations submitted with its claim, and petitioner K-Mart's two claims for the period April 1, 1976 through December 31, 1978 are duplicative and are barred for any period prior to June 1, 1977 (See Conclusion of Law "B").

G. That this Commission is without authority to pass judgement upon the constitutional issues raised.

H. That the petitions of Ponderosa Systems, Inc., Ernest Trefz, d/b/a Mac Peekskill Company, Hampshire Country Club, Inc., Longley's, Inc., B.G. Foods, Inc., Hager, Inc., Renaissance Restaurant Co., and K-Mart Corporation are hereby denied, and the Notice of Determination and Demand issued to Ponderosa

Systems, Inc., on June 13, 1980, together with such interest as may be lawfully owing, as well as are each of the Audit Division's denials of application for credit or refund filed by the various petitioners herein are sustained.

DATED: Albany, New York
MAY 27 1983

STATE TAX COMMISSION

Richard A. Cline
PRESIDENT

Frank R. Koenig
COMMISSIONER

Mark J. Hill
COMMISSIONER

REQUEST FOR BETTER ADDRESS

Requested by	Unit	Date of Request <i>6-28-83</i>
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition <i>F Dec 6-27-83</i>
Name <i>Renaissance Restaurant Co.</i>	
Address <i>Powerhouse Rd Roslyn Heights NY 11577</i>	

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input checked="" type="checkbox"/> Other:	<i>unclaimed</i>

Searched by <i>Cal</i>	Section	Date of Search <i>6-28-83</i>
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PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

P 481 207 905

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Ponderosa Systems, Inc.	
Street and No.	
P.O. Box 578	
P.O., State and ZIP Code	
Dayton, OH 45401	
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	

PS Form 3800, Feb. 1982

P 481 207 876

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Eugene Steiner	
Steiner and Steiner	
Street and No.	
90 State Street	
P.O., State and ZIP Code	
Albany, NY 12207	
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	

PS Form 3800, Feb. 1982

P 481 207 925

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Ernest Trefz	
d/b/a MacLeeks Skill Company	
Street and No.	
1576 Golden Hill St., Box 310	
P.O., State and ZIP Code	
Bridgeport, CT 06601	
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	

PS Form 3800, Feb. 1982

P 481 207 877

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Hampshire Country Club, Inc.	
Street and No.	
Hammocks Rd.	
P.O., State and ZIP Code	
Mamaroneck, NY 10543	
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	

PS Form 3800, Feb. 1982

P 481 207 890

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Longley's Inc, c/o Steiner & Steiner	
Street and No. 90 State St.	
P.O., State and ZIP Code Albany, NY 12207	
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	

PS Form 3800, Feb. 1982

P 481 207 853

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to B.G. Foods, Inc.	
Street and No. 520 Secaucus Rd.	
P.O., State and ZIP Code Secaucus, NJ 07094	
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	

PS Form 3800, Feb. 1982

P 481 207 875

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Hager, Inc.	
Street and No. 1044 Northern Blvd.	
P.O., State and ZIP Code Roslyn, NY 11576	
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	

PS Form 3800, Feb. 1982

P 481 207 908

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Renaissance Restaurants,	
Street and No. Powerhouse Rd.	
P.O., State and ZIP Code Roslyn Heights, NY 11577	
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	

PS Form 3800, Feb. 1982

P 481 207 887

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
K-Mart Corporation	
Street and No.	
3100 W. Big Beaver Rd.	
P.O., State and ZIP Code	
Troy, MI 48084	
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	

PS Form 3800, Feb. 1982

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

May 27, 1983

Renaissance Restaurant Co.
Powerhouse Rd.
Roslyn Heights, NY 11577

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 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
Eugene J. Steiner
Steiner & Steiner
90 State Street
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
PONDEROSA SYSTEMS, INC.,	:	
ERNEST TREFZ, d/b/a MACPEEKSKILL COMPANY,	:	
HAMPSHIRE COUNTRY CLUB, INC.,	:	
LONGLEY'S INC., B.G. FOODS, INC.,	:	DECISION
HAGER, INC.,	:	
RENAISSANCE RESTAURANT CO.,	:	
AND	:	
K-MART CORPORATION	:	
for Revision of a Determination or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of	:	
the Tax Law for the Years 1976 through 1980.	:	

Petitioners, Ponderosa Systems, Inc., Ernest Trefz, d/b/a MacPeekskill Company, Hampshire Country Club, Inc., Longley's Inc., B.G. Foods, Inc., Hager, Inc., Renaissance Restaurant Co., and K-Mart Corporation, c/o Steiner & Steiner, Esqs., 90 State Street, Albany, New York 12207, filed petitions for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the years 1976 through 1980 (File Nos. 31238, 33818, 33819, 33820, 33821, 33822, 33829 and 33950).

A consolidated formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York on August 17, 1982 at 9:15 A.M., with all briefs to be submitted by December 23, 1982. Petitioners appeared by Steiner & Steiner, Esqs., (Eugene J. Steiner, Esq., and Donald Zee, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq., (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether applications for credit or refund of sales and use taxes allegedly paid, and subsequent protests of the denials of said applications, were timely filed by petitioners or by properly authorized representatives of petitioners.

II. Whether certain machinery, equipment and replacement parts, as well as utilities to power such items, allegedly purchased by petitioners and used in the preparation of food and drink offered for sale, qualify for exemption from sales and use tax under sections 1115(a)(12) and 1115(c) of the Tax Law.

III. Whether, in the event the above items qualify for exemption from tax, petitioners have substantiated the purchase of said items and the payment of tax thereon and thus are entitled to credit or refund with respect to such taxes.

IV. Whether the imposition of sales and use tax upon the purchase by petitioners of the machinery and equipment, replacement parts and utilities, as described above, constitutes an arbitrary and capricious exercise in law making, is without rational purpose or basis, and thus is constitutionally violative of the right to equal protection under the law.

V. Whether the imposition of tax on the purchase of the items as described above leads to a constitutionally impermissible pyramiding of tax or double taxation, inasmuch as the tax on such purchases may be passed along to the ultimate consumer in the form of higher product prices.

FINDINGS OF FACT

1. On various dates, as specified in the following findings of fact, each of the individual petitioners herein sought credit or refund of sales and use taxes for various periods. The basis upon which each of the petitioners predicates its claim is the assertion that certain equipment or machines and

replacement parts (with a useful life of more than one year or more), as well as the utilities used to power the equipment or machinery, are exempt from tax since they are (allegedly) used directly and predominately in the manufacturing or processing of tangible personal property for sale.

On various dates, the Audit Division denied each individual petitioner's claim for credit or refund, on the general basis that the machinery, equipment, replacement parts and utilities at issue are used in the processing of restaurant food and thus do not qualify for exemption from tax. Certain procedural issues as well as certain additional grounds for denial of the claims for credit or refund have been raised with respect to various of the individual petitioners. Accordingly, findings of fact addressing specific procedural items and specific grounds for denial concerning individual petitioners will be presented first, followed by findings of fact addressing the factual basis upon which refund or credit is claimed and upon which said claim, in general, was denied.

2. On June 13, 1980, the Audit Division issued to petitioner Ponderosa Systems, Inc. ("Ponderosa") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$35,699.87 plus interest. This Notice pertained to the period September 1, 1976 through August 31, 1979, and was based on an audit of Ponderosa's books and records by the Audit Division. On December 5, 1979, Ponderosa had signed a consent allowing sales and use taxes for the period September 1, 1976 through August 31, 1979, to be assessed at any time on or before March 20, 1980. A second, similar consent covering the same period and allowing assessment on or before June 20, 1980 was signed by Ponderosa on February 19, 1980.

3. On July 16, 1976, the Audit Division received from Ponderosa an Application for Credit or Refund of State and Local Sales and Use Tax (hereinafter

"Form ST-137") dated July 7, 1976, seeking credit or refund for the "prior three years" in an estimated amount of \$2,000.00. On December 19, 1980, Ponderosa filed a second Form ST-137 pertaining to the period September 1, 1976 through November 30, 1979, and seeking refund or credit of "\$1.00 or any amount legally refundable".

4. By a letter dated March 11, 1981, the Audit Division denied in full Ponderosa's claims for credit or refund, premising such denial on Ponderosa's failure to provide documentation in support of the amount of refund claimed as well as failure to substantiate payment of the tax.

5. By a letter dated June 8, 1981, Arnold Standard Review Corporation (hereinafter "Arnold Standard"), on behalf of Ponderosa, protested the above denial of Ponderosa's claims. This letter was stamped as received by the Audit Division on June 12, 1981, bore a Pitney Bowes postage meter stamp dated June 8, 1981, and bore a United States Postal Service cancellation stamp dated June 10, 1981.

6. No substantiation of either payment of tax or of the amount of refund to which Ponderosa alleges it is entitled has been provided.

7. On July 26, 1976, the Audit Division received from MacPeekskill Company ("MacPeekskill"), a Form ST-137 dated July 16, 1976, seeking credit or refund of tax in an amount estimated at \$600.00 for the "prior three years". On September 20, 1979, MacPeekskill filed a second Form ST-137 seeking "\$1.00 or any amount legally refundable" for the period June 1, 1976 through August 31, 1979. A third Form ST-137, filed by MacPeekskill in the amount of \$143.50, was received by the Audit Division on April 14, 1980. Attached to this third Form ST-137 were invoices, receipts and workpapers in support of the amount of

refund or credit claimed (\$143.50). This third Form ST-137 was neither signed nor dated by petitioner nor by any representative.¹

8. The above claims for credit or refund filed by MacPeekskill were denied in full by the Audit Division on March 17, 1981. These denials were protested by Arnold Standard, on behalf of petitioner, by a letter dated June 12, 1981.

9. Petitioner Hampshire Country Club, Inc. ("Hampshire"), filed a Form ST-137 seeking "\$1.00 or any amount legally refundable" for the periods June 1, 1977 through August 31, 1980. This application was dated September 19, 1980, bore a Pitney Bowes postmark of September 22, 1980 and a United States Postal Service postmark of September 24, 1980.

10. The above Form ST-137 was denied in full by the Audit Division by a letter dated March 24, 1981. Arnold Standard, on behalf of petitioner, protested this denial by a letter dated June 16, 1981.

11. The Audit Division asserts petitioner has provided neither documents nor computations in support of the above application, nor has petitioner substantiated payment of the tax. The Audit Division further asserts that the

¹ The perfected petition notes an amount at issue of \$2,694.62, in addition to the amount of \$143.50 stated on the third Form ST-137. No information concerning this additional amount was provided at the hearing. Additional attached receipts, invoices and workpapers pertained, with one exception, to tax paid on charges for the installation of safety glass in doors. No further explanation of these items or the reason for their inclusion was offered.

above application was not timely filed with respect to periods prior to September 1, 1977.²

12. On September 20, 1979, Arnold Standard, on behalf of petitioner Longley's Food, Inc. ("Longley's"), filed a Form ST-137 seeking a "\$1.00 or any amount legally refundable" for the period June 1, 1976 through August 31, 1979.

13. The above claim for refund or credit was denied in full by the Audit Division by a letter dated March 24, 1981. Arnold Standard protested this denial, on behalf of Longley's, by a letter dated June 16, 1981 and received by the Audit Division on June 19, 1981.

14. The Audit Division issued the above denial on the basis that petitioners had not supplied documents supporting computation of the amount of refund or credit claimed or substantiating payment of the tax.³

15. On September 20, 1979, Arnold Standard, on behalf of petitioner B.G. Foods, Inc. ("B/G"), filed a Form ST-137 seeking "\$1.00 or any amount legally refundable" for the period June 1, 1976 through August 31, 1979.

On November 1, 1979, a second Form ST-137 pertaining to the same period was filed by Arnold Standard on behalf of B/G, seeking refund or credit in the amount of \$2,267.23. Attached to this second Form ST-137 were workpapers detailing the computations by which the above amount (\$2,267.23) was calculated.

16. The Audit Division denied the above claims for credit in full by a letter dated March 30, 1981. By a letter dated June 12, 1981 and received by

² The perfected petition dated December 8, 1981 specifies an amount at issue of \$2,594.60. No information as to the computation or substantiation of this amount was provided at the hearing.

³ The perfected petition specifies an amount at issue of \$13,098.95. However, no information concerning the calculation of this amount or substantiating the payment of this amount was provided at the hearing.

the Audit Division on June 19, 1981, Arnold Standard, on behalf of petitioner B/G, protested this denial.

17. The Audit Division's denial of the above claims is based, in part, on the assertion that petitioner B/G has failed to provide documents supporting either its calculation of the amount of refund or credit claimed or substantiating payment of the tax.

18. On December 13, 1979, petitioner Hager, Inc. ("Hager") filed a Form ST-137 seeking \$32,457.37 for the period September 1, 1976 through September 30, 1979.

19. By a letter dated April 9, 1981, the Audit Division denied the above claim for credit or refund in full. By a letter dated June 12, 1981, Arnold Standard, on behalf of petitioner Hager, protested this denial.

20. On March 7, 1980, petitioner Renaissance Restaurant Co. ("Renaissance") filed a Form ST-137 seeking "\$1.00 or any amount legally refundable" for the period December 1, 1976 through February 28, 1980.

21. By a letter dated March 30, 1981, the Audit Division denied the above application in full, asserting as part of its basis for denial that petitioner had provided no documents in support of either its computation of the amount of credit or refund claimed or in substantiation of the payment of tax. By a letter dated June 12, 1981, Arnold Standard, on behalf of petitioner Renaissance, protested the above denial of petitioner's claim for credit or refund.

22. On June 23, 1980, petitioner K-Mart Corporation ("K-Mart") filed a Form ST-137 seeking \$27,760.70 for the period September 1, 1976 through May 31, 1980. On August 6, 1980 and on September 9, 1980, K-Mart filed additional Form ST-137's seeking \$8,636.34 and \$13,648.09, respectively, for the period April 1, 1976 through December 31, 1978. Attached to the above three claims for credit

or refund were workpapers explaining the computations used by petitioner in arriving at the above claimed amounts of credit or refund.

23. By a letter dated March 30, 1981, the Audit Division denied each of the above claims in full. By a letter dated June 26, 1981, Arnold Standard, on behalf of petitioner K-Mart, protested this denial.

24. The Audit Division asserts that the two Form ST-137's for the period April 1, 1976 through December 31, 1978 are duplicative, and further that no refund or credit may be granted for any period prior to the quarter commencing June 1, 1977.

25. The Audit Division asserts that Arnold Standard was not a proper party duly authorized to file claims on behalf of petitioners herein or to protest the denial of those claims, and thus the claims and/or protests as filed by Arnold Standard on behalf of petitioners herein are null and void.

26. Various powers of attorney were executed by the individual petitioners with respect to the matters at issue herein as follows:

<u>Name of Petitioner</u>	<u>Date of Petitioner's Power Appointing Arnold Standard</u>	<u>Date of Petitioner's Power Appointing Steiner & Steiner, Esqs.</u>
Ponderosa	1/15/80	3/29/82
MacPeekskill	No power in evidence	2/ /82
Hampshire	11/10/81	1/26/82
Longley's	11/12/81	1/27/82
B/G	9/20/79	1/11/82
Hager	11/3/81	1/26/82
Renaissance	10/22/81	2/1/82
K-Mart	11/24/81	1/26/82

The power of attorney from petitioner MacPeekskill appointing Steiner & Steiner, Esqs., although proper in both form and manner of execution (acknowledgement before a notary), bore only the date February, 1982, with no particular day of appointment evident. The power of attorney dated September 20, 1979, whereby petitioner B/G purports to appoint Arnold Standard was neither witnessed nor

acknowledged before a notary public. Finally, individual powers of attorney, dated December 30, 1981, were executed by Arnold Standard appointing Steiner & Steiner, Esqs. to represent each of the petitioners except Hager, for whom no such power was introduced in evidence.

27. Each of the powers of attorney, including those executed prior to as well as after the filing of protests, contained language indicating that representation was to be for sales tax with respect to the particular items and periods at issue herein, and each allowed full power of substitution. Robert Arnold testified that it is the general policy of Arnold Standard to obtain powers of attorney from those clients for whom Arnold Standard was to perform work and that, to the best of his recollection, such powers of attorney were obtained from the petitioners herein and were filed with the Audit Division. Petitioners assert that such powers, including those appointing Steiner & Steiner, Esqs., constitute ratification of all prior actions taken by petitioners or by Arnold Standard on behalf of petitioners with respect to the items at issue herein.

28. In addition to the various procedural issues raised, as detailed, the principal substantive issue raised by each of the petitioners herein involves the claimed exemption from sales and use taxes as noted in Finding of Fact "1" supra.

29. At the hearing, the parties stipulated that testimony concerning the operation of petitioner MacPeekskill's business, insofar as related to the issue of exempt machinery and utilities, would be binding on each of the other petitioners and that the decision of the Commission with respect to petitioner MacPeekskill and the issue of exempt machinery and utilities would be binding

on each of the other petitioners.⁴ No stipulation was reached with respect to the various procedural issues described previously.

30. Petitioner MacPeekskill owns and operates thirty-two McDonalds Restaurants. Petitioner utilizes certain items of machinery or equipment and replacement parts (with a useful life of more than one year) in the conduct of its business. These items include, but are not limited to, ovens, fryers, broilers, coffee urns, toasters, milk shake machines, ice cream makers and dispensers. In addition, petitioner purchases utilities to provide the power necessary to operate the various machines and equipment.

31. Petitioner utilizes the various machines and equipment in preparing the food and drink it offers for sale. Petitioner asserts that the machines and equipment, as well as the utilities necessary to power them, are integral to the production, manufacturing, fabricating and/or processing of a "raw product" (e.g. uncooked hamburger patties, unheated rolls, ground coffee, milk shake liquid, etc.) into a finished product, constituting tangible personal property, to be sold. Petitioner asserts further that each of the various machines and equipment is designed specifically for and used only in the preparation of specific items of food or drink offered for sale. Finally, petitioner concedes that elements of service (such as packaging, weighing, delivery and a comfortable environment or place for sale of the item) are added to the product, but asserts that such service occurs after preparation of the foods utilizing the various machines and equipment, is completed.

⁴ The exact nature of each petitioner's restaurant operation differs in that some of the operations are fast-food establishments which allow for on and off premises consumption and others are the traditional sit-down restaurants.

32. The Audit Division asserts, by contrast, (and in addition to the issues of procedure and substantiation previously described) that the activities performed by the various machines and equipment in the preparation of the food and drink sold by petitioner do not constitute the production, manufacturing, fabricating or processing of tangible personal property offered for sale.

CONCLUSIONS OF LAW

A. That section 1139(a) of the Tax Law in pertinent part provides:

"[i]n the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission...Such application shall be in such form as the tax commission shall prescribe."

Section 1139(b) of the Tax Law in pertinent part further provides:

"[i]f an application for refund or credit is filed with the tax commission... , the tax commission may grant or deny such application in whole or in part and shall notify the taxpayer by mail accordingly. Such determination shall be final and irrevocable unless the applicant shall, within ninety days after the mailing of notice of such determination apply to the tax commission for a hearing."

B. That the applications for credit or refund (Forms ST-137) filed by all petitioners were timely in all cases, except that the applications of petitioners Hampshire and K-Mart do not extend to periods prior to September 1, 1977, and June 1, 1977, respectively, since any earlier dates for these petitioners would be beyond the three (3) year limitation specified by section 1139(a) of the Tax Law.

C. That the protests of the Audit Division's denials of the claims for credit or refund, filed by either petitioners or by Arnold Standard Review

Corporation on behalf of petitioners, were filed within the ninety (90) day period specified by section 1139(b) of the Tax Law and are thus timely in all instances.

D. That powers of attorney executed and filed by petitioners and appointing either Arnold Standard Review Corporation or Steiner & Steiner, Esqs., as detailed more fully in Findings of Fact "26" and "27" are valid and proper. Furthermore, the powers of attorney executed by Arnold Standard Review Corporation, which appoint Steiner and Steiner, Esqs., as representatives, under the authority of substitution contained in powers given to Arnold Standard are valid. Mr. Arnold testified that it was Arnold Standard Review Corporation's policy to obtain powers of attorney from those clients for whom it was engaged to do work. Finally, each of the powers of attorney involved herein contains language specifying that acts to be undertaken on behalf of the various petitioners are limited to matters of sales and use taxes for the particular periods involved, and thus, though post-dating some of the acts undertaken on behalf of some of the petitioners, signal a ratification of such acts by the petitioners and are valid. Accordingly, those claims for credit or refund and those protests of denial filed by Arnold Standard Review Corporation are not null and void.

E. That section 1115(a)(12) of the Tax Law in pertinent part provides:

"(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property,....".

Section 1115(c) of the Tax Law further provides exemption from tax for "[f]uel, gas, electric, refrigeration and steam service...for use or consumption directly

and exclusively in the production of tangible personal property,...., for sale, by manufacturing, (or) processing,....".

F. That the above exemption from tax on machinery, equipment and utilities, etc., has been held inapplicable to such items as used in the production of restaurant food and drink. [Mtr. of Burger King v. Tax Comm., 51 N.Y.2d 614; See also 20 NYCRR 528.13(c)(2)(Example 6)]. Furthermore, neither calculations of the amount of refund alleged to be due nor substantiation of the payment of tax has been provided by petitioners Ponderosa, Hampshire, Longley's or Renaissance, and documents (invoices) provided as substantiation by petitioner MacPeekskill appear, at least in part, to pertain to expenditures for items other than for those upon which credit or refund is claimed or would be in any event allowable. Finally, petitioner B/G has offered no testimony, documents or other means of substantiating the computations submitted with its claim, and petitioner K-Mart's two claims for the period April 1, 1976 through December 31, 1978 are duplicative and are barred for any period prior to June 1, 1977 (See Conclusion of Law "B").

G. That this Commission is without authority to pass judgement upon the constitutional issues raised.

H. That the petitions of Ponderosa Systems, Inc., Ernest Trefz, d/b/a Mac Peekskill Company, Hampshire Country Club, Inc., Longley's, Inc., B.G. Foods, Inc., Hager, Inc., Renaissance Restaurant Co., and K-Mart Corporation are hereby denied, and the Notice of Determination and Demand issued to Ponderosa

Systems, Inc., on June 13, 1980, together with such interest as may be lawfully owing, as well as are each of the Audit Division's denials of application for credit or refund filed by the various petitioners herein are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983

Rodnicka W. Chm
PRESIDENT

Frank R. Koenig
COMMISSIONER

Mark J. Smith
COMMISSIONER