

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Kobrand Corp.

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 3/1/72-2/28/75. :

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 11th day of January, 1980, he served the within notice of Determination by mail upon Kobrand Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kobrand Corp.
134 E. 40th St.
New York, NY

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
11th day of January, 1980.

Joanne Knapp

[Signature]

STATE OF NEW YORK
STATE TAX COMMISSION

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for the Period 3/1/72-2/28/75.

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 11th day of January, 1980, he served the within notice of Determination by mail upon Richard A. Reitman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

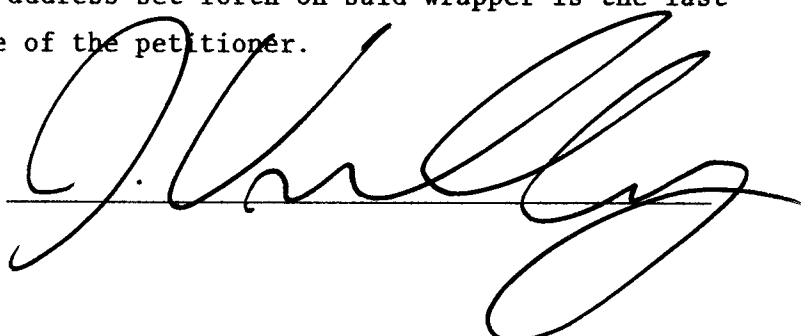
Mr. Richard A. Reitman
Reitman & Reitman
8 West 40th St.
New York, NY

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
11th day of January, 1980.

Joanne Knapp

A large, stylized handwritten signature, likely of Jay Vredenburg, is written over a horizontal line.

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

January 11, 1980

Kobrand Corp.
134 E. 40th St.
New York, NY

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 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
Richard A. Reitman
Reitman & Reitman
8 West 40th St.
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
KOBRAND CORPORATION	:	DETERMINATION
	:	
for Revision of a Determination or for	:	
Refund of Sales and Use Taxes under	:	
Articles 28 and 29 of the Tax Law for	:	
the Period March 1, 1972 through	:	
February 28, 1975.	:	

Applicant, Kobrand Corporation, 134 East 40th Street, New York, New York, filed an application for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1972 through February 28, 1975 (File No. 14159).

A small claims hearing was held before Raymond J. Siegel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 17, 1978. Applicant appeared by Richard Reitman, CPA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the result of an audit of applicant's books and records for the period March 1, 1972 through February 28, 1975 properly reflects its sales and use tax liability.

FINDINGS OF FACT

1. Applicant, Kobrand Corporation, is a wholesale liquor distributor which sells wines and liquors only to retail stores for resale. Applicant had no taxable sales during the period March 1, 1972 through February 28, 1975, except for the three-month period which ended February 28, 1974. For this period, the record indicates that applicant filed a sales tax return which showed taxable sales of \$683.00 and sales tax paid of \$47.81.

2. On March 12, 1976, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. 90,753,100) against Kobrand Corp. for \$4,462.47. Said Notice was the result of a field audit performed by the Sales Tax Bureau on applicant's books and records for the period March 1, 1972 through February 28, 1975. This resulted in the determination of additional use tax due of \$3,158.76, plus penalty and interest of \$1,303.71.

3. The aforesaid audit consisted of the following:

(a) An expense purchase test was performed for a three-month period which ended January 31, 1974. This resulted in expense purchases of \$1,975.35 being subject to sales tax, on which no tax was paid. This amounted to a taxable ratio of .0234% of average quarterly purchases of wines and liquors during the test period. Said taxable ratio was applied to total wine and liquor purchases for the entire audit period, to result in additional taxable expense purchases of \$17,409.26.

(b) The sales tax examiner allowed a tax credit of \$186.62 against use tax which was due. This was based on an invoice dated November 28, 1973, on which applicant had overpaid sales tax on a large purchase of advertising display signs that had been direct-shipped to out-of-state and to in-state locations. The out-of-state deliveries amounted to a taxable purchases credit of \$2,666.00. The Sales Tax Bureau held this one purchase bill to be an extraneous item which was not representative of normal business operations.

(c) An analysis of the "Tasting" expense account for the fiscal year ended October 31, 1974, revealed that \$3,625.00 had been charged to the account, which represented the retail value of bottles of wine which were used for tasting, as a means of quality control. The Sales Tax Bureau determined that \$5,942.95 was subject to use tax for the entire audit period.

(d) An analysis of a "Personal Consumption" expense account and a "charity" account, was computed and projected on the same basis as the "Tasting" account. This resulted in a "Personal Consumption" figure of \$16,508.94, and a "charity" figure of \$4,319.27, which were subject to use tax for the entire audit period.

(e) A detailed audit of the "Furniture and Fixtures" account for the period March 1, 1972 through February 28, 1975 resulted in \$2,142.98 worth of items subject to use tax.

4. Applicant agrees with the findings in Findings of Fact 3(d) and 3(e).

5. Applicant protested the exclusion of the one expense-purchase credit from the expense-purchase test percentage, stating that it should be considered an integral part of the test, as being representative of normal business operations. Applicant offered no documentary evidence to support this contention.

6. Applicant protested the use of total purchases as the basis for allocating taxable expense purchases over the three-year audit period, rather than the use of only expense purchases for the three-year period.

7. Applicant protested the \$5,942.95 "Tasting" expense which was found to be subject to use tax, stating that only one-twelfth of a bottle of wine is used for tasting, and that the balance of the bottle is thrown out. Applicant contended that if this item of expense is subject to tax, then only one-twelfth of the cost should be subject to tax. In addition, applicant protested the use of total sales as the basis for allocating the taxable ratio of "Tasting" expense over the three-year audit period.

CONCLUSIONS OF LAW

A. That the methods used by the Sales Tax Bureau to determine applicant's use tax liability were standard audit procedures. The results of the audit are deemed to be proper, in accordance with the meaning and intent of section 1138 of the Tax Law.

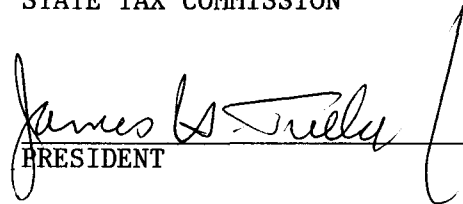
B. That applicant, Kobrand Corporation, has not presented any documentary evidence to sustain the burden of proof which is required to refute the determination of the Sales Tax Bureau.

C. That the application of Kobrand Corporation is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on March 12, 1976 is sustained.

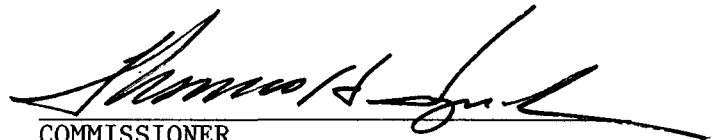
DATED: Albany, New York

JAN 11 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER