

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Honest to Goodness 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 6/1/69 - 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 10th day of April, 1981, he served the within notice of Decision by mail upon Honest to Goodness Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Honest to Goodness Corp.
18-48 120 St.
College Point, 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
10th day of April, 1981.

Ann A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Honest to Goodness Corp.

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for Redetermination of a Deficiency or a Revision :
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Sales & Use Tax :
under Article 28 & 29 of the Tax Law :
for the Period 6/1/69 - 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 10th day of April, 1981, he served the within notice of Decision by mail upon Murray Rothemberg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Murray Rothemberg
76-36 113th St.
Forest Hills, NY 11375

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
10th day of April, 1981.

Gennie A. Hagedorn

J. Vredenburg

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

April 10, 1981

Honest to Goodness Corp.
18-48 120 St.
College Point, NY

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
Murray Rothemberg
76-36 113th St.
Forest Hills, NY 11375
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
HONEST TO GOODNESS 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 June 1, 1969	:	
through February 28, 1975.	:	

Applicant, Honest to Goodness Corporation, 18-48 120th Street, College Point, New York 11356, 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 June 1, 1969 through February 28, 1975 (File No. 10158).

A formal hearing was held before Archibald F. Robertson, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 15, 1977 at 1:55 P.M. Applicant appeared by Murray Rothenberg, Accountant. The Audit Division appeared by Peter Crotty, Esq. (James Morris, Esq., of counsel).

ISSUES

I. Whether the audit of applicant for the period June 1, 1969 to February 28, 1975 (based on such external indices as purchase invoices, pricing lists, sales records when available and when reflective of actual transactions, and sizes of glasses and mugs in actual use) was properly performed under section 1138 of the Tax Law, applicant, therefore, being liable for the assessed sales and use taxes for the audit period under Articles 28 and 29 of the Tax Law.

II. Whether the unsupported assertion that one-ounce size shot glasses were used throughout most of the audit period is sufficient to overcome the

State auditor's determination, based on measurements of shot glasses actually and currently in use, applicant, therefore, being entitled to a pro rata reduction in the liquor markup calculated by the State's auditor.

III. Whether penalties assessed against a vendor corporation which paid no sales tax for seven years (remaining an unregistered sales tax vendor for four of them) should be remitted by the State Tax Commission.

FINDINGS OF FACT

1. On May 22, 1975 the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant for the period June 1, 1969 through February 28, 1975 in the amount of \$56,765.71, plus penalty and interest of \$22,343.46, for a total of \$79,109.17. On December 2, 1976, a Notice of Assessment Review was issued increasing the tax due to \$68,916.60 and reflecting a payment of \$7,500.00. With additional penalty and interest, the revised amount due was stated to be \$104,534.55.

2. Applicant, Honest to Goodness Corporation was a combination bar and restaurant operating within New York State from 1969 through 1975.

3. Applicant was not registered as a New York State sales tax vendor until the Department of Taxation and Finance caused its involuntary registration in September of 1974.

4. Applicant paid no sales tax to the State of New York during the audit period herein involved. Applicant admitted collecting sales taxes on food sold by it.

5. Applicant was audited by the State of New York for the period June 1, 1969 to February 28, 1975. The audit (based on certain external indices) made use of figures taken from applicant's own books, purchase invoices, pricing lists, and sales records when these existed and when they were made available. The auditors found applicant's sales figures to be too low in relation to purchase invoices; therefore, they relied more heavily on the invoices.

6. Applicant asserted an overall markup for beer, liquor, and food during the period herein involved of 85 percent. The State performed markup tests on beer and liquor for the test quarter ending November, 1974. On the basis of the items mentioned in Finding of Fact "5", the auditors obtained a markup of 168.25 percent on beer and 359 percent on liquor. These percentages were then extended to cover the whole audit period. A standard markup percentage of 125 percent, based on the State's past experience with similar business enterprises, was placed on food. The State allowed appropriate discounts for spillage, spoilage, and food consumed by employees.

7. Applicant has adduced no satisfactory evidence to establish that the one-ounce shot glasses it asserts were used from 1969 to the beginning of 1975 were in fact used for all or any part of that period. In early 1975, Camile Mule, a tax auditor for New York State entered applicant's premises, observed the glasses used in actual operations and removed a sample of each type. The shot glass for liquor held 3/4 of an ounce of liquid. The holding capacity of this glass and the two sizes of beer mugs removed were part of the basis for the State's markup and final assessment of sales taxes.

7. Applicant has shown no basis for the exercise of the State Tax Commission's discretionary authority to remit penalties assessed.

CONCLUSIONS OF LAW

A. That the New York State Department of Taxation and Finance's audit of applicant was conducted in a reasonable and proper manner, under section 1138 of the Tax Law; therefore, applicant is liable for the assessed sales and use taxes for the period June 1, 1969 through February 28, 1975.

B. That applicant's unsupported assertion that it used one-ounce shot glasses throughout most of the audit period is insufficient to overcome the

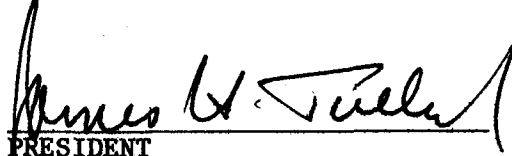
auditor's determination that 3/4 ounce glasses were the glasses used in actual operations.

C. That applicant has advanced no satisfactory basis for the State Tax Commission's exercise of its discretionary authority to remit penalties assessed for failure to pay tax. Accordingly, the application of Honest to Goodness Corporation is in all respects denied.

DATED: Albany, New York

APR 10 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER