

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Drinks Galore, Inc.

:

:

AFFIDAVIT OF MAILING

for a Hearing to Review a Determination of
Alcoholic Beverage Tax under Article(s) 18 of
the Tax Law and Title Y of the Administrative
Code of the City of New York for the Period
9/1/80 - 3/30/82.

:

:

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of July, 1987, he/she served the within notice of Decision by certified mail upon Drinks Galore, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Drinks Galore, Inc.
1331 Jerome Ave.
Bronx, NY 10452

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
20th day of July, 1987.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

Drinks Galore, Inc. :

AFFIDAVIT OF MAILING

for a Hearing to Review a Determination of :
Alcoholic Beverage Tax under Article(s) 18 of :
the Tax Law and Title Y of the Administrative :
Code of the City of New York for the Period :
9/1/80 - 3/30/82.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 20th day of July, 1987, he served the within notice of Decision by certified mail upon Harvey R. Poe, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harvey R. Poe
256 Columbia Tpke. - Columbia Commons - Suite 202
Florham Park, NJ 07932

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
20th day of July, 1987.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 20, 1987

Drinks Galore, Inc.
1331 Jerome Ave.
Bronx, NY 10452

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 453-4301

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Harvey R. Poe
256 Columbia Tpke. - Columbia Commons - Suite 202
Florham Park, NJ 07932

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 beer 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 of 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.

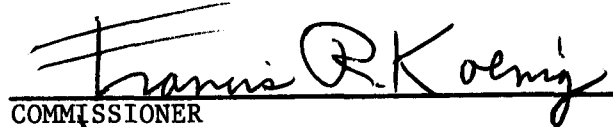
D. That the petition of Drinks Galore, Inc. is denied and the Notice of Determination of Tax Due issued on December 8, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER