

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

NEHI BEVERAGES, INC.

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY ~~(CERTIFIED)~~ MAIL

For a Redetermination of a Deficiency or
a Refund of Sales and Use
Taxes under Article(s) 28 & 29 of the
Tax Law for the ~~years~~ Periods 8/1/65:
through 7/31/72.

State of New York
County of Albany

Donna Scranton, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 23rd day of June, 1976, she served the within
Notice of ~~Decision~~ (or Determination) by ~~(certified)~~ mail upon Nehi
Beverages, Inc. ~~(representative of)~~ the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Nehi Beverages, Inc.
1240-1242 Broadway
Albany, New York

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 Post Office Department within the State of New York.

That deponent further says that the said addressee is the ~~(representative of)~~
~~SE~~ 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

23rd day of June, 1976.

Donna Scranton

Janet Mack



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N.Y. 12227

June 23, 1976

STATE TAX COMMISSION

ADDRESS YOUR REPLY TO

TELEPHONE: (518) **457-3850**

Nehe Beverages, Inc.
1240-1242 Broadway
Albany, New York

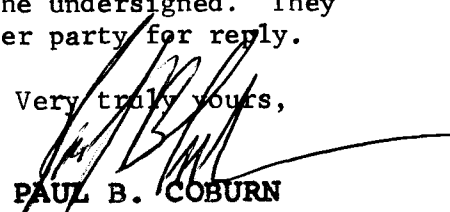
GENTLEMEN:

Please take notice of the **DETERMINATION**
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to
Section(s) **1139 & 1243** of the Tax Law, any
proceeding in court to review an adverse deci-
sion must be commenced within **4 months**
from the date of this notice.

Inquiries concerning the computation of tax
due or refund allowed in accordance with this
decision or concerning any other matter relative
hereto may be addressed to the undersigned. They
will be referred to the proper party for reply.

Very truly yours,


PAUL B. COBURN
SUPERVISING TAX
HEARING OFFICER

Enc.

cc: ~~Petitioner's Representative~~
~~XXXXXXXXXXXXXXXXXXXX~~

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	DETERMINATION
NEHI BEVERAGES, INC.	:	
for a Revision of a Determination or for	:	
Refund of Sales and Use Taxes under	:	
Articles 28 and 29 of the Tax Law for	:	
the Periods August 1, 1965 through	:	
July 31, 1972.	:	

Applicant, Nehi Beverages, Inc., 1240-1242 Broadway, Albany, New York, applied for a revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods August 1, 1965 through July 31, 1972.

A formal hearing was held at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on April 17, 1975, and a further hearing at the direction of the Commission was held on January 28, 1976, before L. Robert Leisner, Hearing Officer. The taxpayer was represented by Eugene H. Berkun, Secretary-Treasurer, and the Sales Tax Bureau was represented by Peter Crotty, Esq., (Alexander Weiss, Esq., of counsel).

ISSUE

Was the taxpayer's sales tax refund claim for periods prior to September 1, 1969, barred by law?

FINDINGS OF FACT

1. The taxpayer, Nehi Beverages, Inc., timely filed New York State sales and use tax returns for the periods in issue and on September 1, 1972, filed a claim for refund.

2. A notice of denial of refund of sales and use taxes and interest for the periods August 1, 1965 through July 31, 1972, was issued to the taxpayer on October 11, 1974. Subsequently a refund was allowed for the period September 1, 1969 to September 1, 1972.

3. The taxpayer applied for a hearing from the denial of the refund for the periods prior to September 1, 1969.

4. The taxpayer paid sales taxes on bottles during the years August 1, 1965 through July 31, 1972, without protest and he filed no claim for refund until the decision in Nehi Bottling Co., Inc. v. Gallman in 1972.

5. The question of sales tax on bottle purchases such as this applicant's was litigated in Nehi Bottling Co., Inc. v. Gallman, 39 A.D. 2d 256, aff'd 34 N.Y. 2d 808, and it was decided that such purchases of bottles were not taxable.

6. The taxpayer's officer contended that he was told by phone or in conversations with the district office that the taxpayer would get a refund when the Nehi Bottling Co., Inc. v. Gallman case was decided. The taxpayer has no correspondence. The taxpayer also claimed that the decision in the Nehi case was excessively long in being decided by the Commission

and the appellate courts. The taxpayer further claimed that it was penalized by that delay and therefore that the Commission should waive the time bar or that the Sales Tax Bureau is estopped from asserting the statute of limitations.

7. The taxpayer, at the second formal hearing, asserted that it was singled out and it was discriminated against because other bottlers did not pay the tax. There was no evidence to substantiate this assertion.

CONCLUSIONS OF LAW

A. The applicant in Nehi Bottling Co., Inc. v. Gallman, SUPRA timely and effectively filed a protest and application for revision of sales tax for the period August 1, 1965 through February 28, 1967, received a notice of determination and paid money under protest in 1967, filed refund claims, obtained a hearing from this Commission and vigorously carried appeals to the highest courts of New York State.

Here the taxpayer, Nehi Beverages, Inc., failed to timely and effectively protest the sales tax on the bottles or to file a timely and effective refund claim until August 31, 1972.

B. The taxpayer's claims, at the first hearing and also at the second hearing, of being selectively assessed or discriminated against or penalized

or for waiver are all without merit. Additionally, the law does not permit the courts or the State Tax Commission to extend the statute of limitations after the time limit has run. Estate of Thayer v. Gallman, 47 A.D. 2d 170.

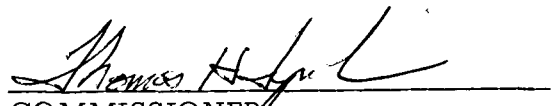
C. The taxpayer's application for sales tax refund for periods prior to September 1, 1969, is denied.

DATED: Albany, New York
June 23, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER