

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

May 6, 1983

Atlantic Chemists of Freeport, Inc.
and Anthony P. DeNicola, as officer
51 Oxford Rd.
Rockville Centre, NY 11570

Dear Mr. DeNicola:

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
Henry L. Goldberg
Goldberg & Goldberg
66 North Village Ave.
Rockville Centre, NY 11570
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ATLANTIC CHEMISTS OF FREEPORT, INC.	:	DECISION
AND ANTHONY P. DENICOLA, AS OFFICER	:	
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, 1975	:	
through February 28, 1979.	:	

Petitioners, Atlantic Chemists of Freeport, Inc., 179 Atlantic Avenue, Freeport, New York 11520, and Anthony P. DeNicola, as officer, 51 Oxford Road, Rockville Centre, New York 11570, 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 June 1, 1975 through February 28, 1979 (File No. 28358).

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 November 19, 1981 at 2:45 P.M. and continued to conclusion on April 27, 1982 at 9:15 A.M. Petitioners appeared by Henry L. Goldberg, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Angelo Scopellito, Esq., of counsel on November 19, 1981 and Anne Murphy, Esq., of counsel on April 27, 1982).

ISSUES

I. Whether the Audit Division's use of the markup method of audit as a basis for determining taxable sales of Atlantic Chemists of Freeport, Inc. was proper and if so,

II. Whether the additional taxable sales resulting from the use of such procedure were correct.

FINDINGS OF FACT

1. Petitioner Atlantic Chemists of Freeport, Inc. ("Atlantic") operated a pharmacy located at 179 Atlantic Avenue, Freeport, New York. During the period at issue, Atlantic implemented a discount merchandising policy to generate a greater sales volume.

2. On September 20, 1979, as the result of an audit, the Audit Division issued notices of determination and demand for payment of sales and use taxes due against Atlantic covering the period June 1, 1975 through February 28, 1979 for taxes due totaling \$9,804.96, plus minimum statutory interest. On the same date identical notices were issued against petitioner Anthony P. DeNicola, as officer of Atlantic.

3. Atlantic executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1975 through May 31, 1978, to September 20, 1979.

4. Atlantic did not retain cash register tapes and as a result, the Audit Division could not independently verify the cash receipts journal for accuracy. Therefore, in order to determine whether Atlantic's reported sales were correct, the Audit Division performed the following audit:

Purchases invoices for the fiscal year ended June 30, 1978 were analyzed to determine items that would be subject to tax when resold. Atlantic made the same analysis for the fiscal year ended June 30, 1976. The two analyses were combined to determine taxable purchases of \$494,440.90 for the period June 1, 1975 through June 30, 1978. Said amount reflects an increase in inventory and an inventory loss by fire. Markup percentages were computed for selected items purchased from every supplier found for the test year (fiscal

year ended June 30, 1978) using costs and selling prices in effect at the time of the audit. The average markup of the items selected was applied to the total purchases from each supplier resulting in an overall weighted markup of 56.88 percent. This markup was adjusted to 54 percent to give consideration to items marked down in price. The adjusted markup was applied to the foregoing taxable purchases to arrive at taxable sales of \$761,439.00. An allowance of 2½ percent was given for pilferage which reduced the taxable sales to \$744,307.00. Petitioner reported taxable sales of \$641,544.00, leaving additional taxable sales of \$102,763.00 or an error factor of 16.018 percent. The error factor was used to compute additional taxable sales of \$30,413.00 for the remainder of the audit period.

Use taxes found due of \$101.27 are not at issue.

5. Atlantic did not employ security personnel to control pilferage. The aisle displays of the store were not in view from the prescription counter nor the cash registers and consequently invited shoplifting. Atlantic made numerous calls to the Freeport Police Department during the audit period to report such incidents as shoplifting, burglaries, attempted burglaries and criminal mischief.

Published pharmacy industry norms for pilferage are greater than the allowance estimated by the Audit Division.

6. Atlantic advertised special sale merchandise regularly in local newspapers. The normal selling price of the advertised item was discounted

substantially. In addition, seasonal merchandise such as greeting cards, candy, and Christmas accessories were sold the following day at cost or at a minimal markup.

Atlantic also offered a 10 percent discount to senior citizens.

7. Petitioner argued that it maintained complete and accurate books and records and therefore it was not necessary for the Audit Division to estimate sales through the use of markup percentages.

CONCLUSIONS OF LAW

A. That petitioner's failure to retain cash register tapes as required by section 1135 of the Tax Law justifies the Audit Division's use of markup percentages to determine taxable sales (Matter of Murray's Wines and Liquors v. State Tax Commission, 78 AD2d 947. Matter of Mc Cluskey's Steak House, Inc. v. State Tax Commission, 80 AD2d 713).

B. That the markup test conducted by the Audit Division did not reflect the discount nature of the business operation; that its subsequent adjustment of 2.88 percent was inadequate given the factors set forth in Finding of Fact "6" and thereby taxable sales were overstated. That a reasonable estimate of petitioner Atlantic's overall markup percentage on taxable items was 40 percent.

C. That Atlantic's pilferage losses were 4 percent as opposed to the 2½ percent allowed on audit.

D. That the petition of Atlantic Chemists of Freeport, Inc. and Anthony P. De Nicola is granted to the extent indicated in Conclusions of Law "B" and "C"; that the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued September 20,

1979; and that, except as so granted, the petition is in all other respects denied.

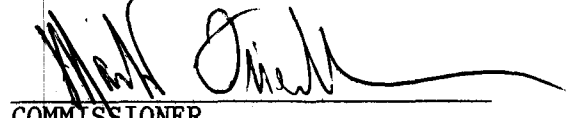
DATED: Albany, New York

MAY 06 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Atlantic Chemists of Freeport, Inc.
and Anthony P. DeNicola, as officer

: 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 6/1/75-2/28/79. :

State of New York
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Atlantic Chemists of Freeport, Inc., and Anthony P. DeNicola, as officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Atlantic Chemists of Freeport, Inc.
and Anthony P. DeNicola, as officer
51 Oxford Rd.
Rockville Centre, NY 11570

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
6th day of May, 1983.

David Parchuck

Barbara R. Hays

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Atlantic Chemists of Freeport, Inc. :
and Anthony P. DeNicola, as officer :
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 6/1/75-2/28/79. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Henry L. Goldberg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Henry L. Goldberg
Goldberg & Goldberg
66 North Village Ave.
Rockville Centre, NY 11570

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
6th day of May, 1983.

David Parchuck

Ronnie R. Hagedorn

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

P 389 758 914
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Henry S. Goldberg</i>	
<i>Goldberg & Goldberg</i>	
Street and No. <i>66 North Village Ave.</i>	
P.O., State and ZIP Code <i>Rockville Centre, NY 11570</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 339 758 913
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Anthony P. Atlantic Chemist</i>	
<i>of Freeport, Inc. & Anthony P. DeNiro</i>	
Street and No. <i>51 Oxford Rd.</i>	
P.O., State and ZIP Code <i>Rockville Ctr, NY 11570</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982