

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Spenson Ltd.

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision  
of a Determination or Refund of Sales & Use Tax  
under Article 28 & 29 of the Tax Law for the  
Period 6/1/79 - 5/31/82.

:

:

:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 30th day of October, 1985, he served the within notice of Decision by certified mail upon Spenson Ltd., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Spenson Ltd.  
1000 Brush Hollow Road  
Westbury, NY 11590

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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, 1985.

David Parchuck

Carrie O'Hagerty  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Spenson Ltd. :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax :  
under Article 28 & 29 of the Tax Law for the :  
Period 6/1/79 - 5/31/82. :  
:

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State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 30th day of October, 1985, he served the within notice of Decision by certified mail upon Donald T. Kiley, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald T. Kiley  
38-08 Bell Blvd.  
Bayside, NY 11361

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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, 1985.

David Parchuck

Samuel A. [Signature]  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

October 30, 1985

Spenson Ltd.  
1000 Brush Hollow Road  
Westbury, NY 11590

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 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Donald T. Kiley  
38-08 Bell Blvd.  
Bayside, NY 11361  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
SPENSON, LTD.	:	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, 1979	:	
through May 31, 1982.	:	

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Petitioner, Spenson, Ltd., 1000 Brush Hollow Road, Westbury, New York 11590, 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, 1979 through May 31, 1982 (File No. 39938).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 6, 1985 at 1:15 P.M., with all briefs to be submitted by April 6, 1985. Petitioner appeared by Donald T. Kiley, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division accurately determined the sales taxes due from Barrelhouse Beverage Distributors, Inc.

FINDINGS OF FACT

1. On June 15, 1982, the Audit Division received a Notification of Sale, Transfer or Assignment in Bulk from petitioner, Spenson, Ltd., regarding the purchase of a wholesale and retail beverage business operated by Barrelhouse Beverage Distributors, Inc. ("Barrelhouse"). Said notification indicated

June 1, 1982 as the scheduled date of sale and listed the total sales price of the business as \$145,000.00.

A bulk sales tax of \$725.00 was remitted with the notification.

2. On June 22, 1985, the Audit Division notified petitioner, as purchaser, of a possible claim for New York State and local sales and use taxes due from the seller.

3. The Audit Division attempted to conduct an audit of the books and records of Barrelhouse; however, no records were ever made available. As a result, the Audit Division estimated taxes due of \$199,609.98 for the period June 1, 1979 through May 31, 1982. The estimate was based on disallowed nontaxable sales reported for periods when returns were filed (August 31, 1979, November 30, 1979, November 30, 1981 and February 28, 1982). The Audit Division estimated taxable sales of \$277,173.00 for each of the remaining periods under audit. These sales were based on the gross sales reported on the sales tax return filed for the period ending November 30, 1981, which sales were all held taxable.

4. On September 13, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period June 1, 1979 through May 31, 1982 for taxes due of \$145,000.00. The notice stated that the taxes were determined due from Barrelhouse and represented petitioner's liability, as purchaser, in accordance with section 1141(c) of the Tax Law. The notice, however, indicated that petitioner's liability was limited to \$145,000.00, the sales price of the business.

5. Petitioner did not contest its liability under section 1141(c) of the Tax Law for the taxes determined due from Barrelhouse. However, it took the position that the amount of the taxes assessed were excessive.

6. In September of 1981, petitioner was formed for the purpose of purchasing the beverage distributorship operated by Barrelhouse. Immediately thereafter, petitioner applied for a C License from the New York State Liquor Authority. The license was approved in late May, 1982 and the closing on the sale of the business took place on June 6, 1982.

As part of the agreement of sale, Barrelhouse agreed to continue operating while petitioner was securing the license so that it would be a viable, functioning distributorship at the time of closing. The owner of Barrelhouse was having financial difficulties and, in order to comply with the agreement, placed a manager in control of the operations from approximately July, 1981 to the closing date. The manager was responsible for the sales, making the purchases and maintaining the books and records.

7. Petitioner was unsuccessful in its attempts to obtain books and records from the owner of Barrelhouse. The manager, however, did provide petitioner the records he maintained for the period July 1, 1981 through June 6, 1982. These records consisted of purchase invoices, sales invoices for wholesale sales and a ledger showing retail sales in total on a daily basis. There were no cash register tapes or any other record that would serve as a verifiable record of taxable sales. The manager did not make any deposits of the receipts in the bank.

8. Petitioner analyzed the records furnished by the manager. The analysis showed that Barrelhouse purchased 123,042 cases of beverages, of which 91,951 cases were beer and 31,091 cases were soda. The purchases were further allocated

to product by the size of the container. From the sales invoices, petitioner determined that 99,483 cases were sold wholesale and the difference of 23,559 cases were attributable to retail sales. The cases available for retail sales were allocated to product by size and the average retail sales price was applied to the number of cases to arrive at retail sales of \$159,062.00 for the period July 1, 1981 through June 6, 1982.

Petitioner concluded from its analysis that since this amount did not take into account breakage, exempt retail sales, price increases and inventory, the retail sales of \$104,528.00 as shown in the ledger for this period reasonably reflected the actual retail sales of the business. Petitioner also concluded that there was a substantial increase in sales once the manager took control and such factor should be considered in estimating retail sales for prior periods.

9. The cost of the 123,042 cases referred to above was \$933,524.00. The wholesale sales from the invoices amounted to \$724,123.00. At the hearing, petitioner submitted additional invoices for wholesale sales of \$1,343.00.

10. Barrelhouse filed sales tax returns for the period ending November 30, 1981 and February 28, 1982 on which it reported gross sales of \$277,173.00 and \$271,411.00, respectively.

#### CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

Barrelhouse failed to provide the Audit Division with any books and records for audit. Accordingly, the Audit Division properly estimated the

taxes due from such information as was available and external indices pursuant to section 1138(a) of the Tax Law.

B. That petitioner has the burden of demonstrating by clear and convincing evidence that the amount of tax assessed was erroneous (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 A.D.2d 576).

The records offered by petitioner (Finding of Fact "7") were incomplete and useless for purposes of verifying taxable sales. Hand recorded entries in a ledger of retail sales for each day were not reliable records to satisfy the statutory requirements that records of individual sales be retained (Matter of Skiadas v. State Tax Commission, 95 A.D.2d 971).

C. That petitioner established that Barrelhouse made nontaxable wholesale beverage sales amounting to \$725,466.00 for the period July 1, 1981 through June 6, 1982. Therefore, the taxable retail sales determined by the Audit Division on audit are revised as follows:

Reported gross sales on returns filed for the period September 1, 1981 through February 28, 1982	\$ 548,584.00
Estimated gross sales for the periods July 1, 1981 through August 31, 1981 and March 1, 1982 through June 6, 1982 (\$91,431.00 average gross sales per month x 5 months and 6 days)	475,441.00
	<hr/> \$1,024,025.00
Less: nontaxable sales	725,466.00
	<hr/>
Taxable retail sales for the period July 1, 1981 through June 6, 1982	\$ 298,559.00
Taxable retail sales for the period June 1, 1979 through June 30, 1981 (\$27,142 average per month x 26 months)	705,692.00
Total taxable sales	<hr/> \$1,004,251.00

In the absence of any records for the period June 1, 1979 through June 30, 1981, there is no basis to presume that retail sales were any less during said period.

D. That the petition of Spenson, Ltd. is granted to the extent indicated in Conclusion of Law "C"; the Audit Division is hereby directed to modify the

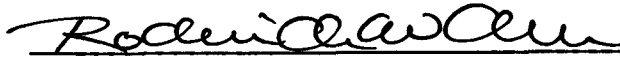


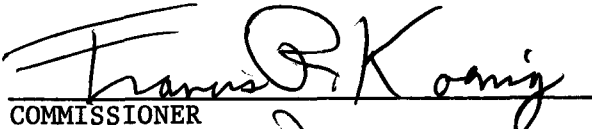
Notice of Determination and Demand for Payment of Sales and Use Taxes Due  
issued September 13, 1982; and that, except as so granted, the petition is in  
all other respects denied.

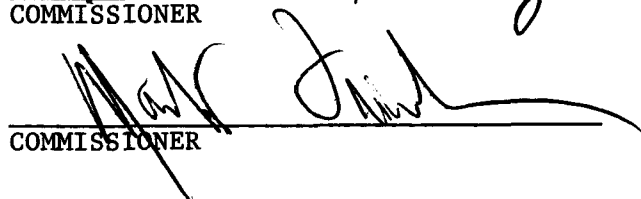
DATED: Albany, New York

STATE TAX COMMISSION

OCT 30 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 153 387 627

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

Sent to <i>Spencer Ltd</i>	
Street and No. <i>100 Broad Hollow Rd</i>	
P.O., State and ZIP Code <i>Westbury NY 11591</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 153 387 628

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

Sent to <i>Donald T. Kelly</i>	
Street and No. <i>38-08 Bell Blvd.</i>	
P.O., State and ZIP Code <i>Queens NY 11361</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982