

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

July 15, 1983

Harold P. Mellor
d/b/a Mellor Drug Store
3343 Fulton St.
Brooklyn, NY 11208

Dear Mr. Mellor:

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
John R. Serpico
186 Joraleman St.
Brooklyn, NY 11201
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Harold P. Mellor :
d/b/a Mellor Drug Store : 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 3/1/77 - 11/30/79. :

State of New York
County of Albany

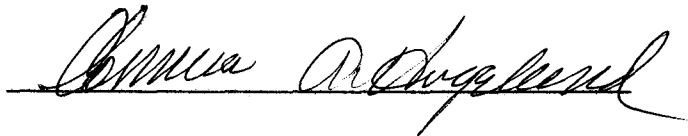
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Harold P. Mellor, d/b/a Mellor Drug Store the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harold P. Mellor
d/b/a Mellor Drug Store
3343 Fulton St.
Brooklyn, NY 11208

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
15th day of July, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harold P. Mellor :
d/b/a Mellor Drug Store :

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 :
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State of New York
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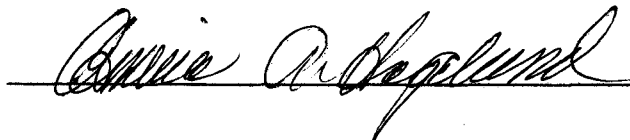
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon John R. Serpico the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John R. Serpico
186 Joraleman St.
Brooklyn, NY 11201

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
15th day of July, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HAROLD P. MELLOR	:	DECISION
d/b/a MELLOR DRUG STORE	:	
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 March 1, 1977	:	
through November 30, 1979.	:	

Petitioner, Harold P. Mellor d/b/a Mellor Drug Store, 3343 Fulton Street, Brooklyn, New York 11208, 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 March 1, 1977 through November 30, 1979 (File No. 32684).

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 September 22, 1982 at 9:15 A.M. Petitioner appeared by John R. Serpico, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether the audit procedures and tests used by the Audit Division to determine additional sales taxes due from petitioner were proper.

FINDINGS OF FACT

1. On December 12, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Mellor Drug Store for the period March 1, 1977 through November 30, 1979. The Notice was issued as a result of a field audit and asserted additional tax due of \$14,566.78 plus

interest of \$2,781.51 for a total of \$17,348.29. Petitioner, Harold P. Mellor, was the owner of Mellor Drug Store.

2. Petitioner consented to extend the period of limitation for the issuance of an assessment for the period March 1, 1977 through November 30, 1979 to March 20, 1981.

3. On audit, the Audit Division reviewed purchases made by petitioner for the period March 1 through May 31, 1978. Purchases which would be taxable upon resale were converted to percentages of total check purchases and cash purchases as follows:

<u>Category</u>	<u>Percentage of Total Purchases Paid By Check</u>	<u>Percentage of Total Cash Purchases</u>
General Taxable	18.36%	2.95%
Cosmetics	11.28%	-
Candy	3.69%	7.89%
Cigarettes	.22%	86.83%
Greeting Cards	.95%	-
Film	1.96%	-
Total	<u>36.46%</u>	<u>97.67%</u>

The Audit Division found that a substantial amount of cosmetics purchased were sold by petitioner for resale; therefore, an analysis of such cosmetics suppliers was made for the period September 1, 1977 through October 27, 1978. The Audit Division determined that 78.4 percent of the total purchases from these cosmetic suppliers were resold to other retailers. The Audit Division applied 78.4 percent to total purchases made of \$50,320.00 for such resale purposes and deleted \$39,450.00 from cosmetic purchases subject to a retail markup for the audit period.

To determine retail markups, the Audit Division compared current purchase invoices and shelf prices. Based on this analysis, the following markups were determined:

<u>Category</u>	<u>Markup</u>
General Taxable	47.60%
Cosmetics	66.66%
Candy	53.73%
Cigarettes	18.97%
Greeting Cards	100.00%
Film	43.05%

The Audit Division made an allowance of 3 percent for pilferage before applying the above markups to their respective purchases and deleted the nontaxable portion of cigarette sales constituting the cigarette tax. By then applying the appropriate markups, the Audit Division determined taxable sales for the audit period to be \$406,802.00. Petitioner reported taxable sales of \$224,718.00 on sales and use tax returns filed. The Audit Division thereby determined additional taxable sales of \$182,088.00 and the tax due thereon of \$14,566.78.

4. Petitioner determined its total taxable sales by first computing 40 percent of the general drug sales from the cash receipts journal as being taxable. This computation was intended to include general taxable items, cosmetics, greeting cards and film. Taxable cigarette sales were then computed by multiplying the number of cartons purchased by the selling prices, less the state and city cigarette taxes. Candy sales as recorded in the cash receipts journal were divided by 108 percent to determine the amount of such taxable sales. The results of the above three computations were then combined each quarter to arrive at taxable sales to be reported on sales and use tax returns filed.

5. Petitioner contended that he had a cash register with a tax key which was used. He argued, however, that the above method of reporting his taxable sales was used because of one of the prior audits conducted. Petitioner maintained that he had previously been advised by the Audit Division that by reporting 40 percent of his general drug sales as taxable, this would sufficiently cover the amount of taxable sales made and would not result in future tax deficiencies.

Petitioner's method of reporting resulted in an average of 17.49 percent of his gross sales being reported as taxable sales during the audit period.

6. Petitioner submitted a worksheet reconstructing the gross sales as reported on sales and use tax returns filed. Petitioner argued that if his prescription drug purchases which were marked up an average of 100 percent were deleted, and the pilferage allowance was increased to 5 percent, the balance remaining would be taxable sales. This computation reflected lower taxable sales than those determined by the Audit Division. Gross sales, however, were not a factor in the audit method applied by the Audit Division.

7. Petitioner submitted no source documents to show the accuracy of the sales as recorded in his cash receipts journal nor the accuracy in his sales tax collections. Petitioner did not record sales tax collections in the cash receipts journal. Further, no evidence was submitted to show that the percentage of purchases which were taxable when resold was not consistent throughout the audit period.

8. Petitioner offered no evidence to show that the Audit Division's pilferage allowance of 3 percent was not sufficient to reflect such losses.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that if a return when filed is incorrect or insufficient, 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 stock on hand or purchases.

B. That petitioner failed to maintain books and records from which an exact amount of tax could be determined. By petitioner's own testimony, the taxable sales as reported on sales and use tax returns filed were estimated. That the Audit Division's resort to use of external indices in order to determine petitioner's tax due was proper. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

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.) Petitioner has failed to meet that burden with respect to any of the audit findings.

D. That the petition of Harold P. Mellor d/b/a Mellor Drug Store is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 12, 1980 is sustained together with such additional interest due and owing.

DATED: Albany, New York

JUL 15 1983

STATE TAX COMMISSION

Rodica W. Cline
PRESIDENT

Frank R. Kang
COMMISSIONER

Mark J. [Signature]
COMMISSIONER

P 481 208 029

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Harold P. Mellor</u>	
Street and No. <u>Albia Mellor Drug Store</u>	
<u>3343 Fulton St.</u>	
P.O., State and ZIP Code <u>Brooklyn, NY 11208</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 481 208 030

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>John R. Serpico</u>	
Street and No. <u>186 Joraleman St.</u>	
P.O., State and ZIP Code <u>Brooklyn, NY 11201</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