

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

W. R. Bartmon, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Sales Tax :

under Article 28 & 29 of the Tax Law

for the Period 9/1/74-12/31/77. :

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 30th day of January, 1981, he served the within notice of Decision by mail upon W. R. Bartmon, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

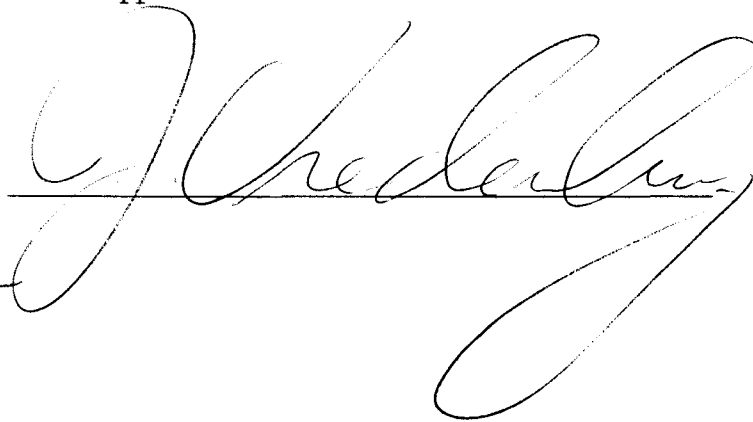
W. R. Bartmon, Inc.
c/o Philip Gerver, Officer
180 Prospect Ave.
Oradell, NJ 07649

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
30th day of January, 1981.

Cornie A. Hagelund



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

W. R. Bartmon, Inc.

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales Tax :
under Article 28 & 29 of the Tax Law
for the Period 9/1/74-12/31/77. :

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 30th day of January, 1981, he served the within notice of Decision by mail upon Sidney W. Mintz 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. Sidney W. Mintz
Miller & Mintz
295 Madison Ave.
New York, NY 10017

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
30th day of January, 1981.

Connie P. Hagellund

Jay Vredenburg

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

January 30, 1981

W. R. Bartmon, Inc.
c/o Philip Gerver, Officer
180 Prospect Ave.
Oradell, NJ 07649

Gentlemen:

Please take notice of the Decision 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
Sidney W. Mintz
Miller & Mintz
295 Madison Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
W.R. BARTMON, INC.	:	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 September 1,	:	
1974 through December 31, 1977.	:	

Petitioner, W.R. Bartmon, Inc., c/o Philip Gerver, 180 Prospect Avenue, Oradell, New Jersey 07649, 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 September 1, 1974 through December 31, 1977 (File No. 24248).

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 October 1, 1980 at 1:15 P.M. Petitioner appeared by Sidney W. Mintz, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division accurately determined additional sales taxes due from petitioner for the period September 1, 1974 through December 31, 1977.

FINDINGS OF FACT

1. Petitioner, W.R. Bartmon, Inc., operated a drug store located at 2275 Grand Concourse, Bronx, New York. The business was sold on or about January 1, 1978.

2. On May 22, 1978, 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 petitioner for the period September 1, 1974 through December 31, 1977 for taxes due of \$6,206.54, plus minimum statutory interest of \$1,025.98, for a total of \$7,232.52.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period September 1, 1974 through August 31, 1977, to December 19, 1978.

4. On audit, the Audit Division analyzed purchase invoices for the months of March 1976 and September 1976 and determined that 31.51 percent of said purchases were items that would be subject to tax when sold. A markup test was not performed because the business was sold prior to the audit and consequently, actual selling prices were not available. Therefore, the Audit Division estimated petitioner's markup on taxable items at 50 percent. Said markup was based on petitioner's overall markup reported on Federal income tax returns filed for the years 1974, 1975 and 1976. This markup was applied to applicable purchases which resulted in additional taxable sales of \$74,807.00.

The Audit Division also found use taxes due of \$222.00 on the purchase of fixed assets. However, petitioner did not contest said amount.

5. Petitioner was burglarized on approximately ten different occasions during the audit period. Reports of such burglaries were filed with the 46th Precinct of the New York City Police Department. A detective with the 46th Precinct testified that he personally investigated two burglaries at petitioner's store and that, he was also aware of several reports made by other police officers. The detective also testified that the store was located in a high crime area and the nature of the merchandise stolen was items such as watches. The extent of petitioner's losses varied in each burglary; however, the entire

inventory was stolen or destroyed in the blackout which occurred in 1977. The stolen merchandise was primarily taxable items.

Petitioner suffered inventory losses of taxable items of \$45,000.00 during the period at issue due to the foregoing burglaries and pilferage.

6. During the period at issue, it became necessary for petitioner to buy merchandise through jobbers rather than directly from manufacturers and, consequently, pay higher prices for the same merchandise. In order to stay competitive, petitioner did not increase its selling prices. Therefore, its profit margin and markup percentage were reduced. Petitioner also ran special sales to induce customers into the store. Petitioner's markup percentage on prescription drugs and medicines was greater than on taxable items. Since 68 percent of petitioner's purchases were for non-taxable items, the overall markup of 50 percent from Federal income tax returns is excessive for taxable items.

Petitioner's average markup on taxable items was 33 percent.

7. Petitioner acted in good faith at all times.

CONCLUSIONS OF LAW

A. That the Audit Division did not give consideration to burglaries and pilferage as set forth in Finding of Fact "5"; moreover, the estimated markup of 50 percent was excessive based on Finding of Fact "6". Therefore, the Audit Division's determination of additional taxes due is incorrect. That the application of a 33 percent markup to taxable purchases reduced by the extent of petitioner's losses, result in no additional tax liability. Accordingly, the additional sales taxes due of \$5,984.54 determined by the Audit Division are cancelled.

B. That the petition of W.R. Bartmon, Inc., 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 22, 1978, together with interest computed at the minimum statutory rate; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JAN 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER