

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

November 10, 1983

Zorn's Poultry Farms, Inc.  
4321 Hempstead Tpke.  
Bethpage, NY 11714

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Zorn's Poultry Farms, Inc.	: : : : : : :	: : : : : : :
AFFIDAVIT OF MAILING		

for Redetermination of a Deficiency or a Revision  
of a Determination or a Refund of Sales & Use Tax  
under Article 28 & 29 of the Tax Law for the  
Period 3/15/77-3/15/80.

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Zorn's Poultry Farms, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Zorn's Poultry Farms, Inc.  
4321 Hempstead Tpke.  
Bethpage, NY 11714

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  
10th day of November, 1983.

Martha L. Brunelle

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
ZORN'S POULTRY FARMS, INC. : DECISION  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and :  
29 of the Tax Law for the Period March 15, 1977 :  
through March 15, 1980.

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Petitioner, Zorn's Poultry Farms, Inc., 4321 Hempstead Turnpike, Bethpage, New York 11714, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 15, 1977 through March 15, 1980 (File No. 32859).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 29, 1982 at 2:45 P.M. with all briefs to be submitted by January 20, 1983. Petitioner appeared by Gregory Dilian. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a refund of sales tax paid on its purchases of electricity, gas and oil based on the exemption provided under section 1115(c) of the Tax Law.

FINDINGS OF FACT

1. Zorn's Poultry Farms, Inc. ("Zorn's") filed the following applications for credit or refund of state and local sales or use tax on the grounds that it paid sales tax on its total purchases of electricity, gas and oil, certain percentages of which were used in manufacturing:

<u>Claim No.</u>	<u>Date Filed</u>	<u>Period Covered</u>	<u>Purchase</u>	<u>% of Total Claimed Exempt</u>	<u>Refund Claimed</u>
2252	3/24/80	3-15-77 to 2-11-80	Electricity	70%	\$5,491.24
2253	3/24/80	3-15-77 to 2-11-80	Gas	100%	1,884.91
2252A	6/3/80	2-26-77 to 2-29-80	Gas	87%	888.00
2253A	6/3/80	3-25-77 to 3-15-80	Oil	81%	<u>1,044.55</u>
TOTAL					<u>\$9,308.70</u>

2. Petitioner processes fresh killed poultry for sale in a manner similar to a meat operation in a supermarket. The processing consists of cutting up the poultry into parts and packaging of same. Zorn's sells fresh and frozen poultry which it raises at other facilities. A portion of the store within the facility at issue contains a takeout prepared food counter similar to a delicatessen in a supermarket which offers such items as barbecued chicken, spareribs, pork tenderloin, chicken wings, chicken liver and salads. Petitioner also sells chilled beverages; however, no eating facilities are available on the premises.

Chickens coming into the facility are stored in coolers. Turkeys are generally received in a frozen state and stored in freezers, except for holidays when fresh turkeys are available. Ninety percent of the turkeys sold are in an uncooked or frozen state and thirty percent of the chickens sold are uncooked. These sales are exempt from sales tax by reason of section 1115(a)(1) of the Tax Law. The dollar value in exempt sales is about equal for both turkeys and chickens. Petitioner reported more than 50 percent of its gross sales as taxable prepared food sales. Some taxable poultry sales are made to Zorn's



Total kilowatts used per year	= 747240kw	
Total tax exempt kilowatts per year	= 526086kw	= 70%
Total taxable kilowatts per year	= 221154kw	= 30%

6. Petitioner failed to show the portion of electricity that was consumed directly and exclusively in the production phase of processing. The record and evidence lacks the information required to identify the electricity consumed in operations prior to the packaging of poultry for sale (in an exempt manner), as opposed to refrigerated storage of the finished product or for use in preparing poultry for taxable prepared food sales. Petitioner did not present any witness with first hand knowledge of the business operation or one who was a participant in the original equipment survey.

7. Petitioner consumed the gas and oil in its ovens for roasting and for the production of steam used in its taxable prepared food sales operation as well as for the preparation of taxable food sold to caterers.

#### CONCLUSIONS OF LAW

A. That section 1115(c) of the Tax Law exempts from tax fuel, gas and electricity for use or consumption directly and exclusively in the production of tangible personal property, refrigeration or steam, for sale, by manufacturing or processing.

B. That the preparation of poultry for sale as prepared foods taxable under section 1105(d) of the Tax Law is neither manufacturing or processing (Matter of Burger King v. State Tax Commission, 51 N.Y.2d 614).

C. That 20 NYCRR 528.13(b) provides, in part, that production includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale.

D. That while petitioner engages in some processing, it failed to show the portion of electricity that was consumed directly and exclusively in the production phase of processing of poultry for sale exempt from tax under section 1115(a)(1) of the Tax Law.

E. That the gas and oil used in the preparation of food taxable under section 1105(d) of the Tax Law does not qualify for exemption under Tax Law §1115(c) (Matter of Burger King v. State Tax Commission, supra).

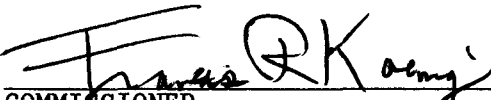
F. That the petition of Zorn's Poultry Farms, Inc. is denied and the refund denial of February 10, 1981 is sustained.

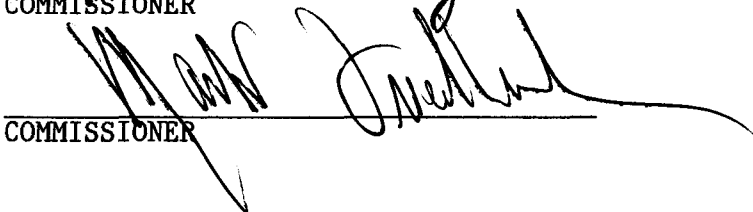
DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983

  
\_\_\_\_\_  
PRESIDENT

  
\_\_\_\_\_  
COMMISSIONER

  
\_\_\_\_\_  
COMMISSIONER

P 470 316 230

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Zorn's Poultry Farm Inc	
Street and No.	
4321 Hempstead Tpk	
P.O., State and ZIP Code	
Bethpage NY 11714	
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