

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Middleport Cold Storage, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law for the :
Period 6/1/79-5/31/82.
_____ :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of October, 1986, he/she served the within notice of Decision by certified mail upon Middleport Cold Storage, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Middleport Cold Storage, Inc.
Kelly Ave.
Middleport, NY 14105

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
20th day of October, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

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of
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under Article(s) 28 & 29 of the Tax Law for the :
Period 6/1/79-5/31/82.
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State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of October, 1986, he served the within notice of Decision by certified mail upon Albert Brandt, Jr., the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Albert Brandt, Jr.
929 Lincoln
Lockport, NY 14094

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
20th day of October, 1986.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

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

October 20, 1986

Middleport Cold Storage, Inc.
Kelly Ave.
Middleport, NY 14105

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Albert Brandt, Jr.
929 Lincoln
Lockport, NY 14094

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MIDDLEPORT COLD STORAGE, 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, Middleport Cold Storage, Inc., Kelly Avenue, Middleport, New York 14100, 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. 42418).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York on February 25, 1986 at 1:15 P.M., with all briefs to be submitted by April 30, 1986. Petitioner appeared by Albert Brandt, Jr., Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether electricity used by petitioner to refrigerate and store produce is exempt from sales and use taxes under section 1115(c) of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Middleport Cold Storage, Inc., was engaged in the refrigeration and storage of processed produce. During the period at issue, petitioner shared its business premises with Monroe Frozen Foods (hereinafter "Monroe"), which processed fresh fruits.

2. On January 15, 1981, petitioner filed an Application for Credit or Refund of State and Local Sales or Use Taxes, in the amount of \$30,841.38, for the period January 1978 through December 1980. The Audit Division issued a denial of that refund claim on August 2, 1984.

3. On February 10, 1983, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period June 1, 1979 through May 31, 1982 for taxes due of \$8,092.93, plus interest of \$2,355.28, for a total of \$10,448.21. This assessment was made on the purchases of electricity and equipment used by petitioner to conduct its refrigeration and storage operations.

4. Petitioner is engaged in refrigeration, storage and blast freezing of produce. The majority of petitioner's business during the audit period was derived from Monroe. The fresh produce, usually fruit, would arrive at petitioner's warehouse where Monroe would peel, core, slice and further process the fruit for sale to its customers. Petitioner would blast freeze the fruit for ten days to three weeks and then store the frozen fruit for up to one year. Petitioner contends that this blast freezing was part of the production process and therefore exempt from tax.

5. All petitioner's freezing operations involve blast freezing. The record indicates that blast freezing is commonly used as a primary method of refrigeration in the industry. The blast freezing process prolongs the storage life of fresh fruit.

6. The initial freezing and first month storage charges were paid by Monroe. The subsequent storage charges were paid by Monroe's customers. These customers, generally pastry, jam and jelly companies, would then take the product, thaw it and process it into a product for retail sale.

7. There was one electric meter for petitioner's and Monroe's operations at Kelly Avenue. Monroe paid petitioner for the electricity Monroe used in its operations. However, the evidence was insufficient to determine the amount of electricity used exclusively in production and the amount used in taxable operations, such as facility lighting. At the hearing, the parties stipulated that electricity used in the operation of the following equipment was nontaxable, as it was electricity used in production:

<u>EQUIPMENT</u>	<u>HP OR WATTAGE</u>	<u>TOTAL KW</u>	<u>HOURS PER MO.</u>	<u>TOTAL KWH PER MO.</u>
12 Conveyor Motors (cleaning & grading)	1HP ea	8.95	342	3,061
2 Washer Pumps (cleaning & grading)	3HP ea	6.71	342	2,295
Peeling Line A	39HP	29.09	342	9,949
Peeling Line B	52HP	38.79	173	6,711
Blanching Line A	12HP	8.95	342	3,061
Blanching Line B	7HP	5.22	173	903
2 Vacuum Motors	50HP	74.6	209	15,591
Dryer	109HP	81.31	342	27,808
Waste Pump	5HP	3.73	342	1,276
2 Waste Treat Pumps	10HP ea	14.92	139	2,074
Slurry Crusher	15HP	11.19	342	3,827
Slurry Pump	5HP	3.73	171	638
High Pressure Pump	50HP	37.3	139	5,185
Juice Line	30HP	22.38	219	4,901
CHERRY PROCESSING				
Cherry Line	60HP	44.76	60	2,686
Sorting Conveyors	32HP	23.87	60	1,432
Vacuum Pump	50HP	37.3	40	1,492
Hot Water	3KW	3.0	57	171
Pitting & Packaging Line	30HP	22.38	60	1,343
TOTAL				92,912

CONCLUSIONS OF LAW

A. That section 1115(c) of the Tax Law exempts from tax electricity used directly and exclusively in the production of tangible personal property. Section 528.22(a)(1)(ii) of the New York Code of Rules and Regulations exempts electricity used in production by means of processing. Subparagraph (c) of the above regulation defines "directly" to mean that the electricity must during the production phase of a process, either:

- "(i) operate exempt production machinery or equipment, or
 - (ii) create conditions necessary for production, or
 - (iii) perform an actual part of the production process.
- (2) Usage in activities collateral to the actual production process is not deemed to be use directly in production."

B. That 20 NYCRR 528.13(b) divides the manufacturing process into three activities as follows:

"(i) Administration includes activities such as sales promotion, general office work, credit and collection, purchasing, maintenance, transporting, receiving and testing of raw materials and clerical work in production such as preparation of work, production and time records.

(ii) Production includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale.

(iii) Distribution includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products."

C. That the electricity used in petitioner's blast freezing process was not used directly in the production process. The blast freezing was utilized as part of the storage procedure after the fruit had been processed for sale. The blast freezing and refrigeration of the produce did not effect a change in the nature of the produce. Since petitioner's operation was a distribution

activity, subsequent to the production process, it is not exempt from tax under Tax Law §1115(c).


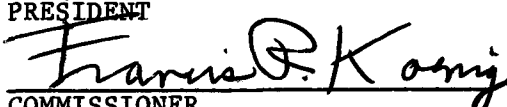

D. That the electricity and equipment listed in Finding of Fact "7" was used in production and is exempt from tax pursuant to section 1115(c) of the Tax Law.

E. That the petition of Middleport Cold Storage, Inc. is granted to the extent indicated in Conclusion of Law "D"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 10, 1983 and the Denial of the Application for Credit or Refund of State and Local Sales or Use Taxes dated August 2, 1984 accordingly; and that the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 20 1986


PRESIDENT

COMMISSIONER

COMMISSIONER

P 319 117 410

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to: <i>Middleport Cold Storage Inc.</i>	
Street and No.: <i>Kelly Ave.</i>	
P.O., State and ZIP Code: <i>Middleport, N.Y. 14105</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

100

P 319 117 411

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to: <i>Albert Brandt Jr.</i>	
Street and No.: <i>929 Lincoln</i>	
P.O., State and ZIP Code: <i>Lockport, N.Y. 14094</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