

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**ROEBLING LIQUORS, INC.** :  
**AND SIDNEY COOPER, AS OFFICER** :

DECISION  
DTA NO. 814192

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 September 1, 1990 through May 31, 1993.

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Petitioners Roebling Liquors, Inc. and Sidney Cooper, as officer, 44 West 62<sup>nd</sup> Street, Suite 29A, New York, New York 10023-7014, filed an exception to the determination of the Administrative Law Judge issued on November 5, 1998. Petitioners appeared by Sidney Cooper. The Division of Taxation appeared by Terrence M. Boyle, Esq. (John E. Matthews, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation relied on its brief filed below. Oral argument, at petitioners' request, was heard on May 25, 1999 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

### ***ISSUES***

I. Whether a Notice of Determination was issued to Roebling Liquors, Inc. and, if so, whether the Division of Tax Appeals has jurisdiction to entertain the petition of Roebling Liquors, Inc.

II. Whether the conciliation orders were timely issued to petitioners.

III. Whether information obtained by the Division of Taxation from the suppliers of Roebling Liquors, Inc. could be used to verify the amount of its purchases.

IV. Whether the Division of Taxation properly utilized an external index to determine additional sales and use taxes due from Roebling Liquors, Inc.

V. Whether the Division of Taxation correctly determined petitioners' sales and use tax liability.

VI. Whether the statute of limitations precludes assessment of additional tax for September and October, 1990.

VII. Whether penalty assessed pursuant to Tax Law § 1145(a)(1)(i) was properly computed.

### ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

#### ***The Audit***

Petitioner Roebling Liquors, Inc. ("Roebling Liquors") was a retail wine and liquor store. Petitioner Sidney Cooper was the president and owner of 100 percent of the stock of Roebling Liquors. In February 1993, the Division of Taxation ("Division") assigned an auditor to conduct an audit of Roebling Liquors.

At the outset of the audit, the Division mailed a letter to Mr. Cooper, dated May 21, 1993, which confirmed a telephone conversation wherein a field audit of the New York State sales and use tax returns of Roebling Liquors was scheduled on June 1, 1993. The letter requested that Mr. Cooper provide books and records pertaining to the sales tax liability for the period under audit including "journals, ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates." The letter also included a consent to extend the period of limitation for assessment of sales and use taxes and a list of documents to be provided to the auditor for review. Subsequently, the appointment was canceled at the request of Mr. Cooper.

In a letter dated August 5, 1993, the Division scheduled a second audit appointment on August 16, 1993. The letter stated that the period under audit was June 1, 1990 through May 31, 1993 and again requested that Mr. Cooper provide all of the books and records pertaining to the corporation's sales and use tax liability. The Division also requested that Mr. Cooper return the form extending the statute of limitations which had previously been mailed to him.

In August 1993, an auditor spent four days at the premises of Roebling Liquors. During the audit, sales were reconciled to bank deposits for a portion of the audit period. This resulted in finding only a small discrepancy. The auditor also did not find anything amiss with respect to the control of sales checks or any discrepancy with respect to the cash register tapes. Although there was a dispute with respect to who conducted a purchase markup test, there was no disagreement that a purchase markup test was conducted and that it showed that Roebling Liquors had a markup of approximately seven percent.

There was no animosity between Mr. Cooper and the auditor during the four days that the auditor spent at the premises of Roebling Liquors. Mr. Cooper provided everything that was

requested with two exceptions. He refused to execute a waiver of the statute of limitations because each time he had done so in the past, it took more than three years to resolve the matter, and Mr. Cooper did not want to wait that long again. Also, Mr. Cooper would allow the auditor to examine only the sales and cost of sales information on Roebling Liquors' Federal income tax returns.

As the audit progressed, the Division concluded that Roebling Liquors provided complete books and records and that they were in a condition which permitted them to be audited. By August 1993, the auditor conducting the audit assumed that the audit would not result in any change in petitioners' tax liability. When she finished at Roebling Liquors' premises, the auditor indicated to Mr. Cooper that she was going to recommend a no-change audit.

The auditor prepared a report recommending a no-change audit. However, after the case was turned in, the section head told the auditor that there was information from the Revenue Opportunities Division ("ROD") that should be addressed. This was the first time that the auditor became aware that there was information in her office from ROD. The auditor's opinion changed when she examined the information from ROD which showed greater purchases than were reflected in the books and records of Roebling Liquors. In response to the information from ROD, the auditor requested that the suppliers of Roebling Liquors advise the Division of the amount of merchandise sold to Roebling Liquors for the period in issue and whether the merchandise was delivered to the vendor's place of business. The Division then summarized the information from the suppliers by quarterly periods. The auditor did not think that there was any reason to go back to Roebling Liquors to look at additional information because everything

presented by Mr. Cooper tied in, and she did not think that another visit to the liquor store would provide any further explanation.

The Division prepared a schedule of additional tax due by quarterly period. The first column on the schedule was audited purchases per quarterly period which consisted of the information obtained from Roebling Liquors' suppliers. The Division multiplied the audited purchases by a markup percentage of 1.0707<sup>1</sup> to obtain audited taxable sales. The amount of tax due was determined by multiplying audited taxable sales by the sales tax rate of 8¼ percent. The Division then calculated the amount of additional tax due by subtracting the amount of tax previously reported on the sales and use tax returns from the amount of tax determined to be due on audit.

On September 23, 1993, the auditor notified Mr. Cooper by telephone that she could no longer recommend a no-change audit because information that she had received from third-party sources revealed large liquor purchases which were inconsistent with what was reflected in the books and records of Roebling Liquors. Mr. Cooper responded that the discrepancy could be resolved by a credit in 1991 being reversed in 1992. Between the telephone conversation of September 26, 1993 and a letter which she sent on October 26, 1993, the auditor did not do anything further because she felt that she needed additional information which was not forthcoming. The auditor did not tell Mr. Cooper about the information that she had received from ROD or about the responses to the third-party questionnaires. It was the auditor's understanding that Mr. Cooper realized that there was some type of discrepancy in the figures.

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<sup>1</sup>The markup percentage was obtained by dividing the sales per Roebling Liquors' Federal income tax returns for the years 1991 and 1992 by the amount of purchases reported for the same period.

However, before October 26, 1993 Mr. Cooper did not have any of the ROD figures or third-party facts that the auditor was concerned about.

In a letter dated October 26, 1993, the Division advised Mr. Cooper that the third-party information received for the period September 1, 1990 through May 31, 1993 did not substantiate his contention that the discrepancy in purchases was attributable to a credit in 1991 being reversed in 1992. The Division noted that it attempted to schedule a closing conference; however, Mr. Cooper stated that he would not be available before January 15, 1994. The Division then explained its position that since Mr. Cooper refused to sign any waivers and since the Division had already allowed extensions of time, the request for further time was unreasonable.

In its letter, the Division scheduled a conference for Friday, November 12, 1993 at 10:00 A.M. and included a copy of the workpapers and a Statement of Proposed Audit Adjustment seeking additional tax due of \$428,966.45 plus penalty of \$477,919.18 and interest of \$121,431.41 for a balance due of \$1,028,317.04. The Division stressed that the appointment was being offered in order to give Mr. Cooper an opportunity to discuss the apparent differences between the Division's figures and the amounts reported by petitioner and to substantiate the need for any adjustments to the amount asserted to be due by the Division. The Division explained that, if Mr. Cooper did not appear at the scheduled conference, the Division would be forced to view the veracity of the tax returns on the basis of the information in its possession.

Mr. Cooper responded to the letter of October 26, 1993 with a letter of November 3, 1993 wherein he requested an additional seven days or until November 19, 1993 to provide the information requested. The auditor felt that the request for additional time was unreasonable

because all she wanted was an explanation of what the purchases were. She also considered the fact that Mr. Cooper refused to waive the statute of limitations and felt that it was important not to allow the time for issuing an assessment to expire. Additionally, the auditor believed that time was of the essence because it was her understanding that Mr. Cooper was planning on selling the business. When Mr. Cooper did not attend the meeting on November 12, 1993, the auditor decided that the assessment should be issued.

As noted, a Statement of Proposed Audit Adjustment was included with the letter of October 26, 1993. This statement, which was dated October 22, 1993, contained numerous errors. For example, the schedule states that the tax due for the quarter ended May 31, 1993 is \$71,910.00. However, a second schedule included with this letter lists the same amount as the tax due for the quarter ended August 31, 1993. A second error resulted because the markup percentage was applied twice.

The Division prepared a Schedule of Additional Tax Due dated November 20, 1993 which calculated tax due in the amount of \$428,966.46. This schedule also contained numerous errors. For example, the schedule contains a column entitled "AUDIT ADDITIONAL TAXABLE SALES" which reflects the application of the markup percentage twice. Further, all of the amounts set forth in the "ADDITIONAL TAX DUE" column were in error and required correction.

The Division prepared a Statement of Penalty Computation by Quarter dated October 22, 1993. The penalty and interest amounts set forth on this document were changed following a conciliation conference conducted by the Bureau of Conciliation and Mediation Services.

The Division prepared a Statement of Proposed Audit adjustment dated November 17, 1993. As with the previous documents, significant errors are apparent on the face of the document. A comparison of the Statement of Proposed Audit Adjustment dated October 22, 1993 with the statement dated November 17, 1993 leads to the conclusion that the Division mistakenly attributed the tax in each quarterly period from the first document to the subsequent quarter in the second document. For the quarter ended November 30, 1990, the amount of tax assessed was reduced in the second statement. However, the amount of the penalty assessed for this period inexplicably increased. In other instances, there is no apparent correlation between the amount of tax assessed and the amount of the penalty asserted to be due. For example, for the quarterly period ended November 30, 1992, the Statement of Proposed Audit Adjustment of October 22, 1993 asserted that no tax was due but that penalty was due in the amount of \$49,556.54. In contrast, the Statement of Proposed Audit Adjustment dated November 17, 1993 stated that tax was due in the amount of \$31,772.22 and that penalty was due in the amount of \$21,076.63. Thus, although the amount of tax asserted to be due increased, the amount of the penalty in issue for the same quarter was reduced. The Statement of Proposed Audit Adjustment of October 22, 1993 shows that for the quarters ended February 29, 1992 and May 31, 1992, no tax was asserted to be due. Nevertheless, the document stated that penalties were due for these quarters in the amounts of \$58,186.57 and \$56,169.03, respectively.

The Division issued a Notice of Determination, dated December 13, 1993, to petitioner Sidney Cooper, 44 West 62ST #29A, New York, NY 10023-7014, which assessed a deficiency of sales and use tax in the amount of \$302,806.60 plus interest in the amount of \$91,994.31 and penalty in the amount of \$225,159.94 for a balance due of \$619,960.85. The notice was issued to



Sidney Cooper as an officer or person responsible for the taxes due from Roebling Liquors. Since an issue has been raised regarding whether a notice of determination was issued to Roebling Liquors, this matter will be discussed in greater detail later.

Mr. Cooper received the Notice of Determination addressed to him but not one addressed to Roebling Liquors. The notice addressed to Sidney Cooper was received sometime before December 13, 1993. When it prepared the notices of determination, the Division did not give petitioners the benefit of any credits which it was aware of because it had questions about purchases which were not reflected on the books and records of Roebling Liquors. In addition, the Division deleted the August 31, 1993 quarterly period from the assessment despite the fact that there was a credit for this period. The Division did not include the quarterly period ended August 31, 1993 in the assessment because the Division requested petitioners' books and records only until the quarterly period ended May 31, 1993.

Mr. Cooper's initial reaction to the Notice of Determination was one of shock and the feeling that he needed additional time. Upon receipt of the Notice of Determination, Mr. Cooper requested a conciliation conference at the Bureau of Conciliation and Mediation Services.

A conciliation conference was held by the Bureau of Conciliation and Mediation Services ("BCMS") on October 11, 1994. In addition to Mr. Cooper, the participants were the auditor and Lee Carrus who served as the conciliation conferee. At this meeting the conciliation conferee asked the same questions as those asked by Mr. Cooper with respect to why the auditor omitted the tax credits and how penalties could be assessed on quarters when no tax was due. When Mr. Cooper realized that the conciliation conferee was trying to be fair, he offered to provide documentation. A second conciliation conference was held on November 16, 1994 which was

attended by Mr. Cooper, the conciliation conferee and, for a short period of time, the auditor. The auditor had to leave before the conference was concluded in order to care for her sick mother. Therefore, the auditor's supervisor took her place. During the second meeting, Mr. Cooper offered documents in an attempt to substantiate the position that there should be a no-change audit.

On March 31, 1995, the conciliation conferee issued a proposed resolution in the form of a consent. On May 12, 1995, BCMS issued conciliation orders to Roebeling Liquors and Sidney Cooper which determined that tax was due in the amount of \$219,504.00 plus penalties and interest. The adjustment in the assessment arose from petitioners' receiving credit for overpayments in the quarters ending May 1993, August 1992 and February 1993. In addition, the fraud penalty was abated. The penalties imposed pursuant to Tax Law § 1145(a)(1)(i) and (vi) were in the amounts of \$90,709.14 and \$27,759.50, respectively.

### ***The Revenue Opportunity Division***

The Revenue Opportunity Division ("ROD") was created in order to develop new ideas in a "freewheeling think tank environment." ROD had three primary concerns: to induce taxpayers to file their tax returns; to encourage taxpayers to file accurate returns, and; to assist in projects that help in collection efforts. The purpose of ROD was to identify and deal with persons who had not complied with the law.

At one juncture auditors from New York City and Long Island asked for assistance in developing a third-party database of purchases for audits of local businesses. The auditors felt that their biggest problem was that there were many businesses where the books and records tied in with the sales tax returns but it was suspected that there was more business activity than was

reflected on the books and records. The auditors believed that they were losing cases because they did not have solid evidence of purchases and asked if ROD could create a database of distributors and wholesalers.

Initially, ROD asked the New York State Liquor Authority for assistance in identifying the distribution of products from the manufacturers to the wholesalers to the retail level. ROD personnel also met with a number of associations and asked for their opinion on what ROD should be focusing on. As a result of these meetings, ROD learned that liquor products, particularly beer, were transported from upstate New York to New York City and, as a result, it was impossible to treat the assignment as a regional project.

Utilizing data from the State Liquor Authority, which identified the wholesalers, distributors, and retailers (with subclassifications for package stores, bars and restaurants), ROD looked for a correlation between purchases and the reported gross and taxable sales on the retail returns. ROD found that, for one quarterly period, the cost of purchases significantly exceeded the total gross sales reported by retailers. The finding led ROD to conclude that there was a problem of underreporting. Using the same analysis, ROD also found that gross income figures were also being underreported. At the same time, associations of individuals were telling ROD that honest retailers could not compete because there were dishonest retail establishments. The analysis by ROD caused the localized project to evolve into a statewide project.

As Acting Director of ROD, Mr. Joseph Catalina drafted a letter, dated January 7, 1992, directed to liquor wholesalers of New York which stated, in part:

The New York State Tax Department is reviewing and updating its computer file of retail beer, liquor, and wine sellers. These include

taverns, restaurants, grocery stores, liquor stores, and all other establishments making sales of your product at retail.

To accomplish this review, we request your cooperation in providing names and addresses of your customers and the sales made to those customers for the 12 month period of January 1, 1991 to December 31, 1991. Sales volumes reported by our firm may be compared with figures reported by your customer to determine their compliance with the tax laws.

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In addition, please complete and return the enclosed questionnaire. Failure to respond to this request will result in the issuance of a subpoena to obtain the desired information. If a subpoena is required prior to releasing this information, please check the appropriate box on the questionnaire.

Mr. Catalina obtained approval for mailing the letter from John Langer, who was Deputy Director of Operations. The letter was also reviewed by Counsel's Office of the Department of Taxation and Finance. It is possible that a letter was sent out before the one quoted above as a pilot test. The Division's lawyers felt that it had the authority to collect this information because there were strong indications that there was underreporting in the industry. Mr. Catalina did not regard the letter as a demand.

The questionnaire was designed to provide ROD with information on how records were kept. As a result of the questionnaire, the Division learned that there were many distributors who were not keeping proper records such as a detailed record of customers. The Division did not pursue those distributors who did not have proper records.

During the pilot project, a few of the distributors asked for a "friendly" subpoena so they could explain to their customers that they had to give the information. John Langer authorized

Mr. Catalina to issue the subpoenas. Mr. Catalina did not get the approval of a magistrate or judge before issuing the subpoenas.

Mr. Catalina authored a letter to the liquor industry, dated August 13, 1992, which stated, in part:

The New York State Tax Department is reviewing and updating its computer files on retail beer, liquor, and wine sales. These include taverns, restaurants, grocery stores, liquor stores, and all other establishments or businesses making sales of alcoholic beverages at retail.

In order to complete our review, we request your cooperation and assistance in providing the following data for the period January 1, 1991 through December 31, 1991. All names, addresses, New York State Liquor Authority license identification numbers and the total sales of alcoholic beverages, in dollars, made by you to each of your customers. You are not required to include sales information where the customer is not licensed by the State Liquor Authority and the sales tax has been collected and remitted by you. Total sales figures may include other product lines such as soft drinks, bottled water, or any other non alcoholic beverage provided you so indicate in your response.

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Failure to respond will result in either the issuance of a subpoena or the referral of your file for audit which may include additional sales tax areas and a review of your tax compliance in other areas administered by the Department of Taxation and Finance.

The foregoing letter was intended to encourage people to supply information rather than to intimidate them.

ROD sent a letter dated March 24, 1993 to approximately 400 distributors which requested sales information for the years 1989, 1990 and 1992. The letter explained that the information would be used to perform a "base line analysis" in order to identify purchasers of bootlegged

products. This letter was part of a different initiative to identify the movement of liquor products from out of the State into New York.

ROD accepted the information it received from the wholesalers as it was reported. It did not conduct an audit of the wholesalers.

There were two things that ROD was looking for in its project. First, it wished to continue gathering information to determine who should be audited. Second, it wanted to ascertain if the request for information would cause an increase in voluntary compliance. ROD determined that the markups increased after the information was gathered. The attorneys who were consulted by ROD advised that it was permissible for ROD to request the information sought in the letters.

ROD identified and sent letters to more than 400 wholesalers that did business with approximately 30,000 retailers. If any wholesalers did not voluntarily comply with the request made in the first letter, ROD would contact them by telephone to find out why they did not comply. If the wholesaler refused to work with ROD, it received the second letter with stronger language. The recipients of the second letter generally complied with the request. In the case of the wholesale liquor project, there were two wholesalers that were issued subpoenas because they did not comply with the requests in the letters. Upon receipt of the subpoenas, each of the wholesalers provided the information requested.

The Director of ROD worked directly with the program director of sales tax audits, who, in turn, utilized the services of a person assigned to perform audit selection work. The individual who performed the audit selection worked with people in the district offices.

When ROD obtained the results of a project, the information was presented to a program manager in the Audit Division. The program manager would then assign an audit selection

person to take control of the audit database. In the case of the liquor project, ROD found 6,000 retailers whose reported purchases were greater than sales. The decision was then made to conduct an audit of the 1,700 liquor stores with the biggest difference between purchases and sales. Later, it was decided to send 600 of the 1,700 cases to the District Offices for an audit as an experiment. Roebing Liquors was included in the 600 cases. Initially, the Division gave priority to the other audits. However, once the Audit Division started conducting audits on the experimental cases, it found that it was able to obtain favorable results. If a taxpayer said that it did not buy anything from a particular distributor, ROD would go back to the distributor to find the source of the difference. If it was necessary, the auditor would ask the retailer about the ROD information.

After the first 700 audits were conducted, the consensus of opinion was that the ROD information was reliable.

***Mr. Cooper's Response***

Petitioner Sidney Cooper graduated from the Bernard Baruch School of Business of the City College of New York in 1948. Among other things, he served as the treasurer of the Bond Stores, Inc. and as chief financial officer of the Peerless Company. As a result of these positions, he has had extensive experience in auditing and business finance. Mr. Cooper also worked on behalf of veterans' rights and as a result he has studied constitutional law. On behalf of veterans rights, he as testified before congress on six occasions and had lunch with an associate justice of the United States Supreme Court.

As president, Mr. Cooper spends approximately two days a week at Roebbling Liquors. While at Roebbling Liquors, Mr Cooper takes inventory and picks up the mail and other materials to work on at home.

At the hearing, Mr. Cooper presented the following chart in an attempt to substantiate his position that adjustments to the Notice of Determination are warranted:

Purchases		\$8,309,311.00
Deductions:		
1% Purchase discounts	(\$83,093.00)	
Inventory, on hand 5/31/93	(418,752.00)	
Inventory, on hand (floor estimate)	(150,000.00)	
Pilferage @ three percent	(249,279.00)	
Total Deductions		<u>901,124.00</u>
Net Purchases, as adjusted		\$7,408,187.00
Markup percent	7.07%	<u>523,759.00</u>
Sales (as projected)		7,931,946.00
Sales Tax, as projected	8.25%	654,385.55
Sales Tax, reported		(514,460.93)
Sales Tax Owed, subject to adjustments		\$139,924.62
Purchases at wholesalers		(35,028.30)
Net owed, per conferee		\$104,896.32
Inventory, on hand, not counted or considered	25% of 418,752 x 7.07 x 8.25%	(9,247.38)
Overpayments in subsequent periods		<u>(\$87,188.94)</u>



Net owed, subject to further  
considerations

\$8,460.00

It is the practice of Roebing Liquors to record its purchases net of cash discounts. Therefore, if Roebing Liquors' wholesaler reported its gross sales to Roebing Liquors, there would be a one-percent difference between the sales on the wholesaler's books and the purchases on the books of Roebing Liquors. In this case, the discrepancy between purchases and sales would be \$83,093.00.

It was Mr. Cooper's practice to personally take an inventory once a week of all sensitive items in the warehouse. The inventory taken by Mr. Cooper represents approximately 80 percent of the inventory in the warehouse. The inventory count conducted by Mr. Cooper indicates that as of May 31, 1993, the value of the inventory in the warehouse of Roebing Liquors was \$418,751.79. Mr. Cooper further estimates that the value of the inventory in the store was \$150,000.00.

Mr. Cooper estimates that Roebing Liquors suffered inventory losses of three percent due to pilferage. This estimate is based upon Mr. Cooper's experience in retailing and the operation of Roebing Liquors since 1972. The three-percent pilferage adjustment results in a reduction in purchases of \$249,279.00.

As set forth above, Mr. Cooper subtracted the total deductions of \$901,124.00 from the total purchases of \$8,309,311.00 to calculate net purchases of \$7,408,187.00. He then multiplied the net purchases by a markup rate of 7.07 percent and added the product of \$523,759.00 to the adjusted purchases to estimate total sales of \$7,931,946.00. Next, Mr. Cooper subtracted the

sales tax due on this amount from the sales tax that was reported to find that the sales tax due was \$139,924.62.

At the conclusion of the audit period, May 31, 1993, there was merchandise in the amount of \$396,549.00 which had been ordered by Roebling Liquors. Mr. Cooper submits that these purchases, which resulted in sales tax being assessed in the amount of \$35,028.00, could not have been sold because it had not been received. During the audit, the auditor was not aware that certain merchandise was at the wholesaler's warehouse because Mr. Cooper did not have the opportunity to tell her.

The next inventory adjustment requested by Mr. Cooper represents the inventory which was not included in the "Inventory, on hand 5/31/93" because the inventory count taken by Mr. Cooper did not include all of the inventory (*see*, above).

During the audit period and thereafter, Roebling Liquors had a substantial increase in sales as shown by the following table:

Period	1991	1992	1993
Quarter Ended February 28	\$298,114.93	\$829,518.47	\$1,025,729.89
Quarter Ended May 30	243,894.45	825,338.59	807,308.77
Quarter Ended August 31	215,366.29	697,295.51	670,808.23
Quarter Ended November 30	288,354.33	773,323.51	837,737.31

Mr. Cooper was able to accomplish the increase in sales by purchasing large amounts of inventory at advantageous prices. However, not all of the inventory was paid for immediately.

The U.S. corporation income tax returns of Roebling Liquors reported the following inventory amounts in the calculation of cost of goods sold:

	1991	1992
Beginning Inventory	\$185,000.00	\$700,000.00
Ending Inventory	\$700,000.00	\$275,000.00

***The Mailing Issue***

No issue has been raised with respect to whether petitioner Sidney Cooper timely filed a petition for a conciliation conference. However, in the course of the hearing, the Division asserted that a timely petition was not filed by Roebling Liquors. At the hearing, Mr. Cooper asserted that he never received a notice of determination addressed to Roebling Liquors and that the first time he became aware that the Division was seeking taxes from Roebling Liquors was when he received a Notice and Demand.

In response to the timeliness issue, the Division submitted, among other things, affidavits by Daniel LaFar and Geraldine Mahon. The affidavit of Daniel B. LaFar, the Principal Mail and Supply Clerk in the Division's mail and supply room, attests to the regular procedures followed by the mail and supply room staff in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service ("USPS"). Mr. LaFar states that after a notice is placed in the "outgoing certified mail" basket in the mail room, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail room clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the mail record. Once the envelopes are stamped, Mr. LaFar maintains that a member of the mail room staff delivers them to a branch of the USPS in Albany. The postal

employee affixes a postmark and his or her signature or both to the certified mail record as an indication of receipt by the USPS. According to Mr. LaFar, the certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail. Mr. LaFar states that in this case "the postal employee affixed a Postmark to every page of the certified mail record, circled the total number of pieces and initialed the certified mail record to indicate that this was the total number of pieces received at the Post Office." Mr. LaFar explained in this affidavit that his:

knowledge that the postal employees circled the 'total number of pieces' for the purpose of indicating that 307 pieces were received at the Post Office is based on the fact that the staff of the Department's Mail Processing Center specifically request that the postal employees acknowledge, on the last page of the certified mail record, the amount of items received by either 1) circling the number following the phrase 'total pieces and amounts listed' if the number of pieces received equals that listed or 2) by writing in the total number received after the phrase 'total pieces received at Post Office.' (Division's exhibit "U.")

In the ordinary course of business, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

In her affidavit, Ms. Mahon, a principal clerk of the Case and Resource Tracking System ("CARTS") control unit, stated that as part of her regular duties she supervises the processing of notices of deficiency and determination prior to their mailing. Ms. Mahon receives a computer printout referred to as the "certified mail record." Each of the notices is assigned a certified control number which is recorded on the certified mail record.

The certified mail record pertaining to the mailing on December 13, 1993 consisted of 28 fan-folded (connected) pages and included the Notice of Determination issued to Roebling Liquors, Inc. Ms. Mahon described the certified mail record as having all pages connected when

the document is delivered into the possession of the U.S. Postal Service. The pages remain connected unless she requests otherwise. The document itself consists of 28 pages each with 11 entries with the exception of page 28 which has 10 entries. Having examined the document, Ms. Mahon certifies that it is a true and accurate copy of pages 1, 10 and 28 of the certified mail record issued by the Division on December 13, 1993 which includes Notice of Determination L 008312713 issued to Roebling Liquors, Inc. In the upper left hand corner of the certified mail record, the date "12/2/93" appears and was changed manually to "12/13/93". The original date, December 2, 1993, was the date that the certified mail record was printed, which is approximately 10 days in advance of the anticipated mailing of the notices. This procedure allows for sufficient lead time for the notices to be manually reviewed and processed for postage, etc., by the Division's mechanical section. The handwritten change made to the date was made by personnel in the Division's mail room who are responsible for altering the date so that it conforms to the actual date the notices and the certified mail record were delivered into the possession of the U.S. Postal Service.

Ms. Mahon further indicates that each statutory notice is placed in an envelope by Division personnel and then delivered into the possession of a postal service representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the certified mail record. In this case the postal representative initialed page 28 of the certified mail record and affixed a postmark to each of the 28 pages.

Ms. Mahon's affidavit indicates that in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or

registered mail. Ms. Mahon concludes that the procedures followed and described were the normal and regular procedures of the CARTS control unit on December 13, 1993.

On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. LaFar concluded that on December 13, 1993 an employee of the mail and supply room delivered a piece of certified mail addressed to Roebling Liquors, Inc. to the Roessleville Branch of the United States Postal Service in Albany, in a sealed postpaid envelope for delivery by certified mail. In addition, based on his review of the documents, Mr. LaFar determined that a member of his staff obtained a copy of the certified mail record, with the postmark delivered to and accepted by the Postal Service on December 13, 1993 for the records maintained by the CARTS control unit of the Division. He further concluded that the regular procedures comprising the ordinary course of business for the staff of the mail and supply room were followed in the mailing of the item of certified mail at issue herein.

The Division offered a certified mailing record and a copy of the Notice of Determination issued to Roebling Liquors, Inc. On its face, the information on the certified mailing record corresponds with the description set forth in the affidavit. Among other things, the certified mail record shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE - ASSESSMENTS RECEIVABLE - CERTIFIED RECORD FOR ZIP + 4 MINIMUM DISCOUNT MAIL." In the upper right-hand corner, the pages are numbered from 1 to 28. The upper left-hand corner of each page of the certified mail record contains the printed date of "12/2/93". On the first page, this date was crossed out and a new date of "12/13/93" was written above the original printed date. Each page contains columns labeled "Certified No.," "Notice Number," "Name of Addressee, Street and P.O. Address,"

“Postage,” “Fee” and “RR Fee.” Page 10 contains an entry which sets forth Roebing Liquors, Inc.’s name and address, a notice number (L 008312713) and a certified control number (P 911 006 982). The notice number and the certified control number correspond with those found on the copy of the notice. On the final page, page 28, the “total pieces and amounts listed” is stated to be 307. Also, the number 307 is circled adjacent to the statement “total pieces received at the post office.” The total number of pieces of certified mail recorded on the last page of the certified mail record corresponds with the total number of certified numbers. It also corresponds with the total postal fees recorded on the form of \$307.00 at a stated fee of \$1.00 per piece of mail. A stamp of “December 13, 1993” from the Roessleville Branch of the United States Postal Service appears on each page of the certified mailing record. Initials are handwritten near the stamp on the last page of the certified mailing record.

The copy of the Notice of Determination issued to Roebing Liquors, Inc. is addressed to 311 Roebing Street, Brooklyn, NY 11211-6204 and bears a date of December 13, 1993. This is the same address as appears on the certified mailing record. It also states that sales and use taxes are due under Articles 28 and 29 of the Tax Law in the amount of \$302,806.60 plus interest in the amount of \$91,994.31 and penalty in the amount of \$225,159.94 for a balance due of \$619,960.85.

The Division also offered affidavits from Daniel LaFar and Geraldine Mahon pertaining to the mailing of the Notice of Determination to Sidney Cooper. The affidavits were identical in all respects to those described above except that they refer to the mailing to Mr. Cooper.

On the basis of the procedures enumerated and the information contained in Ms. Mahon’s affidavit, Mr. LaFar concluded that on December 3, 1993 an employee of the mail and supply

room delivered a piece of certified mail addressed to Sidney Cooper to the Roessleville Branch of the United States Postal Service in Albany, in a sealed postpaid envelope for delivery by certified mail. In addition, based on his review of the documents, Mr. LaFar determined that a member of his staff obtained a copy of the certified mail record, with the postmark delivered to and accepted by the Postal Service on December 3, 1993 for the records maintained by the CARTS control unit of the Division. He further concluded that the regular procedures comprising the ordinary course of business for the staff of the mail and supply room were followed in the mailing of the item of certified mail at issue herein.

The certified mail record pertaining to the mailing on December 3, 1993 consisted of seven fan-folded (connected) pages and included the Notice of Determination issued to Sidney Cooper. Ms. Mahon described the certified mail record as having all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected unless she requests otherwise. The document itself consists of 7 pages each with 11 entries with the exception of page 7 which has 7 entries. Having examined the document, Ms. Mahon certifies that it is a true and accurate copy of the certified mail record issued by the Division on December 3, 1993 which includes Notice of Determination L 008315420 issued to Sidney Cooper. In the upper left hand corner of the certified mail record, the date "12/2/93" appears and was changed manually to "12/3/93." The original date, December 2, 1993, was the date that the certified mail record was printed, which usually is approximately 10 days in advance of the anticipated mailing of the notices. This procedure allows for sufficient lead time for the notices to be manually reviewed and processed for postage, etc., by the Division's mechanical section. The handwritten change made to the date was made by personnel in the Division's mail



room who are responsible for altering the date so that it conforms to the actual date the notices and the certified mail record were delivered into the possession of the U.S. Postal Service.

The Division offered a certified mailing record and a copy of the Notice of Determination issued to Sidney Cooper. On its face, the information on the certified mailing record corresponds with the description set forth in the affidavit. Among other things, the certified mail record shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE - ASSESSMENTS RECEIVABLE - CERTIFIED RECORD FOR NON-PRESORT MAIL." In the upper right-hand corner of the page, the pages are numbered from 1 to 7. The upper left-hand corner of each page of the certified mail record contains the printed date of "12/2/93". On the first page, this date was crossed out and a new date of "12/3/93" was written above the original printed date. Each page contains columns labeled "Certified No.," "Notice Number," "Name of Addressee, Street and P.O. Address," "Postage," "Fee" and "RR Fee." Page one contains an entry which sets forth Sidney Cooper's name and address, a notice number (L 008315420) and a certified control number (P 911 205 401). The notice number and the certified control number correspond with those found on the copy of the notice. On the final page, page 7, the "total pieces and amounts listed" is stated to be 73. Also, the number 73 is circled adjacent to the statement "total pieces received at the post office." The total number of pieces of certified mail recorded on the last page of the certified mail record corresponds with the total number of certified numbers. It also corresponds with the total postal fees recorded on the form of \$73.00 at a stated fee of \$1.00 per piece of mail. A stamp of "December 3, 1993" from the Roessleville Branch of the United States Postal Service appears on each page of the certified

mailing record. Initials are handwritten near the stamp on the last page of the certified mailing record.

The copy of the Notice of Determination issued to Sidney Cooper is addressed to 44 W 62 ST #29A, New York, NY 10023-7014 and bears a date of December 13, 1993. This is the same address as appears on the certified mailing record. It also states that sales and use taxes are due under Articles 28 and 29 of the Tax Law in the amount of \$302,806.60 plus interest in the amount of \$91,994.31 and penalty in the amount of \$225,159.94 for a balance due of \$619,960.85.

The Division expects notices to be mailed on the date listed on the notice. There are no exceptions to this rule. Accordingly, where, as here, there are two notices dated December 13, 1993 they should have been mailed on the same day. Since they did not, an error arose at some juncture.

As indicated earlier, notices are printed 10 days in advance to allow for manual review. Notices designated for manual review are on a different list from the regular mailing list.

The machine which inserts the mail checks the total number of documents but there is no check in Ms. Mahon's processing function which examines whether the log comports with the Notice of Determination as to names and addresses.

Mailing logs are produced in zip code order. Since Roebling Liquors and Sidney Cooper have different zip codes, they would not appear together on the mailing log.

Separate batch headers are printed for notices of determination and for mailing logs. The AD-84 is a form used by Ms. Mahon's section to tell the mechanical and mailing services what is being sent to them, when it has to be mailed and any other pertinent information. The batch

header for the notices of determination and the batch header for the corresponding mailing log have the same job ID number. When the AD-84 is prepared, the two numbers are matched up. The headers are destroyed after they are checked.

The TCL number is a number that is printed at the bottom of the notice of determination issued to Roebbing Liquors. If something happened to the notice before it was mailed, Ms. Mahon could use the TCL number to ask the “computer room” to print a reproduction of the bill. After a notice is mailed, a hard copy of the notice is stored in a box with other notices that were printed as part of the same batch. Through the use of the identification number, Ms. Mahon would be able to locate a copy of the document. Ms. Mahon has never been unable to find a document.

Mr. LaFar’s office checks the AD-84 for mail dates to determine if it was received in a timely manner. Thereafter, the notices are placed in an automatic inserting machine which folds the notice, places the notices in an envelope and weighs it for postage. Mr. LaFar’s office also checks the certified numbers to make sure that they are in order and spot-checks the names and addresses. The mail room checks the beginning certified number and the last certified number on a page and counts the number of pieces in between. The mail room also checks that the certified numbers are in consecutive order. The mail room only performs a spot check on whether the names and addresses on the notices conform with the mailing log.

After the mail is processed by the machines, it is set in a staging area depending on the date. Two couriers take the mail to the post office at approximately 9:00 A.M. At the post office, the postal clerk checks the number of pieces, postage and date. He also stamps the certified mailing record and if the number of pieces is correct, he circles the number. If the

number is wrong, he makes the correction and notifies the Division's mail room. It is possible that the postal clerk will find fewer pieces of mail than the Division anticipated were being sent for mailing. This could happen if a piece of mail were damaged in the mailing machine.

Undeliverable mail is returned to the nixing department. The mail room does not know what is returned.

The return receipt card from certified mail is returned to the originating office.

Before it is sent, mail is stored in a caged area in postal containers. The doors are not locked during the day when the mail clerks are present.

The post office will only accept a mailing log that is dated the day it is brought in.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge first considered the Division's argument that Roebling Liquors had not timely filed a petition for a hearing as well as the claim by Roebling Liquors that it had never received a Notice of Determination. The Administrative Law Judge noted that this issue was determinative of whether the Division of Tax Appeals had jurisdiction to consider the merits of the claim of Roebling Liquors. Based on relevant statutes and case law, the Administrative Law Judge noted that when the timeliness of a petition for hearing or a request for a conciliation conference by a taxpayer was at issue, the Division has the burden of proving proper mailing of the notice in question. In such cases, the Division is required to prove its standard procedure for the issuance of notices and that its standard procedure was followed in the particular instance in question. Once it is determined that the notice was properly mailed, the mailing of such notice is presumptive evidence of the receipt of the same by the person to whom addressed.

The Administrative Law Judge concluded, based on the evidence presented, that the Division had established that the Notice of Determination was mailed to Roebling Liquors on December 13, 1993. The Division introduced adequate proof of its standard mailing procedures via the testimony and affidavits of Division employees involved in the notice generation and issuance process. Further, the Division established that its standard notice issuance procedures were followed on December 13, 1993. The Division presented the certified mail record for December 13, 1993 in its entirety which contained evidence that the items of mail listed on that record (including the Notice of Determination issued to Roebling Liquors) were received at the post office by the United States Postal Service. The Administrative Law Judge further concluded that since Roebling Liquors did not file a timely petition for a hearing or a timely request for a conciliation conference, the Division of Tax Appeals had no jurisdiction to review the merits of the Notice of Determination mailed to Roebling Liquors on December 13, 1993.

The Administrative Law Judge considered Mr. Cooper's arguments that there were numerous inadequacies in the mailing procedures which prevented the presumption of receipt from being raised. These alleged deficiencies included a 10-day delay in mailing, the failure to use mailing receipts in consecutive order, the failure to check off each document on the mailing log, the manner in which the post office received the documents and the failure to obtain post office receipts for each certified mailing. The Administrative Law Judge rejected these arguments. While the Administrative Law Judge agreed that implementation of Mr. Cooper's suggestions might have made the mailing procedures more reliable, they did not establish that the procedures followed with respect to the mailing to Roebling Liquors were insufficient to raise the presumption of receipt. Since the Division issued a Notice of Determination to Roebling Liquors

on December 13, 1993, the Administrative Law Judge concluded that the argument raised at the hearing that the subsequent issuance of the Notice and Demand is barred by the statute of limitations was rendered moot. The Administrative Law Judge also rejected Mr. Cooper's argument that the conciliation order was untimely since it was issued within 30 days of the date on which the proceedings were deemed concluded, as required by 20 NYCRR 4000.5(c)(3)(iii).

The Administrative Law Judge rejected Mr. Cooper's argument that by seeking information from Roebling Liquor's suppliers, the Division violated the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and Article 1, sections 6 and 12 of the New York State Constitution and that all of the evidence which was illegally obtained should be suppressed. The Administrative Law Judge noted that pursuant to provisions of the Tax Law and the Division's regulations (Tax Law § 1135[a]; 20 NYCRR 533.2[a]), a vendor is required to maintain records in support of its business operations and its sales tax liability. Upon demand by the Division, a vendor must make the records available for inspection and examination (20 NYCRR 533.2[a][2]). The Administrative Law Judge, relying on *Matter of Glenwood TV v. Ratner* (103 AD2d 322, 480 NYS2d 98, *aff'd* 65 NY2d 642, 491 NYS2d 620, *appeal dismissed* 474 US 916, 88 L Ed 2d 250), concluded that here the Division sought records from vendors which were required to be made available for inspection upon demand. As in *Glenwood TV*, such records are not afforded the traditional protections of the Fourth or Fifth Amendments and judicial review was available if the Division had found it necessary to issue a subpoena.

The Administrative Law Judge did not accept Mr. Cooper's argument that the Division had no basis to use external indices in its audit of Roebling Liquors. Mr. Cooper maintained books

and records which were available to and were examined by the Division. On initial examination of the books and records, it appeared to the Division that the books and records accurately reflected Roebing Liquors' sales and use tax liability. However, the Administrative Law Judge noted that verification of a taxpayer's books and records is a critical part of the audit process. Prior to the conclusion of the audit, it came to the attention of the Division that Roebing Liquors had far more purchases than was reflected on its books and records. Thus, the Administrative Law Judge found that it was reasonable for the Division to conclude that Roebing Liquors' books and records were inadequate and that it was appropriate to resort to the use of external indices.

The Administrative Law Judge noted that the audit methodology employed by the Division must be reasonably calculated to determine the amount of tax due. However, the burden of proof falls on the taxpayer to demonstrate by clear and convincing evidence that the audit method or amount of tax assessed is unreasonable. The Administrative Law Judge concluded that since Mr. Cooper did not demonstrate that the amount of Roebing Liquors purchases reported by the liquor wholesalers was erroneous, he had not met his burden of proof to demonstrate that the audit method used by the Division was unreasonable.

Mr. Cooper failed to persuade the Administrative Law Judge that numerous mathematical errors in the Statement of Additional Tax Due, the Statement of Penalty Computation By Quarter, the Statement of Proposed Audit Adjustment and in the Notice of Determination required a cancellation of the tax asserted due. The Administrative Law Judge concluded that the only document at issue for Mr. Cooper was the Notice of Determination and errors in other documents had no effect on the validity of that Notice.

The Administrative Law Judge accepted, in part, Mr. Cooper's arguments that the amount of sales and use taxes asserted due was incorrect. Specifically, the Administrative Law Judge agreed with Mr. Cooper that in order for an audit methodology based on purchases to accurately reflect sales, both the beginning and ending inventories must be the same. The Administrative Law Judge found that a reasonable estimate of Roebling Liquors' inventory at the commencement of the audit period was contained on the U.S. Corporation Income Tax Return of Roebling Liquors for the year 1991. The Administrative Law Judge accepted the estimated inventory of Roebling Liquors at the conclusion of the audit period which was provided through the testimony and documents presented by Mr. Cooper. The difference in inventories between the beginning and the end of the audit period resulted in a reduction in purchases by Roebling Liquors (and consequently sales) of \$392,999.38. The Administrative Law Judge also concluded that Mr. Cooper had established that the liquor suppliers reported their gross sales to Roebling Liquors while his purchases were recorded net of a 1% purchase discount. Therefore, the purchases reported by the liquor wholesalers should be reduced by the 1%. Lastly, Mr. Cooper has established that he incurred losses from pilferage at a rate of 3%. Therefore, purchases and, consequently, sales should be reduced by the 3% rate of pilferage loss. The Administrative Law Judge dismissed the remaining adjustments sought by Mr. Cooper for overpayments made after the audit period and purchases ordered but not delivered.

The Administrative Law Judge also rejected Mr. Cooper's argument that the statutory penalty imposed is excessive. The Administrative Law Judge noted that the penalty imposed by Tax Law § 1145(a)(1)(i) for failing to file a return or to pay tax is 10% plus an additional 1% for each month or fraction thereof during which the failure continues up to 30%. Thus, the penalty is



calculated separately for each quarterly period and it appears that the penalty was properly computed in this case.

### ***ARGUMENTS ON EXCEPTION***

On exception, petitioners present many of the same arguments which were considered by the Administrative Law Judge and found to be without merit. Specifically, petitioners claim that the Administrative Law Judge erred by failing to conclude that the Division had exceeded its lawful authority by engaging in a massive and coercive “fishing expedition” into the records of more than 20,000 businesses absent probable cause therefor (Attachment to Exception, p. 1). As a result, any evidence obtained by these illegal searches may not be employed in ascertaining petitioners’ sales tax liability and such illegally obtained evidence must be suppressed.

Petitioners also argue that the Administrative Law Judge erroneously failed to reject the testimony of the Division’s auditor. Petitioners assert that the auditor was not responsive or truthful in her answers. Petitioners maintain that they owe no additional tax based on documentation they submitted. Further, petitioners insist that the notices of determination should be dismissed because the orders issued by BCMS to petitioners were issued untimely and, thus, violated the legislative intent behind the establishment of that Bureau.

Petitioners claim that mark-up tests were improperly performed by the auditor since complete corporate records were available for review. Further, they assert that the Administrative Law Judge improperly concluded that a Notice of Determination was mailed to Roebling Liquors and that there was no jurisdiction to entertain the merits of Roebling Liquors’ claim. Roebling Liquors argues that the Notice was never mailed and, therefore, should be dismissed. However, since BCMS entertained the merits of Roebling Liquors’ claim and issued

an order sustaining the assessment, it would be an error to disregard this fact. Petitioners point out that BCMS treated both the Notice issued to Roebling Liquors and the Notice issued to Sidney Cooper as being timely protested and the Division cannot challenge that decision by BCMS at this time. Petitioners maintain that numerous flaws exist in the procedures employed by the Division to mail notices to taxpayers and that the Division has not proven that the Notice to Roebling Liquors was mailed on December 13, 1993 or that such Notice was ever mailed to Roebling Liquors in the normal course of the Division's business. As a result, petitioners request that the Notice should be canceled. Finally, petitioners argue that if the assessments are upheld, the amounts assessed for the months of September and October 1990 should be dismissed because such months were not assessed within the statute of limitations provided therefor.

The Division filed no brief in opposition but relied, instead, on its post-hearing brief and asked that the determination of the Administrative Law Judge be affirmed for the reasons set forth in such determination.

### ***OPINION***

As a first matter, we agree with the Administrative Law Judge's conclusion that the Division presented adequate proof to demonstrate that a Notice of Determination was issued to petitioner Roebling Liquors on December 13, 1993. This conclusion was sufficient to defeat the motion made by Roebling Liquors during the hearing that the Notice of Determination was never issued to it and, therefore, the Notice should be canceled.

However, based on Mr. Cooper's statements that he did not receive such Notice, the Administrative Law Judge also concluded that Roebling Liquors had not filed either a timely request for a conciliation conference or petition for a hearing subsequent to the issuance of that

Notice and, therefore, the Division of Tax Appeals was without jurisdiction to consider the merits of the petition of Roebling Liquors. We disagree with this conclusion.

In order to reach his conclusion, the Administrative Law Judge was forced to ignore the fact that BCMS held a conciliation conference with Roebling Liquors in attendance and issued a conciliation order to Roebling Liquors sustaining the Notice of Determination.

Just as it was not necessary for Roebling Liquors to have received the Notice of Determination in order for its time to file a request for a conciliation conference or petition for a hearing to start running, it was likewise not necessary that Roebling Liquors receive the Notice in order for it to make a timely request for a conciliation conference. In this case, BCMS was apparently satisfied that a timely request for conference was made by both Roebling Liquors and Sidney Cooper and that it had jurisdiction to conduct a conference and issue an order to both petitioners. The conferee's order, once issued, is binding on the Division in the absence of fraud, malfeasance or the misrepresentation of a material fact (Tax Law §170[3-a][e]; *see also, Matter of Sandrich, Inc.*, Tax Appeals Tribunal, April 15, 1993). None of those grounds has been advanced by the Division herein. There is no question that both petitioners timely filed a petition with the Division of Tax Appeals challenging the conferee's orders. As a result, we reverse the Administrative Law Judge's conclusion that the Division of Tax Appeals was without jurisdiction to review the merits of the Notice of Determination issued to Roebling Liquors. Since the Administrative Law Judge's determination on this issue was not rendered until the conclusion of the hearing, Roebling Liquors was not deprived of the opportunity to fully present its case and no remand is necessary herein.

On exception, petitioners have devoted the bulk of their protest to challenging the legality of the actions of the Division in requesting information from liquor wholesalers concerning their retail customers. Petitioners liken this action to a warrantless search without probable cause, the fruits of which are “tainted” so that they may not be used against petitioners. The Administrative Law Judge disagreed with this characterization and we affirm his conclusion. Pursuant to Tax Law § 1135, every person required to collect sales and use tax must keep records of every sale in such form as the Commissioner may require. Further, such records are to be available for inspection and examination at any time on demand of the Commissioner, its agent or employee. The Administrative Law Judge accurately summarized the reasons for rejecting petitioners’ argument as follows:

the Division sought records which must be made available for inspection upon demand [footnote omitted]. Such records are not afforded the traditional protections of the Fourth or Fifth Amendments. Moreover, as in *Glenwood TV*, the Division’s request for records was very limited. Additionally, there is certainty and regularity in the application of the sales and use tax law which provides an adequate substitute for a warrant (*Matter of Glenwood TV v. Ratner, supra*, 480 NYS2d, at 103). Lastly, if the Division found it necessary to issue a subpoena, a liquor wholesaler would have the opportunity to obtain judicial review prior to enforcement (CPLR 2304). In view of the foregoing, Mr. Cooper’s argument that the Division’s practices violated the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and Article 1, sections 6 and 12 of the New York State Constitution is rejected (Determination, conclusion of law “O”).

Petitioners also argue that in the event the assessments are upheld, the amounts assessed for the months of September and October 1990 should be canceled because such months were not assessed within the statute of limitations provided therefor. The statute of limitations is an affirmative defense and it is deemed waived if not raised. In *Matter of Richards* (Tax Appeals

Tribunal, December 3, 1991), this Tribunal set the standard for analyzing whether an assessment is barred by the statute of limitations:

It is well established that the statute of limitations defense is waived unless affirmatively raised by the taxpayer (*see, Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, 828, *lv denied* 71 NY2d 806, 530 NYS2d 109; *Matter of Convissar v. State Tax Commn.*, 69 AD2d 929, 415 NYS2d 305; *Matter of Servomation Corp. v. State Tax Commn.*, 60 AD2d 374, 400 NYS2d 887). To establish this defense, the taxpayer must go forward with a prima facie case showing the date on which the limitations period commences, the expiration of the statutory period and receipt or mailing of the notice after the running of the period (*see, Amesbury Apts., Ltd. v. Commissioner*, 95 TC 227; *Robinson v. Commissioner*, 57 TC 735; *Matter of Jencon, Inc.*, Tax Appeals Tribunal, December 20, 1990).

Petitioners did not raise this defense in their petition. However, at hearing, petitioners made a motion to amend their petition to conform the pleadings to the proof adduced at the hearing which motion was granted by the Administrative Law Judge. The motion, as granted, included the assertion of an affirmative defense that if the Administrative Law Judge should determine that the Notice of Determination was not issued to Roebling Liquors but that the Notice and Demand, received on or about March 24, 1994 by Roebling Liquors, was deemed to be the equivalent of such a Notice of Determination, then any tax periods excluded by the statute of limitations based on a receipt of a Notice of Determination on that date should be excluded from the assessment herein. As set forth above, the Notice of Determination was found to have been issued on December 13, 1993 and petitioners' statute of limitations argument was deemed to be moot by the Administrative Law Judge.

However, petitioners raise a different statute of limitations argument for the first time on exception. Petitioners argue that Roebling Liquors filed its sales and use tax returns on a

monthly basis and, therefore, the Notice of Determination of additional tax due for the months of September and October 1990 was issued more than three years subsequent to the time that the returns for those months were due. In *Matter of Klein* (Tax Appeals Tribunal, January 25, 1996), we concluded that a part-quarterly or monthly sales and use tax return filed in accordance with Tax Law § 1136(a)(i) is a "return" within the meaning of Tax Law § 1147(b). In such case, the quarterly return serves as both a monthly return for the last month in the quarter and as a reconciliation for the quarter (20 NYCRR 533.3[b][3]). Tax Law § 1147(b) provides:

except in the case of a willfully false or fraudulent return with intent to evade the tax no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that where no return has been filed as provided by law, the tax may be assessed at any time.

We find no basis in the record on which to conclude that petitioners raised this statute of limitations claim as a defense prior to the close of the hearing. Even if we were to conclude that petitioners had raised this statute of limitations defense as part of their motion to amend the pleadings to conform them to the evidence presented at the hearing, we must deny their claim. As set forth above, petitioners bear the burden of proof to show the commencement of the period of limitations (i.e., the date of filing of the monthly returns). After searching the record, there is no evidence that Roebling Liquors filed monthly sales and use tax returns or, if they did, when returns for the months of September and October 1990 were filed. As a result, there is no basis in the record on which to conclude that the Notice of Determination issued to Roebling Liquors on December 13, 1993 was untimely as to the amount of additional tax asserted due for the months of September and October 1990.

Petitioners take exception to the amount of inventory the Administrative Law Judge determined to be on hand at the end of the audit period and, therefore, not includible in sales for the same period. Specifically, petitioners believe that the item “inventory on hand, not counted or considered” should not have been \$9,247.38 but \$104,688.00. The reason for this is that petitioners provided the \$9,247.38 amount as a tax credit, i.e., the amount of tax on marked-up sales for which they want a decrease in the assessed tax. In the alternative, petitioners believe the tax figure should be converted back to sales before a markup is performed and then added to inventory on hand at the end of the audit period.

Although the Tax Appeals Tribunal usually defers to the Administrative Law Judge’s evaluation of the credibility of witnesses and evidence, we are not bound by that determination and the record herein does not support the allowance for “inventory on hand, not counted or considered” (*see, Matter of Wachsmann*, Tax Appeals Tribunal, November 30, 1995, *confirmed Matter of Wachsmann v. New York State Commissioner of Taxation & Fin.*, 241 AD2d 708, 660 NYS2d 462). In this matter, we choose to exercise the powers vested in us by Tax Law § 2006(7) and the regulation at 20 NYCRR 3000.17(e)(1) which permit us to review the record and make a determination therefrom.

Mr. Cooper claims that he took inventory of “sensitive items” once per week and only counted “approximately 80% of the inventory in the warehouse” (*see*, finding of fact “43”). However, there is no evidence in the record, other than Mr. Cooper’s speculative testimony, to substantiate his claim that the cost of the uncounted inventory comprised approximately 20% of the value of the entire stock in Roebling Liquors’ warehouse. This discrepancy must be construed most strongly against petitioners (*see, Noce v. Kaufman*, 2 NY2d 347, 161 NYS2d 1;

*Milio v. Railway Motor Trucking Co.*, 257 App Div 640, 15 NYS2d 73; *see also, Matter of Drebin*, Tax Appeals Tribunal, March 27, 1997, *confirmed Matter of Drebin v. Tax Appeals Tribunal*, 249 AD2d 716, 671 NYS2d 565). The Administrative Law Judge concluded that the Division properly resorted to an estimation of tax because of petitioners' inadequate records. It would be inconsistent to reward petitioners now for the same deficient record keeping. Since there is no basis for assuming the existence of inventory not counted and, therefore, not accounted for, we modify the determination of the Administrative Law Judge to the extent that the item "inventory on hand, not counted or considered" is deleted and that no credit to inventory or tax shall be allowed for same.

As to the remaining claims raised by petitioners on exception, we agree with the Administrative Law Judge that they are without merit. We find that the Administrative Law Judge has fully and correctly addressed each of the issues raised by petitioners and we affirm his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Roebling Liquors, Inc. and Sidney Cooper, as Officer is granted to the extent that the Division of Tax Appeals has jurisdiction to consider the merits of the petition of Roebling Liquors, Inc., but in all other respects is denied;
2. The determination of the Administrative Law Judge is reversed in accordance with paragraph "1" above and is modified with respect to certain adjustments made in conclusion of law "W," but is otherwise affirmed;
3. The petition of Roebling Liquors, Inc. and Sidney Cooper, as Officer is granted in accordance with paragraph "2" above, but in all other respects is denied; and



4. The Division of Taxation is directed to modify the notices of determination mailed to Roebing Liquors, Inc. and Sidney Cooper, as Officer in accordance with paragraph "2" above.

DATED: Troy, New York  
November 24, 1999

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.  
Commissioner