

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

October 29, 1980

Dev-Marlin Stores, Inc. (Seller)
and William Wolin
39-57 60th St.
Woodside, NY 11377

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 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Daniel Turchin
170 Broadway
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
DEV-MARIN STORES, INC. (SELLER)	:	DETERMINATION
and	:	
WILLIAM WOLIN	:	
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	:	
December 1, 1973 through September 24, 1976.	:	

Applicants, Dev-Marin Stores, Inc. (Seller), 39-57 60th Street, Woodside, New York 11377 and William Wolin as Officer, 145-12 23rd Avenue, Whitestone, New York 11357, filed an application for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1973 through September 24, 1976 (File No. 21196).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 30, 1979 at 9:15 A.M. Applicants appeared by Daniel Turchin, Esq. & CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

- I. Whether the audit performed by the Audit Division properly reflected applicants' sales tax liability on cigarette and other tobacco sales.
- II. Whether an allowance should be made in the audit results for pilferage and theft of cigarettes and other tobacco products.

FINDINGS OF FACT

1. On March 25, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Dev-Marin Stores, Inc.

(Seller) and William Wolin, as officer, for the period December 1, 1973 through September 24, 1976 for tax due of \$15,772.12, plus penalties and interest.

2. Applicants protested the above Notice on May 9, 1977.

3. The above Notice was issued as a result of an estimate that 50 percent of applicants' reported gross sales were taxable. A field audit was performed after applicants protested the Notice and resulted in the reduction of the tax liability to \$5,841.07.

4. The Audit Division based its revised determination on a markup of applicants' taxable purchases. Applicants' records were not sufficient to verify an exact amount of tax in that taxable receipts were not segregated from the gross receipts. Purchase invoices for the period March through May, 1975 were used to categorize purchases and to obtain markup percentages on taxable items sold.

The selling prices for cigarettes were obtained from applicants' accountant and the markup was determined to be 30 percent for periods prior to January 1, 1976 and 28.7 percent for periods after. The taxable portion of cigarette sales was determined to be 67.4 percent and 64.7 percent respectively for periods before and after January 1, 1976. The markup on other tobacco products was found to be 35 percent after adjustment. Various pilferage allowances were made on all taxable items except tobacco products and cigarettes.

The results of the audit indicated taxable sales to be 32.79 percent of gross sales reported for the period December 1, 1973 through November 30, 1975 and 32.1 percent of gross sales reported for the period December 1, 1975 through September 23, 1976.

5. The selling prices quoted by applicants' accountant included sales tax. Applicant displayed a sign at the business premises which indicated the

amount of sales tax included in the selling prices of cigarettes. The taxable portion of cigarette sales including all taxes was 62.46 percent before January 1, 1976 and 59.9 percent for periods after.

6. Due to the competition in the neighborhood, applicants contended that the markups on cigarettes used in the audit were too high. Applicants failed to introduce any substantiation to show that the markups were lower.

7. Applicants' cigarette and cigar displays were on open counters during the periods audited. The storeroom, located at the rear of the store, was susceptible to cigarettes being pilfered without notice of the employees.

8. Applicants acted in good faith.

CONCLUSIONS OF LAW

A. That the taxable portion of cigarette sales made by the applicants is adjusted to reflect the sales tax included in the selling prices as found in Finding of Fact "5".

B. That the purchases of cigarette and tobacco products are reduced by 2 percent to allow for pilferage sustained in the business operation.

C. That the penalties and interest in excess of the minimum statutory rate are canceled.

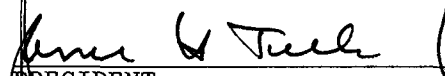
D. That the application of Dev-Marin Stores, Inc. and William Wolin is granted to the extent prescribed in Conclusions of Law "A", "B" and "C", that the Audit Division is hereby directed to further modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued against Dev-Marin

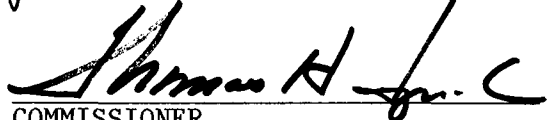
Stores, Inc. (Seller) and William Wolin and except as so granted, the application is in all other respects denied.

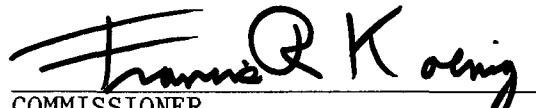
DATED: Albany, New York

OCT 29 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER