

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

May 6, 1983

Carl Harm  
d/b/a National Distributing Co.  
868 Broadway  
New York, NY 10003

Dear Mr. Harm:

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  
Murray Appleman  
225 Broadway  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Carl Harm :  
d/b/a National Distributing Co. : 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 :  
6/1/73-5/31/76. :

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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 Carl Harm, d/b/a National Distributing Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carl Harm  
d/b/a National Distributing Co.  
868 Broadway  
New York, NY 10003

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 P. Hopland

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Carl Harm	:	
d/b/a National Distributing Co.	:	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 6/1/73-5/31/76.	:	

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 Murray Appleman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Murray Appleman  
225 Broadway  
New York, NY 10007

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

Conni O'Hair

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	:	
CARL HARM	:	DECISION
d/b/a NATIONAL DISTRIBUTING CO.	:	
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, 1973	:	
through May 31, 1976.	:	

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Petitioner, Carl Harm, d/b/a National Distributing Co., 868 Broadway, New York, New York 10003, 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, 1973 through May 31, 1976 (File No. 21654).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 23, 1982 at 2:45 P.M. Petitioner appeared by Murray Appleman, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUES

I. Whether the portion of the assessment relating to the period June 1, 1973 through May 31, 1974 must be cancelled by reason of the Audit Division's failure to present at the hearing petitioner's sales tax return for said period.

II. Whether the portion of the audit which increased petitioner's sales by 0.83 percent was arbitrary and capricious.

III. Whether 85 percent of petitioner's sales were properly deemed taxable by the Audit Division, though claimed by petitioner to have been for resale.

FINDINGS OF FACT

1. As the result of a field audit conducted by its sales tax examiner, the Audit Division issued to petitioner, Carl Harm, d/b/a National Distributing Co. ("Distributing"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated December 15, 1977, asserting sales taxes due for the period June 1, 1973 through May 31, 1976, plus penalties and interest, scheduled as follows:

<u>PERIOD ENDED</u>	<u>TAX</u>	<u>PENALTY AND INTEREST</u>	<u>TOTAL</u>
08/31/73	\$ 7,934.29	\$ 4,363.86	\$ 12,298.15
11/30/73	8,834.07	6,448.87	15,282.94
02/28/74	7,303.17	5,112.22	12,415.39
05/31/74	8,239.84	5,520.69	13,760.53
06/30/74	2,195.20	1,404.93	3,600.13
08/31/74	5,945.04	3,804.83	9,749.87
11/30/74	12,376.00	7,549.36	19,925.36
02/28/75	11,244.00	6,521.52	17,765.52
05/31/75	8,198.32	4,509.08	12,707.40
08/31/75	9,167.04	4,766.86	13,933.90
11/30/75	10,743.76	5,264.44	16,008.20
02/29/76	12,440.48	5,722.62	18,163.10
05/31/76	12,892.24	5,156.90	18,049.14
	<u>\$117,513.45</u>	<u>\$66,146.18</u>	<u>\$183,659.63</u>

On March 21, 1977, Mr. Harm had executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1973 through May 31, 1976, to and including December 19, 1977.

2. Distributing is engaged in selling miscellaneous merchandise, including housewares, cutlery and glassware. It filed sales and use tax returns for the periods June 1, 1973 through May 31, 1974, June 1, 1974 through May 31, 1975 and June 1, 1975 through May 31, 1976, reporting zero gross and taxable sales and claiming that all sales were wholesale.

3. The audit procedure employed by the sales tax examiner is summarized below.

(a) The examiner attempted to reconcile petitioner's cash receipts journal and unnumbered, but dated, sales invoices for the test month April, 1976. Sales according to the journal were \$73,004.00, while sales as reflected by the invoices were \$73,613.36, thereby resulting in an increase in gross sales of 0.83 percent.

The examiner could not recollect attempting to ascertain whether the April invoices had been recorded in the journal for March or May; he testified, however, that usual and accepted auditing techniques would include such a check.

(b) The examiner investigated claimed out-of-state sales for the test month. Such sales constituted 10.2 percent (\$7,528.95) of all sales but were entirely disallowed by the examiner on two grounds: petitioner's failure to produce documentation to show that the goods were shipped out-of-state; and Mr. Harm's statement that the vendors picked up the goods at his place of business.

(c) The balance of sales, all claimed by petitioner to have been for resale, totaled \$66,084.41 for the test month. Petitioner supplied resale certificates for all these sales, but the examiner decided to investigate further due to the high percentage of sales for cash (84.6 percent of gross sales), numerous repeat sales to the same vendors during the test month, and reports by unregistered street peddlers that they had purchased goods from Distributing.

The Audit Division subsequently examined the purchase books of four peddlers who had bought goods from Distributing. The books reflected \$5,954.30 in purchases from Distributing during the month of April, 1976; Distributing's sales invoices, on the other hand, showed \$23,104.71 in sales to these peddlers. The examiner accordingly disallowed 74.2 percent of the resales claimed.

In sum, the Audit Division (i) increased petitioner's gross sales by 0.83 percent to \$1,992,067.00 for the audit period, (ii) disallowed 10.2 percent of the adjusted sales claimed by petitioner to have been sold to out-of-state vendors, and (iii) disallowed 74.2 percent of the balance of sales claimed by petitioner to have been for resale, to arrive at additional taxable sales of \$1,530,537.00 for the period June 1, 1973 through May 31, 1976.

4. At the hearing, counsel for the Audit Division offered in evidence Distributing's returns for the period June 1, 1974 through May 31, 1975 and June 1, 1975 through May 31, 1976, but was unable to produce any return for the period June 1, 1973 through May 31, 1974. The examiner's workpapers and report include a Schedule of Returns Filed, which indicates that a return was filed for the period June 1, 1973 through May 31, 1974 and was assigned deposit serial number 68607117.

5. Mr. Harm did not appear personally at the hearing. His representative did not offer any testimony or documentary evidence in support of the petition but maintains, among other things, that all petitioner's sales were for resale and thus no tax liability exists.

6. Distributing maintained sufficient books and records from which the actual amount of tax liability could be determined.

#### CONCLUSIONS OF LAW

A. That since the petitioner maintained sufficient books and records, the Audit Division's use of a test period was not warranted. Therefore, those portions of the assessment projected from the test period computations are hereby cancelled. Chartair, Inc. v. State Tax Comm., 65 A.D.2d 44.

B. That in view of the foregoing, the first issue is rendered moot.

C. That the adjustment, which was based upon the Audit Division's examination of petitioner's sales invoices and which increased petitioner's gross sales for April, 1976 by 0.83 percent, was proper and in accordance with the provisions of section 1138(a) of the Tax Law. Petitioner's assertion that such adjustment was arbitrary and capricious is absolutely lacking in support. If the invoices had been improperly recorded in the cash receipts journal, petitioner could easily have so demonstrated.

D. That the adjustment which subjected 84.4 percent of petitioner's gross sales (for April, 1976) to taxation was likewise proper.

Petitioner produced no evidence to establish that goods were shipped to out-of-state vendors; on the contrary, petitioner admitted that the goods were picked up in New York.

The remaining portion of this adjustment was based upon the Audit Division's finding that 74.2 percent of petitioner's gross sales had been made to unknown customers from whom no tax was collected, and not to the customers named in petitioner's invoices and from whom petitioner had received resale certificates. Petitioner did not meet his burden of rebutting the presumption, created by section 1132(c), that these sales were subject to tax. See Matter of Sakran v. State Tax Comm., 73 A.D.2d 989 (3d Dept.). Petitioner's position appears to be that inasmuch as the Audit Division knew that some sales were made to unlicensed street peddlers, it follows that all the disallowed sales were for resale. This position ignores section 1132(c) and is entirely without merit.




E. That the petition of Carl Harm, d/b/a National Distributing Co., is granted to the extent indicated in Conclusion of Law "A"; that the Notice of Determination and Demand issued on December 15, 1977 is to be modified accordingly; 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 389 758 874**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Carl Harm</u>	
<u>d/b/a National Distributing Co.</u>	
Street and No. <u>868 Broadway</u>	
P.O., State and ZIP Code <u>New York, NY 10003</u>	
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	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982

**P 389 758 875**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Murray Appleman</u>	
Street and No. <u>225 Broadway</u>	
P.O., State and ZIP Code <u>New York, NY 10007</u>	
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	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982