

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DONALD T. BERGERON : 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, 1978 :
through May 31, 1981. :
:

Petitioner, Donald T. Bergeron, 117 Parklane Road, New Milford, Connecticut, 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, 1978 through May 31, 1981 (File No. 49046).

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 June 3, 1985 at 1:15 p.m. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (William Fox Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner.

FINDINGS OF FACT

1. Petitioner, Donald T. Bergeron, was the President of B.S.L.W. Enterprises, Inc. ("BSLW") which operated a college bar in Plattsburgh, New York under the name Goober's Ragtime. The business was purchased in November, 1978 and was sold on March 10, 1981.

2. On May 13, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Tax Due against BSLW, covering the

period September 1, 1978 through March 13, 1981 for taxes due of \$5,132.72, plus penalty and interest of \$1,208.54, for a total of \$6,341.06. The notice indicated that "a markup of your purchases reported on the completed questionnaire has resulted in an increase in reported taxable sales of 24 percent." On the same date, a notice for the same amount was issued against petitioner Donald T. Bergeron and Thomas H. Salka as officers of BSLW under the provisions of sections 1131(1) and 1133 of the Tax Law.

3. In October, 1981, an auditor reviewed the books and records of BSLW, including the sales journal, sales tax returns, cash register tapes and cancelled checks for purchases of beer and liquor for the audit period. Randomly selected cash register tapes were reconciled against the sales journal and showed no errors. The transfer of totals from the sales journal to sales tax returns also proved to be accurate. Based on reported sales and purchases, the books and records reflected the following markup percentages: liquor - 236.6 percent; food - 54.2 percent; and beer - 94.3 percent. Liquor and food sales were accepted as correct. However, the auditor determined that the 94.3 percent markup on beer was too low. A markup test on beer revealed a markup of 234 percent for bottled beer and 198.5 for draft. These markups were reduced to 175 percent and 125 percent, respectively, to give consideration to special drink prices. Total purchases were allocated 50 percent to bottles and 50 percent for draft. The applicable markups were applied to the beer purchases to arrive at sales of \$180,584.00. BSLW reported beer sales of \$140,353.00, leaving additional taxable sales of \$40,232.00 and tax due thereon of \$2,813.01. In addition,

BSLW failed to file a sales tax return and pay over \$114.85 in sales tax due for the period ending May 31, 1981, for a total tax due of \$2,927.86.

4. On May 10, 1982, petitioner, on behalf of BSLW, signed a Statement of Proposed Audit Adjustment in the amount of \$2,927.86 indicating his agreement with the taxes due for the audit period. He had been advised by counsel to accept the audit results because any further reduction "would be totally consumed by the money you would have to pay me."

5. On July 13, 1982, the auditor received a check in the amount of \$2,678.61 issued by Norm Foote, Inc., escrow agent. As a result, a Notice of Assessment Review was issued to BSLW on September 8, 1982 for the revised taxes determined due on audit of \$2,927.86 plus interest of \$747.96, less the amount paid (\$2,678.61) for a total amount due of \$997.21.

6. On July 12, 1983, petitioner timely filed an Application for Credit or Refund of State and Local Sales or Use Tax for \$2,678.61 on the grounds that the assessment was erroneous. On August 3, 1983, the Audit Division denied the refund claim based on BSLW's agreement with the additional taxes found due.

7. Goober's Ragtime was a bar which catered almost exclusively to local college students. Because of the competitive nature of the business, petitioner was forced to offer low priced drink specials in order to attract business. These specials included the following: Mondays: 50¢ mixed drinks; Tuesdays: two for one night; Wednesdays: \$1.00 pitchers of beer; Thursdays: 75¢ for imported bottled beer; Friday: 2 p.m. to 7 p.m. happy hour which included all specials.

CONCLUSION OF LAW

A. That the Audit Division did not give adequate consideration to BSLW's promotional specials for beer. Taking into account a reduced markup based on

such factor, the adequacy of the record keeping, as evidenced by the audit procedures set forth in Finding of Fact "4" and the Audit Division's acceptance of the accuracy of the records with respect to food and liquor sales, the total sales as reported by BSLW for the audit period are deemed correct.

B. That petitioner is liable for \$114.85 plus applicable interest due thereon for the tax not paid for the period ending May 31, 1981.

C. That although BSLW consented to the fixing of tax as provided in section 1138(c) of the Tax Law, it was nevertheless entitled to apply for a refund in accordance with section 1139(c) of the Tax Law.

D. That the petition of Donald T. Bergeron is granted to the extent indicated in Conclusion of Law "A"; the Audit Division is hereby directed to determine the appropriate party to whom the refund is payable and refund the sum of \$2,678.61 less \$114.85 (plus accrued interest due); and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, NY

STATE TAX COMMISSION

DEC 13 1985

Richard A. Allen
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Smith
COMMISSIONER