

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

October 5, 1984

Phil Marvin Buick Olds, Inc.
c/o Phil Marvin
226 E. Union St.
Newark, NY 14513

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
Phil Marvin Buick Olds, 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 6/1/79-5/31/82.

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 5th day of October, 1984, he served the within notice of Decision by certified mail upon Phil Marvin Buick Olds, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Phil Marvin Buick Olds, Inc.
c/o Phil Marvin
226 E. Union St.
Newark, NY 14513

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
5th day of October, 1984.

David Parcluck

Amno [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
PHIL MARVIN BUICK OLDS, 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 June 1, 1979	:	
through May 31, 1982.	:	

Petitioner, Phil Marvin Buick Olds, Inc., 226 East Union Street, Newark, New York 14513, 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 June 1, 1979 through May 31, 1982 (File No. 39492).

A small claims hearing was held before Anthony Ciarlone, Jr., Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Room 1300, Rochester, New York, on April 24, 1984 at 1:15 P.M. Petitioner appeared by Phil Marvin, President. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether three machines purchased by petitioner and used to produce ice cream and frozen custard qualify as equipment or machinery exempt from tax under section 1115(a)(12) of the Tax Law.

FINDINGS OF FACT

1. On July 21, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Phil Marvin Buick Olds, Inc. for the period June 1, 1979 through May 31, 1982. Said Notice

assessed additional use tax due of \$982.29, plus interest of \$78.32, for a total due of \$1,060.61.

2. The aforementioned Notice was premised on a field audit of petitioner's books and records. Said field audit determined that petitioner owed additional tax of \$72.29 on recurring purchases and additional tax of \$910.00 on the purchase of three machines used to produce ice cream and frozen custard (more commonly known as "soft ice cream"). Petitioner does not contest the \$72.29 of tax due on recurring purchases and, therefore, same will not be addressed hereinafter.

3. Sometime during the quarter ending November 30, 1981, petitioner purchased two machines used to produce soft ice cream and one machine used to produce hard ice cream. No sales tax was paid on the purchase of said machines as petitioner issued a resale certificate to the seller.

4. The three machines in question were used to produce both soft and hard ice cream which was sold either in bulk (e.g., in pints, quarts, half-gallons or gallons) or for immediate consumption (e.g., in cones, sundaes, etc.). No records were kept nor was any evidence presented at the hearing held herein detailing the percentage of time the machines were used to produce ice cream sold in bulk as compared to ice cream sold for immediate consumption.

5. Petitioner maintains that the ice cream produced by the three machines in question constituted tangible personal property, whether sold in bulk or for immediate consumption, and that said machines were exempt from taxation pursuant to section 1115(a)(12) of the Tax Law since they were used directly and predominantly in the production of tangible personal property.

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 ... for sale, by manufacturing..." (emphasis added) 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(c)(4) provides that "[m]achinery 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 ice cream machines in question produced tangible personal property as defined in section 1101(B)(6) of the Tax Law (the ice cream sold in bulk) and prepared restaurant food the receipts from which are taxable pursuant to section 1105(d)(i) of the Tax Law (the ice cream sold for immediate consumption). The production of ice cream for immediate consumption is properly considered as the production of prepared restaurant food and does not constitute the production of tangible personal property (Matter of Burger King, Inc. v. State Tax Comm., 51 N.Y.2d 614; 20 NYCRR 527.8). Accordingly, in order to qualify for the exemption provided for in section 1115(a)(12) of the Tax Law petitioner must show that the ice cream machines in question were used more than 50 percent of the time in the production of tangible personal property (i.e. ice cream sold in bulk).


D. That pursuant to section 1132(c) of the Tax Law petitioner bears the burden of proof. Petitioner has failed to present any credible evidence to establish that the three machines in question were used more than 50 percent of the time in the production of ice cream sold in bulk.

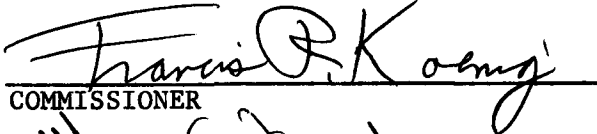
E. That the petition of Phil Marvin Buick Olds, Inc. is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated July 21, 1982 is sustained.

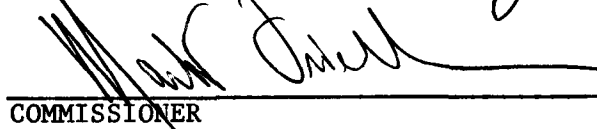
DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 168 857

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to	Phil Marvin Burkold, Inc.	
Street and No.	c/o Phil Marvin	
P.O., State and Zip Code	226 E. Union St.	
Postage	Newark, NJ 07102	
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		