STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SKY CHEFS, INC.	:	DETERMINATION DTA NO. 814865
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 September 1, 1986 through February 29, 1992.	:	

Petitioner, Sky Chefs, Inc., Dallas Fort Worth Airport, P. O. Box 619777, Dallas, Texas 75261-9777, filed a petition for revision of a determination or for refund of sales and uses taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1986 through February 29, 1992.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 12, 1996 at 9:15 A.M. with all briefs to be submitted by June 26, 1997. Petitioner appeared by Price Waterhouse, L.L.P. (Kyle B. Kasner, C.P.A.). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Robert J. Tompkins, Esq., of counsel).

ISSUES

I. Whether the resale exclusion of section 1101(b)(4)(i)(A) of the Tax Law applies to dry ice purchased by an airline caterer and used by it to maintain prepared food at a constant temperature of 41 degrees or below.

II. Whether dry ice used to cool food while in transit from an airline caterer's facilities to

awaiting aircraft falls within the definition of packaging material used by a vendor to package tangible personal property for sale, as those terms are used in the Tax Law and regulations.

III. Whether interest charges imposed on the tax determined to be due may be abated.

FINDINGS OF FACT

1. As a result of a field audit of the books and records of petitioner, Sky Chefs, Inc., the Division of Taxation ("Division") issued to petitioner a Notice of Determination of sales and use taxes due, dated December 2, 1994, for the period September 1, 1986 through February 29, 1992 in the amount of $343,052.43 plus interest. No penalties were assessed as a result of the audit.

2. The entire amount of the tax assessment results from petitioner's failure to pay sales tax on its purchases of dry ice during the audited period.

3. Petitioner acts as a caterer to airlines in New York and elsewhere. Its facilities in New York State are located at JFK Airport on Long Island. It prepares food at its facilities in accordance with agreements with various airlines and delivers that food to the airline shortly before the scheduled time of the flight departure. Approximately 10,000 to 17,000 meals per day are prepared by petitioner at JFK.

4. Petitioner is subject to the authority of several Federal government agencies. For purposes of this determination, the most significant regulations governing petitioner were those promulgated by the Food and Drug Administration ("FDA"). Under FDA regulations, prepared food served by an airline must be maintained at a temperature of 41 degrees or lower for all but four hours of the time between completed food preparation and food service by the airline. The temperature and time regulations are to insure that disease-causing bacteria on the food do not have an opportunity to multiply.

5. Petitioner received a final order for each flight from six to nine hours before departure. Hot food was placed in a blast chiller after preparation to bring the temperature of the food down below the mandated 41 degrees. Foods were packaged in a refrigerated environment, and, as soon as preparation was completed, the food trays were placed in a cooler where the food was maintained at 41 degrees.

6. Petitioner uses different methods to determine whether food is above the critical 41 degree temperature and to track the amount of time that this condition continues. Any food which is above 41 degrees for a cumulative period of more than four hours must be destroyed.

7. Food is delivered to the airline on carts especially equipped to hold the food trays and to move up and down the narrow aisles of an airplane. The carts, which are the property of the airline, are insulated and have compartments where dry ice can be placed to maintain the temperature of the food during delivery time and during the flight.

8. Approximately two hours before flight departure, petitioner loads the carts in a refrigerated environment and then stores them in a cold holding area with the doors open to keep the cold air circulating through the carts and around the food. At the last possible moment, the dry ice is placed in the carts, the doors are closed and the carts are placed on a truck for delivery to the airline. As one of petitioner's witnesses explained, the dry ice turns the carts into something like individual ice chests. Petitioner's trucks are not refrigerated.

9. It takes approximately 15 minutes to move the carts from the refrigerated holding area to the trucks and another 15 minutes for the trucks to reach the terminal. Because dry ice dissipates rapidly, a prolonged delay in flight departure might require petitioner to replenish the dry ice while the carts are sitting in trucks awaiting loading into the aircraft. Although title to the

food passes when the carts are loaded onto the airplane, petitioner works in partnership with the airlines to keep the food cold even after it is delivered. Consequently, petitioner's employees will board an airplane to replenish the dry ice if a flight is delayed after the carts are loaded on the airplane. Petitioner was required to replenish the dry ice about once per month.

10. Prepared food was never delivered to the airlines without the use of dry ice. The dry ice served no purpose other than to maintain the food in the service carts at the required temperature.

11. There is no evidence that the dry ice used by petitioner for cooling was billed to its customers as a separate charge.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) provides for the imposition of tax on "receipts from every retail sale of tangible personal property, except as otherwise provided in [Article 28]". As pertinent here, Tax Law § 1101(b)(4)(i)(A) defines a retail sale as the "sale of tangible personal property to any person for any purpose, other than . . . for resale as such. . . ." This provision is sometimes known as the "resale exclusion". It is petitioner's position that it purchased dry ice for "resale as such" to the airlines and, consequently, that its purchases of dry ice qualify for the resale exclusion. Petitioner argues that the dry ice satisfies the criteria found in section 527.8(f)(2)(iii)(a) of the Division's sales tax regulations[1] which describes items of property which are considered to be purchased for resale when provided to a customer by a caterer. The regulation states:

[1] These regulations were renumbered without change in 1995. The citations are to the current regulation.

> "(a) Tangible personal property which is *necessary to contain* an item of food or drink for delivery to the customer and which is transferred to the customer with the sale of the food or drink may be purchased for resale by caterers. Such property includes disposable containers, wrappers, cups, dinner plates, trays, platters and the accompanying lids" (emphasis added).

Petitioner argues that the dry ice qualifies for the resale exclusion because it is "necessary to contain" food delivered to the airlines. According to petitioner, the first definition of "contain" in "Webster's Dictionary" is "keeping within limits". Webster's Ninth New Collegiate Dictionary (282 [9th ed 1987]) offers the following definition of the word "contain":

> **"1:** to keep within limits: as **a:** RESTRAIN, CONTROL **b:** CHECK, HALT **c:** to follow successfully a policy of containment toward **d:** to prevent (as an enemy or opponent) from advancing or from making a successful attack".

Petitioner argues that the dry ice is used to "contain" food, in that it is used to keep food within acceptable temperature limits. It claims that the Division's construction of the regulation is unreasonably narrow.

As the Division construes the regulation, it applies only to tangible personal property which is used to hold food for delivery, in essence, that the word "contain" refers only to spatial containment. The Division argues that petitioner misconstrues the regulation by taking the term "necessary to contain" out of context. It notes that the regulation applies the resale exclusion to items of tangible personal property "necessary to contain an item of food or drink *for delivery* to the customer" (20 NYCRR 527.8 [f][2][iii][a]; emphasis added). It is the Division's position that the dry ice is not used to contain food for delivery, but rather to maintain temperature levels within the holding cart. It takes support for its construction of the term "necessary to contain" from the next statement in the regulation: "Such property includes disposable containers, wrappers, cups, dinner plates, trays, platters and the accompanying lids" (20 NYCRR 527.8

[f][2][iii][a]). These examples of qualifying property are consistent with the Division's contention that only items used to hold food for delivery qualify for the resale exclusion. Finally, the Division looks to 20 NYCRR 527.8(f)(2)(i) which sets forth examples of property not qualifying for the resale exclusion including "ice used to chill food or drinks before serving. . . ." The Division argues that there is no reason to treat the dry ice used by petitioner to keep food chilled differently from ordinary ice. Dry ice is defined as "solidified carbon dioxide usu. in the form of blocks that at -78.5 degrees Centigrade changes directly to a gas and that is used chiefly as a refrigerant" (Webster's Ninth New Collegiate Dictionary, 386 [9th ed 1987). Based on this definition, the Division argues that dry ice is essentially a refrigerant and not tangible personal property necessary to contain food for delivery.

B. In this instance, it is not necessary to look beyond the precise language of the regulation to discern its meaning. Identifying property qualifying for the resale exclusion, the regulation speaks of property "necessary to contain an item of food or drink for delivery to the customer" and goes on to give examples of the kind of property covered by the exclusion: "disposable containers, wrappers, cups, dinner plates, trays, platters and accompanying lids" (20 NYCRR 527.8 [f][2][iii][a]). Within the same section of the regulation, "ice used [by caterers] to chill food or drink before serving" is identified as tangible personal property not qualifying for the resale exclusion (20 NYCRR 527.8 [f][2][i]). While petitioner may have been under greater constraint than most caterers to maintain food at a precise temperature, it used the dry ice for the same purpose that ice is used generally: to keep food and drink cold before serving. Petitioner accuses the Division of giving the regulation an extremely narrow interpretation. But its own interpretation is strained and unconvincing. The only fair and practical construction of the

regulation is the one given to it by the Division.

C. Each party argues that its interpretation of the statute is supported by the decision in *Matter of Burger King v. State Tax Commn.* (51 NY2d 614, 435 NYS2d 689). In that case, the Court was asked to decide whether wrappers for hamburgers, cups for beverages and sleeves for french fries were purchased for resale and thus not subject to the tax on retail sales. For guidance in making this decision, the Court looked to "the so-called container cases" (*id*.). In those earlier cases the courts held "that a sale is not one at retail when a supplier sells containers to a wholesaler or manufacturer, who then sells his product packed in these containers either to a retailer or to an ultimate consumer" (*Matter of Burger King v. State Tax Commn; supra*, at 622, 435 NYS2d at 692). The *Burger King* decision extends this principle to packaging materials used by Burger King to contain items of food or drink for sale to a customer. The critical element of the Court's reasoning is its finding that the wrappers, cups and other packaging materials, although not inseparable from the food or drink, were being resold "*as containers*" (*Matter of Colgate-Palmolive-Peet Co. v. Joseph*, 308 NY 333, 339, quoted in *Matter of Burger King v. State Tax Commn*; *supra*, at 622, 435 NYS2d at 692; emphasis in original).

Petitioner misreads the *Burger King* decision. According to petitioner, the Burger King packaging materials were found to qualify for the resale exclusion because the materials were to become a "critical element" of the final product sold. Petitioner then states that the Court used a three-prong test to determine when an item which is not inseparable from the food or drink being sold is, nonetheless, a critical element of that property. According to petitioner, the three prongs of the test are speed, sanitation and portability. The Court used those terms to describe the "vaunted service features" of fast food restaurants (an innovation at the time the *Burger King*

decision was written). It did not use these three service features as a test to determine when an item is a "critical element" of food or drink when sold by a restaurant or a caterer. The *Burger King* decision rests on the premise that materials purchased by a fast food restaurant to package or contain food and beverages for sale to a customer should be treated the same as containers purchased by a manufacturer who sell his products, packed in those containers, to a retailer or ultimate consumer. In either case, the packaging materials and containers are purchased for resale (*Matter of Burger King v. State Tax Commn.*, *supra*).

There is no case, at any level, where the container principle stated in *Burger King* has been broadened to include anything other than containers or similar packaging materials. In *Matter of Celestial Foods of Massapequa Corp. v. New York State Tax Commn*. (63 NY2d 1020, 484 NYS2d 509), the Court was asked to extend its holding in *Burger King* to include napkins, straws, plastic utensils and similar items in the category of items purchased by a fast food restaurant for resale to its customers. The Court declined to do so and clarified its earlier ruling by strictly confining it to packaging. The Court stated: "Only when, as in *Burger King*, such items are necessary to contain the product for delivery can they be considered a critical element of the product sold, and excluded from sales tax" (*Matter of Celestial Foods of Massapequa Corp. v. New York State Tax Commn.*, *supra,* at 1022, 484 NYS2d 510). As I have stated, the dry ice was not an item necessary to contain the food for delivery. Even if petitioner's definition of contain is adopted, it cannot be said that the dry ice contains the food. At best, it contains the temperature within the cart and thus maintains the temperature of the food. Neither the language of *Celestial Foods* nor of *Burger King* can be stretched to cover petitioner's use of dry ice (*see also*, *Matter of Dunkin Donuts*, Tax Appeals Tribunal, May 19, 1994 [where wax paper used to

line containers and handle donuts was found not to be a critical element of the product sold and not purchased by the petitioner for resale]).

D. In the alternative, petitioner contends that the dry ice is exempt from sales tax pursuant to section 528.20(b)(1) of the Division's regulations. Tax Law § 1115(a)(19) provides an exemption from sales and use taxes for:

> "Cartons, containers, and wrapping and packing 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."

In the definition of packaging material eligible for the exemption, the Division's regulations include "preservative materials" (20 NYCRR 528.20[b][1]). Petitioner claims that the dry ice is eligible for the exemption as a preservative material. The Division maintains that prepared food and drinks are not tangible personal property as that term is used in the Tax Law § 1115(a)(19) and thus the exemption is not applicable.

The Division's position in this proceeding was found to be a correct interpretation of the Tax Law in *Matter of Servomation Corp. v. State Tax Commn.* (51 NY2d 608, 435 NYS2d 687) where the Court states:

> "The Tax Commission . . . initially contends that section 1115 (subd. [a], par. [19]) only exempts containers and wrapping materials used to package tangible personal property and that restaurant food is not tangible personal property within the meaning of the Tax Law, a contention we today accept in *Matter of Burger King v. State Tax Commn.* (*Matter of Servomation Corp. v. State Tax Commn., supra*, at 612, 435 NYS2d at 688; citation omitted).

In *Burger King,* the Court held that the sale of food and drink by a restaurant is a hybrid transaction encompassing food and drink and service as one product (*Matter of Burger King v. State Tax Commn.*, *supra*, at 621-622, 435 NYS2d at 691-692). Like restauranteurs, caterers

offer both food and service; the customer purchases both as one hybrid product. Accordingly, petitioner did not sell tangible personal property to its airline customers and is not eligible for the exemption provided by Tax Law § 1115(a)(19).

E. There is no provision of the Tax Law which authorizes the Division of Tax Appeals to abate or cancel interest under the circumstances of this case..

F. The petition of Sky Chefs, Inc. is denied, and the Notice of Determination, dated December 2, 1994, is sustained.

Dated: Troy, New York
November 26, 1997

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ADMINISTRATIVE LAW JUDGE