

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

November 10, 1983

East Side Chemist Ltd.
d/b/a Block Pharmacy
1270 Third Ave.
New York, NY 10021

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Richard H. Miller
c/o Haver, Porchenick & Co.
20 Waterside Plaza
New York, NY 10010
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
East Side Chemist Ltd. :
d/b/a Block Pharmacy : 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 :
12/1/75-11/30/80. :

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon East Side Chemist Ltd. d/b/a Block Pharmacy, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

East Side Chemist Ltd.
d/b/a Block Pharmacy
1270 Third Ave.
New York, NY 10021

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
10th day of November, 1983.

Martha L. Drunelle

Connie P. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
East Side Chemist Ltd.	:	
d/b/a Block Pharmacy	:	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 12/1/75-11/30/80.	:	

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Richard H. Miller the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard H. Miller
c/o Haver, Porchenick & Co.
20 Waterside Plaza
New York, NY 10010

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
10th day of November, 1983.

Maucha L. Grunelle

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EAST SIDE CHEMISTS, LTD.	:	DECISION
d/b/a BLOCK PHARMACY	:	
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 December 1,	:	
1975 through November 30, 1980.	:	

Petitioner, East Side Chemists, Ltd., d/b/a Block Pharmacy, 1270 Third Avenue, New York, New York 10021, 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 December 1, 1975 through November 30, 1980 (File No. 33817).

A formal 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 April 18, 1983 at 1:15 P.M. Petitioner appeared by Richard H. Miller, CPA. The Audit Division appeared by John P. Dugan, Esq. (Lawrence Newman, Esq., of counsel).

ISSUE

Whether the audit procedures and tests used by the Audit Division in an examination of petitioner's books and records were proper and whether the additional taxable sales determined as a result thereof were correct.

FINDINGS OF FACT

1. Petitioner, East Side Chemists, Ltd., d/b/a Block Pharmacy, operated a drug store located at 1270 Third Avenue, New York, New York.
2. On March 30, 1981, as the result of an audit, the Audit Division issued notices of determination and demand for payment of sales and use taxes

due against petitioner covering the periods December 1, 1975 through November 30, 1978 and December 1, 1978 through November 30, 1980 for taxes due of \$21,309.43 and \$22,862.89, respectively, plus applicable penalty and interest.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period December 1, 1975 through August 31, 1979, to March 30, 1981.

4. On audit, the Audit Division analyzed purchase invoices for the period March 1, 1978 through May 31, 1978 to determine those purchases that would result in a taxable sale when resold. The taxable purchases (\$64,287.30) were categorized as follows: cosmetics and toiletries - \$59,203.35, candy - \$129.06, cigarettes - \$1,169.94 and miscellaneous taxable - \$3,784.95. The taxable items represented 64.76 percent of total purchases examined. A markup was determined for each category and applied to the above purchases to arrive at an overall weighted average markup of 64.88 percent.

The taxable ratio (64.76%) was applied to total purchases of \$930,365.00 for the period December 1, 1975 through November 30, 1979 to arrive at taxable purchases of \$602,504.37. The weighted markup was applied to these purchases to determine taxable sales of \$993,409.21. Petitioner reported taxable sales of \$609,023.00 for the same period, leaving additional taxable sales of \$384,386.21, or an error factor of 63.115 percent. This percentage was applied to taxable sales reported for the entire audit period of \$874,776.00 to determine total taxable sales of \$1,426,890.87 and tax due thereon of \$114,151.26. Petitioner paid sales taxes of \$69,978.94, leaving a deficiency of \$44,172.32.

5. Petitioner had "in-house" charge accounts. An invoice, listing the individual items purchased, was prepared for charge sales and each customer was

sent a statement monthly. Cash sales were rung on a cash register; however, the tapes produced by the register were discarded by petitioner.

The Audit Division took the position that without cash register tapes it could not independently verify the taxable sales recorded in petitioner's books and records and the use of the audit procedures described above was necessary to determine such sales.

6. Petitioner analyzed monthly summaries of charge sales for the audit period and found that sales tax was charged on 45 percent of the sales. Petitioner assumed that cash sales of taxable items were in the same proportion as charge sales and applied the 45 percent to gross sales to determine taxable sales. This method showed a deficiency of \$3,947.12.

7. Petitioner argued that the above analysis was based on actual sales invoices which indicate the items purchased and is an accurate representation of sales activities. Petitioner further argued that such records should have been utilized by the Audit Division rather than making a determination based on an examination of purchases.

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 AD 2d 947. Matter of McCluskey's Steak House, Inc. v. State Tax Commission, 80 AD 2d 713).

That, moreover, the audit procedures set forth in Finding of Fact "4" disclosed a significant variance with taxable sales reported to conclude that sales tax was not properly charged on all taxable items. Such a discrepancy

further established the inadequacy and unreliability of petitioner's books and records, (Matter of George Korba v. State Tax Commission, 84 AD 2d 655).

Accordingly, the determination of additional taxes due was proper pursuant to section 1138(a) of the Tax Law (Matter of Sakran v. State Tax Commission, 73 AD 2d 989).

B. That the Audit Division reasonably calculated petitioner's tax liability and petitioner has not overcome its burden of showing error (Matter of Manny Convissar v. State Tax Commission, 69 AD 2d 929).

C. That the petition of East Side Chemists, Ltd., d/b/a Block Pharmacy, is denied and the notices of determination and demand for payment of sales and use taxes due issued March 30, 1981 are sustained.

DATED: Albany, New York

NOV 10 1983

STATE TAX COMMISSION

Roderich W. Chu
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER

P 470 315 103

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
East Side Chemist Ltd	
Street and No.	
1270 Third Ave.	
P.O., State and ZIP Code	
NY, NY 10021	
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 470 315 104

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Richard H. Miller	
Street and No.	
20 Waterside Plaza	
P.O., State and ZIP Code	
NY, NY 10010	
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