

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Day Surgicals, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 3/1/71 - 2/8/74. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of August, 1979, he served the within notice of Determination by mail upon Day Surgicals, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Day Surgicals, Inc.
1912 Deer Park Ave.
Deer Park, NY 11729

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
17th day of August, 1979.

Victoria Gary

Jay F. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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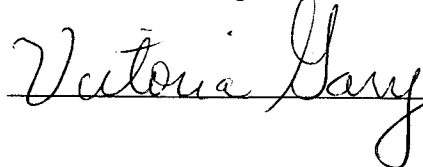
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of August, 1979, he served the within notice of Determination by mail upon Leo H. Kupersmith the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

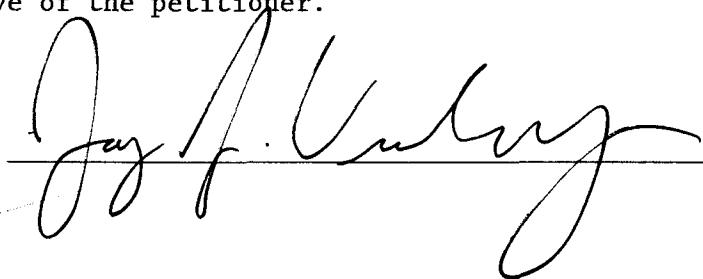
Mr. Leo H. Kupersmith
116 - 55 Queens Blvd.
Forest Hills, NY 11375

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
17th day of August, 1979.


Victoria Gary


Jay Vredenburg



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

STATE TAX COMMISSION

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

August 17, 1979

Day Surgicals, Inc.
1912 Deer Park Ave.
Deer Park, NY 11729

Gentlemen:

Please take notice of the Determination 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, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

A handwritten signature in cursive script, appearing to read "John J. Sollecito".

cc: Petitioner's Representative
Leo H. Kupersmith
116 - 55 Queens Blvd.
Forest Hills, NY 11375
Taxing Bureau's Representative

STATE TAX COMMISSION

A small claims hearing was held before Joseph Chyrywaty, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 28, 1977, and was continued on June 30, 1977. Applicant appeared by its treasurer, Bernard Harris, and by Leo Kupersmith, CPA. The Sales Tax Bureau appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the audit of applicant's books and records for the period March 1, 1971 through February 28, 1974 and the resultant findings were proper and correct.

FINDINGS OF FACT

1. Applicant, Day Surgicals, Inc., filed New York state and local sales and use tax returns for the period March 1, 1971 through February 28, 1974.

2. On February 27, 1974, applicant executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes (Form ST-578) for the period March 1, 1971 through February 28, 1974 to June 20, 1975.

3. On February 7, 1975 as the result of a field audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant for \$13,200.38, plus penalty and interest of \$4,186.62, for a total due of \$17,387.00, for the period March 1, 1971 through February 28, 1974.

4. During the period at issue, applicant, Day Surgicals, Inc., operated a retail drug store at 1912 Deer Park Avenue, Deer Park, New York. Sales consisted of cigarettes, greeting cards, drugs, medicines, cosmetics, jewelry, surgical supplies and sundry items.

5. On audit, the Sales Tax Bureau's auditor analyzed applicant's purchases for the months of May and October of 1973, and determined that 36.97% of said purchases were taxable when sold. The auditor then marked up total taxable purchases by 53.94% (which percentage was based on a markup test), to arrive at audited taxable sales (exclusive of cigarette sales) for the entire audit period.

6. The auditor discovered that during most of the audit period, applicant did not record the purchase of cigarettes in its purchase journal. In order to determine the cigarette purchases and the subsequent sales, the auditor contacted local cigarette wholesalers and determined that applicant made purchases of cigarettes from said wholesalers in the amount of \$193,755.39

for the audit period. Since applicant sold the cigarettes at cost, no markup was applied.

7. The above cigarette sales, plus other taxable sales as determined in accordance with Finding of Fact "5", amounted to total audited taxable sales of \$623,030.52. Reported taxable sales of \$420,486.00 were subtracted from the amount, resulting in additional taxable sales of \$202,544.52 and additional sales tax due of \$13,176.95.

8. Applicant contended the following:

a) The State cigarette tax was not subtracted from the sales price to arrive at the taxable sales price of cigarettes.

b) No allowance was made for sales to the State Insurance Fund.

c) Purchase discounts were not considered.

d) The markup percentage was too high.

e) No allowance was made for inventory shrinkage.

9. Applicant made sales of cigarettes and charged sales tax on the entire selling price, including the State cigarette tax.

10. The Sales Tax Bureau made an allowance for items sold to exempt entities.

11. Applicant offered no documentary or other evidence to substantiate its contentions.

CONCLUSIONS OF LAW

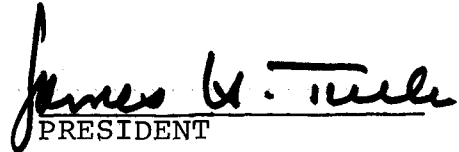
A. That the audit of applicant's books and records for the period March 1, 1971 through February 28, 1974 was conducted in accordance with section 1138(a) of the Tax Law, and that the resultant findings were proper and correct.

B. That the application of Day Surgicals, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 7, 1975 is sustained.

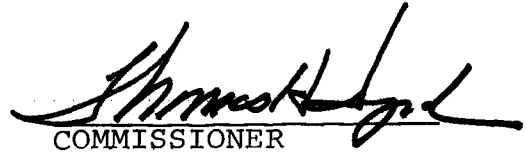
DATED: Albany, New York

AUG 17 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER