

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jackson Heights Pharmacy, Inc. :
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 9/1/74-8/31/77. :
_____:

AFFIDAVIT OF MAILING

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 3rd day of January, 1983, he served the within notice of Decision by certified mail upon Jackson Heights Pharmacy, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jackson Heights Pharmacy, Inc.
c/o Anthony L. Palladino
34-48 76th St.
Jackson Heights, NY 11372

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
3rd day of January, 1983.

Kathy Pfaffenbach

J. Vredenburg

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

January 3, 1983

Jackson Heights Pharmacy, Inc.
c/o Anthony L. Palladino
34-48 76th St.
Jackson Heights, NY 11372

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 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Gerald W. Cunningham
Cunningham & Lee
40 Gold St.
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JACKSON HEIGHTS PHARMACY, 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 August 31, 1977.

Petitioner, Jackson Heights Pharmacy, Inc., c/o Anthony L. Palladino, 34-48 76th Street, Jackson Heights, New York 11372, 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 August 31, 1977 (File No. 24846).

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 February 1, 1982, at 2:45 P.M. Petitioner appeared by Cunningham & Lee (Gerard W. Cunningham, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the field audit conducted by the Audit Division, whereby purchases which were taxable when resold were marked up to their selling prices, properly reflected the resulting additional sales tax liability asserted due.

II. Whether petitioner's books and records were sufficient for use in determining an exact amount of tax due without the need for the above audit method.

FINDINGS OF FACT

1. On November 13, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Jackson Heights Pharmacy, Inc. as a result of a field audit. The Notice covered the period September 1, 1974 through August 31, 1977 and asserted additional sales tax due of \$4,449.76 plus penalty and interest of \$2,569.21 for a total due of \$7,018.97.

2. On November 30, 1977, petitioner, by signature of its vice-president, Louis A. Palladino, executed a consent extending the period of limitation for the issuance of an assessment for the period September 1, 1974 through August 31, 1977 to December 20, 1978.

3. Petitioner operated a retail pharmacy at 82-02 Northern Boulevard in Jackson Heights. Both taxable and nontaxable sales were made. Petitioner reported the actual amount of tax collected on sales and use tax returns filed and determined its taxable sales by dividing the tax collected by 8 percent, the appropriate sales tax rate.

4. On audit, the Audit Division performed a detailed analysis of petitioner's purchases for the months of March and April, 1977 to determine the percentage of purchases which were taxable when resold. The review was later expanded to cover the twelve-month period, June 1, 1976 to May 31, 1977. The Audit Division determined two percentages for taxable purchases due to a change in section 1115(a)(3) of the Tax Law effective September 1, 1976. This change expanded the exemption to include medical equipment and supplies. The Audit Division determined that 31.86 percent of petitioner's purchases, excluding cigarette purchases, were taxable when resold for periods prior to September 1, 1976 and 29.82 percent were taxable when resold for periods after September 1, 1976. The Audit Division adjusted the total purchases made by petitioner by \$10,500.00

due to an increase in inventory during the audit period. Also, cigarette purchases were excluded. The taxable percentages determined were applied to the purchases made before and after September 1, 1976; and it was thus determined that petitioner made purchases of \$75,646.00 which were taxable when resold during the entire audit period. The Audit Division further made an allowance of 2 percent of taxable purchases determined for pilferage, spoilage and shrinkage, reducing purchases taxable when resold to \$74,133.00 for the entire audit period.

The Audit Division then performed a markup analysis using the two most current months' purchase invoices (November and December, 1977) and current selling prices (January, 1978). Based on this analysis, the Audit Division determined an overall markup for taxable items of 48.55 percent. It reduced the markup by 5 percent to 43.55 percent to allow for items marked down. The markup on cigarettes was separately determined to be 4.82 percent.

The Audit Division then applied the markup of 43.55 percent to the purchases deemed taxable when resold of \$74,133.00 and determined taxable sales of \$106,418.00. The markup on cigarettes of 4.82 percent was applied to cigarette purchases of \$6,908.00 to determine cigarette sales of \$7,241.00. The Audit Division then deducted the cigarette tax (not subject to sales tax) included of \$2,976.00 and determined taxable cigarette sales of \$4,265.00. The Audit Division determined total taxable sales for the audit period of \$110,683.00. Petitioner reported taxable sales of \$55,061.00 on sales and use tax returns filed. The Audit Division thereby determined additional taxable sales of \$55,622.00 and the additional tax due thereon of \$4,449.76.

5. By use of the above taxable percentage and markup analyses, the Audit Division determined that sales and use tax returns filed by the petitioner were insufficient. Petitioner had cash register tapes available for audit. The cash register tapes showed the total of each sales transaction including any sales tax charged. The cash register was totaled daily and the total sales including tax and the total tax collected were posted to a cash receipts book. These records, although complete, were insufficient in that the proper tax collections on individual items sold could not be verified.

6. Petitioner's major supplier was Rogers Wholesalers, Inc. Upon review of the audit workpapers, petitioner pointed out that a total of \$640.29 or 1 percent of purchases from Rogers was included in the taxable purchase analysis of one year which were actually purchases of promotional items and not subject to the normal markups. Petitioner was a member of Co-op Pharmacy Guild which was sponsored by Rogers. Members of the guild purchased goods at substantially reduced prices for promotional sales. The markup analysis performed by the Audit Division made no provision for such sales. Petitioner submitted samples of circulars used in advertising. The costs and selling prices of these promotional items sold by Jackson Heights Pharmacy reflected an average markup of 6.89 percent.

7. Petitioner contended that \$3,085.33 in purchases from Rogers, included in the month of May, 1977 of the taxable purchase analysis, was an additional statement which should not have been included. Petitioner was billed semi-monthly from Rogers. No evidence was submitted to show that this was a duplicate statement or that the results of the taxable purchase analysis might have been distorted in any way.

8. Petitioner conducted its own analysis of the purchase invoices from Rogers Wholesalers, Inc. which were used by the Audit Division to determine the taxable percentage of purchases on audit. Petitioner argued that items were included as taxable in the Audit Division's analysis which were actually exempt from tax. Petitioner submitted its analysis to show those purchases which it felt should have been exempt. A review of the purchases in question disclosed that some of these were taxable upon resale prior to September 1, 1976 and were included in the audit results only for that period. It also showed items that were taxable upon resale and properly included in the audit results as such. It did show that some items were included as taxable on audit which were actually exempt, and some purchases considered taxable purchases were actually packaging materials for drugs and should not have been marked up and considered taxable sales. The exclusion of such items from the taxable purchase analysis reduced the over-all taxable purchase ratio to 31.72 percent for periods prior to September 1, 1976 and 29.7 percent for periods thereafter.

9. Petitioner argued that the markup determined on audit was incorrect in that a 10 percent discount was given on most over-the-counter sales. Petitioner offered no substantial evidence to show that such discounts were the normal policy of the store and that the selling prices used in the markup analysis, other than the promotional items, were inaccurate. Moreover, petitioner reported an average overall markup of 47 percent on Federal tax returns covering the same basic period as the audit period.

10. Petitioner submitted invoices for purchases which were returned to suppliers and not sold. These purchases, however, were not included in the audit figures and therefore had no bearing on the audit results.

11. Petitioner argued that all books and records were available for audit and should have been used without the utilization of a test period. Further, petitioner argued that the assessment should be cancelled on the grounds that the months used for the markup analysis were not within the period under audit. Petitioner maintained that no sales tax was due in that all sales taxes collected were properly reported.

12. Petitioner acted in good faith in filing its sales and use tax returns without any intent to evade any taxes due.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that if a return, when filed, is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices such as stock on hand and/or purchases.

B. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41).

That petitioner did maintain books and records, all of which were available to the Audit Division. These books and records, however, were insufficient for the verification of taxable sales and the proper collection of the taxes thereon. Moreover, the use of a taxable purchase analysis and a markup analysis disclosed that the taxes reported by petitioner were insufficient. Petitioner's own analysis submitted disclosed certain items considered by petitioner to be exempt which were actually taxable when resold which further indicated the tax collections made were insufficient.

That petitioner's argument that all the books and records available should have been used on audit and that the markup analysis was outside the audit period is without merit in that individual selling prices of the goods sold were unavailable other than those current selling prices of the stock on hand which were used in the markup analysis. The use of the most current costs and selling prices available in determining the markup was not unreasonable.

C. That the Audit Division in determining petitioner's taxable percentage of purchases to which the markups were applied failed to consider sales of promotional items from Rogers Wholesalers, Inc. That 1 percent of petitioner's purchases from Rogers were resold on promotion at a markup of 6.89 percent pursuant to Finding of Fact "6", and the audit results are reduced to reflect such sales.

D. That the taxable purchase percentage applied on audit is reduced to 31.72 percent for periods prior to September 1, 1976 and 29.7 percent for periods thereafter in accordance with Finding of Fact "8".

E. That except as noted in Conclusions of Law "C" and "D" above, the field audit performed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law.

F. That the petition of Jackson Heights Pharmacy, Inc. is granted to the extent indicated in Conclusions of Law "C" and "D" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 13, 1978 with

minimum statutory interest thereon; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JAN 3 1983

STATE TAX COMMISSION

ACTING


PRESIDENT


COMMISSIONER


COMMISSIONER