

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

May 6, 1983

Del Mor Pharmacy
and Del Mor Pharmacy, Inc.
1410 Delaware Ave.
Buffalo, NY 14209

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
Thomas A. Morris
Sunshine, Morris & Co.
5500 Main St.
Williamsville, NY 14221
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Del Mor Pharmacy
and Del Mor Pharmacy, Inc. :

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 12/1/74-5/31/78.

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 Del Mor Pharmacy, and Del Mor Pharmacy, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Del Mor Pharmacy
and Del Mor Pharmacy, Inc.
1410 Delaware Ave.
Buffalo, NY 14209

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

James A. Caplan

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Del Mor Pharmacy :
and Del Mor Pharmacy, Inc. :

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 12/1/74-5/31/78. :

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 Thomas A. Morris the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas A. Morris
Sunshine, Morris & Co.
5500 Main St.
Williamsville, NY 14221

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

Connie O. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DEL MOR PHARMACY	:	DECISION
and DEL MOR PHARMACY, INC.	:	
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1974	:	
through May 31, 1978.	:	

Petitioners, Del Mor Pharmacy and Del Mor Pharmacy, Inc., 1410 Delaware Avenue, Buffalo, New York 14209, filed a petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1974 through May 31, 1978 (File Nos. 27597 and 27742).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on May 11, 1982 at 1:15 P.M. Petitioners appeared by Seymour Mandel, Esq. and Thomas Morris, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether the audit procedures used by the Audit Division in an examination of petitioners' books and records were proper and whether the additional taxable sales resulting therefrom were correct.

FINDINGS OF FACT

1. Petitioners, Del Mor Pharmacy and Del Mor Pharmacy, Inc., operated a drug store located at 1410 Delaware Avenue, Buffalo, New York. The business changed from a sole proprietorship to a corporation on January 1, 1977.

2. On July 27, 1979, 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 Del Mor Pharmacy covering the period December 1, 1974 through December 31, 1976 for taxes due of \$19,397.06, plus minimum statutory interest of \$5,731.35, for a total of \$25,128.41.

On the same date, a Notice was also issued against Del Mor Pharmacy, Inc., covering the period January 1, 1977 through May 31, 1978 for taxes due of \$12,638.85, plus minimum statutory interest of \$1,800.38, for a total of \$14,439.23.

3. Petitioner Del Mor Pharmacy executed consents extending the period of limitation for assessment of sales and use taxes for the period December 1, 1974 through November 30, 1977, to December 20, 1979.

4. On audit, the Audit Division reviewed purchase invoices for the year 1977 to determine those purchases that would result in a taxable sale when resold. If a supplier sold both taxable and exempt items, a taxable percentage was computed based on an analysis of purchases made for the period March 1, 1977 through May 31, 1977. Taxable resaleable purchases amounted to \$125,729.64 for 1977. This amount was reduced to \$125,262.07 to adjust for sales of taxable items to exempt organizations. Petitioner did not keep a record of said sales; however, the allowance was given based on the Audit Division's request to document nontaxable sales for the months of June, 1978 and July, 1978.

The taxable purchases found for the period ended May 31, 1977 were categorized as follows: cigarettes, candy, tobacco, notions, film and processing, greeting cards, beauty products, toys, school supplies and novelties, watches and pocketbooks.

A markup was computed for each category of purchases based on the current cost and selling prices of selected items within that category. The individual markups were applied to the total purchases by category for the test period to determine a weighted average markup of 36.78 percent. Said markup was adjusted to 34.73 percent to give consideration to discounts given senior citizens and employees. The adjusted markup of 34.73 percent was applied to taxable purchases of \$433,165.00 for the entire audit period to arrive at taxable sales of \$583,606.00. Petitioners reported taxable sales of \$125,949.81 for the same period, leaving additional taxable sales of \$457,657.00 and taxes due thereon of \$32,035.91. (Additional taxes of \$19,397.06 were assessed against the sole proprietorship and \$12,638.85 against the corporation.)

5. Petitioners did not include prescription sales in gross sales reported on sales tax returns. Petitioners' charge sales were rung on a cash register at the prescription counter which did not have a tax key and therefore, any taxable item sold on account to a customer was not reported as a taxable sale.

Petitioners reported taxable sales of \$125,949.81 over the audit period of 3½ years whereas purchases of taxable items were \$125,729.64 for one year (1977). Petitioners' books and records were inadequate for the Audit Division to determine the exact amount of taxable sales.

6. Petitioners argued that the audit procedures described in Finding of Fact "4" above, did not accurately determine taxable sales. Petitioner audited the period ending May 31, 1976. Petitioners applied markup percentages to purchases of taxable and nontaxable items for said period. The percentage of taxable sales based on total sales was 26.61 percent. Petitioners then adjusted the percentage to 13.5 percent for discounts, markdowns, exempt sales, donations and theft (employee and shoplifting). Petitioners' audit shows a deficiency of \$3,968.95.

7. Petitioners' audit did not establish how the markup percentages were determined or the nature of the items classified taxable and nontaxable. Moreover, the adjustments made to the taxable percentage were not supported by any substantial evidence.

8. The Audit Division did not give consideration to pilferage. Petitioner estimated that pilferage losses were 10.67 percent of total sales. A more reasonable estimate of such losses is 5 percent of taxable sales.

CONCLUSIONS OF LAW

A. That the audit procedures described in Finding of Fact "4" are generally accepted audit procedures established by the Audit Division and are used to verify the accuracy of books and records. That such procedures as well as the factors set forth in Finding of Fact "5" disclosed that petitioners' books and records were unreliable and sales tax returns filed were insufficient.

B. That due to the insufficiency of petitioners' records, the audit procedures and tests adopted by the Audit Division were proper pursuant to section 1138(a) of the Tax Law (Matter of Chartair, Inc. v. State Tax Commission, 65 AD2d 44, Matter of Meyer v. State Tax Commission, 61 AD2d 223, mot. for lv. to app. den. 44 NY2d 645).

C. That except for its failure to consider pilferage, the Audit Division reasonably determined petitioners' sales tax liability and petitioners have not overcome their burden of showing error (Matter of Manny Convissar v. State Tax Commission, 69 AD2d 929).


D. That the petition of Del Mor Pharmacy and Del Mor Pharmacy, Inc. is granted to the extent that the additional taxable sales shall be reduced in accordance with Finding of Fact "8"; that the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use

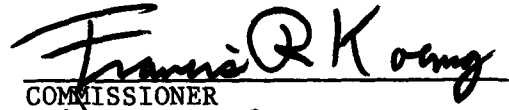
taxes due issued July 27, 1979; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAY 06 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 207 703

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	Del Mar Pharmacy
Street and No.	Del Mar Pharmacy
P.O., State and ZIP Code	1410 Delaware Ave. Buffalo NY 14204
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 481 207 704

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	Thomas A Morris
Street and No.	Sumner House Co.
P.O., State and ZIP Code	Wellington NY 14221
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