

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Beverage Wholesalers, Inc. :

AFFIDAVIT OF MAILING

for a Hearing to Review a Determination of Tax on :
Alcoholic Beverages under Article 18 of the Tax Law :
for the Period 6/1/80 - 12/31/81 and Chapter 46, :
Title Y of the Administrative Code of the City of :
New York for the Period July, 1981. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1984, he served the within notice of Decision by certified mail upon Beverage Wholesalers, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Beverage Wholesalers, Inc.
140 Merrick Rd.
Lynbrook, NY 11563

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
14th day of March, 1984.

David Parchuck

By: [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Beverage Wholesalers, Inc. :

AFFIDAVIT OF MAILING

for a Hearing to Review a Determination of Tax on :
Alcoholic Beverages under Article 18 of the Tax :
Law for the Period 6/1/80 - 12/31/81 and Chapter :
46, Title Y of the Administrative Code of the City :
of New York for the Period July, 1981. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1984, he served the within notice of Decision by certified mail upon Louis J. Giacobino, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Louis J. Giacobino
417 Northern Blvd.
Great Neck, NY 11201

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
14th day of March, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

March 14, 1984

Beverage Wholesalers, Inc.
140 Merrick Rd.
Lynbrook, NY 11563

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 430 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Louis J. Giacobino
417 Northern Blvd.
Great Neck, NY 11201
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
BEVERAGE WHOLESALERS, INC. : DECISION
for a Hearing to Review a Determination of Tax :
on Alcoholic Beverages under Article 18 of the :
Tax Law for the Period June 1, 1980 through :
December 31, 1981 and Chapter 46, Title Y of :
the Administrative Code of the City of New York :
for the Period July, 1981.

Petitioner, Beverage Wholesalers, Inc., 140 Merrick Road, Lynbrook, New York 11563, filed a petition for a hearing to review a determination of tax on alcoholic beverages under Article 18 of the Tax Law for the period June 1, 1980 through December 31, 1981 and Chapter 46, Title Y of the Administrative Code of the City of New York for the period July, 1981 (File No. 37416).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 6, 1983 at 1:30 P.M. Petitioner appeared by Louis J. Giacomino, CPA. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether petitioner is entitled to refund of alcoholic beverage tax it paid on purchases of gallons of beer subsequently sold to distributors situated in Massachusetts.

FINDINGS OF FACT

1. Petitioner, Beverage Wholesalers, Inc. (formerly Beverage Brokers, Inc.), is engaged in the wholesale sale, within and without this state, of soft drinks and beer. Petitioner uses the cash method of accounting, and maintains

its books and files its federal corporation income tax return on a fiscal year basis (July 1 through June 30).

2. For the period under consideration, petitioner filed Returns of Tax on Beer and Similar Fermented Malt Beverages (form MT-103.7) on a monthly schedule. Petitioner's June, 1980 return reflected no sales of beer and hence, no tax liability incurred; its returns for July and August, 1980 showed tax due; its returns for the remainder of the period indicated overpayments of tax.

3. On or about February 11, 1982, petitioner filed two Claims for Refund of Tax on Alcoholic Beverages (form MT-381.1), seeking refunds for the periods September, 1980 through September, 1981 and October through December, 1981 in the respective amounts of \$20,238.18 and \$8,889.72.

4. On May 24, 1982, the Audit Division issued to petitioner a Notice of Determination of Tax Due under Article 18 of the Tax Law, assessing alcoholic beverage tax for the period June 1, 1980 through December 31, 1981 in the amount of \$2,304.10 and penalty of \$391.70; plus New York City excise tax under the Administrative Code of the City of New York Chapter 46, Title Y for the period July, 1981 in the amount of \$342.96 and penalty of \$44.58. The Audit Division also advised petitioner in such notice of determination that petitioner's claims for refund had been denied in full.

5. Petitioner purchased cases of beer from New York Beer Distributing Corp. ("NY Beer") at a price which embraced the Article 18 alcoholic beverage tax. Petitioner's representative offered in evidence photocopies of the purchase invoices for the months of September, October and November, 1980 and April, June and August, 1981, which documents indicated the brand of beer, number of cases, number of gallons and price per case and stated "N.Y.S. tax included." (The original invoices had been furnished to, but never returned

by, the State Liquor Authority.) The beer remained in storage at NY Beer's business premises until sold by petitioner.

6. Petitioner sold most of the beer it purchased from NY Beer to distributors situated in Massachusetts. Petitioner charged these distributors the same price petitioner itself paid, petitioner's profit thus to consist of the amount of the excise tax. Petitioner's representative introduced in evidence the originals of sales invoices to various Massachusetts beverage distributors for the months of September, October and November, 1980 and April, June and August, 1981.

7. Petitioner's president did not deposit the checks received for the beer shipped to the Massachusetts distributors but rather, endorsed them and forwarded them to NY Beer as payment for petitioner's purchases. Petitioner's accountant was unaware of this practice until it was discovered by the excise tax examiners in the course of the audit. The number of gallons of beer petitioner sold were properly reported on petitioner's returns, however, since the returns were prepared utilizing the invoices; petitioner's income was likewise accurately reported since petitioner has not yet realized and recognized the profits on the beer at issue (since its refund claims were disallowed).

8. Petitioner and NY Beer developed these business arrangements because the latter was not licensed to sell beer in the Commonwealth of Massachusetts.

9. The Audit Division's position is that there is insufficient evidence that petitioner paid the excise tax: the subject purchases and sales of beer were not entered on petitioner's books and records.

CONCLUSIONS OF LAW

A. That Tax Law Article 18, section 424.1(a) imposes upon distributors and noncommercial importers an excise tax on beer, when sold or used within

this state, at the rate of four and four-ninths cents per gallon. The Administrative Code of the City of New York, Chapter 46, Title Y, section Y46.2.0(a)(1) imposes an additional excise tax on beer, when sold or used within the City, at the rate of twelve cents per gallon. Whenever the Commission determines that the excise taxes were paid in error, it is authorized to cause such taxes to be refunded, provided an application therefor was filed within two years from the time the erroneous payment was made. Tax Law section 434.1, Administrative Code section Y46-4.0.

B. That petitioner satisfactorily established, by the introduction in evidence of sample purchase invoices and sample sales invoices and by the credible testimony of its president (as noted in Findings of Fact 5 and 6), that it paid excise tax on beer purchases which it subsequently sold to out-of-state distributors. Consequently, petitioner is entitled to refund of such taxes erroneously paid.

C. That the petition of Beverage Wholesalers, Inc. is granted; the notice of determination of tax due issued on May 24, 1982 is cancelled; and the Audit Division is directed to process petitioner's claims for refund.

DATED: Albany, New York

MAR 14 1984

STATE TAX COMMISSION

Richard W. Clu
PRESIDENT

Francis R. Koeny
COMMISSIONER

Mark J. Juel
COMMISSIONER