

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MYRON MARKO,	:	DECISION
OFFICER OF H & H BEER AND SODA SERVICE, INC.	:	
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, Myron Marko, Officer of H & H Beer and Soda Service, Inc., c/o Kleinberg, 7300 N.W. 8th Street, Margate, Florida 33063, 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 Nos. 41046 and 46096).

On May 23, 1986, petitioner filed a waiver of hearing and requested that this matter be decided by the State Tax Commission on the basis of the contents of the file and additional documents submitted with the waiver. After due consideration, the State Tax Commission renders the following decision.

ISSUES

- I. Whether the Audit Division properly estimated the tax liability of H & H Beer and Soda Service, Inc. in the absence of books and records.
- II. Whether petitioner is personally liable for sales taxes due from H & H Beer and Soda Service, Inc.

FINDINGS OF FACT

1. H & H Beer and Soda Service, Inc. ("H & H") was engaged in the retail and wholesale sale of beer and soda. The business was located at 640 Broadway,

Newburgh, New York. Myron Marko was the President and sole stockholder of the corporation. On September 20, 1982, H & H filed a petition for bankruptcy.

2. On December 20, 1982, the Audit Division issued notices of determination and demands for payment of sales and use taxes due against H & H and petitioner, Myron Marko, individually as officer of H & H, for taxes due of \$42,940.92, plus interest of \$14,154.24, for a total of \$57,095.16. Said notices covered the period June 1, 1979 through February 29, 1980.

3. Myron Marko, President of H & H, executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through August 31, 1979 to December 20, 1982. The Audit Division started an audit of H & H's books and records in August 1982. Before the audit was concluded, the books and records were confiscated by the New York City Department of Finance. The auditor was unsuccessful in obtaining another consent prior to December 20, 1982 and, as a result, issued the notices referred to in Finding of Fact "2". The amount of tax due was determined by disallowing all claimed nontaxable sales amounting to \$1,073,523.00.

4. On May 20, 1983, the Audit Division issued additional notices of determination and demands for payment of sales and use taxes due against H & H and petitioner which covered the period March 1, 1980 through May 31, 1982. These notices assessed taxes due of \$773,233.02, plus interest of \$162,781.87, for a total of \$936,014.89 and were issued when subsequent attempts to obtain consents extending the period for assessment proved unsuccessful and the books and records of H & H were not available for audit. Once again, reported nontaxable sales of \$18,860,787.00 were disallowed in total.

5. Petitioner timely filed a petition for revision of the above determinations of taxes due. No petition was received from H & H.

6. On October 10, 1984, petitioner attended a prehearing conference with the Tax Appeals Bureau. At that time, he signed a statement giving the Audit Division permission to examine the books and records of H & H which were under the jurisdiction of the New York City Department of Finance. The Audit Division examined the available records for the period March 1, 1980 through May 31, 1982 and substantiated nontaxable sales of \$7,116,693.46. The additional taxable sales were adjusted to \$11,760,770.09 and the taxes due were reduced to \$478,836.70 for this period.

7. Petitioner offered no evidence to support a further reduction of the liability of H & H or to show that he was not a person under a duty to act for the corporation.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law specifically provides, in pertinent part, that it shall be presumed that all receipts for property or services are subject to tax until the contrary is established and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax.

B. That section 1138(a)(1) of the Tax Law provides that "if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available" and authorizes, where necessary, an estimate of tax due "on the basis of external indices." The Audit Division examined the available books and records of H & H and properly disallowed reported nontaxable sales that could not be verified pursuant to section 1138(a) of the Tax Law. Petitioner failed to meet his burden of showing error.


C. That Myron Marko was a person required to collect tax under section 1131(1) of the Tax Law and, therefore, is personally liable for the taxes determined due from H & H in accordance with section 1133(a) of the Tax Law.

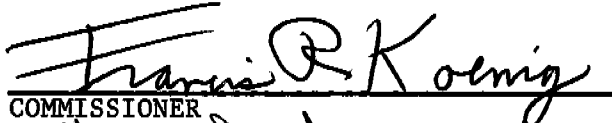
D. That the petition of Myron Marko, Officer of H & H Beer and Soda Service, Inc., is granted to the extent indicated in Finding of Fact "6"; the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued May 20, 1983; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER