

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
                    of :  
                    Shanty Hollow Corp. :  
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 - 5/31/77. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

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 9th day of March, 1984, he served the within notice of Decision by certified mail upon Shanty Hollow Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Shanty Hollow Corp.  
Hunter, NY 12442

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  
9th day of March, 1984.

David Parchuck

James P. Haggard  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Shanty Hollow Corp. :  
for Redetermination of a Deficiency or Revision :  
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under Article 28 & 29 of the Tax Law for the :  
Period 6/1/74 - 5/31/77. :  
:

AFFIDAVIT OF MAILING

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 9th day of March, 1984, he served the within notice of Decision by certified mail upon Louis M. Weber, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Louis M. Weber  
20 East 74th St.  
New York, NY 10021

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  
9th day of March, 1984.

David Parchuck

James Adelman  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

March 9, 1984

Shanty Hollow Corp.  
Hunter, NY 12442

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  
Louis M. Weber  
20 East 74th St.  
New York, NY 10021  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
SHANTY HOLLOW CORP.	:	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, 1974	:	
through May 31, 1977.	:	

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Petitioner, Shanty Hollow Corp., Hunter, New York 12442, 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, 1974 through May 31, 1977 (File No. 21764).

A formal hearing was held before Frank Landers, Hearing Officer, at the offices of the State Tax Commission, Building No. 9, State Campus, Albany, New York, on August 12, 1982 at 1:15 P.M. Petitioner appeared by Louis M. Weber, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether the purchases of paper products by petitioner for use in connection with the sale of food products qualify as exempt purchases for resale.

II. Whether the purchase of snowmaking equipment was exempt from tax as the purchase of machinery or equipment for use directly and predominantly in the production of tangible personal property for sale by manufacturing or processing (Tax Law §1115(a)(12)).

III. Whether amounts paid by patrons for use of petitioner's facilities in the summertime are not taxable by virtue of section 1105(f)(1) of the Tax Law as admission charges to facilities for sporting activities in which the patron is to be a participant.

IV. Whether, in connection with the sale of food products, the petitioner maintained a sign which indicated the amount of the tax, or that the tax was included in the price of the food.

V. Whether the purchase by petitioner of lockers for use in the storage of ski equipment or other valuables of a patron qualify for the exclusion accorded purchases for resale.

VI. Whether the purchase by petitioner of materials and parts for use in the construction and maintenance of ski lifts represents taxable retail purchases.

VII. Whether penalty and interest in excess of the statutory minimum should be waived.

#### FINDINGS OF FACT

1. On December 1, 1977, as the result of a field audit, the Audit Division issued against the petitioner, Shanty Hollow Corp. (hereinafter referred to as "Shanty Hollow"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a tax of \$35,447.53, plus penalty and interest of \$15,669.50, for a total amount due of \$51,117.03 for the period June 1, 1974 through May 31, 1977.

2. The aforesaid notice was timely issued pursuant to a consent executed by petitioner extending the period of limitation for assessment of sales and use taxes to and including December 20, 1977.

3. Shanty Hollow owns and operates Hunter Mountain Ski Bowl (hereinafter referred to as "Hunter Mountain") a resort and recreation area located in the

Catskill Mountains at Hunter, New York. In addition to its outdoor recreation area, Hunter Mountain also has a cafeteria, bar, lounge and souvenir shop.

4. During the wintertime, Hunter Mountain is open primarily for the sport of skiing. A patron, by purchasing a "lift use ticket", is entitled to unlimited use of Hunter Mountain's lifts which transport him up the mountain in order to participate in the sport of skiing usually by skiing down the mountain runs. Hunter Mountain has three types of lifts viz, a double chair lift which can accommodate two people, a triple chair lift which can accommodate three people, and a surface lift whereby the patron holds onto an attachment and is transported up the mountain.

Patrons to Hunter Mountain in the summertime participate in the sport of hiking. Commencing on Memorial Day and continuing through Labor Day, patrons, by purchasing a "lift use ticket" were entitled to use the area for hiking or climbing and also unlimited use of the ski lift which was in operation at this time of the year. The lift was designated for two-way operation, i.e. patrons would hike or climb up to the summit and be transported back down, or they would be transported up to the summit and hike or climb back down. In excess of 50,000 patrons used the facilities during the summertime.

5. Shanty Hollow purchased paper products which it used in connection with the sale of food through its cafeteria, a fast-food type operation. The paper products according to Orville A. Slutzky, petitioner's witness, consisted of "coffee containers, stirrers and the like", and were transferred to petitioner's customers with the purchase of food.

6. During the winter ski season, in order to augment the depth of snow left by natural snowfall, Shanty Hollow uses its snowmaking equipment to manufacture artificial snow which is placed on its ski runs. The petitioner

does not sell the snow and the lift use ticket, discussed supra, affords the skier the right to use the facilities. According to Mr. Slutzky, "the snowmelt goes back into the water resources."

7. During the audit, the sales tax examiner for the Audit Division visited the petitioner's cafeteria or fast food operation. The examiner, although he ate at the cafeteria, remembered seeing a sign which indicated the type of food offered for sale. He could not recall if the sign contained any reference to sales tax either as a separate unit or as being included in the price of the food or drink. At the formal hearing the petitioner presented a photograph of a sign which showed the price of the food or drink, the amount of sales tax, and the total price. Mr. Slutzky testified that the sign is a fair representation of the sign presently at the cafeteria area and during the audit period. Mr. Slutzky did not know when the picture was taken.

8. Shanty Hollow purchased a variety of lockers for use by its patrons in the storage of their valuables. During the period at issue, the petitioner furnished coin operated lockers, season lockers, lockers for the storage of small valuables and "ski banks". The coin operated lockers required the insertion of a coin (25 cent piece) for each use. The other lockers or the ski banks were operated by a key or combination lock provided by petitioner. The petitioner collected tax on the receipts from the use of the lockers.

9. Shanty Hollow also purchased construction materials and other tangible personal property which it used in the construction and maintenance of its ski lifts. The petitioner offered no evidence to show why these materials should not be subject to tax.

10. Petitioner acted in good faith at all times and did not intend to evade the tax at issue.

CONCLUSIONS OF LAW

A. That paper products, such as coffee containers, etc., used as containers which are transferred to customers fall within the resale exclusion of section 1101(b)(4)(i)(A) of the Tax Law (Servomation Corp. v. State Tax Commission, 51 N.Y.2d 608, 435 N.Y.S.2d 686 (Ct. App. 1980); Burger King, Inc. v. State Tax Commission, 51 N.Y.2d 614, 435 N.Y.S.2d 689 (Ct. App. 1980)). Accordingly, such purchases by petitioner qualify as exempt purchases for resale.

B. That stirrers and any other non-container paper product purchases do not fall within the resale exclusion of section 1101(b)(4)(i)(A) of the Tax Law and are subject to tax (Burger King, Inc. v. State Tax Commission, supra; Servomation Corp. v. State Tax Commission, supra).

C. That paragraph (12) of subdivision (a) of section 1115 of the Tax Law exempts receipts from the following from the tax on retail sales and compensating use tax:

"(12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property...for sale, by manufacturing, processing..."

D. That paragraph (5) of subdivision (b) of section 1101 of the Tax Law defines sale as:

"(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume..."

E. That the petitioner is not entitled to the exemption claimed for its snowmaking equipment. Petitioner did not sell the snow but manufactured it for use by skiers who paid an admission charge.

The term "license to use" refers to transactions in which there is a transfer of possession. 20 NYCRR 526.7(c). In Bathrick Enterprises, Inc. v.



Murphy, 27 A.D.2d 215, aff'd. 23 N.Y.2d 664, the court citing American Locker Company, Inc. v. City of New York, 308 N.Y. 264, stated in pertinent part:

"... 'The purpose of the sales tax is not to impose a tax on all transactions but only on transactions which involve the passage or transfer of title... or transactions in which the actual, exclusive possession is transferred.'  
No title ever passed nor was any possession ever transferred."  
(emphasis supplied)

F. That paragraph (1) of subdivision (f) of section 1105 of the Tax Law imposes a tax on:

"(a)ny admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state... except charges to a patron for admission to, or use of facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools..."

G. That paragraph (10) of subdivision (c) of section 1101 of the Tax Law defines "place of amusement" as:

"(10) Place of amusement. Any place where any facilities for entertainment, amusement, or sports are provided."

Petitioner's summertime customers paid an admission charge to a place of amusement to participate in the sport of hiking. Such charge was for the use of facilities for sporting activities in which the patron is to be a participant within the meaning and intent of section 1105(f)(1). Therefore, such charge is not subject to tax.

H. That subdivision (a) of section 1132 of the Tax Law provides, in part:

"(a) Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies..."

That the petitioner has sustained the burden of proof required to show that it collected the sales tax on its cafeteria sales and that it maintained a sign that the price included the tax.

I. That the purchase by petitioner of lockers for the use of its customers was subject to tax.

The fee charged by petitioner to its customers is a storage charge subject to tax under section 1105(c)(4) of the Tax Law (Matter of American Locker Company, Inc. v. State Tax Commission, 32 N.Y. 2d 175). In fact, petitioners properly collected taxes on such charges. Storage services taxable under section 1105(c)(4) are not services enumerated in section 1101(b)(4)(i)(B) of the Tax Law, however, and thus the sale of tangible personal property used in such storage services (e.g., lockers) is not excluded from the definition of "Retail sales" (section 1101(b)(4) of the Tax Law).

J. That the petitioner is liable for tax on the construction materials used in the construction and maintenance of its ski lifts. The petitioner failed to sustain the burden of proof required to show that it is not liable for the tax.

K. That the penalty is cancelled and interest is reduced to the minimum statutory rate.

L. That the petition of Shanty Hollow Corp. is granted to the extent indicated in Conclusions of Law "A", "G", "H" and "K" supra; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 1, 1977; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

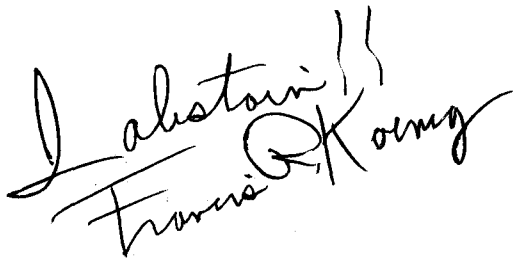
MAR 09 1984

STATE TAX COMMISSION

  
PRESIDENT

COMMISSIONER

  
COMMISSIONER

  
J. Lahtinen  
Francis R. Koenig

P 470 315 279

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Louis M. Weber	
Street and No.	
20 East 74th St.	
P.O., State and ZIP Code	
NY, NY 10021	
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 470 315 280

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Shanty Hollow Corp	
Street and No.	
P.O., State and ZIP Code	
Winter, NY 12442	
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