

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

February 4, 1983

Sunny Vending Services Co., Inc.  
c/o Seymour Morris, President  
297 Buell Rd.  
Rochester, NY 14624

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 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  
Robert J. Pearl  
Mousaw, Vigdor, Reeves, Heilbrunner & Kroll  
600 First Federal Plaza  
Rochester, NY 14614  
Taxing Bureau's Representative

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

February 4, 1983

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d/b/a Sunny Vending Co.  
297 Buell Rd.  
Rochester, NY 14624

Dear Mr. Morris:

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STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Sunny Vending Services Co., Inc. :  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Sales & Use Tax :  
under Article 28 & 29 of the Tax Law for the :  
Period 12/1/74-11/30/77. :  
\_\_\_\_\_:

AFFIDAVIT OF MAILING

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 4th day of February, 1983, he served the within notice of Decision by certified mail upon Robert J. Pearl the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert J. Pearl  
Mousaw, Vigdor, Reeves, Heilbrunner & Kroll  
600 First Federal Plaza  
Rochester, NY 14614

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

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
4th day of February, 1983.

David Parchuck

Gerrit A. Highland

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Seymour Morris :  
d/b/a Sunny Vending Co. : AFFIDAVIT OF MAILING  
:  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Sales & Use Tax :  
under Article 28 & 29 of the Tax Law for the Period :  
12/1/74-12/31/75. :

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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 4th day of February, 1983, he served the within notice of Decision by certified mail upon Seymour Morris d/b/a Sunny Vending Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Seymour Morris  
d/b/a Sunny Vending Co.  
297 Buell Rd.  
Rochester, NY 14624

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.

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AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
Seymour Morris	:	
d/b/a Sunny Vending Co.	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision	:	
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 12/1/74-12/31/75.	:	

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AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
SEYMOUR MORRIS :  
D/B/A SUNNY VENDING CO. :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period December 1, 1974 :  
through December 31, 1975. :

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DECISION

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In the Matter of the Petition :  
of :  
SUNNY VENDING SERVICES CO., INC. :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period December 1, 1974 :  
through November 30, 1977. :

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Petitioners, Seymour Morris d/b/a Sunny Vending Co. and Sunny Vending Services Co., Inc., 297 Buell Road, Rochester, New York 14624, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 1974 through December 31, 1975 and December 1, 1974 through November 30, 1977 (File Nos. 24458 and 24167).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on July 21, 1981 at 9:15 A.M. Petitioners appeared by Mousaw, Vigdor, Reeves, Heilbronner & Kroll (Robert J. Pearl, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Thomas Sacca, Esq., of counsel).

### ISSUES

I. Whether the transfer of assets from a sole proprietorship to a corporation, both wholly-owned by the same individual, constituted a sale subject to sales tax.

II. Whether the Audit Division properly calculated the selling price in determining the sales tax due on a sale alleged to have been entered into between the petitioners.

III. Whether food and drink sales made by cafeterias operated by petitioners were fully taxable under section 1105(d)(i)(1) of the Tax Law.

IV. Whether purchases of soda and coffee vending machines were exempt from sales tax as purchases of equipment for use directly and predominantly in the production of tangible personal property.

V. Whether penalties and interest in excess of the statutory minimum should be waived.

### FINDINGS OF FACT

1. On September 18, 1978, as the result of a field audit, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to Seymour Morris d/b/a Sunny Vending Co. ("the Company") in the amount of \$58,290.59, plus penalty of \$14,572.66 and interest of \$19,327.89, for a total of \$92,191.14 for the period December 1, 1974 through December 31, 1975. On the same date notices of determination and demand for payment of sales and use taxes due were issued to Sunny Vending Services Co., Inc. ("the Corporation") and Seymour Morris, as an officer of the Corporation, in the amount of \$82,717.29, plus penalty of \$18,360.70 and interest of \$18,570.15, for a total of \$119,648.14 for the period December 1, 1974 through November 30, 1977.



2. Petitioners, by Seymour Morris, as owner and president, signed consents extending the period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law to September 20, 1978. On December 7, 1978 petitioners each timely filed petitions.

3. Following a pre-hearing conference, the deficiency of Seymour Morris d/b/a Sunny Vending Co. was reduced to \$42,256.11 and the deficiency of Sunny Vending Services Co., Inc. was reduced to \$44,952.01. On March 31, 1980 petitioners, by Seymour Morris, executed forms for partial withdrawal of petition and discontinuance of case.

4. Prior to the hearing, as a result of the Court of Appeals decision in Burger King, Inc. v. State Tax Commission, 51 N.Y.2d 614, the deficiency of Seymour Morris d/b/a Sunny Vending Co. was further reduced to \$38,935.49 plus penalty and interest and the deficiency of Sunny Vending Services Co., Inc. was reduced to \$39,153.63.

5. The Company and the Corporation were essentially identical businesses engaged in vending machine and small cafeteria operations in the Rochester, New York metropolitan area. The vending machines and cafeterias were located in various business and public locations within the area. The Company and the Corporation were at all times during the audit periods wholly-owned by Seymour Morris. Mr. Morris was the sole proprietor of the Company as well as the sole shareholder of the Corporation. The petitioners used the same office and the same set of books. The Company and the Corporation each filed separate Federal and State tax returns.

6. On January 1, 1976 the Company transferred all of its assets to the Corporation in return for which the Corporation issued 100 shares of common stock to Seymour Morris. At the same time, the Corporation's capital stock

thereby increased by \$80,390.93. The transfer was accomplished by a journal entry; no title documents were transferred and the assets themselves were not physically moved.

7. Prior to the transfer, the Corporation listed no assets on its books and records. As far as financial statements were concerned, the Company owned all the assets. At the hearing, however, the Audit Division stipulated that in excess of \$278,000.00 in purchases during the audit periods were made by and in the name of the Corporation as evidenced by purchase invoices presented by petitioners.

8. On audit, the Audit Division determined that a bulk transfer of assets occurred on January 1, 1976 and that such transfer was not a transfer of property to a corporation upon its organization in consideration for the issuance of its stock, and therefore, deemed it a retail sale. Based upon the book value of the assets transferred, the Audit Division then determined that the amount subject to tax was \$420,817.00.

9. Petitioners argued that there was no sale because there was no transfer of possession and no consideration and that the transaction was merely a book entry. Petitioners alternatively argued that, even if there was a bulk sale, the taxable selling price should be the \$80,390.93 by which the Corporation stock increased after the transfer of the 100 shares of common stock. Petitioners offered no other evidence indicating the fair market value or any other measure of the value of the transferred assets.

10. In their cafeteria operations, petitioners sold certain pre-packaged food items which, if sold for off-premises consumption, would not be taxable. Petitioners estimated that 30 percent of all cafeteria sales constituted such

sales for off-premises consumption and deducted this amount when filing sales tax returns.

11. On audit, the auditor determined sales tax to be due on all cafeteria sales with no allowance for off-premises consumption. At the hearing, petitioners conceded that the 30 percent figure was merely an estimate based upon a 20 to 25 percent figure alleged to have been allowed other similar companies. Petitioners' witness stated that a precise computation of which sales were for off-premises consumption was not possible. Petitioners were unable to produce any evidence indicating what percentage, if any, of their cafeteria sales were for off-premises consumption.

12. During the audit period the Company purchased a number of coffee and cup soda vending machines for which it took a credit on its 1975 sales tax returns. The coffee machines heat and brew the coffee and the cup soda machines make and freeze the ice and refrigerate the beverage. Petitioner produced letters from various manufacturers indicating that from 65 to 70 percent of the parts and equipment in their machines is used for the production of the vended products.

13. On audit, the auditor determined tax to be due on the purchase of the aforesaid vending machines. Petitioner claimed that these purchases were exempt as equipment used directly and predominantly in the production of tangible personal property.

14. Petitioners acted in good faith at all times and there was no attempt to evade the tax.

15. Included in petitioners' brief were proposed findings of fact, all of which are adopted and have been incorporated into this decision.

CONCLUSIONS OF LAW

A. That section 1101(b)(5) of the Tax Law defines sale, in part, as a "transfer of title or possession or both...by any means whatsoever for a consideration". Possession does not require any physical movement in order to effect a transfer. The fact that the Corporation had dominion and control over the assets suffices to establish a transfer of possession. Moreover, the assets of the Corporation increased after the transfer and the value of the stock held by Seymour Morris likewise increased accordingly. Clearly, there was consideration for the transaction. The fact that Mr. Morris owned 100 percent of the Corporation's stock before and after the transfer is immaterial. There was, therefore, a transfer of possession for consideration and, absent a specific exemption, the transaction was a taxable sale under section 1105(a) of the Tax Law.

B. That section 1101(b)(4)(ii) of the Tax Law excludes certain transactions from the definition of retail sale. Among these exclusions are transfers of tangible personal property to a corporation upon its organization in return for the issuance of its stock. Because the Corporation was an existing entity, there was no transfer of property to a corporation upon its organization. The mere fact that the transaction in issue might have been similar to any type of exempt transaction is not controlling. The Company and the Corporation "chose not to follow procedures which would have exempted the transaction from the sales tax" and an exemption not expressly stated will not be read into the statute (Prospect Dairy, Inc. v. Tully, 53 A.D.2d 755). The selling of the Company's assets to the Corporation for its stock was, therefore, a taxable retail sale not falling within the exclusion provided by section 1101(b)(4)(ii).

C. That in a transaction involving a transfer of tangible personal property for corporate stock with no clear selling price, it is the obligation of the Tax Commission to arrive at a fair sales price of the personal property for sales tax purposes (see WEBER, Inc. v. State Tax Commission, 58 A.D.2d 471). The sale of property by one related company to another is taxable to the extent of the consideration paid, or the fair market value, if the consideration paid is not an adequate indication of the true value of the property transferred (Cf. 20 NYCRR 526.6(d)(8)(i)). Inasmuch as the transaction in issue involved a transfer of property between businesses having a common owner, there was not an "arms length" bargain. The increase in corporate stock as recorded in the books and records was, therefore, an arbitrary figure not adequately indicative of the true value of the property. Absent any evidence of valuation to the contrary, the book value of the Company's assets at the time of the sale as determined by the auditor accurately reflects the fair market value of the personal property owned by the Company at the time of the sale.

D. That inasmuch as more than \$278,000.00 in purchases during the audit period were creditable to the Corporation, the selling price of the Company's assets, as computed by the auditor, will be reduced by the book value, at the time of sale, of any assets which were included in both the aforesaid purchases and the determination of the value of the Company's assets by the Audit Division.

E. That section 1105(d)(i) imposes a tax on the receipts from every sale of food and drink "when sold in or by restaurants...or other establishments" except where the sale is for off-premises consumption of unheated food "of a type commonly sold for consumption off the premises...in food stores". Since petitioners were unable to substantiate that any measureable portion of their

cafeteria sales were for off-premises consumption, the auditor was justified in determining sales tax to be due on 100 percent of cafeteria food sales.

F. That section 1105(a) of the Tax Law imposes a tax on the "receipts from every retail sale of tangible personal property except as otherwise provided" in the law. Section 1115(a)(12) of the Tax Law exempts from the sales tax, purchases of equipment for use "directly and predominantly in the production of tangible personal property". Restaurant food is not within the category of tangible personal property as provided for in section 1105(a) and, therefore, the exemption provided by section 1115(a)(12) will not apply to purchases of equipment for the production of such food (Burger King, Inc. v. State Tax Commission, 51 N.Y.2d 614, 624). Vending machine operators are included in the category of "restaurants or other establishments" as provided for in section 1105(d)(i) of the Tax Law (20 NYCRR 527.8(b)). Therefore, the vending machines purchased by the Company are not equipment for use in production of tangible personal property and the purchases of such equipment were subject to sales tax.

G. That penalty and interest in excess of the minimum prescribed by section 1145(a) of the Tax Law are waived.

H. That the petitions of Seymour Morris d/b/a Sunny Vending Co. and Sunny Vending Services Co., Inc. are granted to the extent indicated in Conclusions of Law "D" and "G" above; that the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due

issued September 18, 1978; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

FEB 04 1983

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER

**P 389 758 529**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Sunny Vending Services Co Inc</i>	
Street and No. <i>10 Seymour Morris, Pkcs</i>	
<i>297 Buell Rd</i>	
P.O., State and ZIP Code <i>Rochester N.Y. 14624</i>	
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	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982

**P 389 758 530**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Robert J. Pearl</i>	
Street and No. <i>Mousaw, Gisdon</i>	
<i>Reeves, Heilbrunner + Kroll</i>	
P.O., State and ZIP Code <i>600 First Federal Plaza</i>	
<i>Rochester N.Y. 14614</i>	
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	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982

**P 389 758 525**  
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NO INSURANCE COVERAGE PROVIDED—  
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Sent to <i>Robert J. Pearl</i>	
Street and No. <i>Mousaw, Gisdon, Reeves</i>	
<i>Heilbrunner + Kroll</i>	
<i>600 First Federal Plaza</i>	
P.O., State and ZIP Code <i>Rochester N.Y. 14614</i>	
Postage	\$
Certified Fee	
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Restricted Delivery Fee	
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<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982

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(See Reverse)

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Street and No. <i>614 Sunny Vending</i>	
<i>297 Buell Rd</i>	
P.O., State and ZIP Code <i>Rochester N.Y. 14624</i>	
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	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
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PS Form 3800, Feb. 1982