

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

December 3, 1982

Murray Saltzman
d/b/a Evans Drug Store
878 Nostrand Ave.
Brooklyn, NY 11225

Dear Mr. Saltzman:

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) 1139 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
Martin R. Weinberg
10 Harvard St.
Roslyn Heights, NY 11577
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MURRAY SALTZMAN	:	DECISION
d/b/a EVANS 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 March 1, 1976	:	
through August 31, 1979.	:	

Petitioner, Murray Saltzman, d/b/a Evans Drug Store, 878 Nostrand Avenue, Brooklyn, New York 11225, 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 March 1, 1976 through August 31, 1979 (File No. 32035).

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 February 22, 1982, at 1:15 P.M. Petitioner appeared by Martin R. Weinberg, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether petitioner over reported taxable sales on sales tax returns filed for the period March 1, 1976 through August 31, 1979.

FINDINGS OF FACT

1. Petitioner, Murray Saltzman, d/b/a Evans Drug Store, operated a drug store located at 878 Nostrand Avenue, Brooklyn, New York.

2. On June 5, 1980, petitioner filed an application for a refund of sales tax of \$8,225.74 plus interest for the period March 1, 1976 through August 31, 1979. The claim was based on a field audit conducted by the Audit Division for

the period March 1, 1976 through August 31, 1979 which showed that petitioner's reported taxable sales exceeded the taxable sales determined by the auditor.

3. Petitioner executed two consents extending the period of limitation for assessment of sales and use taxes for the period at issue, to December 20, 1980.

4. On audit, the Audit Division analyzed petitioner's purchase invoices for the year 1978 and found that 15.5 percent of said purchases were items that would result in a taxable sale when sold. This percentage was applied to total purchases for the audit period of \$228,598.55 to arrive at taxable purchases of \$35,432.78. A mark-up analysis using costs and selling prices in effect at the time of the audit for the taxable items sold revealed an average mark-up of 59.94 percent. The average mark-up determined was applied to the above taxable purchases to determine taxable sales of \$56,671.19. Petitioner reported taxable sales of \$159,493.00 or \$102,821.81 greater than those determined on audit. As a result, the Audit Division accepted the accuracy of the sales reported by petitioner.

5. On November 10, 1980, petitioner's refund claim was denied in full on the basis that the sales taxes were overcollected from customers and that such overcollections were correctly paid over to New York State.

6. Petitioner's cash register tapes or books and records did not account for taxable sales and sales tax collected. The books and records reflect one amount for total receipts from all sources. Petitioner estimated taxable sales by applying a ratio of 35 percent to gross sales. This percentage was determined from a prior audit conducted in 1968.

CONCLUSIONS OF LAW

A. That petitioner failed to maintain the records required under section 1135 of the Tax Law, and in the absence of such records petitioner cannot establish the exact amount of sales tax liability for the period under review which is necessary to determine if, in fact, a refundable overpayment was made.

That section 1138 of the Tax Law authorizes the use of the audit procedures set forth in Finding of Fact "4" to estimate taxes due when insufficient books and records are maintained. However, such procedures are not satisfactory for the purpose of proving that a refund is due.

B. That the petition of Murray Saltzman, d/b/a Evans Drug Store is denied and the refund denial issued November 10, 1980 is sustained.

DATED: Albany, New York

DEC 03 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Murray Saltzman :
d/b/a Evans 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 :
3/1/76 - 8/31/79. :

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 December, 1982, he served the within notice of Decision by certified mail upon Murray Saltzman, d/b/a Evans Drug Store, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Murray Saltzman
d/b/a Evans Drug Store
878 Nostrand Ave.
Brooklyn, NY 11225

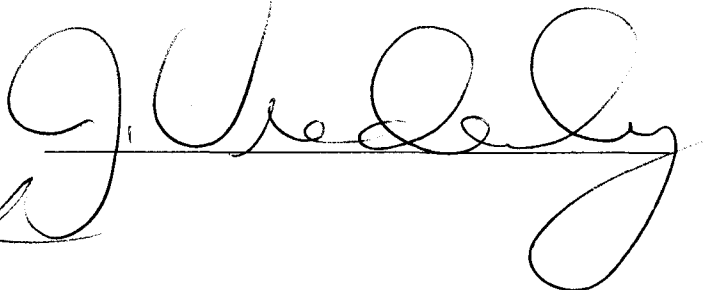
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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 December, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Murray Saltzman	:	
d/b/a Evans 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 3/1/76 - 8/31/79.	:	

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 December, 1982, he served the within notice of Decision by certified mail upon Martin R. Weinberg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

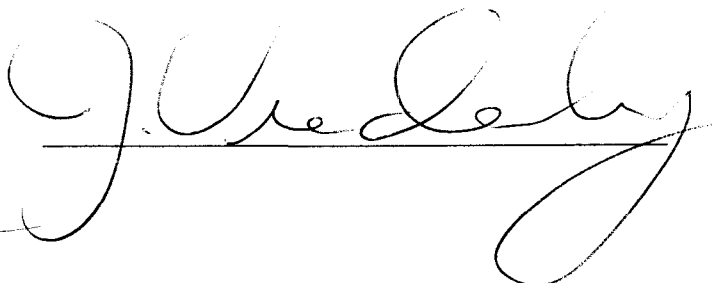
Martin R. Weinberg
10 Harvard St.
Roslyn Heights, NY 11577

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
3rd day of December, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



P 230 844 243
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO		<i>Martin J. Weinberg</i>	
STREET AND NO.		<i>10 Harvard St</i>	
P.O., STATE AND ZIP CODE		<i>Korlun Heights NY</i>	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	<i>71577</i> ¢
		SPECIAL DELIVERY	¢
	RETURN RECEIPT SERVICE	RESTRICTED DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

P 230 844 242
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO		<i>Murray Seltzman</i>	
STREET AND NO.		<i>4th Evans Drug Store</i>	
P.O., STATE AND ZIP CODE		<i>278 Postland Ave. Brooklyn NY</i>	
POSTAGE		\$	
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	<i>1225</i> ¢
		SPECIAL DELIVERY	¢
	RETURN RECEIPT SERVICE	RESTRICTED DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976