

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

February 29, 1984

Appletree Restaurant, Inc.
c/o Jillian Zarny
63rd Dr. & Queens Blvd.
Rego Park, NY 11374

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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 TAX COMMISSION

In the Matter of the Petition
of
Appletree Restaurant, Inc.
for Redetermination of a Deficiency or Revision
of a Determination or Refund of Sales & Use Tax
under Article 28 & 29 of the Tax Law for the
Period 12/1/74-11/30/77.

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 29th day of February, 1984, he served the within notice of Decision by certified mail upon Appletree Restaurant, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Appletree Restaurant, Inc.
c/o Jillian Zarny
63rd Dr. & Queens Blvd.
Rego Park, NY 11374

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
29th day of February, 1984.

David Parluck

Janice A. Haggland
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
APPLETREE RESTAURANT, 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 December 1, 1974 :
through November 30, 1977. :

Petitioner, Appletree Restaurant, Inc., 63rd Drive & Queens Boulevard, Rego Park, New York 11374, 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 December 1, 1974 through November 30, 1977 (File No. 25533).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 24, 1983 at 10:45 A.M. Petitioner appeared by Julian Zarny, Director of Taxes. The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether frozen yogurt machines purchased by petitioner are equipment or machinery exempt from tax under section 1115(a)(12) of the Tax Law.

FINDINGS OF FACT

1. On January 8, 1979, as a result of a field audit covering the period December 1, 1974 through November 30, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Appletree Restaurant, Inc. The Notice asserted additional use tax due of \$352.00 plus penalty and interest of \$142.12 for a total due of \$494.12.

2. On audit, the Audit Division held the purchase of two electro-freeze yogurt machines in the amount of \$8,800.00 subject to use tax of \$352.00 at 4 percent. Petitioner had paid the 4 percent New York City tax to the manufacturer.

3. Petitioner operated restaurants located in Alexander's department stores in the New York City area. Petitioner operated at approximately six locations, two of which also had yogurt stands outside the entrance to the department stores.

Frozen yogurt was made by pouring liquid yogurt and other ingredients into the machines to be mixed with air and frozen. This process changed the yogurt from a liquid state to a frozen dessert. Frozen yogurt was served either in a container for take out or in a glass dish if eaten on the premises.

Petitioner did not prepare and package yogurt for distribution to other stores or supermarkets.

4. Petitioner argued that the yogurt machines used in its operation qualify for the exemption provided by section 1115(a)(12) of the Tax Law in that they are no different from those used to manufacture ice cream. In support of its position, petitioner argued that it was required to be registered with the Department of Health and was required to obtain a Retail Frozen Desserts Manufacturer's License.

Petitioner distinguished the case at hand from Burger King in that the processing of yogurt changes the initial product, a liquid mix, into a finished product, namely a frozen dessert. Petitioner contended therefore that it was engaged in the manufacture of a food product as opposed to the preparation of same.

CONCLUSIONS OF LAW

A. That section 1115(a)(12) of the Tax Law exempts from sales and use taxes machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property for sale by manufacturing or processing.

B. That petitioner processed frozen yogurt to be sold at retail through its restaurants and stands. These sales constituted receipts subject to tax under section 1105(d) of the Tax Law as opposed to section 1105(a) which taxes the receipts from the sale of tangible personal property. That the machinery or equipment at issue herein is therefore not within the exemption provided by Tax Law §1115(a)(12). (Matter of Burger King, Inc. v. State Tax Commission, 51 NY2d 614, 435 NYS2d 689(1980).)

C. That the petition of Appletree Restaurant, Inc. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 8, 1979 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 29 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 315 248

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Apple Tree Restaurant Inc.</i>	
Street and No. <i>63rd St. & Queens Blvd.</i>	
P.O., State and ZIP Code <i>Rego Park, NY 11374</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	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982