

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
B. K. LIQUORS, INC. : 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 March 1, 1979 :
through November 30, 1981.

Petitioner, B. K. Liquors, Inc., 1134 Kensington Avenue, Buffalo, New York 14215, 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 March 1, 1979 through November 30, 1981 (File No. 41043).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York on July 22, 1985 at 1:15 P.M. and was continued to conclusion at the same offices on December 4, 1985 at 9:15 A.M., with all briefs filed by January 7, 1986. Petitioner appeared by Miserendino, Krull & Foley, P.C. (Philip Celniker, of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

- I. Whether petitioner was timely assessed taxes for the periods ended May 31, 1979 through November 30, 1981 inclusive.
- II. Whether the Audit Division properly treated as taxable petitioner's claimed sales to exempt organizations.

FINDINGS OF FACT

1. Petitioner B. K. Liquors, Inc. operated a retail liquor store in Buffalo, New York during the periods at issue.

2. The Audit Division issued to petitioner a Notice of Determination and Demand dated September 17, 1982 for the periods ended May 31, 1979 through August 30, 1981 asserting additional tax due of \$11,684.12 plus interest accrued to the date of the notice.

3. The Notice of Determination and Demand dated September 17, 1982 was mailed to petitioner on or before September 17, 1982 by certified mail, the return receipt therefor showing delivery thereof on September 18, 1982.

4. That petitioners executed a "Consent Extending the Period of Limitation for Assessment of Sales and Use Taxes" for the periods at issue authorizing assessment on or before September 20, 1982.

5. That petitioner timely protested the Notice of Determination and Demand asserting additional tax liability for the periods ended May 31, 1979 through November 30, 1981.

6. An audit of petitioner's books and records was performed. The audit report stated that the records of the business were found to be in "fair" condition. However, said records had sustained water damage. The auditor stated at the hearing that the records of the business were generally "good" and his characterization of the records as being "fair" was related more to the water damage than towards a finding of any inadequacy of said records.

7. Petitioner properly reported and paid sales tax upon all sales it considered taxable. Likewise, petitioner showed an acceptable markup over the costs of its purchases and its gross sales were therefore accepted as filed.

8. Petitioner's exempt sales in the amount of \$116,916.00 were denied non-taxable status based upon a failure to properly substantiate sales in such amount to exempt organizations resulting in the tax claimed due of \$11,684.12.

9. Petitioner reported a ratio of 89% taxable sales to 11% nontaxable sales on its sales tax returns, said nontaxable sales solely representing sales to exempt purchasers. Said exempt sales represented approximately thirty-nine (39) different purchasers.

10. The auditor attempted third party verification of said exempt sales by corresponding with the alleged purchaser organizations. While said verification did not substantiate the amount of \$116,916.00 in exempt purchases, at least 14 of the 39 organizations contacted verified making purchases from petitioner.

11. That petitioner had on file approximately 39 "exempt organization certifications" (Form ST-119.1). That the auditor checked the Department of Taxation and Finance's records and all of these certifications were properly filed with petitioner in the sense that the organizations listed on the certifications existed in the departments records as an exempt organization pursuant to section 1116 of the Tax Law, the exempt organization certificate "numbers" listed on each certificate correctly matched each of the named organizations, and thus, on their faces all appeared to be valid certifications.

12. Whenever a person made purchases purportedly on behalf of an exempt organization for which petitioner had on file a certification, petitioner wrote the name of the organization on the cash register tape attributable to that sale and then associated that tape in a file with the filed certificate.

13. Petitioner's exempt sales have decreased since the audit as petitioner now requires each purchaser to sign that they have authority to make purchases on behalf of and in the name of the exempt organization and petitioner is finding that many purchasers are unable or otherwise refusing to so certify.

CONCLUSIONS OF LAW

A. That section 1147(c) of the Tax Law provides that taxpayers may consent to extend the time within which tax may be determined and if such time is so extended the tax may be determined at any time within such extended period. Tax Law section 1147(a)(1) provides in pertinent part:

"A 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."

The Notice of Determination and Demand was properly mailed (and although not determinative was actually in fact delivered) within the extended period authorized by petitioner in which to determine its liability and the taxes were therefore timely determined.

B. That section 1132(c) of the Tax Law in pertinent part provided:

* * *

"Unless...the purchaser prior to taking delivery, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise which the tax commission may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. Where such a certificate or statement has been furnished to the vendor, the burden of proving that the receipt, amusement charge or rent is not taxable hereunder shall be solely upon the customer. The vendor shall not be required to collect tax from purchasers who furnish a certificate of resale or an exempt organization statement in proper form.

C. That Alcoholic Beverage Law Section 100(5) prohibits retail liquor stores from extending credit to purchasers.

D. That petitioner was furnished and did so receive exempt organization certifications in proper form. Petitioner, being a cash business, associated each cash register tape from a cash sale to each organization with the certificate

of such organization which it maintained on file. That though Part 529 of the Commission's Regulations may now, within the meaning and intent of section 1132(c) of the Tax Law, require that petitioner receive additional information from the exempt organization purchaser, to wit the individual purchasers' names and their authority to purchase on behalf of such organization, said regulations were not adopted and effective until November 24, 1982 and should not be construed to "retroactively" require petitioner to have maintained said additional information concerning his cash sales in prior periods. While petitioner now must ascertain additional information to complete exempt organization sale transactions, absent a showing of "bad faith" in originally accepting said certificates and making sales pursuant thereto prior to the November 24, 1982 date, petitioner should not be held liable to police said purchasers (see Saf-Tee Plumbing v. Tully, 77 A.D.2d 1). Petitioner is therefore released from liability for collection of the taxes at issue pursuant to section 1132(c) of the Tax Law.


E. That the petition is granted and the Audit Division is directed to cancel the Notice of Determination and Demand dated September 17, 1982.


DATED: Albany, New York

STATE TAX COMMISSION

APR 21 1986


PRESIDENT


COMMISSIONER


COMMISSIONER