

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
James F. Farrell :
d/b/a North Country Coldelite : 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 :
3/1/75 - 8/31/78. :

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 25th day of May, 1984, he served the within notice of Decision by certified mail upon James F. Farrell d/b/a North Country Coldelite, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James F. Farrell
d/b/a North Country Coldelite
411 Orchard St.
P.O. Box 551
Dexter, NY 13634

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
25th day of May, 1984.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
James F. Farrell	:	
d/b/a North Country Coldelite	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision	:	
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under Article 28 & 29 of the Tax Law for the	:	
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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 25th day of May, 1984, he served the within notice of Decision by certified mail upon E. Parker Brown, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

E. Parker Brown
Hancock, Estabrook, Ryan, Shove & Hust
1400 Mony Plaza
Syracuse, NY 13202

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
25th day of May, 1984.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 25, 1984

James F. Farrell
d/b/a North Country Coldelite
411 Orchard St.
P.O. Box 551
Dexter, NY 13634

Dear Mr. Farrell:

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
E. Parker Brown
Hancock, Estabrook, Ryan, Shove & Hust
1400 Mony Plaza
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JAMES F. FARRELL	:	DECISION
D/B/A NORTH COUNTRY COLDELITE	:	
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Tax under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1975	:	
through August 31, 1978.	:	

Petitioner, James F. Farrell d/b/a North Country Coldelite, 411 Orchard Street, P.O. Box 551, Dexter, New York 13634, filed a petition for revision of a determination or for refund of sales and use tax under Articles 28 and 29 of the Tax Law for the period March 1, 1975 through August 31, 1978 (File No. 25425).

A 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 May 12, 1983 at 1:45 P.M., with all briefs to be submitted by September 8, 1983. Petitioner appeared by Hancock, Estabrook, Ryan, Shove & Hust, Esqs. (Joseph H. Murphy and E. Parker Brown, II, Esqs., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Harry Kadish, Esq., of counsel).

ISSUE

Whether the Audit Division's assessment of sales tax upon receipts from the sale of certain machinery by petitioner was proper.

FINDINGS OF FACT

1. By a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated February 26, 1979, the Audit Division assessed additional sales tax due against petitioner, James F. Farrell d/b/a North Country Coldelite, in

the amount of \$35,054.32, plus interest. This assessment was based upon a field audit performed by the Audit Division. Petitioner had previously executed various consents extending the period of limitation on assessment, the latest of which allowed assessment of sales and use taxes for the period March 1, 1975 through November 30, 1975 to be made at any time on or before March 20, 1979.

2. Petitioner, James F. Farrell, uses the business name North Country Coldelite and is a distributor of Coldelite ice cream machines. During the period at issue, Mr. Farrell sold Coldelite machines as a factory representative for the Coldelite Corporation of America. The sole issue in this proceeding is the propriety of imposing sales tax upon the receipts from the sale of Coldelite machines by Mr. Farrell, with the dollar amount of the tax assessed by the Audit Division not challenged by petitioner.

3. The Coldelite ice cream machines sold by petitioner consisted of an upright cabinet 30 inches wide by approximately 44 inches deep by 57 inches high. These machines weighed approximately twelve hundred pounds, and were considered high volume machines with a production capability (depending upon mix composition) of up to fifty gallons of ice cream per hour.

4. The basic internal workings of each machine consisted of a refrigerated hopper or barrel, called a "helicoidal", into the back of which a controlled flow of raw ice cream mix together with varying flavors was injected under pressure. This mixture was projected forward in the refrigerated barrel by bladeless beaters, known as augers. The machines also contained an injection system, called a stirring vat or homogenizer, which combined the ice cream mix with cold air (-50°) to cause an "overrun". The homogenizer setting (amount of air by volume) determined the consistency of the ice cream, either soft or hard, as desired. The machines were "on demand" machines and were equipped

with spigots for drawing off the ice cream as needed. They were also equipped with a sensing device, known as a "hardmatic", which held the ice cream mix in semi-frozen suspension until the output of ice cream was desired. As ice cream was drawn out of the spigots, more mix was automatically injected into the refrigerated barrel and the operational cycle was continued as ice cream was needed.

5. Petitioner testified that the Coldlite machines differ from other ice cream machines in that the Coldelite's injection system allows a consistency control such that items requiring other than soft ice cream consistency, including ice cream cakes, logs, bulk ice cream and novelty items, etc., could be produced. By comparison, other ice cream machines, in general, are capable of producing only soft consistency ice cream. Thus it was alleged that the Coldelite machines are not unlike those machines found in large ice cream manufacturing plants.

6. Ice cream drawn from the Coldelite machines for use either in bulk (e.g. in pints, quarts, half-gallons or gallons) or in the form of specialty items (e.g. ice cream cakes, logs, novelties, etc.), would be stored in a freezer or dipping cabinet separate from the Coldelite machine.

7. The Coldelite machines were sold by petitioner at prices of \$7,000.00 to \$10,000.00, and were considered expensive in comparison to other ice cream machines which sold for approximately forty percent less than the Coldelite machines.

8. Petitioner testified that the customers to whom he sold Coldelite machines operated small, independently-owned ice cream stands and ice cream stores. Petitioner had known and done business with these customers over a period of twenty years, first as a salesman of ice cream syrups and toppings,

later as a salesman of ice cream mix and finally as a salesman of Coldelite ice cream machines. About thirty percent of these establishments had facilities for consumption of the products on their premises, and some had parking facilities and drive-up windows. Petitioner did not sell to large chain or franchise establishments, such as Dairy Queen, Burger King, McDonalds, etc., allegedly because these chain outlets only sold soft ice cream products for immediate consumption, such as cones and sundaes, etc., and thus did not need a machine with the Coldelite's varying consistency capability for producing other items such as hard ice cream and specialty items. Petitioner asserted that for establishments only interested in producing soft ice cream products, these other capabilities of the Coldelite machines would not be needed and there would be no justification for the added expense of investing in the comparatively higher-price Coldelite machines.

9. Petitioner explained that his customers sold items for immediate consumption (sundaes, cones, etc.), as well as items which were pre-packaged (bulk ice cream in pints, quarts, half-gallons and gallons, and specialty items such as tortonis, spumoni, ice cream cakes, logs, etc.). Petitioner testified that, in general, his customers used 80 percent of the Coldelite machines' operating time and 75 percent of the ice cream produced in making specialty items to be pre-packaged before sale, and that such items accounted for 60 to 70 percent of the customers' sales dollars due to the higher selling prices for the specialty items as compared to immediate consumption items.

10. Mr. Donald Delosio, who operated a four-booth ice cream parlor in Cortland, New York, owned a Coldelite machine purchased from petitioner and also had two freezers or dipping cabinets in his store. He testified that he sold both immediate consumption items, such as sundaes, cones, splits, sodas,

shakes and floats, and pre-packaged items previously made and stored in his freezers, such as bulk ice cream, wrapped pre-packaged sundaes in bags of 6, 8, 12 or 13, "nuttie buddies", ice cream sandwiches, "chipwiches", parfaits and "drum sticks". Mr. Delosio further testified that 60 to 65 percent of his Coldelite machine's operating time, 65 to 70 percent of the ice cream produced and 55 to 60 percent of his receipts were from the latter type of items.

11. Petitioner asserts that the predominant use to which the Coldelite machines he sold were put by his customers was in the producing of bulk ice cream and specialty items of the type sold in food stores for off-premises consumption, and that the minority portion of the machines' use was for the production of soft ice cream products to be sold for immediate consumption as in a restaurant food situation. Consequently, petitioner maintains that the machines were used more than 50 percent of their operating time in the production of tangible personal property for sale and thus receipts from the sale of these machines should be exempt from the imposition of sales tax. Petitioner stresses the point that to purchase a Coldelite machine solely for the purpose of producing soft ice cream items would not be economically justifiable, since an expenditure of forty percent less would enable the purchase of a machine with sufficient capability to fulfill this purpose. In sum, petitioner maintains that in order to justify the expense of a Coldelite machine a customer must use the Coldelite machine predominantly for producing items other than soft ice cream for immediate consumption.

12. The Audit Division asserts, by contrast, that petitioner admits the Coldelite machines were capable of producing both soft ice cream products (restaurant-type items) and specialty items, that only one of petitioner's customers gave testimony as to the actual use of his Coldelite machine, that no

other supportive evidence was provided as to the actual use of the machines by petitioner's various customers, that no exemption certificates were obtained by petitioner from his customers, and that the field auditor could not, due to the absence of sales invoices from petitioner's records, establish effective audit trails (presumably the Audit Division asserts that this precluded the auditor from determining the location of and calling on petitioner's customers). Thus, the Audit Division maintains petitioner has failed to sustain his burden of proving that the sales in question qualified for exemption from sales tax.

CONCLUSIONS OF LAW

A. That section 1115(a)(12) of the Tax Law provides that receipts from the sale of "...[m]achinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting,..." shall be exempt from the imposition of the sales (and use) tax imposed by section 1105 (and section 1110) of the Tax Law.

B. That 20 NYCRR 528.13, promulgated during the period at issue herein, in pertinent part, provides:

"528.13 Machinery and equipment used in production;..." (Tax Law, §1115[a][12]).

* * *

(c) Directly and predominantly. (1) Directly means the machinery or equipment must, during the production phase of a process,

- (i) act upon or effect a change in the material to form the product to be sold, or
- (ii) have an active causal relationship in the production of the product to be sold, or
- (iii) be used in the handling, storage or conveyance of materials or the product to be sold, or

- (iv) be used to place the product to be sold in the package in which it will enter the stream of commerce.

* * *

(4) Machinery or equipment is used predominantly in production, if over 50 percent of its use is directly in the production phase of a process."

C. That the bulk ice cream in pints, quarts, half-gallons and gallons, the various pre-packaged novelty items and the ice cream cakes made and sold by petitioner's customers are items which are of the same form, condition, quantity and packaging as are commonly found in food stores. Such food store items are considered nontaxable items of tangible personal property pursuant to the terms of Tax Law section 1105(d)(1)(3), as distinguished from restaurant food items which are subject to tax under Tax Law section 1105(d) [Matter of Burger King, Inc. v. State Tax Comm., 51 N.Y.2d 614; see also 20 NYCRR 527.8]. The Coldelite machines sold by petitioner produced the ice cream used in making these nontaxable, food store type of items sold by petitioner's customers. The machines also were used by petitioner's customers to produce ice cream for taxable immediate consumption products in the nature of restaurant food items also sold by petitioner's customers.

D. That petitioner bears the burden of proving the non-taxability of the receipts at issue [Tax Law section 1132(c)]. There is no evidence that petitioner sought or obtained exemption certificates from his customers, the presentation of which would have satisfied petitioner's burden of proof (see 20 NYCRR 532.4). Moreover, only one of petitioner's many customers appeared and gave testimony regarding the actual use of the machine sold to him by petitioner, with no other documentary or testimonial evidence presented to establish the actual use of the many other machines sold by petitioner. In sum, the evidence

presented does not establish that more than 50 percent of the actual use of the machines sold by petitioner was devoted to the production of items not subject to tax.

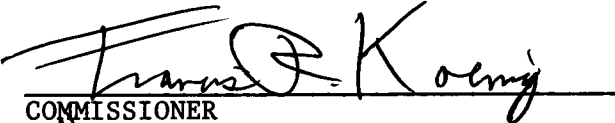
E. That the petition of James F. Farrell d/b/a North Country Coldelite is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated February 26, 1979 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 25 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 440 976 963

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
James J. Farrell	
Street and No.	
411 Orchard St. P.O. Box 851	
P.O., State and ZIP Code	
Wester, NY 13634	
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 440 976 964

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
C. Parker Brown	
Street and No.	
1400 Mony Plaza	
P.O., State and ZIP Code	
Syracuse, NY 13202	
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