

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
F & Z Foods, 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 12/11/72. :

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon F & Z Foods, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

F & Z Foods, Inc.
924 Arsenal St.
Watertown, NY 13601

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
6th day of February, 1985.

David Parchuck

James A. 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 :
F & Z Foods, 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 12/11/72. :

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon James C. Oster, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James C. Oster
Groben, Liddy, Cardamone & Gilroy
185 Genesee St.
Utica, NY 01622

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
6th day of February, 1985.





Authorized to administer oaths
pursuant to Tax Law section 174

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

February 6, 1985

F & Z Foods, Inc.
924 Arsenal St.
Watertown, NY 13601

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
James C. Oster
Groben, Liddy, Cardamone & Gilroy
185 Genesee St.
Utica, NY 01622
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

F. & Z. FOODS, 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 11,
1972.

Petitioner, F. & Z. Foods, Inc., 924 Arsenal Street, Watertown, New York 13601, 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 11, 1972 (File No. 01619).

On June 14, 1984, petitioner waived its right to a hearing and requested that a decision be rendered based on the entire record contained in its file, including briefs to be submitted by August 27, 1984. After due consideration, the State Tax Commission hereby renders the following decision.

ISSUE

Whether equipment purchased by petitioner and installed in leased premises constituted capital improvements exempt from sales and use tax.

FINDINGS OF FACT

1. Petitioner herein, F. & Z. Foods, Inc., obtained, sometime during the 1970 calendar year, a license to operate a McDonald's fast food restaurant ("the restaurant") located at 924 Arsenal Street, Watertown, New York. Petitioner was lessee of the restaurant premises.

2. On October 19, 1970, petitioner entered into an agreement with Illinois Range Company for the purchase of certain restaurant equipment to be used in

the restaurant. By invoice dated December 11, 1970, Illinois Range Company billed the principals of F. & Z. Foods, Inc. the sum of \$41,196.00 for various equipment and \$4,991.00 for installation and delivery, for a total of \$46,187.00. Said invoice also billed New York State sales tax of \$2,771.22 (\$46,187.00 X .06). The total due shown on said invoice of \$48,958.22 (\$46,187.00 + \$2,771.22) was reduced by a deposit of \$15,000.00 which had been made on or about October 19, 1970, leaving a balance due of \$33,958.22. By check dated March 18, 1971, petitioner made payment to Illinois Range Company of the \$33,958.22 balance due.

3. On December 11, 1972, petitioner submitted an Application for Credit or Refund of State and Local Sales or Use Tax claiming a refund of \$1,431.49¹ on the grounds that a portion of the aforementioned equipment purchased from Illinois Range Company became a part of the building when installed and, as such, was exempt from sales and use tax as a capital improvement. Attached to the application for refund was a photocopy of the Illinois Range Company invoice dated December 11, 1970, wherein petitioner marked the following items as exempt capital improvements:

| <u>Item</u> | <u>Amount</u> |
|--------------------------------------------|--------------------|
| a) Multimixer Stand | \$ 575.00 |
| b) Center Island Unit - Complete | 4,946.00 |
| c) K-Way System with Water Chiller & Stand | 4,230.00 |
| d) Sandwich Preparation Unit | 2,365.00 |
| e) Uniflow Walk-In, Reach-In Refrigerator | 3,630.00 |
| f) 3-Compartment Sink | 844.00 |
| g) Trim (Channel) | 55.00 |
| h) Undercounter Shelving | 1,000.00 |
| i) Menu Board with Glass | 630.00 |
| j) Bally Freezer | 3,782.00 |
| k) Delivery & Installation | 4,991.00 |
| Total | <u>\$27,048.00</u> |

¹ In the computation of the refund of \$1,431.49 petitioner used an incorrect tax rate. The proper tax rate for the period at issue was six percent and petitioner has therefore understated its claim for refund by \$191.39.

4. Pursuant to a letter dated March 2, 1973, the Audit Division advised petitioner that its claim for refund was denied in full. Petitioner timely filed a petition with the State Tax Commission for a redetermination of the refund denial.

5. Petitioner's lease agreement for the restaurant premises was not included as part of the record. However, petitioner's representative asserted, pursuant to a letter dated July 27, 1984, that the terms of the lease were "substantially identical" to the lease described in the Matter of the Petition of J.F. Townhouse, Inc.² (decided this date).

6. The record is devoid of any credible evidence as to the manner in which the items in question were affixed to the leased realty. Also, there is no evidence in the record to show that the items in question, if removed, would cause substantial damage to said items or to the realty.

CONCLUSIONS OF LAW

A. That petitioner has failed to show that the items in question were affixed to the leased realty with any degree of permanency or that the items in question, if removed, would be substantially damaged or would cause damage to the realty. Additionally, it would appear that the lease agreement for the rental of the McDonald's restaurant would reveal that title to the items in question remained with petitioner and were therefore not intended to be permanent installations. Flah's of Syracuse, Inc. v. Tully, 89 A.D. 2d 729.

² Petitioner herein, F. & Z. Foods, Inc., and J. F. Townhouse, Inc. have common principals and were both involved in the operation of McDonald's restaurants. Both corporations were represented by the same attorney and identical issues were presented to the State Tax Commission for its consideration.

B. That the various items in question did not, when installed in the leased realty, constitute capital improvements within the meaning and intent of sections 1101(b)(9) and 1105(c)(3)(iii) of the Tax Law.

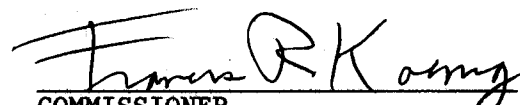
C. That the petition of F. & Z. Foods, Inc. for refund is denied in its entirety and the notice of refund denial dated March 2, 1973 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 169 523

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 | <i>James C. Oster</i> | |
| | Street and No. | <i>Western Liddy Carlavere</i> | |
| | P.O., State and ZIP Code | <i>185 Tennessee St. Albany NY 12227</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 | | | |

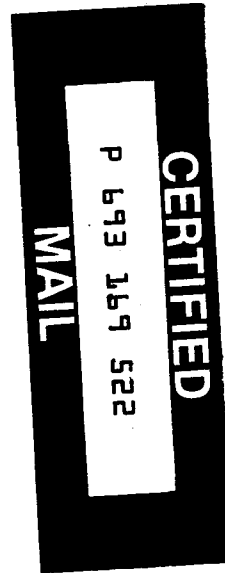
P 693 169 522

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NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

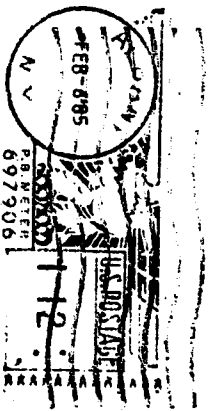
(See Reverse)

| | | | |
|------------------------------------------------------|---------------------------------------------------------------|----------------------------|--|
| ★ U.S.G.P.O. 1983-403-517 PS Form 3800, Feb. 1982 | Sent to | <i>F & Z Food Inc.</i> | |
| | Street and No. | <i>924 Arsenal St.</i> | |
| | P.O., State and ZIP Code | <i>Watertown NY 13601</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 | | | |



TA 26 (9-79)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

RECEIVED
TO
SENDER
Unclaimed
Addressee unknown
Insufficient address
No such street
No such office in state
Do not forward to post office
F & Z Food Inc.
924 Arsenal St.
Watertown, NY 13601



TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227



SEARCHED _____
SERIALIZED _____
INDEXED _____
FILED _____
MAR 14 1985
FBI - ALBANY

[Handwritten signature]

Do not forward to _____

F & Z Foods, Inc.

924 Arsenal St.

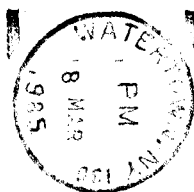
Watertown, NY 13601



CERTIFIED

P 693 169 522

MAIL



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

February 6, 1985

F & Z Foods, Inc.
924 Arsenal St.
Watertown, NY 13601

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Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
James C. Oster
Groben, Liddy, Cardamone & Gilroy
185 Genesee St.
Utica, NY 01622
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

F. & Z. FOODS, INC.

DECISION

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C. That the petition of F. & Z. Foods, Inc. for refund is denied in its entirety and the notice of refund denial dated March 2, 1973 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985

Roderick A. Clem
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Smith
COMMISSIONER