

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PHARMACIA & UPJOHN COMPANY	:	DECISION
	:	DTA NO. 818583
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 March 1, 1996 through February 28, 1999.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on January 9, 2003 with respect to the petition of Pharmacia & Upjohn Company, Tax Unit 8330-088-112, 7000 Portage Road, Kalamazoo, Michigan 49001. Petitioner appeared by McDermott, Will & Emery (Arthur R. Rosen, Esq. and Richard A. Leavy, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (James Della Porta, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception, petitioner filed a brief in opposition and the Division of Taxation filed a reply brief. Oral argument, at the Division of Taxation's request, was heard on January 22, 2004 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether Pharmacia & Upjohn Company is entitled to a refund of sales and use tax paid with respect to packaging materials and informational inserts used in the distribution of sample drugs and medicines to physicians and other health care providers during the period at issue.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner was incorporated under the laws of the State of Delaware on September 5, 1958. Petitioner's Federal Employer Identification Number is 38-1123360C. During the audit period, petitioner was commercially domiciled in Kalamazoo, Michigan and was primarily engaged in the business of developing, manufacturing and marketing pharmaceutical products. Petitioner was subject to New York State sales and use tax under Articles 28 and 29 of the New York State Tax Law during the period March 1, 1996 through February 28, 1999.

As part of its marketing efforts for its pharmaceutical products during the audit period, petitioner distributed samples of drugs and medicines free of charge ("Sample Drugs") to physicians and other health care providers in New York State and elsewhere. The Sample Drugs consisted of medically active ingredients and other chemical ingredients (which, together with the medically active ingredients, comprised "medical compounds"). The Sample Drugs were distributed in a variety of forms, including powders, tablets, creams, gels and liquids. The Food and Drug Administration mandated that the Sample Drugs be delivered in an unadulterated state, in accordance with Federally mandated Good Manufacturing Practices.

The use of the Packaging Materials in the distribution of the Sample Drugs was the method by which petitioner sought to, and did, comply with the Federally mandated Good Manufacturing Practices. The Packaging Materials consisted of bottles, boxes, blister packs, plastic tubes, cotton, safety closure covers, safety seals, protective wrapping and labels affixed to the foregoing.

In accordance with the Federally mandated Good Manufacturing Practices, petitioner was required to maintain the Sample Drugs in a pure and unadulterated state and to ensure that they remained free from contamination. The Packaging Materials were used to contain the Sample Drugs, ensure that they remained free from contamination and tampering, and maintain their purity. The Packaging Materials were also used to provide a means of delivering the Sample Drugs to physicians and other health care providers and for the physicians and other health care providers to distribute the Sample Drugs to their patients.

The Packaging Materials were not used to administer the Sample Drugs and did not include items such as hypodermic needles used for injection or applicators used for applying creams or gels. However, the Packaging Materials were used to deliver measured quantities of the Sample Drugs to physicians and other health care providers and for these individuals to distribute the Sample Drugs to their patients. The Packaging Materials differed only in size, but not nature, from the packaging materials used when drugs and medicines are delivered to a consumer in a retail sale.

In addition to the Federally mandated Good Manufacturing Practices relating to the packaging of the Sample Drugs, Federal law and regulations required that the Sample Drugs be accompanied by printed information describing the proper usage, dosage, possible adverse

reactions and other information required by the United States Food and Drug Administration concerning the Sample Drugs (“Required Information”). Petitioner caused the Required Information to be printed either (i) directly on the Packaging Materials containing the Sample Drugs (on the boxes, bottles, plastic tubes and/or labels), (ii) on the Informational Inserts accompanying the Sample Drugs and Packaging Materials, or (iii) on both the Packaging Materials containing the Sample Drugs and the Informational Inserts accompanying the Sample Drugs. The Inserts consisted of free-standing printed informational inserts that contained all or a portion of the Required Information concerning the Sample Drugs that they accompanied. The Inserts were identical to the informational inserts delivered to a consumer upon a retail sale of drugs and medicines.

The Packaging Materials and Informational Inserts utilized to distribute free samples of Cleocin T Gel and Cleocin T Lotion are representative of the Packaging Materials and Informational Inserts. The Sample Drugs, Packaging Materials and Informational Inserts (collectively, the “Sample Units”) used for the delivery of Cleocin T Gel Sample Drugs consisted of a printed cardboard box containing (i) sixty foil and plastic sample packets each containing .03125 ounces of Cleocin T Gel and (ii) one folded printed paper insert describing the use, pharmacology, indications, usage, contraindications, warnings, drug interactions and other relevant information required by the United States Food and Drug Administration. The Sample Drugs, Packaging Materials and Informational Inserts used for the delivery of Cleocin T Lotion Sample Drugs consisted of a printed cardboard box containing (i) twenty-four plastic sample bottles each containing seven milliliters of Cleocin T Lotion and (ii) one folded printed paper insert describing the use, pharmacology, indications, usage, contraindications, warnings, drug

interactions and other relevant information required by the United States Food and Drug Administration.

Petitioner caused the Sample Units to be delivered into New York State in connection with its solicitation of sales of its pharmaceutical products. In all instances, the Sample Drugs were prepared for distribution to physicians and other health care providers with the Packaging Materials and Inserts prior to their being “hand carried” or shipped into New York State. Under these circumstances, the sample Drugs were contained in the Packaging Materials and packaged with the Inserts when they entered New York State. In most instances, the Sample Units were shipped from outside New York State in corrugated paperboard cartons, using a common carrier, to petitioner’s sales and marketing representatives who “hand carried” the Sample Units to physicians and other health care providers in New York State. In all other instances, such as in the case of Sample Units containing either controlled substances or temperature-sensitive medical compounds, the Sample Units were shipped in corrugated paperboard cartons from outside New York State directly to physicians and other health care providers in New York State using a common carrier.

On July 26, 2000, petitioner filed an Application for Credit or Refund of Sales or Use Tax with the Division of Taxation (“Division”) for the sales and use tax paid during the audit period on the Sample Units (the “Refund Claim”). In the Refund Claim, petitioner claimed a refund of sales and use tax paid in the amount of \$176,113.00. The Refund Claim did not include the cost to petitioner of the corrugated paperboard cartons in which the Sample Units were shipped to sales and marketing representatives and physicians and other health care providers.

In a notice dated November 28, 2000, the Division partially approved the Refund Claim in the amount of \$126,771.00, which was attributable to the portion of the cost of the Sample Units attributable to the Sample Drugs, and partially denied the Refund Claim in the amount of \$49,342.00. The portion of the Refund Claim that was denied was attributable to the sales or use tax paid on the Packaging Material and Inserts that were distributed by petitioner to physicians and other health care providers in New York State during the audit period.

The amount of the sales or use tax that petitioner paid during the audit period relating to its New York State use of the Packaging Materials was \$43,914.00. The amount of the sales or use tax that petitioner paid during the audit period relating to its New York State use of Inserts was \$5,428.00.

If petitioner had separately purchased the Packaging Materials and Inserts for delivery in New York State and subsequently used such Packaging Materials and Inserts in the distribution of Sample Drugs, the exemption provided by section 1115(a)(3) of the Tax Law for drugs and medicines would have been inapplicable to such purchases.

No sales or use tax is collected or legally due with respect to the packaging materials and informational inserts delivered to a consumer upon a retail sale of drugs and medicines, which are equivalent to the Packaging Materials and Inserts distributed free of charge with Sample Drugs.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that all sales of tangible personal property are presumptively subject to tax pursuant to Tax Law § 1132(c) and where a taxpayer claims an exemption from tax, the burden is on the taxpayer to show that its

interpretation of the statute is the only reasonable interpretation or that the Division's interpretation is unreasonable. Additionally, a presumption of correctness attaches to a refund denial issued by the Division, and the taxpayer must overcome this presumption.

The Administrative Law Judge pointed out that Tax Law § 1115(a)(3) provides an exemption from sales tax for drugs and medicines, medical equipment and supplies required for their use. The Administrative Law Judge noted petitioner's claim that the Packaging Materials and Information Inserts used in its distribution of sample drugs and medicines are exempt from sales and use tax pursuant to this section.

The Administrative Law Judge found that the packaging materials and informational inserts which accompany a retail sale of drugs and medicines are the equivalent to the Packaging Materials and Informational Inserts distributed free of charge with the Sample Drugs. The Administrative Law Judge also found that pursuant to the stipulation of the parties, on a retail sale within New York State, no sales or use tax would be collected or would be legally due with respect to the packaging materials and informational inserts delivered to a consumer upon the sale of the drugs and medicines pursuant to Tax Law § 1115(a)(3).

The Administrative Law Judge held that there was no question that the drugs and medicines themselves are exempt from tax pursuant to Tax Law § 1115(a)(3). Exploring why the packaging materials accompanying or containing drugs and medicines are not taxed when these materials are sold to retailers and ultimately to consumers, the Administrative Law Judge concluded that they were either exempt from tax as containers pursuant to Tax Law § 1115(a)(19) or excluded from tax as a sale for resale.

The Administrative Law Judge found that based on a 1965 Opinion of Counsel (November 16, 1965, NYS Tax Bulletin NO. 1965-4) and a 1997 Advisory Opinion (TSB-A-97[62]S) it was evident that the Division itself has never considered such materials as exempt from tax as containers under Tax Law § 1115(a)(19). The Administrative Law Judge determined that although it was not explicitly stated, the implication of the 1997 Advisory Opinion was that labels and informational materials sold with drugs and medicines are exempt because they are actually a part of the drugs and medicines. Therefore, the labels and informational materials are exempt from tax for the same reason the drugs and medicines are exempt from tax, i.e., Tax Law § 1115(a)(3). The Administrative Law Judge also found that the facts in this matter were comparable to those in *Matter of Burger King v. State Tax Commn.* (51 NY2d 614, 435 NYS2d 689) in that what a consumer receives as a final product is not only the drugs themselves but the information necessary to safely use the drugs and medicines.

The Administrative Law Judge found that the containers of the drugs and medicines are provided primarily for safety reasons and to ensure that the drugs and medicines delivered to the consumers are unadulterated as required by the FDA. Based upon the reasoning utilized in the 1997 Advisory Opinion to determine that the labels and informational materials are a critical element of the drugs and medicines, the Administrative Law Judge reached the same determination with regard to the packaging materials and informational inserts.

Having determined that the packaging materials and inserts are a critical element of the drugs and medicines when sold for resale, the Administrative Law Judge addressed whether the Packaging Materials and Inserts are also a critical element of the sample drugs and medicines. The Administrative Law Judge found that the question must be answered in the affirmative as it

is illogical to conclude that somehow the Packaging Materials and Informational Inserts become separated from the drugs and medicines because they are given away instead of sold. The Administrative Law Judge reasoned that since the Packaging Materials and Informational Inserts have become part of the drugs and medicines, their use within New York would not be subject to tax. Thus, the Administrative Law Judge concluded that petitioner has demonstrated that the Packaging Materials and Informational Inserts are a critical element of the sample drugs and medicines and as such are exempt from the use tax pursuant to Tax Law § 1115(a)(3).

ARGUMENTS ON EXCEPTION

On exception, the Division argues that the Administrative Law Judge erred in concluding that Tax Law § 1115(a)(3) exempts packaging from use tax even though this statute would not exempt the purchase of packaging in this State from tax. This, claims the Division, conflicts with the basic principle that the sales and use taxes are intended to be commensurate in scope. The Division rejects the Administrative Law Judge's conclusion that the Packaging Materials were a critical element of the sample drugs. It maintains that the critical element test has only been applied in resale cases. The Division asserts that even if the Administrative Law Judge was correct that packaging is a critical element of the sample drugs, it does not follow that the packaging becomes the drugs for purposes of sales and use tax. Rather, packaging has been held to have been resold "as such" and remains distinct in character from its contents.

Further, the Division argues that the packaging was used to distribute the drugs and, therefore, was used differently than the drugs themselves. The Division urges reliance on a draft Advisory Opinion prepared in 1998 which held that packaging for drug samples is not exempt from sales tax under Tax Law § 1115(a)(3) and, therefore, was subject to use tax when drug

samples are distributed free in New York. The Division maintains that the sale of packaging to a retail customer is not exempt from sales tax pursuant to Tax Law § 1115(a)(3) but because it qualifies for the packaging exemption (Tax Law § 1115[a][19]). The Division asserts that the packaging exemption extends to all sales of packaging that are or have been used and consumed by a vendor in packaging tangible personal property for sale. The Division believes that Tax Law § 1118(3) does not exempt the use of packaging, however, because the packaging exemption only applies if packaging is used to package tangible personal property that is sold. Absent a sale, the Division argues that the exemption does not apply and, therefore, there is no corresponding use tax exemption. Further, the Division urges that even if the packaging exemption did not apply, the sale of packaging is not subject to tax because it is of *de minimis* value.

In opposition, petitioner argues that Tax Law § 1115(a)(3) exempts the Packaging Materials and Informational Inserts on both the retail sale of drugs and on the distribution of sample drugs by petitioner to physicians and health care providers in New York. Petitioner maintains that the Division has acknowledged that for both sales and use tax purposes, drugs, packaging materials and informational inserts are to be treated as a single unit and considered exempt. Petitioner asserts that if this was not so, the Division's regulations would require that the entire charge for the sale of drugs and medicines must be subject to tax because when tangible personal property, comprised of taxable and exempt items, is sold as a single unit, tax must be collected on the total price (20 NYCRR 527.1[b]).

Petitioner rejects the Division's reliance on the *de minimis* value of the packaging materials and informational inserts as a basis for not collecting tax thereon as contrary to the

stipulation of the parties that no tax is “legally due” on such items in a retail sale. However, petitioner alleges that if such materials were exempt on their sale because they are of *de minimis* value, they would likewise be exempt on the use of such products.

Petitioner disagrees with the Division’s characterization of the packaging exemption provided by Tax Law § 1115(a)(19). Petitioner maintains that this exemption does not apply to packaging materials sold and delivered to the ultimate consumer on the retail sale of a product. Rather, petitioner believes that this exemption is limited to packaging used and consumed in the wholesale or retail distribution of products and does not exempt the sale to a purchaser who is not a vendor and who is the ultimate consumer of the packaging. As a result, petitioner maintains that the packaging exemption does not support the Division’s exempt treatment of packaging and informational inserts sold with drugs and medicines. Rather, such items are exempt only because the Division recognizes that these items are “critical elements” of the drugs and medicines sold. Relying on *Matter of Burger King v. State Tax Commn. (supra)*, petitioner asserts that ancillary items that are found to be critical elements of another principal item should be treated, for sales and use tax purposes, in the same manner as the principal item.

Petitioner believes that prior to their entry into New York State, the Packaging Materials and Informational Inserts accompanying the Sample Drugs had been transformed from ordinary tangible personal property into critical elements of the drugs. As a result, petitioner feels that the critical elements are entitled to exemption even though the parties stipulated that the Packaging Materials and Informational Inserts would have been subject to tax if they had been separately purchased in New York State and then used in the distribution of the Sample Drugs.

Petitioner also maintains that the use tax, as applied by the Division, violates the Commerce Clause of the United States Constitution in that it impermissibly discriminates between the tax treatment of the retail sales of drugs and the use of Sample Drugs. Further, petitioner alleges that Tax Law § 1118(3) exempts the use of property that is expressly exempt from tax on a retail sale. Petitioner notes that the Division, by its stipulation, has conceded that on the retail sale of drugs, there is no sales tax legally due on the accompanying packaging materials or informational inserts. Therefore, petitioner maintains that there must be a corresponding exemption for the use of such items.

OPINION

Tax Law § 1105(a) imposes sales tax on “[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article.” Tax Law § 1101(b)(4) defines a retail sale as “[a] sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property.”

Tax Law § 1110(a) imposes a compensating use tax on every person for the use within this state “of any tangible personal property . . . manufactured, processed or assembled by the user, (i) if items of the same kind of tangible personal property are offered for sale by him in the regular course of business.”

A “use” of property within the state is defined by Tax Law § 1101(b)(7) as:

The exercise of any right or power over tangible personal property or over any of the services which are subject to tax under section eleven hundred ten of this article or pursuant to the authority of article twenty-nine of this chapter, by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine. *Without*

limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials, or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine (emphasis added).

Tax Law § 1115(a)(3) provides an exemption from the tax on retail sales imposed under § 1105(a) and the compensating use tax imposed under § 1110 for:

Drugs and medicines intended for use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses or diseases in human beings, medical equipment (including component parts thereof) and supplies required for such use or to correct or alleviate physical incapacity, and products consumed by humans for the preservation of health but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein or medical equipment (including component parts thereof) and supplies, other than such drugs and medicines, purchased at retail for use in performing medical and similar services for compensation.

The parties have stipulated that sales or use tax is neither collected nor legally due with respect to the packaging materials and informational inserts delivered to a consumer upon a retail sale of drugs and medicines. Further, the parties agree that these packaging materials and informational inserts are equivalent to those distributed free of charge with the sample drugs. The issue before us is whether the Packaging Materials and Informational Inserts distributed free of charge to physicians and other health care providers in the state with the Sample Drugs are subject to use tax.

We must first consider why no tax is collected or due on the packaging materials and informational inserts delivered to a consumer upon a retail sale of drugs and medicines. Petitioner argues that both the packaging materials and informational inserts are tax exempt pursuant to Tax Law § 1115(a)(3) because these items are “critical elements” of the drugs based on the holding of the Court of Appeals in *Matter of Burger King v. State Tax Commn.* (*supra*).

Petitioner asserts that these items “become” the drugs for purposes of sales and use taxation. We disagree.

In ***Burger King***, the wrappers used to contain the hamburgers, cups for beverages and "sleeves" for french fries sold by the taxpayer were held to be “critical elements” of the final product sold to consumers. The Court found that “the packaging material is as much a part of the final price as is the food or drink item itself.” However, the Court held that while these wrappers, etc. were sold to the consumer, “the containers and their contents at no time become ‘inseparably connected’ (*Matter of American Molasses Co. v. McGoldrick*, 281 NY 269, 273-274)” (*Matter of Burger King v. State Tax Commn.*, *supra*, 435 NYS2d, at 693). The Court determined that Burger King purchased its packaging from its suppliers for “resale as such” to its customers and, thus, its purchases of wrappers, cups and sleeves for french fries were excluded from tax.

The Administrative Law Judge, relying on an Advisory Opinion of the Division (TSB-A-97[62]S), concluded that the informational inserts accompanying the drugs and medicines sold by petitioner were “critical elements” of the products sold. The Administrative Law Judge also determined that the containers of the drugs and medicines, being provided to ensure that their contents are delivered to the consumer in an unadulterated state, are likewise “critical elements” of the product sold. We agree with the Administrative Law Judge and hold that petitioner’s packaging materials and informational inserts are critical elements of the drugs when resold “as such” on the retail sale of such drugs and medicines. However, we need to clarify that even though they are “critical elements,” the packaging materials and informational inserts do not take on either the characteristics or taxable status of the products they are sold

with. Therefore, if the packaging materials and informational inserts are exempt from tax on a retail sale, they must be entitled to exemption “as such” and not as a component part of the drugs they accompanied on a retail sale.

Petitioner argues that the packaging materials and informational inserts are not exempt from tax pursuant to Tax Law § 1115(a)(19). That section provides an exemption from sales and use tax for: “[c]artons, containers, and wrapping and packaging materials and supplies, and components thereof for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to the purchaser.” Petitioner argues that this exemption only applies to packaging that would be used and consumed on the transfer of materials between a manufacturer and a wholesaler, but not surviving the transfer to a consumer on a retail sale. We disagree with petitioner’s narrow interpretation of this exemption. We note that the Division’s regulations (20 NYCRR 528.20[b][2], [3]) provide that the term “vendor” in relation to this exemption “refers to any person who sells tangible personal property whether manufacturer, wholesaler, retailer, processor or assembler” and the term “purchaser” “refers to any person purchasing tangible personal property from a vendor, whether or not he is the ultimate consumer.”

The Division argues that the packaging materials are exempt on a retail sale pursuant to Tax Law § 1115(a)(19). We agree. The Division insists, however, that since there is no transfer of packaging to a “purchaser” in the use of such materials by petitioner, the exemption from the taxation of such packaging materials provided by Tax Law § 1115(a)(19) does not apply to petitioner. We disagree with this contention.

Tax Law § 1118(3) provides that the compensating use tax does not apply “[i]n respect to the use of property or services upon the sale of which the purchaser would be expressly exempt from the taxes imposed under subdivision (a), (b) or (c) of section eleven hundred five.” Thus, pursuant to Tax Law § 1118(3), if a purchaser is expressly exempt from tax on the sale of packaging material (which, the Division maintains, includes the purchaser of the materials used to package drugs sold at retail due to the express provisions of Tax Law § 1115[a][19]), then the use of such packaging material is also exempt. The fact that the purchaser and user are different parties makes no difference. As the Division maintains in its reply brief on exception, “[t]he identity of the purchaser [of the packaging] is irrelevant as to the applicability of the exemption; it is the use of the packaging that is key” (p. 14). Therefore, we affirm the determination of the Administrative Law Judge concerning petitioner’s entitlement to a refund of tax attributable to the Packaging Materials for the reasons set forth above.

The Informational Inserts present a separate issue. Although the parties have stipulated that no sales or use tax is “collected or legally due” with respect to the informational inserts delivered to a consumer upon a retail sale of drugs and medicines, this does not mean that they are exempt from tax. The Division maintains that they are not subject to tax on a retail sale because they are of *de minimis* value. However, there is no evidence in the record of the value of these informational inserts nor is there a *de minimis* exemption from sales and use tax in the Tax Law. The difficulty presented by a sale of exempt and taxable materials was observed by the Court in *Matter of American Molasses Co. v. McGoldrick* (256 App Div 649, *affd* 281 NY 269) when considering (prior to the enactment of Tax Law § 1115[a][19]) whether a container holding molasses was purchased for resale. The Court stated that:

Whether the container is taxable must depend upon whether the purpose is to resell it as tangible personal property. However, the fact that the contents of the container are exempt may present some difficulties in connection with the collection of the tax when a taxable sale thereof is reached. That difficulty, however, cannot alter the law with respect to what is a taxable sale (*Matter of American Molasses Co. v. McGoldrick, supra*, at 654).

We accept the Division's argument that items such as informational inserts are of such a minimal value that no tax is due on their retail sale when accompanying an exempt item. However, this practical presumption employed by the Division does not affect the fact that such materials remain taxable despite their *de minimis* value.

While the value of individual informational inserts may be *de minimis* on discrete retail sales transactions to the consumers of drugs manufactured by petitioner, the distribution of the Sample Drugs by petitioner to physicians and health care providers throughout the state presents a situation where the value of the Informational Inserts is subject to a calculable amount of tax due to multiple use transactions by a single taxpayer. Therefore, we affirm the Division's denial of refund of tax attributable to petitioner's use of the Informational Inserts.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted to the extent that the denial of refund attributable to petitioner's use of the Informational Inserts is sustained, but is otherwise denied;
2. The determination of the Administrative Law Judge is reversed in accordance with paragraph "1" above, but is otherwise affirmed;
3. The petition of Pharmacia & Upjohn Company is granted to the extent that the Division of Taxation shall issue a refund of tax paid on the Packaging Materials, but is otherwise denied; and

4. The denial of refund issued by the Division of Taxation is modified in accordance with paragraph "3" above.

DATED: Troy, New York
July 22, 2004

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner