

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

May 2, 1984

Burger King Corporation
P.O. Box 783
Biscayne Annex
Miami, FL 33152

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: Petitioner's Representative
Ernest D. Gustafson
The Pillsbury Co.
3922 Pillsbury Ctr.
Minneapolis, MN 55402
Taxing Bureau's Representative

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

May 2, 1984

Davmor Industries, Inc.
7360 N. Kendall Dr.
Miami, FL 33152

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: Petitioner's Representative
Ernest D. Gustafson
The Pillsbury Co.
3922 Pillsbury Ctr.
Minneapolis, MN 55402
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Burger King Corporation : AFFIDAVIT OF MAILING
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 6/1/74 - 11/30/78. :

State of New York }

ss.:

County of Albany }

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 2nd day of May, 1984, he served the within notice of Decision by certified mail upon Burger King Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Burger King Corporation
P.O. Box 783
Biscayne Annex
Miami, FL 33152

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
2nd day of May, 1984.

David Parchuck

James A. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Burger King Corporation : AFFIDAVIT OF MAILING
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 6/1/74 - 11/30/78.

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 2nd day of May, 1984, he served the within notice of Decision by certified mail upon Ernest D. Gustafson, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

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 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.

David Parcluck

Gunnar R. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Davmor Industries, Inc. : AFFIDAVIT OF MAILING
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 12/1/74-2/29/76. :

State of New York }

ss.:

County of Albany }

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 2nd day of May, 1984, he served the within notice of Decision by certified mail upon Davmor Industries, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Davmor Industries, Inc.
7360 N. Kendall Dr.
Miami, FL 33152

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
2nd day of May, 1984.

David Parchuck

James A. Depledge
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Davmor Industries, Inc. : AFFIDAVIT OF MAILING

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 12/1/74-2/29/76.

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

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 2nd day of May, 1984, he served the within notice of Decision by certified mail upon Ernest D. Gustafson, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ernest D. Gustafson
The Pillsbury Co.
3922 Pillsbury Ctr.
Minneapolis, MN 55402

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 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
2nd day of May, 1984.

David Parchuck

James O'Halloran
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
DAVMOR INDUSTRIES, 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 February 29, 1976.

DECISION

In the Matter of the Petition
of
BURGER KING 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 Period June 1, 1974
through November 30, 1978.

Petitioner, Davmor Industries, Inc., 7360 North Kendall Drive, Miami, Florida 33152, 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 February 29, 1976 (File No. 29673).

Petitioner, Burger King Corporation, P.O. Box 783, Biscayne Annex, Miami, Florida 33152, 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 period June 1, 1974 through November 30, 1978 (File Nos. 29674 and 29675).

A combined formal hearing was held before Richard L. Wickham, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on July 26, 1983 at 1:15 P.M., with all evidence to be submitted by August 15, 1983. Petitioners appeared by Ernest D. Gustafson,

Sales Tax Administrator. The Audit Division appeared by John P. Dugan, Esq. (James J. Della Porta, Esq., of counsel).

ISSUE

Whether parts and equipment sold by petitioner Davmor Industries, Inc. for installation in restaurants owned or controlled by petitioner Burger King Corp. are exempt from sales and use taxes as sales of capital improvements to real property.

FINDINGS OF FACT

1. Petitioners, Davmor Industries, Inc. and Burger King Corporation, are subsidiaries of The Pillsbury Company of Minneapolis, Minnesota. Petitioner Burger King Corporation is the controlling corporation for a nationwide chain of fast food restaurants known as "Burger King". Petitioner Davmor Industries, Inc. manufactures restaurant equipment and replacement parts for Burger King restaurants.

2. On December 20, 1979, as the result of an audit, the Audit Division issued Notice of Determination and Demand for Payment of Sales and Use Taxes Due number S791220330C against petitioner Davmor Industries, Inc. assessing taxes due of \$16,597.85, plus penalty and interest of \$12,696.54, for the period December 1, 1974 through February 29, 1976.

3. On December 20, 1979, as the result of an audit, the Audit Division issued two notices of determination and demand for payment of sales and use taxes due against petitioner Burger King Corporation. Notice number S791220332C assessed taxes due of \$24,854.58, plus penalty and interest of \$20,507.52, for the period June 1, 1974 through February 29, 1976, and notice number S791220333C assessed taxes due of \$629,500.40, plus penalty and interest of \$309,982.17, for the period March 1, 1976 through November 30, 1978.

4. By letter of December 8, 1981, the Audit Division revised notice number S791220333C to reflect taxes due of \$241,697.31. Said revision was based on the decision in the Matter of Burger King, Inc. v. State Tax Commission, 51 N.Y.2d 614, involving paper products used in the operation of fast food restaurants.

5. During the audit, it was established that petitioners filed separate New York State and local sales and use tax returns for periods through February 29, 1976 and combined returns for periods after March 1, 1976. The combined returns included the activities of Davmor Industries, Inc. - Distron Division which is an affiliated corporation that provides food, paper products and supply items to Burger King restaurants. These returns were filed under petitioner Burger King Corporation's name.

6. On audit, the Audit Division's auditor reviewed the sales invoices of petitioner Davmor Industries, Inc. The sales of equipment and parts to Burger King franchisees were listed along with the sale of parts to petitioner Burger King Corporation since it was the Audit Division's position that said sales were of tangible personal property subject to tax. Due to the method in which tax returns were filed, the auditor computed sales tax due of \$16,597.85 on said sales within the period December 1, 1974 through February 29, 1976 which amount was assessed against petitioner Davmor Industries, Inc. under notice number S791220330C.

The auditor reviewed store folders as maintained by petitioner Burger King Corporation and listed the purchases of equipment made from petitioner Davmor Industries, Inc.. On the same premise that said purchases were of tangible personal property, he computed a tax due of \$21,467.74 for the period June 1, 1974 through February 29, 1976. The auditor also detected a purchase within

this period of a complete store package from petitioner Davmor Industries, Inc. Said purchase included tables, chairs, kitchen equipment and numerous miscellaneous items on which no tax was paid, even though the billing showed a tax on a portion of the items purchased. The auditor determined a tax due on this purchase of \$3,386.84. The total tax due of \$24,854.58 was assessed against petitioner Burger King Corp. under notice number S791220332C.

For the period March 1, 1976 through November 30, 1978, the auditor found taxes due by Davmor Industries, Inc. of \$79,518.24 on sales of equipment and parts to Burger King franchisees and sales of parts to the Burger King Corporation. He found taxes due by Davmor Industries, Inc.-Distron Div. on sales of straws and stirrers in the amount of \$24,066.41, on sales of paper products in the amount of \$387,803.09 and on purchases of fixed assets in the amount of \$14,203.39. Lastly, the auditor found taxes due by Burger King Corporation on purchases of equipment from Davmor Industries, Inc. in the amount of \$43,340.67 and on the bulk sales of seven completely furnished stores to franchisees in the amount of \$80,568.00. The taxes found due by the auditor total \$629,499.80. No explanation has been offered for the slight discrepancy between the auditor's findings and the assessment against petitioner Burger King Corporation under notice number S791220333C for tax due of \$629,500.40.

7. At the hearing, the parties stipulated that the only issue involved the equipment and parts which petitioner Davmor Industries, Inc. supplied to both petitioner Burger King Corporation and its franchisees. Said equipment and parts were identified as follows:

Equipment: French fry frymaster, infra-red broilers, Cyclo wash hood, microwave oven, panel cyclowash, Gaylord hood, drink dispenser, infra-red burner, shake machines, freezer, fryers, Mosler safe, ice cube maker, freezer top refrigerator, coffee brewer, heat lamp, french fry stack rack, small work table, sandwich chute, steak package and accessories, dump station-fryer equipment package, locker

with padlock, table tops, computer timer kit, secretarial chairs, menu signs, mural patterns, chandeliers, sliding door.

Parts: Motor drives, exhaust fans, circuit breakers, tank and hoist, discharge chute assembly, hood for fryer bank, retro fryer kit, zero max motor, fire extinguisher conversion, evaporator, auger gear motor, exhaust fan hood, counter top, warranty charges on equipment, waste container covers, grease pan lift, tube pilots, assembly motors, rebuilt motors, meat chain, thermostat switch, drip pan assembly, plate steamer, heat shield, diaphragm pump, roof irons, manual hoist, voltage regulator, lye tank for broiler, condensing unit, directional panels, refrigeration and conduit multiplex, fast-filter.

8. Petitioners argued that the equipment and parts are not subject to sales and use taxes on the grounds of their constituting a capital improvement to real property. Petitioners focus on the Appellate Division's decision in Flah's of Syracuse, Inc. v. Tully, 89 A.D.2d 729.

9. Petitioners' representative testified that the equipment and parts under review were manufactured for installation in buildings leased or owned by either petitioner Burger King Corporation or a Burger King franchisee. No evidence was offered to show whether the equipment or parts were included in the value of the building for the purpose of real property assessment, whether the equipment or parts were permanently installed or whether their removal would cause material damage to the buildings or render the equipment or parts practically useless. Moreover, no evidence was offered to show whether the terms of the lease agreement required the removal of the equipment or parts from the leased property upon expiration of the lease agreement.

10. Petitioners' representative further testified that, in most instances, petitioner Davmor Industries, Inc. sold the equipment and parts with the service of installation. The audit reports prepared by the Audit Division's auditor, which were introduced in evidence, indicate, however, that except for one purchase by petitioner Burger King Corporation of a complete store package

and two bulk sales made by petitioner Burger King Corporation to two franchisees of seven fully-equipped and stocked restaurants, the sales subjected to tax involved tangible personal property without the service of installation.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a tax upon "the receipts from every retail sale of tangible personal property". Section 1105(c)(3) of the Tax Law imposes a tax upon the service of "installing tangible personal property...except...for installing property which, when installed, will constitute an addition or capital improvement to real property."

B. That in deciding whether the installation of tangible personal property constitutes a capital improvement, "the pertinent criteria to consider...include the permanency of the affixation of the improvements to the related realty, whether the improvements can be readily removed without damage to them or the realty, and whether the improvements were intended as permanent installations" (Flah's of Syracuse, Inc. v. Tully, 89 A.D.2d 729).

C. That with the exception of petitioner Burger King Corporation's purchase from petitioner Davmor Industries, Inc. of a complete store package and petitioner Burger King Corporation's bulk sales to franchisees of seven fully-equipped restaurants, petitioners have failed to show that the equipment and parts supplied by petitioner Davmor Industries, Inc. included the service of installation so as to be considered a capital improvement.

D. That with regard to petitioner Burger King Corporation's purchase of the complete store package and its bulk sales of seven fully-equipped restaurants, petitioners have failed to show, through documentary evidence or otherwise, the presence of the criteria for a capital improvement.

E. That the equipment and parts sold by petitioner Davmor Industries, Inc. for installation in restaurants owned or controlled by petitioner Burger King Corporation are deemed sales of tangible personal property the receipts of which are subject to tax.

F. That in accordance with Finding of Fact "4", Notice of Determination and Demand for Payment of Sales and Use Taxes Due number S791220333C shall be modified to reflect taxes due of \$241,697.31.

G. That the petitions of Davmor Industries, Inc. and Burger King Corporation are granted to the extent indicated in Conclusion of Law "F" above; that the Audit Division is hereby directed to accordingly modify Notice of Determination and Demand for Payment of Sales and Use Taxes Due number S791220333C; and that, except as so granted, the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 02 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 315 497

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Burgundy Corp</i>	
Street and No. <i>1000 N. 783</i>	
P.O., State and ZIP Code <i>Wesley Chapel</i>	
Postage <i>Miami Fl. 33152</i>	
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 470 315 499

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Carman Industries Inc</i>	
Street and No. <i>7360 N. Kendall Dr</i>	
P.O., State and ZIP Code <i>Miami Fl. 33152</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

P 470 315 498

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Robert O. Gustafson</i>	
Street and No. <i>3922 Ellsbury Dr.</i>	
P.O., State and ZIP Code <i>Minneapolis MN 55402</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