

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Evergreen Wines & Liquor, Inc. :

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:
6/1/72 - 5/31/75.

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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Evergreen Wines & Liquor, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Evergreen Wines & Liquor, Inc.
1502 Westchester Ave.
Bronx, NY 10472

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
30th day of October, 1981.

Janice A. Huglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Evergreen Wines & Liquor, Inc. :
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 6/1/72 - 5/31/75. :

AFFIDAVIT OF MAILING

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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Charles J. Spiegel the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles J. Spiegel
38 Westchester Sq.
Bronx, NY 10461

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
30th day of October, 1981.

Charles A. Haglund

J. Vredenburg

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

October 30, 1981

Evergreen Wines & Liquor, Inc.
1502 Westchester Ave.
Bronx, NY 10472

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) 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
Charles J. Spiegel
38 Westchester Sq.
Bronx, NY 10461
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
EVERGREEN WINES & LIQUOR, INC.	:	DECISION
	:	
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 June 1, 1972	:	
through May 31, 1975.	:	

Petitioner, Evergreen Wines & Liquor, Inc., 1502 Westchester Avenue, Bronx, New York 10472, filed a petition 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 June 1, 1972 through May 31, 1975 (File No. 15033).

A formal hearing was held before James T. Prendergast, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 17, 1978 at 2:45 P.M. Petitioner appeared by Charles J. Spiegel, Jr., Esq. The Audit Division appeared by Peter Crotty, Esq. (Irwin Levy, Esq. of counsel).

ISSUE

Whether it was proper to apply a mark-up test to petitioner's purchases in order to determine the amount of unreported sales for the tax period at issue.

FINDINGS OF FACT

1. Petitioner, Evergreen Wines & Liquor, Inc., timely filed New York State and local sales and use tax returns for the period June 1, 1972 through May 31, 1975.

2. On March 31, 1976 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner in the

amount of \$10,700.71 in additional sales tax, plus \$4,321.13 in penalties and interest, for a total of \$15,021.84.

3. Petitioner subsequently filed a timely petition for revision of the determination.

4. The Audit Division assessed the additional sales tax against petitioner on the basis of an audit mark-up test which consisted of reviewing one month's purchase invoices. The invoices were compared to shelf prices in order to arrive at a mark-up percentage for both wine and liquor. These mark-up percentages were then applied to the purchases made over the entire period at issue in order to arrive at the amount of unreported sales and in turn the amount of remaining sales tax due.

5. Petitioner objected to both the use of a test period and the manner in which the test was conducted. Petitioner averred, and there has been no showing to the contrary, that it maintained adequate books and records from which the exact amount of sales tax due could have been determined.

6. After petitioner objected to the use of a one month test period, the Audit Division agreed to include a second month in the test period. Before the petitioner could produce the records for this second test month, however, all of the books and records of the petitioner which were pertinent to the tax period at issue, were destroyed in a fire. According to a report of the New York City Fire Department, the fire, which occurred on January 25, 1976, began in an adjacent building and spread to petitioner's store. There is no indication in this report that this fire was of a suspicious origin.

7. Petitioner conceded at the hearing that it was liable for an additional \$1,854.79 in sales tax.

8. The petitioner did not establish that reasonable cause exists for the abatement of penalty and interest.

CONCLUSIONS OF LAW

A. That although §1138 of the Tax Law provides for the use of a test period to determine tax liability, the use of such a method "must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit" Chartair v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41).

B. That the Audit Division has failed to meet the burden of establishing that there was such an insufficiency of recordkeeping; therefore, the use of such a test period is arbitrary and capricious and lacks a rational basis.

C. That the petition of Evergreen Wines & Liquor, Inc. is granted to the extent that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 31, 1976 shall be reduced to tax due of \$1,854.79, in accordance with Finding of Fact "7", together with penalty and interest thereon.

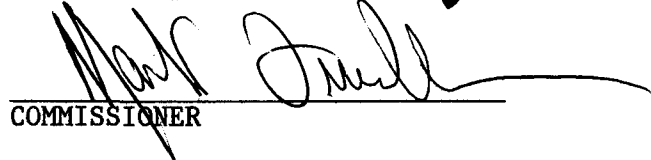
DATED: Albany, New York

OCT 30 1981

STATE TAX COMMISSION

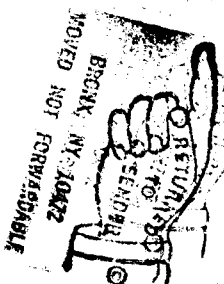

PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

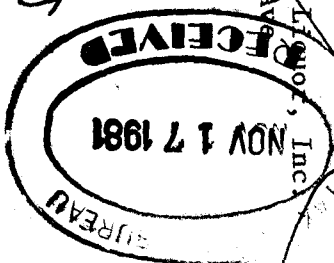
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227



CERTIFIED
MAIL

Evergreen Mines & Lignite, Inc.
1502 Westchester Ave.
Bronx, NY 10472

11/15/81
525



540166

Handwritten signature

Handwritten initials "G/A"

STATE OF NEW YORK

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Evergreen Wines & Liquor, Inc.
c/o Rosenstock
18 Jennifer Lane
Yonkers, NY 10710

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
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