

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SPENSON, 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 June 1, 1979	:	
through May 31, 1982.	:	

Petitioner, Spenson, Ltd., 1000 Brush Hollow Road, Westbury, New York 11590, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1979 through May 31, 1982 (File No. 39938).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 6, 1985 at 1:15 P.M., with all briefs to be submitted by April 6, 1985. Petitioner appeared by Donald T. Kiley, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division accurately determined the sales taxes due from Barrelhouse Beverage Distributors, Inc.

FINDINGS OF FACT

1. On June 15, 1982, the Audit Division received a Notification of Sale, Transfer or Assignment in Bulk from petitioner, Spenson, Ltd., regarding the purchase of a wholesale and retail beverage business operated by Barrelhouse Beverage Distributors, Inc. ("Barrelhouse"). Said notification indicated

June 1, 1982 as the scheduled date of sale and listed the total sales price of the business as \$145,000.00.

A bulk sales tax of \$725.00 was remitted with the notification.

2. On June 22, 1985, the Audit Division notified petitioner, as purchaser, of a possible claim for New York State and local sales and use taxes due from the seller.

3. The Audit Division attempted to conduct an audit of the books and records of Barrelhouse; however, no records were ever made available. As a result, the Audit Division estimated taxes due of \$199,609.98 for the period June 1, 1979 through May 31, 1982. The estimate was based on disallowed nontaxable sales reported for periods when returns were filed (August 31, 1979, November 30, 1979, November 30, 1981 and February 28, 1982). The Audit Division estimated taxable sales of \$277,173.00 for each of the remaining periods under audit. These sales were based on the gross sales reported on the sales tax return filed for the period ending November 30, 1981, which sales were all held taxable.

4. On September 13, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period June 1, 1979 through May 31, 1982 for taxes due of \$145,000.00. The notice stated that the taxes were determined due from Barrelhouse and represented petitioner's liability, as purchaser, in accordance with section 1141(c) of the Tax Law. The notice, however, indicated that petitioner's liability was limited to \$145,000.00, the sales price of the business.

5. Petitioner did not contest its liability under section 1141(c) of the Tax Law for the taxes determined due from Barrelhouse. However, it took the position that the amount of the taxes assessed were excessive.

6. In September of 1981, petitioner was formed for the purpose of purchasing the beverage distributorship operated by Barrelhouse. Immediately thereafter, petitioner applied for a C License from the New York State Liquor Authority. The license was approved in late May, 1982 and the closing on the sale of the business took place on June 6, 1982.

As part of the agreement of sale, Barrelhouse agreed to continue operating while petitioner was securing the license so that it would be a viable, functioning distributorship at the time of closing. The owner of Barrelhouse was having financial difficulties and, in order to comply with the agreement, placed a manager in control of the operations from approximately July, 1981 to the closing date. The manager was responsible for the sales, making the purchases and maintaining the books and records.

7. Petitioner was unsuccessful in its attempts to obtain books and records from the owner of Barrelhouse. The manager, however, did provide petitioner the records he maintained for the period July 1, 1981 through June 6, 1982. These records consisted of purchase invoices, sales invoices for wholesale sales and a ledger showing retail sales in total on a daily basis. There were no cash register tapes or any other record that would serve as a verifiable record of taxable sales. The manager did not make any deposits of the receipts in the bank.

8. Petitioner analyzed the records furnished by the manager. The analysis showed that Barrelhouse purchased 123,042 cases of beverages, of which 91,951 cases were beer and 31,091 cases were soda. The purchases were further allocated

to product by the size of the container. From the sales invoices, petitioner determined that 99,483 cases were sold wholesale and the difference of 23,559 cases were attributable to retail sales. The cases available for retail sales were allocated to product by size and the average retail sales price was applied to the number of cases to arrive at retail sales of \$159,062.00 for the period July 1, 1981 through June 6, 1982.

Petitioner concluded from its analysis that since this amount did not take into account breakage, exempt retail sales, price increases and inventory, the retail sales of \$104,528.00 as shown in the ledger for this period reasonably reflected the actual retail sales of the business. Petitioner also concluded that there was a substantial increase in sales once the manager took control and such factor should be considered in estimating retail sales for prior periods.

9. The cost of the 123,042 cases referred to above was \$933,524.00. The wholesale sales from the invoices amounted to \$724,123.00. At the hearing, petitioner submitted additional invoices for wholesale sales of \$1,343.00.

10. Barrelhouse filed sales tax returns for the period ending November 30, 1981 and February 28, 1982 on which it reported gross sales of \$277,173.00 and \$271,411.00, respectively.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

Barrelhouse failed to provide the Audit Division with any books and records for audit. Accordingly, the Audit Division properly estimated the

taxes due from such information as was available and external indices pursuant to section 1138(a) of the Tax Law.

B. That petitioner has the burden of demonstrating by clear and convincing evidence that the amount of tax assessed was erroneous (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 A.D.2d 576).

The records offered by petitioner (Finding of Fact "7") were incomplete and useless for purposes of verifying taxable sales. Hand recorded entries in a ledger of retail sales for each day were not reliable records to satisfy the statutory requirements that records of individual sales be retained (Matter of Skiadas v. State Tax Commission, 95 A.D.2d 971).

C. That petitioner established that Barrelhouse made nontaxable wholesale beverage sales amounting to \$725,466.00 for the period July 1, 1981 through June 6, 1982. Therefore, the taxable retail sales determined by the Audit Division on audit are revised as follows:

Reported gross sales on returns filed for the period September 1, 1981 through February 28, 1982	\$ 548,584.00
Estimated gross sales for the periods July 1, 1981 through August 31, 1981 and March 1, 1982 through June 6, 1982 (\$91,431.00 average gross sales per month x 5 months and 6 days)	475,441.00
	<hr/> \$1,024,025.00
	<hr/> 725,466.00
Less: nontaxable sales	
Taxable retail sales for the period July 1, 1981 through June 6, 1982	\$ 298,559.00
Taxable retail sales for the period June 1, 1979 through June 30, 1981 (\$27,142 average per month x 26 months)	705,692.00
Total taxable sales	<hr/> \$1,004,251.00

In the absence of any records for the period June 1, 1979 through June 30, 1981, there is no basis to presume that retail sales were any less during said period.

D. That the petition of Spenson, Ltd. is granted to the extent indicated in Conclusion of Law "C"; the Audit Division is hereby directed to modify the

Notice of Determination and Demand for Payment of Sales and Use Taxes Due
issued September 13, 1982; and that, except as so granted, the petition is in
all other respects denied.

DATED: Albany, New York

OCT 30 1985

STATE TAX COMMISSION

Roderic A. Allen
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Jink
COMMISSIONER