STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROEBLING LIQUORS, INC. AND SIDNEY COOPER, AS OFFICER	:	DETERMINATION DTA NO. 814192
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, 1990 through May 31, 1993.	:	

Petitioners, Roebling Liquors, Inc. and Sidney Cooper, as officer, 44 West 62nd Street, Suite 29A, New York, New York 10023-7014, 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 September 1, 1990 through May 31, 1993.

A hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on February 19, 1997 at 10:30 A.M., was continued at the same offices or the offices of the Division of Tax Appeals at 500 Federal Street, Troy, New York, on March 13, 1997 at 10:15 A.M., April 21, 1997 at 10:30 A.M., May 19 and 20, 1997 at 10:30 A.M., June 4, 1997 at 11:30 A.M., June 5, 1997 at 10:00 A.M., and was continued to conclusion on January 21, 1998 at 10:30 A.M., with all briefs to be submitted by May 7, 1998 which date began the six-month period for the issuance of this determination. Petitioner Roebling Liquors, Inc., appeared by John D. Chestara, Esq., at the hearings on February 19, 1997, March 13, 1997, April 21, 1997, May 19 and 20, 1997, and June 4 and 5, 1997. Petitioner Sidney Cooper appeared *pro se* on each of the hearing dates and

on behalf of Roebling Liquors, Inc. at the hearing on January 21, 1998. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly assessed sales and use taxes from Roebling Liquors, Inc. and, if so, whether Roebling Liquors, Inc. timely filed a petition challenging the Notice of Determination.

II. Whether the Conciliation Order was timely issued.

III. Whether the Division is prohibited from contacting the suppliers of Roebling Liquors, Inc. in order to verify the amount of purchases.

IV. Whether the Division of Taxation ("Division") properly utilized an external index to determine additional sales and use taxes due from Roebling Liquors, Inc.

V. Whether the Division correctly determined petitioners' sales and use tax liability.

VI. Whether penalty assessed pursuant to Tax Law § 1145(a)(1)(i) was properly computed.

FINDINGS OF FACT

The Audit

1. Petitioner Roebling Liquors, Inc. ("Roebling Liquors") was a retail wine and liquor store. Petitioner Sidney Cooper was the president and owner of 100 percent of the stock of Roebling Liquors. In February 1993, the Division assigned an auditor to conduct an audit of Roebling Liquors.

2. At the outset of the audit, the Division mailed a letter to Mr. Cooper, dated May 21, 1993, which confirmed a telephone conversation wherein a field audit of the New York State sales and use tax returns of Roebling Liquors was scheduled on June 1, 1993. The letter

requested that Mr. Cooper provide books and records pertaining to the sales tax liability for the period under audit including "journals, ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates." The letter also included a consent to extend the period of limitation for assessment of sales and use taxes and a list of documents to be provided to the auditor for review. Subsequently, the appointment was canceled at the request of Mr. Cooper.

3. In a letter dated August 5, 1993, the Division scheduled a second audit appointment on August 16, 1993. The letter stated that the period under audit was June 1, 1990 through May 31, 1993 and again requested that Mr. Cooper provide all of the books and records pertaining to the corporation's sales and use tax liability. The Division also requested that Mr. Cooper return the form extending the statute of limitations which had previously been mailed to him.

4. In August 1993, an auditor spent four days at the premises of Roebling Liquors. During the audit, sales were reconciled to bank deposits for a portion of the audit period. This resulted in finding only a small discrepancy. The auditor also did not find anything amiss with respect to the control of sales checks or any discrepancy with respect to the cash register tapes. Although there was a dispute with respect to who conducted a purchase markup test, there was no disagreement that a purchase markup test was conducted and that it showed that Roebling Liquors had a markup of approximately seven percent.

5. There was no animosity between Mr. Cooper and the auditor during the four days that the auditor spent at the premises of Roebling Liquors. Mr. Cooper provided everything that was requested with two exceptions. He refused to execute a waiver of the statute of limitations because each time he had done so in the past, it took more than three years to resolve the matter, and Mr. Cooper did not want to wait that long again. Also, Mr. Cooper would allow the auditor

to examine only the sales and cost of sales information on Roebling Liquors' Federal income tax returns.

6. As the audit progressed, the Division concluded that Roebling Liquors provided complete books and records and that they were in a condition which permitted them to be audited. By August 1993, the auditor conducting the audit assumed that the audit would not result in any change in petitioners' tax liability. When she finished at Roebling Liquors' premises, the auditor indicated to Mr. Cooper that she was going to recommend a no-change audit.

7. The auditor prepared a report recommending a no-change audit. However, after the case was turned in, the section head told the auditor that there was information from the Revenue Opportunities Division ("ROD") that should be addressed. This was the first time that the auditor became aware that there was information in her office from ROD. The auditor's opinion changed when she examined the information from ROD which showed greater purchases than were reflected in the books and records of Roebling Liquors. In response to the information from ROD, the auditor requested that the suppliers of Roebling Liquors advise the Division of the amount of merchandise sold to Roebling Liquors for the period in issue and whether the merchandise was delivered to the vendor's place of business. The Division then summarized the information from the suppliers by quarterly periods. The auditor did not think that there was any reason to go back to Roebling Liquors to look at additional information because everything presented by Mr. Cooper tied in, and she did not think that another visit to the liquor store would provide any further explanation.

8. The Division prepared a schedule of additional tax due by quarterly period. The first column on the schedule was audited purchases per quarterly period which consisted of the

information obtained from Roebling Liquors' suppliers. The Division multiplied the audited purchases by a markup percentage of 1.0707[1] to obtain audited taxable sales. The amount of tax due was determined by multiplying audited taxable sales by the sales tax rate of 8¼ percent. The Division then calculated the amount of additional tax due by subtracting the amount of tax previously reported on the sales and use tax returns from the amount of tax determined to be due on audit.

9. On September 23, 1993, the auditor notified Mr. Cooper by telephone that she could no longer recommend a no-change audit because information that she had received from third-party sources revealed large liquor purchases which were inconsistent with what was reflected in the books and records of Roebling Liquors. Mr. Cooper responded that the discrepancy could be resolved by a credit in 1991 being reversed in 1992. Between the telephone conversation of September 26, 1993 and a letter which she sent on October 26, 1993, the auditor did not do anything further because she felt that she needed additional information which was not forthcoming. The auditor did not tell Mr. Cooper about the information that she had received from ROD or about the responses to the third-party questionnaires. It was the auditor's understanding that Mr. Cooper realized that there was some type of discrepancy in the figures. However, before October 26, 1993 Mr. Cooper did not have any of the ROD figures or third-party facts that the auditor was concerned about.

10. In a letter dated October 26, 1993, the Division advised Mr. Cooper that the third-party information received for the period September 1, 1990 through May 31, 1993 did not substantiate his contention that the discrepancy in purchases was attributable to a credit in 1991

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[1]The markup percentage was obtained by dividing the sales per Roebling Liquors' Federal income tax returns for the years 1991 and 1992 by the amount of purchases reported for the same period.

being reversed in 1992. The Division noted that it attempted to schedule a closing conference; however, Mr. Cooper stated that he would not be available before January 15, 1994. The Division then explained its position that since Mr. Cooper refused to sign any waivers and since the Division had already allowed extensions of time, the request for further time was unreasonable.

11. In its letter, the Division scheduled a conference for Friday, November 12, 1993 at 10:00 A.M. and included a copy of the workpapers and a Statement of Proposed Audit Adjustment seeking additional tax due of $428,966.45 plus penalty of $477,919.18 and interest of $121,431.41 for a balance due of $1,028,317.04. The Division stressed that the appointment was being offered in order to give Mr. Cooper an opportunity to discuss the apparent differences between the Division's figures and the amounts reported by petitioner and to substantiate the need for any adjustments to the amount asserted to be due by the Division. The Division explained that, if Mr. Cooper did not appear at the scheduled conference, the Division would be forced to view the veracity of the tax returns on the basis of the information in its possession.

12. Mr. Cooper responded to the letter of October 26, 1993 with a letter of November 3, 1993 wherein he requested an additional seven days or until November 19, 1993 to provide the information requested. The auditor felt that the request for additional time was unreasonable because all she wanted was an explanation of what the purchases were. She also considered the fact that Mr. Cooper refused to waive the statute of limitations and felt that it was important not to allow the time for issuing an assessment to expire. Additionally, the auditor believed that time was of the essence because it was her understanding that Mr. Cooper was planning on selling the business. When Mr. Cooper did not attend the meeting on November 12, 1993, the auditor decided that the assessment should be issued.

13. As noted, a Statement of Proposed Audit Adjustment was included with the letter of October 26, 1993. This statement, which was dated October 22, 1993, contained numerous errors. For example, the schedule states that the tax due for the quarter ended May 31, 1993 is $71,910.00. However, a second schedule included with this letter lists the same amount as the tax due for the quarter ended August 31, 1993. A second error resulted because the markup percentage was applied twice.

14. The Division prepared a Schedule of Additional Tax Due dated November 20, 1993 which calculated tax due in the amount of $428,966.46. This schedule also contained numerous errors. For example, the schedule contains a column entitled "AUDIT ADDITIONAL TAXABLE SALES" which reflects the application of the markup percentage twice. Further, all of the amounts set forth in the "ADDITIONAL TAX DUE" column were in error and required correction.

15. The Division prepared a Statement of Penalty Computation by Quarter dated October 22, 1993. The penalty and interest amounts set forth on this document were changed following a conciliation conference conducted by the Bureau of Conciliation and Mediation Services.

16. The Division prepared a Statement of Proposed Audit adjustment dated November 17, 1993. As with the previous documents, significant errors are apparent on the face of the document. A comparison of the Statement of Proposed Audit Adjustment dated October 22, 1993 with the statement dated November 17, 1993 leads to the conclusion that the Division mistakenly attributed the tax in each quarterly period from the first document to the subsequent quarter in the second document. For the quarter ended November 30, 1990, the amount of tax assessed was reduced in the second statement. However, the amount of the penalty assessed for

this period inexplicably increased. In other instances, there is no apparent correlation between the amount of tax assessed and the amount of the penalty asserted to be due. For example, for the quarterly period ended November 30, 1992, the Statement of Proposed Audit Adjustment of October 22, 1993 asserted that no tax was due but that penalty was due in the amount of $49,556.54. In contrast, the Statement of Proposed Audit Adjustment dated November 17, 1993 stated that tax was due in the amount of $31,772.22 and that penalty was due in the amount of $21,076.63. Thus, although the amount of tax asserted to be due increased, the amount of the penalty in issue for the same quarter was reduced. The Statement of Proposed Audit Adjustment of October 22, 1993 shows that for the quarters ended February 29, 1992 and May 31, 1992, no tax was asserted to be due. Nevertheless, the document stated that penalties were due for these quarters in the amounts of $58,186.57 and $56,169.03, respectively.

17. The Division issued a Notice of Determination, dated December 13, 1993, to petitioner Sidney Cooper, 44 West 62ST #29A, New York, NY 10023-7014, which assessed a deficiency of sales and use tax in the amount of $302,806.60 plus interest in the amount of $91,994.31 and penalty in the amount of $225,159.94 for a balance due of $619,960.85. The notice was issued to Sidney Cooper as an officer or person responsible for the taxes due from Roebling Liquors. Since an issue has been raised regarding whether a notice of determination was issued to Roebling Liquors, this matter will be discussed in greater detail later in this determination.

18. Mr. Cooper received the Notice of Determination addressed to him but not one addressed to Roebling Liquors. The notice addressed to Sidney Cooper was received sometime before December 13, 1993. When it prepared the notices of determination, the Division did not give petitioners the benefit of any credits which it was aware of because it had questions about

purchases which were not reflected on the books and records of Roebling Liquors. In addition, the Division deleted the August 31, 1993 quarterly period from the assessment despite the fact that there was a credit for this period. The Division did not include the quarterly period ended August 31, 1993 in the assessment because the Division requested petitioners' books and records only until the quarterly period ended May 31, 1993.

19. Mr. Cooper's initial reaction to the Notice of Determination was one of shock and the feeling that he needed additional time. Upon receipt of the Notice of Determination, Mr. Cooper requested a conciliation conference at the Bureau of Conciliation and Mediation Services.

20. A conciliation conference was held by the Bureau of Conciliation and Mediation Services ("BCMS") on October 11, 1994. In addition to Mr. Cooper, the participants were the auditor and Lee Carrus who served as the conciliation conferee. At this meeting the conciliation conferee asked the same questions as those asked by Mr. Cooper with respect to why the auditor omitted the tax credits and how penalties could be assessed on quarters when no tax was due. When Mr. Cooper realized that the conciliation conferee was trying to be fair, he offered to provide documentation. A second conciliation conference was held on November 16, 1994 which was attended by Mr. Cooper, the conciliation conferee and, for a short period of time, the auditor. The auditor had to leave before the conference was concluded in order to care for her sick mother. Therefore, the auditor's supervisor took her place. During the second meeting, Mr. Cooper offered documents in an attempt to substantiate the position that there should be a no-change audit.

21. On March 31, 1995, the conciliation conferee issued a proposed resolution in the form of a consent. On May 12, 1995, BCMS issued conciliation orders to Roebling Liquors and Sidney Cooper which determined that tax was due in the amount of $219,504.00 plus penalties

and interest. The adjustment in the assessment arose from petitioners' receiving credit for overpayments in the quarters ending May 1993, August 1992 and February 1993. In addition, the fraud penalty was abated. The penalties imposed pursuant to Tax Law § 1145(a)(1)(i) and (vi) were in the amounts of $90,709.14 and $27,759.50, respectively.

The Revenue Opportunity Division

22. The Revenue Opportunity Division ("ROD") was created in order to develop new ideas in a "freewheeling think tank environment." ROD had three primary concerns: to induce taxpayers to file their tax returns; to encourage taxpayers to file accurate returns, and; to assist in projects that help in collection efforts. The purpose of ROD was to identify and deal with persons who had not complied with the law.

23. At one juncture auditors from New York City and Long Island asked for assistance in developing a third-party database of purchases for audits of local businesses. The auditors felt that their biggest problem was that there were many businesses where the books and records tied in with the sales tax returns but it was suspected that there was more business activity than was reflected on the books and records. The auditors believed that they were losing cases because they did not have solid evidence of purchases and asked if ROD could create a database of distributors and wholesalers.

24. Initially, ROD asked the New York State Liquor Authority for assistance in identifying the distribution of products from the manufacturers to the wholesalers to the retail level. ROD personnel also met with a number of associations and asked for their opinion on what ROD should be focusing on. As a result of these meetings, ROD learned that liquor products, particularly beer, were transported from upstate New York to New York City and, as a result, it was impossible to treat the assignment as a regional project.

25. Utilizing data from the State Liquor Authority, which identified the wholesalers, distributors, and retailers (with subclassifications for package stores, bars and restaurants), ROD looked for a correlation between purchases and the reported gross and taxable sales on the retail returns. ROD found that, for one quarterly period, the cost of purchases significantly exceeded the total gross sales reported by retailers. The finding led ROD to conclude that there was a problem of underreporting. Using the same analysis, ROD also found that gross income figures were also being underreported. At the same time, associations of individuals were telling ROD that honest retailers could not compete because there were dishonest retail establishments. The analysis by ROD caused the localized project to evolve into a statewide project.

26. As Acting Director of ROD, Mr. Joseph Catalina drafted a letter, dated January 7, 1992, directed to liquor wholesalers of New York which stated, in part:

> The New York State Tax Department is reviewing and updating its computer file of retail beer, liquor, and wine sellers. These include taverns, restaurants, grocery stores, liquor stores, and all other establishments making sales of your product at retail.
>
> To accomplish this review, we request your cooperation in providing names and addresses of your customers and the sales made to those customers for the 12 month period of January 1, 1991 to December 31, 1991. Sales volumes reported by our firm may be compared with figures reported by your customer to determine their compliance with the tax laws.
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> * * *
>
> In addition, please complete and return the enclosed questionnaire. Failure to respond to this request will result in the issuance of a subpoena to obtain the desired information. If a subpoena is required prior to releasing this information, please check the appropriate box on the questionnaire.

27. Mr. Catalina obtained approval for mailing the letter from John Langer, who was Deputy Director of Operations. The letter was also reviewed by Counsel's Office of the Department of Taxation and Finance. It is possible that a letter was sent out before the one

quoted above as a pilot test. The Division's lawyers felt that it had the authority to collect this information because there were strong indications that there was underreporting in the industry. Mr. Catalina did not regard the letter as a demand.

28. The questionnaire was designed to provide ROD with information on how records were kept. As a result of the questionnaire, the Division learned that there were many distributors who were not keeping proper records such as a detailed record of customers. The Division did not pursue those distributors who did not have proper records.

29. During the pilot project, a few of the distributors asked for a "friendly" subpoena so they could explain to their customers that they had to give the information. John Langer authorized Mr. Catalina to issue the subpoenas. Mr. Catalina did not get the approval of a magistrate or judge before issuing the subpoenas.

30. Mr. Catalina authored a letter to the liquor industry, dated August 13, 1992, which stated, in part:

> The New York State Tax Department is reviewing and updating its computer files on retail beer, liquor, and wine sales. These include taverns, restaurants, grocery stores, liquor stores, and all other establishments or businesses making sales of alcoholic beverages at retail.
>
> In order to complete our review, we request your cooperation and assistance in providing the following data for the period January 1, 1991 through December 31, 1991. All names, addresses, New York State Liquor Authority license identification numbers and the total sales of alcoholic beverages, in dollars, made by you to each of your customers. You are not required to include sales information where the customer is not licensed by the State Liquor Authority and the sales tax has been collected and remitted by you. Total sales figures may include other product lines such as soft drinks, bottled water, or any other non alcoholic beverage provided you so indicate in your response.
>
> * * *
>
> Failure to respond will result in either the issuance of a subpoena or the referral of your file for audit which may include additional sales tax areas and a review of

> your tax compliance in other areas administered by the Department of Taxation and Finance.

31. The foregoing letter was intended to encourage people to supply information rather than to intimidate them.

32. ROD sent a letter dated March 24, 1993 to approximately 400 distributors which requested sales information for the years 1989, 1990 and 1992. The letter explained that the information would be used to perform a "base line analysis" in order to identify purchasers of bootlegged products. This letter was part of a different initiative to identify the movement of liquor products from out of the State into New York.

33. ROD accepted the information it received from the wholesalers as it was reported. It did not conduct an audit of the wholesalers.

34. There were two things that ROD was looking for in its project. First, it wished to continue gathering information to determine who should be audited. Second, it wanted to ascertain if the request for information would cause an increase in voluntary compliance. ROD determined that the markups increased after the information was gathered. The attorneys who were consulted by ROD advised that it was permissible for ROD to request the information sought in the letters.

35. ROD identified and sent letters to more than 400 wholesalers that did business with approximately 30,000 retailers. If any wholesalers did not voluntarily comply with the request made in the first letter, ROD would contact them by telephone to find out why they did not comply. If the wholesaler refused to work with ROD, it received the second letter with stronger language. The recipients of the second letter generally complied with the request. In the case of the wholesale liquor project, there were two wholesalers that were issued subpoenas because they

did not comply with the requests in the letters. Upon receipt of the subpoenas, each of the wholesalers provided the information requested.

36. The Director of ROD worked directly with the program director of sales tax audits, who, in turn, utilized the services of a person assigned to perform audit selection work. The individual who performed the audit selection worked with people in the district offices.

37. When ROD obtained the results of a project, the information was presented to a program manager in the Audit Division. The program manager would then assign an audit selection person to take control of the audit database. In the case of the liquor project, ROD found 6,000 retailers whose reported purchases were greater than sales. The decision was then made to conduct an audit of the 1,700 liquor stores with the biggest difference between purchases and sales. Later, it was decided to send 600 of the 1,700 cases to the District Offices for an audit as an experiment. Roebling Liquors was included in the 600 cases. Initially, the Division gave priority to the other audits. However, once the Audit Division started conducting audits on the experimental cases, it found that it was able to obtain favorable results. If a taxpayer said that it did not buy anything from a particular distributor, ROD would go back to the distributor to find the source of the difference. If it was necessary, the auditor would ask the retailer about the ROD information.

38. After the first 700 audits were conducted, the consensus of opinion was that the ROD information was reliable.

Mr. Cooper's Response

39. Petitioner Sidney Cooper graduated from the Bernard Baruch School of Business of the City College of New York in 1948. Among other things, he served as the treasurer of the Bond Stores, Inc. and as chief financial officer of the Peerless Company. As a result of these

positions, he has had extensive experience in auditing and business finance. Mr. Cooper also worked on behalf of veterans' rights and as a result he has studied constitutional law. On behalf of veterans rights, he as testified before congress on six occasions and had lunch with an associate justice of the United States Supreme Court.

40. As president, Mr. Cooper spends approximately two days a week at Roebling Liquors. While at Roebling Liquors, Mr Cooper takes inventory and picks up the mail and other materials to work on at home.

41. At the hearing, Mr. Cooper presented the following chart in an attempt to substantiate his position that adjustments to the Notice of Determination are warranted:

Purchases		$8,309,311.00
Deductions:		
1% Purchase discounts	($83,093.00)	
Inventory, on hand 5/31/93	(418,752.00)	
Inventory, on hand (floor estimate)	(150,000.00)	
Pilferage @ three percent	(249,279.00)	
Total Deductions		901,124.00
Net Purchases, as adjusted		$7,408,187.00
Markup percent	7.07%	523,759.00
Sales (as projected)		7,931,946.00
Sales Tax, as projected	8.25%	654,385.55
Sales Tax, reported		(514,460.93)
Sales Tax Owed, subject to adjustments		$139,924.62
Purchases at wholesalers		(35,028.30)
Net owed, per conferee		$104,896.32

Purchases		$8,309,311.00
Inventory, on hand, not counted or considered	25% of 418,752 x 7.07 x 8.25%	(9,247.38)
Overpayments in subsequent periods		($87,188.94)
Net owed, subject to further considerations		$8,460.00

42. It is the practice of Roebling Liquors to record its purchases net of cash discounts. Therefore, if Roebling Liquors' wholesaler reported its gross sales to Roebling Liquors, there would be a one-percent difference between the sales on the wholesaler's books and the purchases on the books of Roebling Liquors. In this case, the discrepancy between purchases and sales would be $83,093.00.

43. It was Mr. Cooper's practice to personally take an inventory once a week of all sensitive items in the warehouse. The inventory taken by Mr. Cooper represents approximately 80 percent of the inventory in the warehouse. The inventory count conducted by Mr. Cooper indicates that as of May 31, 1993, the value of the inventory in the warehouse of Roebling Liquors was $418,751.79. Mr. Cooper further estimates that the value of the inventory in the store was $150,000.00.

44. Mr. Cooper estimates that Roebling Liquors suffered inventory losses of three percent due to pilferage. This estimate is based upon Mr. Cooper's experience in retailing and the operation of Roebling Liquors since 1972. The three-percent pilferage adjustment results in a reduction in purchases of $249,279.00.

45. As set forth above, Mr. Cooper subtracted the total deductions of $901,124.00 from the total purchases of $8,309,311.00 to calculate net purchases of $7,408,187.00. He then

multiplied the net purchases by a markup rate of 7.07 percent and added the product of $523,759.00 to the adjusted purchases to estimate total sales of $7,931,946.00. Next, Mr. Cooper subtracted the sales tax due on this amount from the sales tax that was reported to find that the sales tax due was $139,924.62.

46. At the conclusion of the audit period, May 31, 1993, there was merchandise in the amount of $396,549.00 which had been ordered by Roebling Liquors. Mr. Cooper submits that these purchases, which resulted in sales tax being assessed in the amount of $35,028.00, could not have been sold because it had not been received. During the audit, the auditor was not aware that certain merchandise was at the wholesaler's warehouse because Mr. Cooper did not have the opportunity to tell her.

47. The next inventory adjustment requested by Mr. Cooper represents the inventory which was not included in the "Inventory, on hand 5/31/93" because the inventory count taken by Mr. Cooper did not include all of the inventory (***see***, Finding of Fact "43").

48. During the audit period and thereafter, Roebling Liquors had a substantial increase in sales as shown by the following table:

Period	1991	1992	1993
Quarter Ended February 28	$298,114.93	$829,518.47	$1,025,729.89
Quarter Ended May 30	243,894.45	825,338.59	807,308.77
Quarter Ended August 31	215,366.29	697,295.51	670,808.23

Period	1991	1992	1993
Quarter Ended November 30	288,354.33	773,323.51	837,737.31

49. Mr. Cooper was able to accomplish the increase in sales by purchasing large amounts of inventory at advantageous prices. However, not all of the inventory was paid for immediately.

50. The U.S. corporation income tax returns of Roebling Liquors reported the following inventory amounts in the calculation of cost of goods sold:

	1991	1992
Beginning Inventory	$185,000.00	$700,000.00
Ending Inventory	$700,000.00	$275,000.00

The Mailing Issue

51. No issue has been raised with respect to whether petitioner Sidney Cooper timely filed a petition for a conciliation conference. However, in the course of the hearing, the Division asserted that a timely petition was not filed by Roebling Liquors. At the hearing, Mr. Cooper asserted that he never received a notice of determination addressed to Roebling Liquors and that the first time he became aware that the Division was seeking taxes from Roebling Liquors was when he received a Notice and Demand.

52. In response to the timeliness issue, the Division submitted, among other things, affidavits by Daniel LaFar and Geraldine Mahon. The affidavit of Daniel B. LaFar, the Principal Mail and Supply Clerk in the Division's mail and supply room, attests to the regular procedures followed by the mail and supply room staff in the ordinary course of its business of delivering

outgoing certified mail to branches of the U.S. Postal Service ("USPS"). Mr. LaFar states that after a notice is placed in the "outgoing certified mail" basket in the mail room, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail room clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the mail record. Once the envelopes are stamped, Mr. LaFar maintains that a member of the mail room staff delivers them to a branch of the USPS in Albany. The postal employee affixes a postmark and his or her signature or both to the certified mail record as an indication of receipt by the USPS. According to Mr. LaFar, the certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail. Mr. LaFar states that in this case "the postal employee affixed a Postmark to every page of the certified mail record, circled the total number of pieces and initialed the certified mail record to indicate that this was the total number of pieces received at the Post Office." Mr. LaFar explained in this affidavit that his:

> knowledge that the postal employees circled the 'total number of pieces' for the purpose of indicating that 307 pieces were received at the Post Office is based on the fact that the staff of the Department's Mail Processing Center specifically request that the postal employees acknowledge, on the last page of the certified mail record, the amount of items received by either 1) circling the number following the phrase 'total pieces and amounts listed' if the number of pieces received equals that listed or 2) by writing in the total number received after the phrase 'total pieces received at Post Office.' (Division's exhibit "U.")

In the ordinary course of business, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

53. In her affidavit, Ms. Mahon, a principal clerk of the Case and Resource Tracking System ("CARTS") control unit, stated that as part of her regular duties she supervises the processing of notices of deficiency and determination prior to their mailing. Ms. Mahon receives

a computer printout referred to as the "certified mail record." Each of the notices is assigned a certified control number which is recorded on the certified mail record.

54. The certified mail record pertaining to the mailing on December 13, 1993 consisted of 28 fan-folded (connected) pages and included the Notice of Determination issued to Roebling Liquors, Inc. Ms. Mahon described the certified mail record as having all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected unless she requests otherwise. The document itself consists of 28 pages each with 11 entries with the exception of page 28 which has 10 entries. Having examined the document, Ms. Mahon certifies that it is a true and accurate copy of pages 1, 10 and 28 of the certified mail record issued by the Division on December 13, 1993 which includes Notice of Determination L 008312713 issued to Roebling Liquors, Inc. In the upper left hand corner of the certified mail record, the date "12/2/93" appears and was changed manually to "12/13/93". The original date, December 2, 1993, was the date that the certified mail record was printed, which is approximately 10 days in advance of the anticipated mailing of the notices. This procedure allows for sufficient lead time for the notices to be manually reviewed and processed for postage, etc., by the Division's mechanical section. The handwritten change made to the date was made by personnel in the Division's mail room who are responsible for altering the date so that it conforms to the actual date the notices and the certified mail record were delivered into the possession of the U.S. Postal Service.

55. Ms. Mahon further indicates that each statutory notice is placed in an envelope by Division personnel and then delivered into the possession of a postal service representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the certified mail

record. In this case the postal representative initialed page 28 of the certified mail record and affixed a postmark to each of the 28 pages.

56. Ms. Mahon's affidavit indicates that in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail. Ms. Mahon concludes that the procedures followed and described were the normal and regular procedures of the CARTS control unit on December 13, 1993.

57. On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. LaFar concluded that on December 13, 1993 an employee of the mail and supply room delivered a piece of certified mail addressed to Roebling Liquors, Inc. to the Roessleville Branch of the United States Postal Service in Albany, in a sealed postpaid envelope for delivery by certified mail. In addition, based on his review of the documents, Mr. LaFar determined that a member of his staff obtained a copy of the certified mail record, with the postmark delivered to and accepted by the Postal Service on December 13, 1993 for the records maintained by the CARTS control unit of the Division. He further concluded that the regular procedures comprising the ordinary course of business for the staff of the mail and supply room were followed in the mailing of the item of certified mail at issue herein.

58. The Division offered a certified mailing record and a copy of the Notice of Determination issued to Roebling Liquors, Inc. On its face, the information on the certified mailing record corresponds with the description set forth in the affidavit. Among other things, the certified mail record shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE - ASSESSMENTS RECEIVABLE - CERTIFIED RECORD FOR ZIP + 4 MINIMUM DISCOUNT MAIL." In the upper right-hand corner, the pages are numbered from 1 to 28. The upper left-hand corner of each page of the

certified mail record contains the printed date of "12/2/93". On the first page, this date was crossed out and a new date of "12/13/93" was written above the original printed date. Each page contains columns labeled "Certified No.," "Notice Number," "Name of Addressee, Street and P.O. Address," "Postage," "Fee" and "RR Fee." Page 10 contains an entry which sets forth Roebling Liquors, Inc.'s name and address, a notice number (L 008312713) and a certified control number (P 911 006 982). The notice number and the certified control number correspond with those found on the copy of the notice. On the final page, page 28, the "total pieces and amounts listed" is stated to be 307. Also, the number 307 is circled adjacent to the statement "total pieces received at the post office." The total number of pieces of certified mail recorded on the last page of the certified mail record corresponds with the total number of certified numbers. It also corresponds with the total postal fees recorded on the form of $307.00 at a stated fee of $1.00 per piece of mail. A stamp of "December 13, 1993" from the Roessleville Branch of the United States Postal Service appears on each page of the certified mailing record. Initials are handwritten near the stamp on the last page of the certified mailing record.

59. The copy of the Notice of Determination issued to Roebling Liquors, Inc. is addressed to 311 Roebling Street, Brooklyn, NY 11211-6204 and bears a date of December 13, 1993. This is the same address as appears on the certified mailing record. It also states that sales and use taxes are due under Articles 28 and 29 of the Tax Law in the amount of $302,806.60 plus interest in the amount of $91,994.31 and penalty in the amount of $225,159.94 for a balance due of $619,960.85.

60. The Division also offered affidavits from Daniel LaFar and Geraldine Mahon pertaining to the mailing of the Notice of Determination to Sidney Cooper. The affidavits were

identical in all respects to those described in Findings of Fact "52" through "57" except that they refer to the mailing to Mr. Cooper.

61. On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. LaFar concluded that on December 3, 1993 an employee of the mail and supply room delivered a piece of certified mail addressed to Sidney Cooper to the Roessleville Branch of the United States Postal Service in Albany, in a sealed postpaid envelope for delivery by certified mail. In addition, based on his review of the documents, Mr. LaFar determined that a member of his staff obtained a copy of the certified mail record, with the postmark delivered to and accepted by the Postal Service on December 3, 1993 for the records maintained by the CARTS control unit of the Division. He further concluded that the regular procedures comprising the ordinary course of business for the staff of the mail and supply room were followed in the mailing of the item of certified mail at issue herein.

62. The certified mail record pertaining to the mailing on December 3, 1993 consisted of seven fan-folded (connected) pages and included the Notice of Determination issued to Sidney Cooper. Ms. Mahon described the certified mail record as having all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected unless she requests otherwise. The document itself consists of 7 pages each with 11 entries with the exception of page 7 which has 7 entries. Having examined the document, Ms. Mahon certifies that it is a true and accurate copy of the certified mail record issued by the Division on December 3, 1993 which includes Notice of Determination L 008315420 issued to Sidney Cooper. In the upper left hand corner of the certified mail record, the date "12/2/93" appears and was changed manually to "12/3/93." The original date, December 2, 1993, was the date that the certified mail record was printed, which usually is approximately 10 days in advance

of the anticipated mailing of the notices. This procedure allows for sufficient lead time for the notices to be manually reviewed and processed for postage, etc., by the Division's mechanical section. The handwritten change made to the date was made by personnel in the Division's mail room who are responsible for altering the date so that it conforms to the actual date the notices and the certified mail record were delivered into the possession of the U.S. Postal Service.

63. The Division offered a certified mailing record and a copy of the Notice of Determination issued to Sidney Cooper. On its face, the information on the certified mailing record corresponds with the description set forth in the affidavit. Among other things, the certified mail record shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE - ASSESSMENTS RECEIVABLE - CERTIFIED RECORD FOR NON-PRESORT MAIL." In the upper right-hand corner of the page, the pages are numbered from 1 to 7. The upper left-hand corner of each page of the certified mail record contains the printed date of "12/2/93". On the first page, this date was crossed out and a new date of "12/3/93" was written above the original printed date. Each page contains columns labeled "Certified No.," "Notice Number," "Name of Addressee, Street and P.O. Address," "Postage," "Fee" and "RR Fee." Page one contains an entry which sets forth Sidney Cooper's name and address, a notice number (L 008315420) and a certified control number (P 911 205 401). The notice number and the certified control number correspond with those found on the copy of the notice. On the final page, page 7, the "total pieces and amounts listed" is stated to be 73. Also, the number 73 is circled adjacent to the statement "total pieces received at the post office." The total number of pieces of certified mail recorded on the last page of the certified mail record corresponds with the total number of certified numbers. It also corresponds with the total postal fees recorded on the form of $73.00 at a stated fee of $1.00 per piece of mail. A

stamp of "December 3, 1993" from the Roessleville Branch of the United States Postal Service appears on each page of the certified mailing record. Initials are handwritten near the stamp on the last page of the certified mailing record.

64. The copy of the Notice of Determination issued to Sidney Cooper is addressed to 44 W 62 ST #29A, New York, NY 10023-7014 and bears a date of December 13, 1993. This is the same address as appears on the certified mailing record. It also states that sales and use taxes are due under Articles 28 and 29 of the Tax Law in the amount of $302,806.60 plus interest in the amount of $91,994.31 and penalty in the amount of $225,159.94 for a balance due of $619,960.85.

65. The Division expects notices to be mailed on the date listed on the notice. There are no exceptions to this rule. Accordingly, where, as here, there are two notices dated December 13, 1993 they should have been mailed on the same day. Since they did not, an error arose at some juncture.

66. As indicated earlier, notices are printed 10 days in advance to allow for manual review. Notices designated for manual review are on a different list from the regular mailing list.

67. The machine which inserts the mail checks the total number of documents but there is no check in Ms. Mahon's processing function which examines whether the log comports with the Notice of Determination as to names and addresses.

68. Mailing logs are produced in zip code order. Since Roebling Liquors and Sidney Cooper have different zip codes, they would not appear together on the mailing log.

69. Separate batch headers are printed for notices of determination and for mailing logs. The AD-84 is a form used by Ms. Mahon's section to tell the mechanical and mailing services what is being sent to them, when it has to be mailed and any other pertinent information. The

batch header for the notices of determination and the batch header for the corresponding mailing log have the same job ID number. When the AD-84 is prepared, the two numbers are matched up. The headers are destroyed after they are checked.

70. The TCL number is a number that is printed at the bottom of the notice of determination issued to Roebling Liquors. If something happened to the notice before it was mailed, Ms. Mahon could use the TCL number to ask the "computer room" to print a reproduction of the bill. After a notice is mailed, a hard copy of the notice is stored in a box with other notices that were printed as part of the same batch. Through the use of the identification number, Ms. Mahon would be able to locate a copy of the document. Ms. Mahon has never been unable to find a document.

71. Mr. LaFar's office checks the AD-84 for mail dates to determine if it was received in a timely manner. Thereafter, the notices are placed in an automatic inserting machine which folds the notice, places the notices in an envelope and weighs it for postage. Mr. LaFar's office also checks the certified numbers to make sure that they are in order and spot-checks the names and addresses. The mail room checks the beginning certified number and the last certified number on a page and counts the number of pieces in between. The mail room also checks that the certified numbers are in consecutive order. The mail room only performs a spot check on whether the names and addresses on the notices conform with the mailing log.

72. After the mail is processed by the machines, it is set in a staging area depending on the date. Two couriers take the mail to the post office at approximately 9:00 A.M. At the post office, the postal clerk checks the number of pieces, postage and date. He also stamps the certified mailing record and if the number of pieces is correct, he circles the number. If the number is wrong, he makes the correction and notifies the Division's mail room. It is possible

that the postal clerk will find fewer pieces of mail than the Division anticipated were being sent for mailing. This could happen if a piece of mail were damaged in the mailing machine.

73. Undeliverable mail is returned to the nixing department. The mail room does not know what is returned.

74. The return receipt card from certified mail is returned to the originating office.

75. Before it is sent, mail is stored in a caged area in postal containers. The doors are not locked during the day when the mail clerks are present.

76. The post office will only accept a mailing log that is dated the day it is brought in.

CONCLUSIONS OF LAW

A. At the outset, the parties have raised a series of procedural issues which will be discussed seriatim. As noted, the Division asserts that a timely petition was not filed on behalf of Roebling Liquors. In response, Mr. Cooper asserts that he never received the notice of determination issued to Roebling Liquors and challenges the mailing procedures followed by the Division.

B. Tax Law § 1147(a)(1) provides as follows:

> Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. The notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice.

C. Upon receipt of the notice of determination or deficiency, a taxpayer has the option of requesting a conciliation conference with BCMS, rather than filing a petition (20 NYCRR

4000.3[a]). Such a request must also be filed within the 90-day period for filing a petition and effectively suspends the running of the limitations period for the filing of a petition (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[c]). If a taxpayer fails to file a petition or a request for a conciliation conference protesting the statutory notice, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (***see, Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989).

D. Where the taxpayer files a petition or a request for a conciliation conference, but the timeliness of the petition or request is at issue, the Division has the burden of proving proper mailing of the notice in question (***see, Matter of T. J. Gulf, Inc. v. New York State Tax Commn***., 124 AD2d 314, 508 NYS2d 97; ***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv***., Tax Appeals Tribunal, May 23, 1991).

E. The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (***see, Matter of Katz, supra***; ***Matter of Novar TV & Air Conditioner Sales & Serv., supra***).

F. Through the evidence it has submitted, the Division has established that the notice of determination was, in fact, mailed to Roebling Liquors on December 13, 1998. First, the Division has introduced adequate proof of its standard mailing procedures via the testimony and affidavits of Division employees involved in the notice generation and issuance process. In particular, the LaFar and Mahon affidavits generally describe the various stages of the issuance process and, in addition, attest to the veracity of the copies of the notice of determination sent to

Roebling Liquors on December 13, 1993 as certified number P 911 006 982 and assessment number L 008312713.

G. Second, the Division established that the general issuance procedures were followed on December 13, 1993. The certified mail record for December 13, 1993 is presented in its entirety and contains, on the final page, a total for the number of items received at the post office. This number has been circled to indicate that 307 pieces were received at the post office. The Mahon affidavit corroborates the fact that there are 307 certified control numbers in the mail record, noting that, with the exception of page 28 which has 10 numbers, there are 11 such numbers per page on pages 1 through 27. Further, each of the 28 pages of the certified mail record submitted -- most notably, page 10 on which Roebling Liquor's notice is listed -- is date stamped December 13, 1993 by the United States Postal Service.

H. In short, the testimony and affidavits which are consistent with the information listed on the face of the notice along with the certified mail record and notice in evidence, provide direct evidence confirming the December 13, 1993 date and mailing of the notice to Roebling Liquors. Moreover, the presence of the Postal Service date stamp on page 10 of the December 13, 1993 certified mail record - the page containing the information regarding the notice of determination issued to petitioner - directly supports the conclusion that the mailing of said notice occurred as claimed by the Division (***see***, ***Matter of Katz, supra***).

I. In response to the mailing issue, Mr. Cooper argues that there are numerous inadequacies in the mailing procedures which prevent the presumption of receipt from being raised. In support of his position, Mr. Cooper refers to the following points: ten-day delay in mailing, failure to use mailing receipts in consecutive order, failure to check off each document to the mailing log and vice versa, the post office receipt of documents by the gross method rather

than the individual method, the failure of the Division's witnesses to disclose prior problems regarding the mail, lack of post office confirmation of the problems experienced in the Division's certified mailing system, the practice of warehousing notices for ten days prior to mailing, failure to require post office receipts pursuant to each certified mailing and to trace the same back to each log, failure to permit examination of unredacted log, no one else employs a similar system, and the failure to produce the information requested.

J. The foregoing arguments are rejected. The procedures employed herein have been accepted as sufficient to create the presumption of receipt (***see***, ***Matter of T.J. Gulf, Inc. v. New York State Tax Commn., supra***). The fact that petitioner Cooper may be able to suggest procedures for a more reliable system does not establish that the procedures followed with respect to the mailing to Roebling Liquors were insufficient to raise the presumption of receipt. It is noted that the certified mailing log was redacted in order to prevent a possible violation of the secrecy provisions of the Tax Law. (Tax Law § 1146.) Moreover, Mr. Cooper was given the opportunity to review the documents which he requested. However, at the conclusion of the hearing he decided they were no longer needed (***see***, Tr., p. 1115). Lastly, it is recognized that the Division did not follow its standard mailing procedures with respect to the mailing to Mr. Cooper on December 3, 1993. Nevertheless, it does not follow that the Division did not follow its standard mailing procedures with respect to the mailing to Roebling Liquors simply because it did not follow its standard mailing procedures with regard to the mailing to Mr. Cooper.

K. Since Roebling Liquors did not file a timely petition for a hearing or a timely request for a conciliation conference, there is no jurisdiction to review the notice of determination mailed to it on December 13, 1993 (***see, Matter of Halpern v. Chu***, 138 AD2d 915, 526 NYS2d 660,

appeal dismissed in part, denied in part, 72 NY2d 938, 532 NYS2d 845). Moreover, since it is concluded that the Division issued a notice of determination to Roebling Liquors on December 13, 1993, the argument raised at the hearing that the subsequent issuance of the notice and demand is barred by the statute of limitations is rendered moot.

L. At the hearing, Mr. Cooper argued that the conciliation order was untimely issued. The record shows that the conciliation conferee's consent was issued on March 31, 1995. Petitioners did not execute the consents within 15 days and therefore the proceedings were deemed concluded on April 15, 1995. The conciliation conferee had 30 days from this date to issue his order (20 NYCRR 4000.5[c][3][iii]). Since the conciliation orders were issued on May 12, 1993, they were timely.

M. It is Mr. Cooper's position that, by seeking information from Roebling Liquor's suppliers, ROD

> engaged in massive, warrantless, coercive, computerized 'fishing expeditions' under color of law, absent probable cause, in search of potential clues to wrongdoing violative of the protections afforded New York State citizens and businesses under both Federal and NYS constitutions to include controlling case law. (Petitioner's brief, part 1, page 1.)

Mr. Cooper requests, among other things, that all of the evidence which was illegally obtained be suppressed. In support of his position, Mr. Cooper relies upon the Fourth, Fifth and Fourteenth Amendments to the constitution of the United States and Article 1, sections 6 and 12 of the New York State Constitution.

N. The foregoing argument fails to recognize the nature of the information which ROD sought. A vendor is required to maintain records in support of its business operations and its sales tax liability (Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Upon demand by the Division, a vendor must make the records available for inspection and examination (20 NYCRR 533.2[a][2];

see, Matter of Continental Arms Corp. v. State Tax Commn., 72 NY2d 976, 534 NYS2d 362, 363).

As noted by the Division, the constitutional concerns raised by Mr. Cooper were addressed in ***Matter of Glenwood TV v. Ratner*** (103 AD2d 322, 480 NYS2d 98, ***affd*** 65 NY2d 642, 491 NYS2d 620, ***appeal dismissed*** 474 US 916, 88 L Ed 2d 250). In ***Glenwood,*** the Appellate Division authorized the nonconsensual periodic inspections of the records of a licensed television and radio repair business without a search warrant. In reaching the foregoing conclusion, the court first noted that "[t]he analysis of any search and seizure claim, and correspondingly the Fourth Amendment's warrant clause, must begin with a threshold determination of whether the subject of the search possesses a reasonable expectation of privacy in the area of items searched (citations omitted)." (***Matter of Glenwood TV v. Ratner***, ***supra,*** 480 NYS2d at 102.) The respondents in ***Glenwood TV*** claimed that it was unnecessary to submit the records for inspection without a warrant. The court then explained that "[t]he difficulty with this thesis is that the warrant clause has long been deemed inapplicable to 'required records' which 'are in the public domain' and, as a result, 'their custodian is not afforded the traditional protections of the fourth and fifth amendments (citations omitted).'" (***Matter of Glenwood TV v. Ratner***, ***supra,*** 480 NYS2d at 102.)

The court noted that the statutory schemes which require licensees to make their books and records available for examination are common (***Matter of Glenwood TV v. Ratner***, ***supra,*** 480 NYS2d at 103.) It then explained that the authority to inspect records was analogous to the power of an agency to issue a subpoena duces tecum (***id***). If there is a reasonable exercise of the authority to inspect and if judicial review is available before the records must be produced, then the Fourth Amendment is satisfied (***id***).

Lastly, since the administrative orders could only be enforced through the courts, there was a forum for the licensee to obtain judicial review prior to enforcement. The court noted that under the procedures at issue in ***Glenwood TV***, once the petitioners refused to comply, the commissioner's only recourse was administrative and judicial process.

O. Here, as in ***Glenwood TV***, the Division sought records which must be made available for inspection upon demand.[2] Such records are not afforded the traditional protections of the Fourth or Fifth Amendments. Moreover, as in ***Glenwood TV***, the Division's request for records was very limited. Additionally, there is certainty and regularity in the application of the sales and use tax law which provides an adequate substitute for a warrant (***Matter of Glenwood TV v. Ratner***, ***supra,*** 480 NYS2d at 103). Lastly, if the Division found it necessary to issue a subpoena, a liquor wholesaler would have the opportunity to obtain judicial review prior to enforcement (CPLR 2304). In view of the foregoing, Mr. Cooper's argument that the Division's practices violated the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and Article 1, sections 6 and 12 of the New York State Constitution is rejected.

P. The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of AGDN, Inc***. (Tax Appeals Tribunal, February 6, 1997) as follows:

> a vendor such as AGDN is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (***see***, Tax Law §§ 1138[a]; 1135; 1142[5]; ***see***, ***e.g.***, ***Matter of Mera Delicatessen***, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained 'shall include a true copy of each sales slip, invoice, receipt, statement or memorandum' (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, 'the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external

[2]It is this feature which distinguishes this case from the authorities relied upon by Mr. Cooper.

> indices . . .' (Tax Law § 1138[a]; ***see, Matter of Chartair, Inc. v. State Tax Commn.***, 65 AD2d 44, 411 NYS2d 41, 43).
>
> When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (***Matter of Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869); exactness is not required (***Matter of Meyer v. State Tax Commn***., 61 AD2d 223, 402 NYS2d 74, ***lv denied*** 44 NY2d 645, 406 NYS2d 1025; ***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451).

Q. Here, Mr. Cooper maintained books and records which were available to the Division. Following an initial examination of the books and records, it appeared to the Division that the books and records accurately reflected Roebling Liquors' sales and use tax liability and that, as a result, the Division was prepared to recommend a no-change audit. Under these circumstances, Mr. Cooper submits that there was no basis to use external indices.

R. The foregoing argument is without merit. Verification of a taxpayer's books and records is a critical part of the audit process (***see***, ***Matter of Giordano v. State Tax Commn.***, 145 AD2d 726, 535 NYS2d 255). There is no basis to conclude

> that verification of a taxpayer's books and records by the Division is dependent upon a finding of impropriety or wrongdoing as a result of the examination of the books and records, or that the mere passage of time after an initial examination of records precludes efforts by the Division, within the audit period and prior to the issuance of the Notice of Determination, to verify such records. (***Matter of Morano's Jewelers of Fifth Avenue***, Tax Appeals Tribunal, May 4, 1989).

Prior to the conclusion of the audit, it came to the attention of the Division that Roebling Liquors had far more purchases than was reflected on its books and records. Under these circumstances, it was reasonable for the Division to conclude that Roebling Liquors's books and records were inadequate and that it was appropriate to resort to the use of external indices.

S. Mr. Cooper contends that there was no foundation for the use of the third-party numbers. It is submitted that there must be some foundation "to show the accuracy and trustworthiness of the records submitted as evidence." (Petitioners' brief, part 2 of 2, p. 8.) This argument misstates the burden of proof. When the Division adopts an audit method which is reasonably calculated to determine the amount of tax due, the burden of proof shifts to the taxpayer to demonstrate by clear and convincing evidence that the audit method or amount of tax assessed is unreasonable (***Matter of AGDN***, ***supra***; ***Matter of Meskouris Bros. v. Chu***, ***supra***). In this case, since no evidence has been offered to show that the amount of purchases reported by the liquor wholesalers was erroneous, Mr. Cooper has not shown that the audit method employed was unreasonable.

T. Mr. Cooper's brief next examines the numerous errors in the Statement of Additional Tax Due, the Statement of Penalty Computation By Quarter, the Statement of Proposed Audit Adjustment and in the Notice of Determination. At this juncture, Mr. Cooper's concern with the mathematical errors in the foregoing documents is academic. The only document which is in issue is the Notice of Determination, mailed December 3, 1993, as modified by the conciliation order. In reaching this conclusion, it is recognized that there were numerous errors in the documents which unfortunately caused needless consternation. It is also recognized that greater communication between the Division and Mr. Cooper might have been helpful. Lastly, it is apparent that the auditor's responses to Mr. Cooper's questions at the hearing could have been more direct. However, none of the foregoing factors is a reason for canceling tax which is lawfully due.

U. The question remains whether the Division correctly determined the amount of sales and use taxes due. As noted earlier, Mr. Cooper outlined his position in a chart which is set forth

in the findings of fact (***see,*** Finding of Fact "41"). The first objection raised by Mr. Cooper pertains to Roebling Liquors' inventory. It is submitted that the Division did not give any consideration to the changes in the beginning and ending inventory, from 1991 through 1993, which was necessitated by the increase in sales. Mr. Cooper also contends that there were substantial amounts of inventory located at wholesalers' premises which was later sold and recovered as sales tax in subsequent periods. Moreover, there were substantial amounts of merchandise remaining in inventory as of May 31, 1993 which could not have been sold.

V. The foregoing argument fails to recognize the audit methodology employed. The audit at issue herein was based on purchases. Therefore, beginning or ending inventory would not normally be considered a factor (***see***, ***Matter of Disanco Home Center Corporation***, Tax Appeals Tribunal, February 16, 1989).

W. Mr. Cooper is correct that in order for an audit methodology based on purchases to accurately reflect sales, beginning and ending inventories would have to be the same. If the inventory at the conclusion of the audit period exceeded the inventory at the beginning of the audit period, then it would be reasonable to surmise, other things being equal, that a portion of the purchases during the audit period were not sold.

A reasonable estimate of Roebling Liquors' beginning inventory at the commencement of the audit period may be obtained from the beginning inventory reported on the U.S. Corporation Income Tax Return of Roebling Liquors for the year 1991. On this return, Roebling Liquors reported that its inventory at the beginning of the year was $185,000.00. The inventory of Roebling Liquors at the conclusion of the audit period may be secured from the testimony and documents presented by Mr. Cooper which shows the following:

Inventory on hand, May 31, 1993	$418,752.00
Inventory on hand, floor estimate	150,000.00
Inventory on hand, not counted or considered	9247.38
	$577,999.38

Subtracting the ending inventory of $577,999.38 from the beginning inventory of $185,000.00 results in a reduction in the purchases, and consequently sales, of $392,999.38. Mr. Cooper has also established that the liquor suppliers reported their gross sales to Roebling Liquors while his purchases were recorded net of a 1% purchase discount. Therefore, the purchases reported by the liquor wholesalers should be reduced by the 1%. Lastly, Mr. Cooper has established that he incurred losses from pilferage at a rate of 3%. Therefore, purchases, and consequently sales should be reduced by the 3% rate of pilferage loss.

X. The remaining adjustments sought by Mr. Cooper are rejected. It is noted that if Roebling Liquors made overpayments after the audit period, its remedy is to apply for a refund. There is no authority to apply the claimed overpayments of a later period to the periods in issue. In this regard, it is noted that the audit period ended at May 31, 1993 because the Division did not request books and records after this date. It would have been improper to extend the audit period after this date (***see, Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109). Moreover, the purchases which were ordered and not delivered are properly considered as purchases during the audit period. It is noted that, other things being equal, this amount would presumably be offset by those purchases which were made prior to the audit period but not delivered until after the audit period began and therefore not included in the audit.

There are two remaining points which should be made. First, as stated at the hearing, the prior proceedings before in the Bureau of Conciliation and Mediation Services cannot be considered as precedent or be given any force or effect (Tax Law § 170[3-a][a]; ***Matter of Sandrich, Inc. T/A Bruce's Yogurt***, Tax Appeals Tribunal, April 15, 1993). Second, it is acknowledged that the audit method employed is not exact. However, exactness is not required when the taxpayer's failure to maintain proper records prevents it (***Matter of Markowitz v. State Tax Commn***., 54 AD2d 1023, 388 NYS2d 176, 177, ***affd*** 44 NY2d 684, 405 NYS2d 454

Y. Mr. Cooper argues that, as modified following the conciliation conference, the statutory penalty assessed pursuant to Tax Law § 1145(a)(1)(i) is $90,709.14. Since the amount assessed is not supposed to exceed 30 percent, Mr. Cooper submits that this figure is erroneous.

Mr. Cooper's contention that the penalties were erroneously calculated is without merit. The penalty imposed by Tax Law § 1145(a)(1)(i) for failing to file a return or to pay or to pay over any tax is ten percent plus an additional one percent for each month or fraction thereof during which the failure continues up to 30 percent. Thus, contrary to Mr. Cooper's assertion, the penalty is not based on the total amount of tax that is due for the entire audit period. Rather, the amount is calculated separately for each quarterly period for which there is a failure. Here, it appears that the penalty imposed pursuant to Tax Law § 1145(a)(1)(i) was properly computed.

Z. The petition of Roebling Liquors, Inc. is dismissed. The petition of Sidney Cooper is granted to the extent of Conclusion Law "W" and the Division is directed to modify the Notice of Determination mailed to Mr. Cooper accordingly; except as so granted, the petition is otherwise denied and the Notice of Determination, as modified by the conciliation order, is sustained together with such penalties and interest as may be lawfully due.

DATED: Troy, New York

November 5, 1998

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE