

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

January 24, 1983

Dial Drugs R & W Drugs, Inc.  
2050 Rockaway Pkwy.  
Brooklyn, NY 11236

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  
Abraham I. Friedman  
1555 54th St.  
Brooklyn, NY  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of  
Dial Drugs R & W Drugs, 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 6/1/75-3/31/78.

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State of New York  
County of Albany

Kathy Pfaffenbach, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of January, 1983, she served the within notice of Decision by certified mail upon Abraham I. Friedman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Abraham I. Friedman  
1555 54th St.  
Brooklyn, NY

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  
24th day of January, 1983.

Kathy Pfaffenbach

Annie P. Haglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
DIAL DRUGS R & W DRUGS, 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 June 1, 1975	:	
through May 31, 1978.	:	

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Petitioner, Dial Drugs R & W Drugs, Inc., 2050 Rockaway Parkway, Brooklyn, New York 11236, 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 May 31, 1978 (File No. 27540).

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 April 27, 1982, at 10:45 A.M. Petitioner appeared by Abraham I. Friedman, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Kevin Cahill, Esq., of counsel).

ISSUE

Whether the pilferage allowance of 3 percent of taxable sales conceded by the Audit Division was an accurate representation of such losses sustained by petitioner.

FINDINGS OF FACT

1. On June 20, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Dial Drugs R & W Drugs, Inc. covering the period June 1, 1975 through May 31, 1978. The Notice

was issued as a result of a field audit and asserted additional tax due of \$14,801.15 plus penalty and interest of \$7,620.58 for a total due of \$22,421.73.

2. Petitioner, by signature of its president, Abe Rutman, executed a consent to extend the period of limitation for assessment to June 20, 1979.

3. Petitioner's records were insufficient for the verification of its taxable sales and the proper collection of sales tax thereon. In filing sales and use tax returns, petitioner estimated a percentage of purchases which would be taxable when resold and marked them up to arrive at taxable sales.

4. On audit, the Audit Division performed a purchase analysis and a markup analysis to verify the accuracy of taxable sales reported on returns filed. It used the months of August, 1977 and February, 1978 to determine the percentage of the total purchases which were taxable when resold. August, 1978 was used for the markup analysis. The Audit Division determined the following taxable purchase percentages and markups:

<u>Category</u>	<u>Percentage of Taxable Purchases to Total Purchases</u>	<u>MarkUp</u>
Miscellaneous Taxable:		
Pre-September 1976*	20.82%	15.42%
Post-August 1976*	20.25%	15.42%
Cosmetics	1.74%	43.47%
Candy	2.72%	33.85%
Cigarettes	13.32%	5.13%
Film	2.13%	25.21%
Greeting Cards	.22%	90.00%
Soda	6.64%	2.28%

\* Two taxable purchase percentages were determined for miscellaneous taxable purchases to reflect a change in section 1115(a)(3) of the Tax Law effective September 1, 1976.

The Audit Division made a deduction of \$20,000.00 from total purchases to allow for pilferage. It then applied the appropriate taxable purchase percentages to total purchases of \$1,922,208.00, applied the markups above, and

determined taxable sales of \$924,064.00 for the entire audit period. Petitioner reported taxable sales of \$740,364.00 on sales and use tax returns filed for the same period. The Audit Division thereby determined additional taxable sales of \$183,700.00 and tax due thereon of \$14,696.00.

The Audit Division also determined tax due of \$105.15 on fixed asset purchases of \$1,314.40 on which no sales tax had been paid. The Audit Division thereby determined the total sales and use tax deficiency of \$14,801.15.

5. As a result of a conference held, the Audit Division conceded that the additional tax due should be reduced to \$5,477.71 plus applicable penalty and interest. The adjustment resulted from additional substantiation submitted by petitioner concerning an increase in inventory of \$76,000.00 during the audit period and adjustments made to certain markup percentages originally applied to purchases on audit. The allowance for pilferage was increased to 3 percent of taxable sales to reflect a more reasonable allowance for such losses.

6. Petitioner contended that the 3 percent adjusted allowance for pilferage as allowed by the Audit Division was insufficient in that such losses actually amounted to 8 to 10 percent of overall sales. Petitioner argued that at least 2 to 3 people were apprehended every month for stealing. Petitioner estimated weekly losses of \$300.00 or \$40.00 per day. Petitioner also contended that only taxable items were pilfered from the store since prescription and expensive items are under lock and key. Petitioner offered no substantial evidence to show that the 3 percent allowance made by the Audit Division for pilferage, which constituted \$24,975.00 in taxable sales, was not reasonable. Petitioner offered no documentation of the actual losses sustained.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that where incorrect or insufficient tax returns are filed, 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 purchases or other factors.

B. That petitioner failed to maintain adequate books and records from which to determine its actual tax liability. The Audit Division's resort to use of external indices in order to determine petitioner's tax due was therefore proper. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44.)

C. That once it is established that the Audit Division's independent determination was permissible, the burden of proof is upon petitioner to show that the Audit Division's determination should be overturned. (People ex rel. Kohlman & Co. v. Law, 239 N.Y. 346.)

D. That petitioner submitted proof to show that the Audit Division erred with regard to an allowance for inventory and on certain markups. The tax determination is adjusted to \$5,477.71 in accordance with Finding of Fact "5".

E. That petitioner failed to show that pilferage and theft exceeded the three percent allowance given by the Audit Division. Therefore, petitioner has not met its burden of proof with respect to pilferage or theft (Kohlman & Co., supra).

F. That the petition of Dial Drugs R & W Drugs, Inc. is granted to the extent indicated in Conclusion of Law "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 June 20, 1979 with applicable penalty

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


DATED: Albany, New York

JAN 24 1983


STATE TAX COMMISSION



ACTING PRESIDENT



COMMISSIONER



COMMISSIONER

**P 278 401 696**  
**RECEIPT FOR CERTIFIED MAIL**

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

SENT TO			
Dial Drugs R+W Drugs, Inc.			
STREET AND NO.			
2050 Rockaway Pkwy.			
P.O., STATE AND ZIP CODE			
Brooklyn, NY 11236			
POSTAGE	\$		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	¢	
	SPECIAL DELIVERY	¢	
	RESTRICTED DELIVERY	¢	
	OPTIONAL SERVICES	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES	\$		
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

**P 278 401 697**  
**RECEIPT FOR CERTIFIED MAIL**

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

SENT TO			
Abraham I. Friedman			
STREET AND NO.			
1555 54th St.			
P.O., STATE AND ZIP CODE			
Brooklyn, NY			
POSTAGE	\$		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	¢	
	SPECIAL DELIVERY	¢	
	RESTRICTED DELIVERY	¢	
	OPTIONAL SERVICES	SHOW TO WHOM AND DATE DELIVERED	¢
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
		SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES	\$		
POSTMARK OR DATE			

PS Form 3800, Apr. 1976