

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Max Herbsman and Irving Mecker :
d/b/a Herbsman Mecker Drug Store : 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 6/1/72-5/31/75. :

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 18th day of June, 1980, he served the within notice of Determination by mail upon Max Herbsman and Irving Mecker, d/b/a Herbsman Mecker Drug Store, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Max Herbsman and Irving Mecker
d/b/a Herbsman Mecker Drug Store
5001 Church Ave.
Brooklyn, NY 11203

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
18th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Max Herbsman and Irving Mecker :
d/b/a Herbsman Mecker Drug Store : 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 6/1/72-5/31/75. :

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 18th day of June, 1980, he served the within notice of Determination by mail upon Arthur Mandell 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. Arthur Mandell
570 7th Ave.
New York, NY 10018

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
18th day of June, 1980.

Joanne Knapp

J. J. Vredenburg

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

June 18, 1980

Max Herbsman and Irving Mecker
d/b/a Herbsman Mecker Drug Store
5001 Church Ave.
Brooklyn, NY 11203

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
Arthur Mandell
570 7th Ave.
New York, NY 10018
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
MAX HERBSMAN and IRVING MECKER	:	DETERMINATION
D/B/A HERBSMAN MECKER DRUG STORE	:	
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, 1972 through May 31,	:	
1975.	:	

Applicants, Max Herbsman and Irving Mecker d/b/a Herbsman Mecker Drug Store, 5001 Church Avenue, Brooklyn, New York 11203, 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 June 1, 1972 through May 31, 1975 (File No. 14906).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 20, 1979 at 10:45 A.M. and continued on November 27, 1979 at 9:15 A.M. Applicants appeared by Arthur Mandell, P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the audit procedures employed by the Audit Division in an examination of applicants' books and records were proper and the resultant findings of additional taxable sales correct.

FINDINGS OF FACT

1. Applicants, Max Herbsman and Irving Mecker d/b/a Herbsman Mecker Drug Store, operated a drug store located at 5001 Church Avenue, Brooklyn, New York.
2. On May 21, 1976, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due

against applicants for the period June 1, 1972 through May 31, 1975 for taxes due of \$20,661.00 plus penalty and interest of \$8,905.88 for a total of \$29,566.88.

3. Applicants executed a consent extending the time within which to issue an assessment of sales and use taxes for the period in issue to September 20, 1976.

4. The Audit Division's sales tax auditor analyzed purchase invoices for the months of July, 1974 and February, 1975 and determined that 49.2 percent of said purchases were items that would be subject to tax when resold. Additionally, the auditor categorized the taxable purchases as sundries, candy, cosmetics, greeting cards, photolab and cigars. An analysis of cash purchases for the audit period disclosed cigar and cigarette purchases of \$97,489.00 and \$159,062.00 respectively. A markup test was performed for selected items in each of the foregoing categories using costs and selling prices in effect at the time of the audit. The markups were applied to applicable purchases which resulted in additional taxable sales of \$280,032.00.

Use taxes found due of \$230.73 on expense purchases are not at issue.

5. At the hearing, counsel for the Audit Division introduced schedules that revised the additional taxable sales determined on audit to \$231,188.00 based on the results of a pre-hearing conference. Said revisions were made based on two additional test months incorporated with the test months on the original audit, a 2½ percent allowance for pilferage and a reduction in the markup on cigarettes and candy.

6. The books and records maintained by applicants were insufficient for the Audit Division to determine the exact amount of sales tax liability.

7. Applicants are members of Drug Guild, an association of small independently-owned drug stores. Drug Guild places advertisements on a weekly basis with major New York City newspapers. Guild members are advised of the advertised

specials with their cost and mandatory selling prices. The advertised items are usually sold at cost or at minimal markups.

The Audit Division's markup test did not reflect the discount nature of the business operation.

8. Applicants submitted Drug Guild circulars showing the cost and advertised selling prices of various sundry and cosmetic items which reflect a minimal markup. During the audit period, applicants' overall markup on sundries and cosmetics was 22 percent and 58 percent, respectively.

9. The markup determined on audit for cigarettes did not give consideration to the tax imposed on nicotine content and cigarettes sold by the carton. Applicants' average markup on cigarettes during the period at issue was 25 percent.

CONCLUSIONS OF LAW

A. That the Audit Division followed generally accepted audit procedures consistent with the nature of the business operation and such tax due was determined pursuant to section 1138(a) of the Tax Law; however, the Audit Division did not give consideration to the factors set forth in Findings of Fact "8" and "9" and therefore overstated applicants' markup on sundry items, cosmetics and cigarettes. Accordingly, the Audit Division's findings of additional taxable sales for the period June 1, 1972 through May 31, 1975 are reduced to \$203,366.00.

B. That in all other respects, the audit findings were supported by substantial evidence.

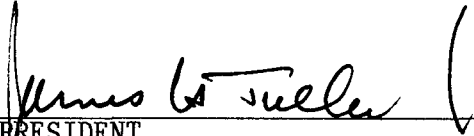
C. That the application of Max Herbsman and Irving Mecker d/b/a Herbsman Mecker Drug Store is granted to the extent indicated in Conclusion of Law "A"; that the Audit Division is hereby directed to modify the Notice of Determination

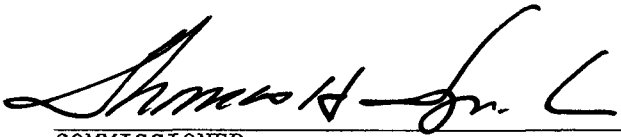
and Demand for Payment of Sales and Use Taxes Due issued May 21, 1976; and that, except as so granted, the application is in all other respects denied.

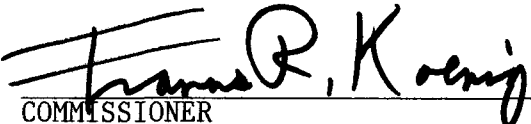
DATED: Albany, New York

STATE TAX COMMISSION

JUN 18 1980


PRESIDENT


COMMISSIONER


COMMISSIONER