

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jacquin-New York Incorporated :
c/o Charles Jacquin et Cie, Inc. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Alcoholic Beverage Tax :
under Article 18 of the Tax Law :
for the Period 9/1/73-6/30/76. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of May, 1980, he served the within notice of Decision by mail upon Jacquin-New York Incorporated, c/o Charles Jacquin et Cie, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jacquin-New York Incorporated
c/o Charles Jacquin et Cie, Inc.
2633 Trenton Ave.
Philadelphia, PA 19125

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
16th day of May, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jacquin-New York Incorporated :
c/o Charles Jacquin et Cie, Inc. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Alcoholic Beverage Tax :
under Article 18 of the Tax Law :
for the Period 9/1/73-6/30/76. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of May, 1980, he served the within notice of Decision by mail upon Paul Chazan the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Paul Chazan
Buchman & Buchman
Ten E. 40th St.
New York, NY 10016

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
16th day of May, 1980.

Joanne Knapp

J. Vredenburg

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

May 16, 1980

Jacquín-New York Incorporated
c/o Charles Jacquín et Cie, Inc.
2633 Trenton Ave.
Philadelphia, PA 19125

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, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Paul Chazan
Buchman & Buchman
Ten E. 40th St.
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
JACQUIN - NEW YORK, INC. : DECISION
for Revision of a Determination or for Refund :
of Alcoholic Beverage taxes under Article 18 :
of the Tax Law for the period September 1, 1973 :
through June 30, 1976. :
:

Applicant, Jacquin - New York, Inc., c/o Charles Jacquin et Cie, Inc., 2633 Trenton Avenue, Philadelphia, Pennsylvania 19125, filed an application for revision of a determination or for refund of alcoholic beverage taxes under Article 18 of the Tax Law for the period September 1, 1973 through June 30, 1976. (File No. 19975).

A formal hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on April 23, 1979 at 1:15 P.M. Applicant appeared by Buchman & Buchman, Esqs. (Paul Chazan, Esq., of counsel) and by Sarner, Borofsky & Stein, Esqs. (Leonard Sarner and Paul M. Lewis, Esqs., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz and Irwin A. Levy, Esqs., of counsel).

ISSUE

Whether overpayment of alcoholic beverage taxes, claim for credit or refund of which was not made within two years, may be used, under the equitable doctrine of recoupment, to offset a deficiency.

FINDINGS OF FACT

1. Applicant, Jacquin - New York, Inc., initially submitted a claim for refund of alcoholic beverage taxes totalling \$40,503.76 for the period January, 1974 through December, 1975.

2. The Audit Division, in examining applicant's records in connection with the refund claim, test-checked applicant's computerized invoice registers to determine if original returns were accurately filed. The test indicated that invoice registers did not agree with the gallonage reported on applicant's returns. Accordingly, the Audit Division initiated an audit to reconcile differences between the invoice register and the returns. The audit was commenced in July or August, 1976.

3. On October 26, 1976, applicant executed a Consent Extending Period of Limitation For Assessment of Beverage Taxes Under Article 18 of the Tax Law, providing that the amount of tax due for the period September, 1973 through February, 1974 could be determined before March 31, 1977. On March 17, 1977, applicant executed a second such consent extending the time for assessment for the periods September, 1973 through May, 1974, to June 30, 1977. (Both of the above mentioned consents were also executed by the State Tax Commission).

4. For the periods January, 1974 through December, 1975, the periods covered by the original refund claim, the Audit Division found that applicant was entitled to a refund of \$17,003.32, which amount was agreed to by applicant's comptroller.

5. The audit for the period September, 1973 through June, 1976 disclosed what appeared to be overpayments for the months of September, October and November, 1973. Applicant was unaware of these possible overpayments until informed thereof by the auditors. The apparent net credits for these months were as follows:

September 1973	\$ 5,523.27
October 1973	7,988.28
November 1973	<u>44,993.79</u>
Total Net Credits	\$58,505.34

6. In the Beverage Tax Field Audit Report, the auditors stated as follows:

"Examiners are not recommending that subject be granted credits indicated for 9/73, 10/73 and 11/73. These returns were filed and paid beyond the two year statute period for refunds.

In addition, the audit differences could not be sufficiently explained via records or the company comptroller to justify issuance of a credit at this time. If Albany should decide to waive the two year statute period, it is recommended that examiners return to subject for further investigation of these differences.

The major difference occurred during 11/73. The only explanation that the comptroller was able to offer was that the same invoices were run twice by the Phila. computer. During this period the returns were prepared in Philadelphia from computer (sic.) runs made by the Philadelphia computer (sic.). The person involved in preparing the returns during this period is no longer employed by the company, and workpapers pertaining to the preparation of the returns could not be located."

7. On May 10, 1977, the Audit Division issued a Ten Day Notice to File a Corrected or Sufficient Return of Tax Due Under Beverage Tax Law, by which it disallowed credits taken by applicant on its tax returns in the amount of \$58,505.34, the total net credits for September, October and November 1973. The notice allowed the \$17,003.32 refund claim for the periods January, 1974 through December, 1975.

8. On June 28, 1977, the Audit Division issued a Notice of Determination of Tax Due Under Beverage Tax Law against applicant in the amount of \$73,953.55, plus penalty and interest of \$19,227.92, for the periods December, 1973 through February, 1976, a total of \$93,181.47. Applicant paid the sum of \$93,181.47 on or about October 27, 1977. On or about November 30, 1977, applicant paid an additional \$3,335.06, the accrued penalty on the assessment.

9. Applicant contends that it is entitled to offset the deficiency for the period December, 1973 through June, 1976, by the overpayments made in September, October and November, 1973 under the equitable doctrine of recoupment.

CONCLUSIONS OF LAW

A. That section 434.1 of the Tax Law provides as follows:

"1. Whenever the tax commission shall determine that any monies received under the provisions of this article were paid in error, it may cause the same to be refunded, without interest, in accordance with such rules and regulations as it may prescribe ... provided an application therefor is filed with the tax commission within two years from the time the erroneous payment was made."

B. That section 430 of the Tax Law, which had provided, in essence, that the State Tax Commission could determine a tax within three years of the filing of a return or, if no return was filed, at any time, was amended effective July 24, 1975 to provide that, notwithstanding the foregoing, where, before the expiration of time prescribed for determination of tax, both the Commission and the taxpayer consented in writing, the period could be extended.

C. That section 434.3 of the Tax Law, which was added effective July 24, 1975, provides that if an agreement extending the period for determination of tax was made within the two year period for the filing of a claim for reimbursement or an application for refund, the period for filing a claim for reimbursement or an application for refund shall not expire prior to six months after the expiration of the period within which a determination may be made pursuant to the agreement or any extension thereof.

D. That applicant is not entitled to refund for the overpayments made in the months of September, October and November, 1973, since application therefor was not made within the two years from the time payment was made, as required by section 434.1 of the Tax Law. Moreover, the agreement extending the period for determination of tax was not made within such two year period; therefore the two year period was not extended by virtue of section 434.3 of the Tax Law.

E. That although courts have recognized the doctrine of recoupment in tax cases (e.g. Matter of National Cash Register Co. v. Joseph, 299 N.Y. 200; Mobil Oil Corporation v. State Tax Commission, 62 A.D.2d 668) there is no jurisdiction at the administrative level of the State Tax Commission to apply

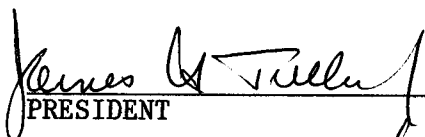
such equitable relief. (It is also noted that since certain discrepancies were not adequately explained at the time of the audit, [see Finding of Fact No. 6] further audit action would be required in the event such relief were to be granted.)

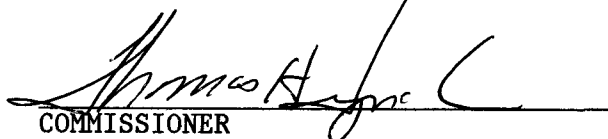
F. That the application of Jacquin - New York, Inc. is denied and the Notice of Determination of Tax Due Under Beverage Tax Law is sustained.

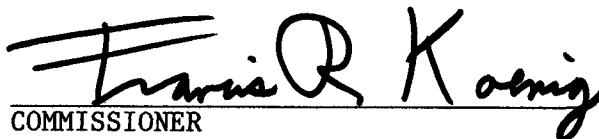
DATED: Albany, New York

STATE TAX COMMISSION

MAY 16 1980


PRESIDENT


COMMISSIONER


COMMISSIONER