

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ON-THE-ROX LIQUORS, LTD.	:	DECISION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1977	:	
through August 31, 1980.	:	

Petitioner, On-The-Rox Liquors, Ltd., 4382 Bailey Avenue, Buffalo, New York 14226, 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, 1977 through August 31, 1980 (File No. 34140).

A small claims hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on May 23, 1984 at 9:15 A.M., with all briefs to be submitted by July 5, 1984. Petitioner appeared by Joel L. Daniels, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined that certain sales by petitioner were not, as claimed, exempt from sales tax.

FINDINGS OF FACT

1. On May 20, 1981, following a field audit, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the quarterly periods ended November 30, 1977 through August 31, 1980, assessing additional tax due in the amount of \$24,704.99, plus interest. A consent form previously executed on December 18, 1980 by petitioner's duly

authorized representative allowed assessment for the period at issue to be made at any time on or before December 20, 1981.

2. The assessment at issue results, in major part, from the disallowance, on audit, of all sales claimed by petitioner to have been made to various organizations having the status of being exempt from sales and use taxes.¹

3. Petitioner is a retail liquor store which has been operated since approximately 1972 by Richard Bergman and Nicholas Shosho.

4. Petitioner kept track of its exempt sales by the use of a daily sheet kept next to its cash register. When a purchase was made by an organization claiming exempt status, the employee operating the cash register listed the dollar amount of the purchase on this daily sheet as a nontaxable sale.² These daily sheets were given to petitioner's accountant at the end of each month. He, in turn, summed the individual sale amounts to arrive at total nontaxable sales per day, which daily totals were entered, together with daily totals for wine sales, liquor sales, tax, etc., on monthly ledger sheets. The daily sheets were not retained.

5. The daily sheets used by petitioner did not include a breakdown of the items purchased or any reference to the purchaser or the organization for which (under whose certificate) the purchase was made, but rather only listed the dollar total of each purchase. No separate sales invoices were prepared on such exempt sales, nor was there any other documentary record kept of individual exempt purchasers and/or the items they purchased.

¹ Of the \$24,704.99 amount of tax assessed, \$24,635.80 represents tax due based on claimed but disallowed exempt sales. The remaining \$69.19 represents tax found to have been collected and accrued by petitioner but not remitted. Petitioner apparently does not contest this latter amount.

² Customer count, underrings and overrings on the cash register were also recorded on these daily sheets.

6. Mr. Shosho, who generally worked at the store six days per week during the period at issue, testified that he did not always personally know the individual customers who came to the store to make purchases on behalf of exempt organizations. In such instances, Mr. Shosho checked to see if the organization for which the customer stated he was buying had an exemption certificate on file and, if so, assumed the customer represented that organization and made the sale without imposing tax.

7. Petitioner submitted in evidence certificates relating to approximately seventy different organizations possessing exempt status. These certificates were all taken from petitioner's files and pertained to the exempt organizations to which petitioner made sales on a continuing basis prior to, during and after the period at issue. Mr. Shosho noted that there may, in fact, have been more exempt organizations sold to by petitioner.

8. Mr. Shosho explained that petitioner advertised extensively and that there are a large number of exempt organizations near its location. He testified that a substantial amount of petitioner's sales, approximately twenty percent, were sales to exempt organizations. The portion of petitioner's claimed exempt sales (disallowed on audit) compared to its gross sales (\$351,940.00/\$1,384,691.00) reflects that approximately 25.4 percent of petitioner's sales are reported as exempt sales.

9. Petitioner was previously audited by the Audit Division in or about 1976. Petitioner's method of record keeping regarding exempt sales was the same during both audit periods. No deficiency in tax based on disallowed exempt sales was found on the previous audit.³ The previous auditor asked to

³ It was not made clear at the hearing whether any deficiency was found in any area as a result of the prior audit.

see petitioner's exempt certificates but, unlike the present audit, there was no request for or requirement of any other records in regard to claimed exempt sales. Petitioner maintains that since its record keeping method regarding exempt sales was not questioned on the prior audit, such method was deemed acceptable and may not be questioned on later audits or give rise to the instant deficiency.

10. Between the time of conclusion of the audit and the instant hearing, petitioner made diligent efforts to contact (using the exemption certificates in its file) the various exempt organizations which had made purchases from petitioner in order to ascertain and obtain substantiation of the dollar amount of sales made to these organizations during the audit period. Mr. Shosho testified that some organizations were helpful while others were not, allegedly out of fear that they would be subjected to audit. As a result of its efforts, petitioner secured substantiation of sales to thirteen exempt organizations during the audit period in the aggregate amount of \$35,353.23. The Audit Division concedes such sales as exempt and agrees to a reduction of the deficiency based thereon.

CONCLUSIONS OF LAW

A. That receipts from sales such as those at issue herein are presumed to be subject to tax until the contrary is established, and the burden of proving that any receipts are not subject to tax rests with the person required to collect tax or the customer [Tax Law section 1132(c)].

B. That petitioner's method of record keeping left no means whereby sales reported as exempt could be tied to or compared with exemption certificates maintained on file by petitioner. Without any means of identifying individual exempt sales, there was no way to determine, on audit, if all such sales were

made to exempt organizations or to individuals properly buying on behalf of exempt organizations. Had petitioner made out (and retained) sales invoices on claimed exempt sales, or at least noted on its daily sheets the name and/or the exempt organization number of the purchaser or its representative, claimed exempt sales could have been associated with the various exempt organization certificates and the propriety of making such sales without charging tax could have been verified. Mr. Shosho's own testimony indicates that not all purchasers were known personally by him, but that if such purchasers said they represented an exempt organization, and if petitioner had a certificate on file for that organization, the sale was made with no tax imposed under the assumption that the person was a representative of the exempt organization. While a vendor may rely upon presentation of a properly completed exemption certificate in making a tax free sale, such vendor's records must provide a means of identifying its sales so that, upon audit, claimed exempt sales may be checked and verified by relation to such exemption certificates. Here, no audit trail could be established to verify that all sales reported as nontaxable were properly exempt and that no tax was due. In sum, without a means of verification available, petitioner has not borne its burden of proving that its claimed tax exempt sales were, in fact, properly made.

C. That there was no proof that the Audit Division or this Commission had, as the result of a prior audit, sanctioned petitioner's method of recording exempt sales. The Audit Division was not precluded from re-examining the petitioner's method of making and recording exempt sales. The fact that no deficiency was assessed during a prior audit does not preclude the instant assessment nor warrant its cancellation.

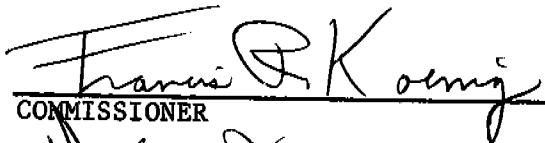
D. That the petition of On-The-Rox Liquors, Ltd. is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated May 20, 1981, after modification in accordance with Finding of Fact "10", is sustained.

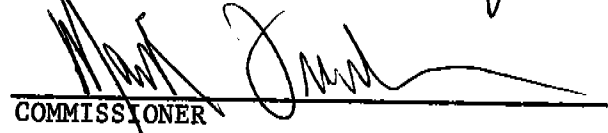
DATED: Albany, New York

MAR 06 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER