

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

ARNMART WHOLESALE BEER DISTRIBUTORS, 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 August 31, 1982.

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Petitioner, Arnmart Wholesale Beer Distributors, Inc., 86-28 103rd Avenue, Ozone Park, New York 11417, 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 August 31, 1982 (File No. 45680).

A hearing was held before Sandra F. Heck, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 30, 1986 at 9:15 A.M. Petitioner appeared by Joseph Winston, P.C. (Stanley Getzoff, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Michael J. Glannon, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division employed proper audit techniques in determining petitioner's sales and use tax liability during the periods in issue.

II. Whether it is proper for the Audit Division to base its audit on external indices when it receives information that petitioner's books and records have been seized by another governmental agency.

111. Whether the Audit Division correctly determined that additional sales and use tax was owed by petitioner for the audit period.

FINDINGS OF FACT

1. On April 27, 1983, as the result of a field audit, the Audit Division issued to petitioner, Armmart Wholesale Beer Distributors, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$5,263.85, plus interest of \$1,605.51, for a total due of \$6,869.36 for the period March 1, 1979 to August 31, 1982.

2. Petitioner, a wholesale beer distributor in Ozone Park, New York, is limited by the terms of its beer distribution license (Type C wholesale) to sell beer only at wholesale. As a result, the Audit Division did not audit petitioner's sales, but instead limited its audit to an examination of petitioner's purchase and expense accounts.

3. In April, 1982, the auditor met with petitioner's accountant to examine petitioner's books and records. At the meeting, petitioner's accountant produced petitioner's general ledger and federal tax returns for the years 1978, 1979 and 1980, but failed to produce any fixed asset or expense purchase invoices. Based on the information made available, the auditor determined that petitioner had an additional sales and use tax liability in the following areas: repair expense account, fixed asset acquisitions and employee consumption of product.<sup>1</sup>

4. The audit methods and results with regard to the repair expense account are more specifically detailed as follows:

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1 The auditor characterized petitioner's tax liability solely as use tax. The auditor defined use tax as any tax that was originally owed to a supplier, but was instead paid directly to the state. In fact, only the employee consumption was subject to use tax. The repair expenses and fixed asset acquisitions were subject to sales tax.

(a) This category of expense involved expenditures by the petitioner to maintain and repair its vehicles. Based on petitioner's failure to produce purchase invoices for the entire audit period, the Audit Division decided to perform a test sample audit for the period September, October, and November, 1981. The test period was chosen as representative of an average quarter.

(b) From petitioner's disbursement ledger it was determined that, during the test period, petitioner made total expenditures for repair expenses of \$5,680.08. During the course of the audit, petitioner presented invoices in the amount of \$2,341.85, leaving repair expense disbursements in the amount of \$3,338.23 for which petitioner was unable to substantiate that tax had been paid.

(c) The auditor then calculated the percentage of the amount disbursed from the repair expense account during the test period for which petitioner was unable to substantiate that tax had been paid, resulting in a disallowance percentage of 58.77 percent.

(d) The 58.77 disallowance percentage was applied to the total amount disbursed from the repair expense account during the entire audit period (\$87,591.00) to arrive at the amount of repair expenditures on which sales tax would be imposed ( $\$87,591.00 \times .5877 = \$51,478.00$ ). The \$87,591.00 figure was taken from petitioner's federal tax returns for the audit period prior to December, 1981, and from petitioner's general ledger for the period December, 1981 to August, 1982.

(e) During the audit period, the sales tax rate increased from 8 percent to  $8\frac{1}{4}$  percent, and applying the two rates to the applicable quarters generated additional sales tax of \$4,133.93.

5. The next portion of the audit pertained to fixed asset acquisitions. The auditor examined all such acquisitions during the audit period. Petitioner failed to provide documentation that tax had been paid on the following expenditures which had been posted to its fixed asset account:

<u>Vendor</u>	<u>Date</u>	<u>Amount</u>	<u>Explanation</u>
McCrory	5-2-79	\$ 3,000.00	Purchase of truck trailer principally garaged in a 4% jurisdiction. No invoice presented.
McCrory	6-4-79	\$ 2,400.00	Purchase of truck trailer principally garaged in a 4% jurisdiction. Check was for \$3,000, but petitioner presented proof that tax had been paid on \$600 to the State of Georgia.
Frank's Equipment	6-5-79	\$ 300.00	No invoice presented.
Dan Mar	12-14-79	\$20,000.00	For a 1977 Mack Truck principally garaged in a 4% jurisdiction. No invoice presented.

Sales tax was imposed on the above purchases at a rate of 4 percent, resulting in the assessment of \$1,028.00 in tax.

6. The final portion of the audit concerned the assessment of use tax on beer consumed by petitioner's employees. The basis for imposition of such tax was a statement by an officer of petitioner corporation that the employees consumed approximately one case of beer per week. A case of beer was valued at \$7.00 per case and taxed at a rate of 8 percent, thus yielding a tax of \$7.28 per quarter or \$101.92 for the audit period (14 quarters).

7. With respect to the audit of petitioner's repair expense account, petitioner challenged the use of its federal tax returns to arrive at the total amount disbursed from the repair expense account when the general ledger had

been made available to the auditor. Petitioner failed, however, to present any evidence to establish that the figure used by the auditor was inaccurate.

8. With respect to that portion of the audit relating to the acquisition of capital assets, petitioner maintained that a motor vehicle cannot be registered with the New York State Department of Motor Vehicles until it is proven that the applicable tax has been paid. Petitioner did not present any evidence that the vehicles were registered, nor did it present any documentary evidence that sales tax had been paid. In the case of the acquisition of a flatbed trailer<sup>2</sup>, petitioner testified that no sales tax had been paid because the vehicle was never registered.

9. Petitioner claimed that the transaction with Dan Mar (see Finding of Fact "5", supra) for \$20,000.00 was never completed, but failed to present any documentation to support its claim, despite its admission that Dan Mar was still in business and could be contacted.

10. Petitioner claimed that it was unable to provide documentation that sales tax had been paid on the repair expenses and capital asset acquisitions because all of its books and records have been subpoenaed by the New York City Beverage Tax Unit prior to the commencement of the audit. Petitioner failed to present the subpoena or any other documentation to indicate which records had been seized or the period covered by the seized records.

11. On March 31, 1982, the auditor contacted the New York City Beverage Tax Unit and was informed that they possessed petitioner's sales invoices for the period August, 1980 through August, 1981, and petitioner's bank statements

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2 This purchase had been erroneously listed by petitioner as a repair expense rather than the purchase of a capital asset. This error does not affect the results of the audit in any event.

for the period December, 1977 through August, 1981. Because sales were not at issue in the audit, the Audit Division did not pursue obtaining this information from the city agency.

12. Petitioner also claimed that records were unavailable because of five break-ins to petitioner's premises. No evidence was presented to document the break-ins, the time of their occurrence or what was taken.

13. With regard to the use tax imposed on employee consumption of beer, petitioner did not deny that its employees consumed beer, but asserted that no use tax was due because the employees were, in effect, stealing the beer from petitioner.

#### CONCLUSIONS OF LAW

A. That section 1105 of the Tax Law imposes sales tax on the "receipts from every retail sale of tangible personal property" and on the sale of certain specified services, including "maintaining, servicing or repairing tangible personal property." Where a customer has failed to pay sales tax to the person required to collect the same, section 1133(b) of the Tax Law requires the customer to file a sales tax return and pay such tax directly to the tax commission.

B. That section 1138(a)(1) provides, in pertinent part, that:

"If a return required by this article is not filed, or 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. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, types of accommodations and service, number of employees or other factors...".

C. Where records are not provided or are incomplete and sufficient, it is the duty of the State Tax Commission to select a method reasonably calculated to reflect the sales and use tax due and the burden then rests upon the taxpayer

to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous. (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 A.D.2d 858, 446 N.Y.S.2d 451 [1981])

D. That the Audit Division was justified in its **use** of external indices to determine petitioner's sales and use tax liability where petitioner failed to substantiate that tax had been paid and failed to show what efforts it made, if any, to obtain its original records, or photocopies thereof, from the New York City Beverage Tax Unit. (See, Matter of American Cars R Us, Inc., State Tax Commission, February 6, 1986)

E. That petitioner failed to sustain its burden of establishing any error in the audit procedures employed by the Audit Division or that the amount of tax assessed was erroneous.

F. That section 1110 of the Tax Law provides, in pertinent part, that:

"Except to the extent that property or services have already been or will be subject to sales tax under this article, there is hereby imposed...a use tax for use within this state..., (A) of any tangible personal property purchased at retail...".

Section 1101(b)(7) of the Tax Law defines "use" as the exercise of any right or power over tangible personal property by the purchaser thereof and includes any consumption of such property. Therefore, petitioner is liable for use tax on the beer consumed by its employees. Petitioner failed to establish that it was entitled to an exemption from imposition of use tax.

G. That the petition of Arnmart Wholesale Beer Distributors, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 27, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL  
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to <b>Arn mart Wholesale Beer</b>	
Street and No. <b>Distr. butans,</b>	
<b>86-28 103rd Ave.</b>	
P.O., State and ZIP Code <b>Ozone Park, NY 11417</b>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

P 319 372 772

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL  
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to <b>Joseph Winston</b>	
Street and No. <b>274 Madison Ave.</b>	
P.O., State and ZIP Code <b>New York, N.Y. 10016</b>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	