

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

May 11, 1983

Harwood Chemists, Inc.  
and Bernard Berman, Officer  
3580 Centerview Ave.  
Wantagh, NY 11793

Dear Mr. Berman:

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  
Robert M. Markman  
108 Edgecliff Terrace  
Yonkers, NY 10705  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Harwood Chemists, Inc. :  
and Bernard Berman, 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 :  
6/1/75-5/31/77. :

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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 11th day of May, 1983, he served the within notice of Decision by certified mail upon Harwood Chemists, Inc. and Bernard Berman, Officer, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harwood Chemists, Inc.  
and Bernard Berman, Officer  
3580 Centerview Ave.  
Wantagh, NY 11793

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  
11th day of May, 1983.

David Parchuck

Annice A. Hagedorn  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Harwood Chemists, Inc.	:	
and Bernard Berman, 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 6/1/75-5/31/77.	:	

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 11th day of May, 1983, he served the within notice of Decision by certified mail upon Robert M. Markman the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert M. Markman  
108 Edgecliff Terrace  
Yonkers, NY 10705

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  
11th day of May, 1983.

David Parchuck

Ronnie A. Highland

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	:	
HARWOOD CHEMISTS, INC.	:	DECISION
and BERNARD H. BERMAN, 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 May 31, 1977.	:	

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Petitioners, Harwood Chemists, Inc. and Bernard H. Berman, 3580 Centerview Avenue, Wantagh, New York 11793, 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, 1977 (File No. 27248).

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 9:15 A.M. Petitioners appeared by Robert M. Markman, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Kevin Cahill, Esq., of counsel).

ISSUE

Whether the result of a field audit performed by the Audit Division on Harwood Chemists, Inc., where the use of external indices was necessitated by a lack of source documents, properly reflected the additional sales tax liability asserted.

FINDINGS OF FACT

1. On November 10, 1978, as a result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Harwood Chemists, Inc. covering the period June 1, 1975 through

May 31, 1977. The Notice asserted additional tax due of \$4,241.00, plus interest of \$1,009.40, for a total of \$5,250.40.

2. On December 1, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Bernard H. Berman for his liability as officer of Harwood Chemists, Inc. for the same aforementioned period. The Notice asserted the additional tax due found on audit of \$4,241.00, plus penalty and interest of \$2,214.38, for a total of \$6,455.38.

3. Petitioner Harwood Chemists, Inc. operated a pharmacy at 467 Hungry Harbor Road, North Woodmere, New York. Prior to the field audit, the business ran into financial difficulties and there was an assignment for the benefit of creditors. At the termination of that receivership, substantially all the source documents were discarded by the receiver.

4. On audit, the Audit Division was unable to perform a detailed audit since no source documents were available to verify either sales or purchases. The Audit Division listed the amount of purchases made by petitioner corporation from its disbursements journal for the period December, 1976 through February, 1977. Based on the supplier, the Audit Division determined whether the purchases were taxable or exempt on resale. For suppliers selling both taxable and exempt items, the Audit Division used external indices, namely the taxable to total purchase percentages determined from audits of similar businesses using the same suppliers. The Audit Division determined an overall taxable purchase percentage of 60.5 percent for petitioner corporation. It then applied 60.5 percent to the total purchases of \$163,178.70 made by petitioner corporation for the period June 1, 1975 through March, 1977 and determined purchases taxable when resold of \$98,723.11.

The Audit Division then estimated a markup of 50 percent on purchases which were taxable on resale and determined taxable sales of \$148,084.67 for the period June 1, 1975 through March, 1977. Petitioner corporation reported taxable sales of \$90,321.00 for the period June 1, 1975 through February 28, 1977. No sales and use tax return was filed for March, 1977. The Audit Division thereby determined additional taxable sales of \$57,763.67 and the tax due thereon of \$4,241.00.

5. The Audit Division conceded that the additional tax due should be reduced to \$3,989.99 to reflect a reduction in the taxable purchase percentage to 60.3 percent and a pilferage allowance of 2 percent.

6. Petitioner corporation's major supplier was S-P Drug Company. On audit, the Audit Division determined a 61 percent taxable purchase percentage from this supplier based on an audit of a similar business.

Petitioner was able to obtain copies of some invoices from S-P Drugs and submitted the following for March, 1977 for the purpose of disclosing a lower taxable purchase percentage than that used by the Audit Division:

<u>Date</u>	<u>Taxable</u>	<u>Total Inv.</u>
3/3/77	\$ 43.42	\$ 267.98
3/4/77	117.45	299.56
3/7/77	-0-	175.06
3/7/77	55.86	259.53
3/8/77	79.20	304.47
3/9/77	-0-	76.16
3/9/77	31.38	135.60
3/10/77	25.66	135.51
3/11/77	132.39	306.09
3/14/77	98.35	230.43
3/15/77	38.98	203.00
3/18/77	27.61	131.29
3/21/77	116.11	291.43
3/21/77	30.81	290.51
Totals	<u>\$797.22</u>	<u>\$3,106.62</u>

The field audit disclosed that purchases for March, 1977 totaled \$7,382.50. Based on the three-month analysis of purchases made by the Audit Division, 83 percent or \$6,127.48 in purchases were made from S-P Drugs. Petitioner has therefore substantiated 50.7 percent of its purchases from S-P Drugs as being 25.66 percent taxable. The balance of the purchases from S-P Drugs in the amount of \$3,020.86 are unsubstantiated as to their taxability. The taxable percentage determined by the Audit Division of 61 percent was applied to these purchases on audit and the result was taxable purchases in the amount of \$1,842.72. The taxable percentage of purchases made from S-P Drugs is therefore 43 percent.

7. The Audit Division erroneously included purchases of vitamins in the amount of \$28.80 in its computation of the overall taxable purchase percentage. The overall taxable purchase percentage incurred by petitioner, including the purchases from S-P Drugs pursuant to Finding of Fact "6", is 45.22 percent.

8. Petitioner Bernard Berman showed no reasonable cause for not filing the corporate sales and use tax returns on a timely basis.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law states that if a return required by Article 28 is not filed or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the Tax Commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices. That the Audit Division properly used the available external indices in the determination of petitioners' additional sales tax liability.

B. That petitioners have submitted documentation sufficient to warrant a further reduction to the results of the field audit. That petitioners' taxable

purchase percentage used in determining taxable sales is hereby reduced to 45.22 percent pursuant to Findings of Fact "6" and "7".

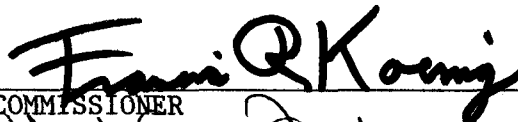
C. That the Audit Division is directed to modify the notices of determination and demand for payment of sales and use taxes due issued to Harwood Chemists, Inc. and Bernard H. Berman pursuant to Finding of Fact "5" regarding a 2 percent pilferage allowance, and in accordance with Conclusion of Law "B" above, with applicable penalty and interest thereon in regard to the Notice issued to petitioner Bernard H. Berman. That except as so granted, the petition is in all other respects denied.

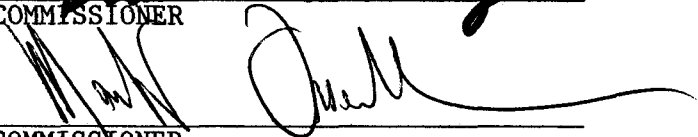
DATED: Albany, New York

MAY 11 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



P 481 207 752

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Harwood Chemists, Inc.</u>	
and <u>Bernard Berman, Officer</u>	
Street and No. <u>3580 Centerview Ave.</u>	
P.O., State and ZIP Code <u>Wantagh, NY 11793</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	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 481 207 753

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Robert M. Markman</u>	
Street and No. <u>108 Edgecliff Terrace</u>	
P.O., State and ZIP Code <u>Yonkers, NY 10705</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	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982