

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
DANIEL BERNARD	:	
D/B/A PORT EWEN PHARMACY	:	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, 1977	:	
through November 30, 1980.	:	

Petitioner, Daniel Bernard d/b/a Port Ewen Pharmacy, 177 Broadway, Port Ewen, New York 12466, 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, 1977 through November 30, 1980 (File No. 33749).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on March 13, 1985 at 1:15 P.M. Petitioner appeared by Joseph F. Koenig PA. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the audit procedures used by the Audit Division in an examination of petitioner's books and records were proper and, if so, whether the additional sales tax due determined as a result of said audit was correct.

FINDINGS OF FACT

1. On March 20, 1981, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner, Daniel Bernard d/b/a Port Ewen Pharmacy, for taxes

due of \$10,266.62, plus interest of \$1,585.58, for a total amount due of \$11,852.20 for the period June 1, 1977 through November 30, 1980.

2. The petitioner executed consents extending the statute of limitations for issuing an assessment of sales and use taxes due for the period at issue to March 20, 1981.

3. On June 18, 1981, the petitioner timely filed a petition for a hearing to review the Notice of Determination. The petitioner claims that the assessment is based on data biased in favor of the Audit Division; that allowances which should have been allowed were not allowed; and that the audit was based on merchandise purchased, and not sales of merchandise purchased.

4. It is the position of the Audit Division that the audit which it conducted followed generally accepted accounting procedures and tests, consistent with the nature of the petitioner's business, and in accordance with the requirements of section 1138 of the Tax Law.

5. During the period at issue, the petitioner operated a pharmacy at 177 Broadway, Port Ewen, New York. The Audit Division performed two audits of petitioner. The first audit, a statistical sampling method audit, involved the random selection by the auditor of merchandise purchase invoices for the period December 1, 1978 through November 30, 1979. The petitioner agreed to the audit method and sample period selected. The auditor determined a taxable purchase percentage of 32.167%, a markup percentage of 49.108%, and the percentage of items withdrawn for personal use of .84041%. The auditor next applied these percentages to merchandise purchases for the period at issue and determined additional taxable sales of \$139,132.00 (after allowances for taxable sales reported and sales to exempt organizations) and additional sales tax due of \$9,739.24. It was subsequently determined that 116 purchase invoices were

missing for the test period and that therefore the test period was not valid as a statistical sample. It was therefore determined that a second audit was necessary.

6. For the second audit, the auditor reviewed merchandise purchase invoices (with the exception of the missing invoices) for the entire period December 1, 1978 through November 30, 1979. The auditor determined a taxable purchases percentage of 24.561% and a markup percentage of 53.396%. The percentage of items withdrawn for personal use determined on the first audit was used for the second audit. The auditor applied these percentages to merchandise purchases for the entire audit period and determined additional taxable sales of \$94,072.00 (after allowances for taxable sales reported and sales to exempt organizations) and additional sales tax due of \$6,585.04.

7. The auditor also determined use tax due on a repair job of \$24.50 and use tax due on taxable items withdrawn for personal use of \$109.41. These items were not contested by the petitioner. The total additional sales and use tax which the Audit Division now claims to be due is \$6,718.95.

CONCLUSION OF LAW

A. That, in view of the missing purchase invoices (see Finding of Fact "5"), the petitioner failed to maintain books and records required under section 1135(a) of the the Tax Law. Without proper books and records, the Audit Division was unable to verify taxable sales reported or to determine such sales accurately. It was therefore, proper and correct for the Audit Division to determine the petitioner's taxable sales from available information as provided in section 1138(a) of the Tax Law. (See Matter of Chartair, Inc. v. State Tax Commission, 64 A.D.2d 44).

B. That the audit procedures used by the Audit Division in an examination of petitioner's books and records were proper (see Finding of Fact "6").

C. That once established that the Audit Division selected a method of calculation reasonably designed to reflect the tax due, it was incumbent upon petitioners to show by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous. It cannot be said from the testimony or evidence presented at the hearing that petitioner has sustained his burden. (See Matter of Carmine Rest. v. State Tax Commission, 99 A.D.2d 581.)

D. That the petition of Daniel Bernard d/b/a Port Ewen Pharmacy is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 20, 1981, as adjusted by the Audit Division (see Finding of Fact "7"), is sustained.

Dated: Albany, New York

OCT 03 1985

STATE TAX COMMISSION

Richard A. Allen
PRESIDENT

COMMISSIONER

[Signature]
COMMISSIONER

I abstain!!
Thomas R. Koehn