

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DRINKS GALORE, INC.

DECISION

for a Hearing to Review a Determination of
Alcoholic Beverage Tax under Article 18 of the :
Tax Law and Title Y of the Administrative Code
of the City of New York for the Period
September 1, 1980 through March 30, 1982.

Petitioner, Drinks Galore, Inc., 1331 Jerome Avenue, Bronx, New York
10452, filed a petition for a hearing to review a determination of alcoholic
beverage tax under Article 18 of the Tax Law and Title Y of the Administrative
Code of the City of New York for the period September 1, 1980 through March 30,
1982 (File No. 50088).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices
of the State Tax Commission, Two World Trade Center, New York, New York, on
January 28, 1987 at 1:30 P.M. Petitioner appeared by Harvey R. Poe, Esq. The
Audit Division appeared by John P. Dugan, Esq. (Michael P. Glannon, Esq., of
counsel).

ISSUE

Whether the Audit Division properly estimated petitioner's tax liability.

FINDINGS OF FACT

1. On December 8, 1983, the Audit Division issued to petitioner, Drinks
Galore, Inc. ("Drinks Galore"), a Notice of Determination of Tax Due under
Article 18 of the Tax Law for the period September 1, 1980 through March 30,
1982, asserting additional New York City alcoholic beverage tax due in the
amount of \$38,044.44, plus penalty of \$12,376.00, for a total due of \$50,420.44.

2. During the audit period, Drinks Galore was a registered wholesale beer distributor located in New York City and subject to the New York City excise tax on beer.

3. The assertion of additional tax due from Drinks Galore resulted from a general investigation of the business practices of New York City's beer distributors conducted by the New York City Department of Finance, Tax Department Enforcement Division ("City")

4. In connection with its investigation, the City subpoenaed the books and records of H & H Beer and Soda, Inc. d/b/a Priced-Rite Beverages ("Priced-Rite"), an unregistered distributor located in Newburgh, New York. Among those books and records were 42 invoices showing sales of beer from Priced-Rite to Drinks Galore.

5. City investigators interviewed Michael Marko, owner of Priced-Rite, and Priced-Rite's bookkeeper, manager and truck drivers. They confirmed that Drinks Galore purchased beer from Priced-Rite during the audit period and paid for those purchases in cash.

6. Subpoenaed New York Telephone bills for the audit period showed numerous telephone calls made from Priced-Rite's business telephone to the business telephone of Drinks Galore.

7. Based on two factors, the City concluded that all sales of beer made by Drinks Galore were made in New York: first, a surveillance of its business premises revealed that the vast majority of trucks and vans which picked up beer purchased from Drinks Galore bore New York license plates; second, a review of the tax returns of Drinks Galore disclosed no requests for refund of excise taxes paid on beer later sold outside of New York.

8. A City auditor reviewed and analyzed records made available by Drinks Galore to determine whether the beer purchases shown on the Priced-Rite invoices were reflected in those records. Two of the forty-two Priced-Rite invoices appeared as purchases in the Drinks Galore cash disbursements journal. One of the invoice purchases (invoice no. **20803**) of 6,615 gallons of Deer was reported by Drinks Galore on its tax return. The remaining invoices, covering the period September 1, 1980 through March 30, 1982, did not appear in the books or records of Drinks Galore.

9. In a written statement, the president and vice-president of Drinks Galore asserted that the only purchases it made from Priced-Rite were those shown on the two invoices which did appear in the books and records of Drinks Galore.

10. The City auditor concluded that Drinks Galore had failed to pay the excise tax due on 317,037 gallons of beer purchased from Priced-Rite. He applied the tax rate of 12 cents per gallon to these purchases to calculate additional tax due of \$38,044.44 for the period under consideration.

11. Drinks Galore was given the opportunity to present evidence in support of its petition, but chose not to do so. Following the introduction of jurisdictional documents by the Audit Division, Drinks Galore made a motion to adjourn the State Tax Commission proceedings, pending the outcome of a civil court proceeding in the Southern District of New York involving Drinks Galore and the City. The hearing officer denied this motion, but granted Drinks Galore the opportunity to renew its motion in writing to the State Tax Commission by March 31, 1987. Petitioner did not submit a motion to the Commission nor request an extension of time to file such a motion.

CONCLUSIONS OF LAW

A. That section Y46-1.0(6) of the Administrative Code of the City of New York defines a distributor as "[a]ny person who imports or causes to be imported into [New York] [C]ity any alcoholic beverages which are or will be offered for sale or used for any commercial purpose". An excise tax is imposed on distributors of beer at the rate of 12 cents per gallon (Administrative Code of the City of New York § Y46-2.0[a]). All of the provisions of Article 18 of the Tax Law apply to the taxes imposed by Administrative Code § Y46-2.0(a).

B. That Tax Law § 429(1), in pertinent part, provides that every distributor shall file, on the twentieth day of each month, a return stating separately the number of gallons of beer sold or used by such distributor in New York State in the preceding month. "All alcoholic beverages which have come into the possession or a distributor shall be deemed to have been sold or used by such distributor unless it shall be proved to the satisfaction of the tax commission that such alcoholic beverages have not been sold or used." (Tax Law § 429[3].)

C. That, with certain limited exceptions, none of which pertain to the instant proceeding, the burden of overcoming a tax assessment is placed upon the taxpayer (see, e.g., Clarence R. Oliver Post Memorial, Inc. v. State Tax Commission, 101 AD2d 921). Petitioner presented no evidence in support of its petition and raised no issues of law regarding the method by which the tax was assessed. Consequently, the tax assessment must be upheld.

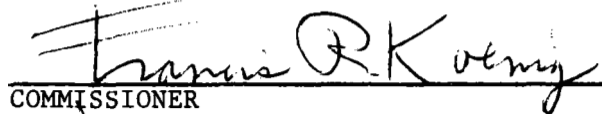
D. That the petition of Drinks Galore, Inc. is denied and the Notice of Determination of Tax Due issued on December 8, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER