

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

November 10, 1983

Pearlstone Pharmacy, Inc.
73-16 Roosevelt Ave.
Jackson Heights, NY 11372

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
David Leseten
150 Broad Hollow Rd., Penthouse Northeast
Melville, NY 11747
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Pearlstone Pharmacy, Inc. :
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 12/1/75-11/30/78. :
_____ :

AFFIDAVIT OF MAILING

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 Pearlstone Pharmacy, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Pearlstone Pharmacy, Inc.
73-16 Roosevelt Ave.
Jackson Heights, NY 11372

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. Scruelle

Connie Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Pearlstone Pharmacy, Inc. :
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 12/1/75-11/30/78. :
:

AFFIDAVIT OF MAILING

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

David Leseten
150 Broad Hollow Rd., Penthouse Northeast
Melville, NY 11747

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.

Martha L. Granelle

Connie P. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PEARLSTONE PHARMACY, 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 December 1,	:	
1975 through November 30, 1978.	:	

Petitioner, Pearlstone Pharmacy, Inc., 73-16 Roosevelt Avenue, Jackson Heights, New York 11372, 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, 1978 (File No. 29291).

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 February 9, 1983 at 2:45 P.M. with all evidence to be submitted by March 21, 1983. Petitioner appeared by Stephen Leseten, Accountant. The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a refund of sales tax purportedly overpaid on sales and use tax returns filed.

FINDINGS OF FACT

1. A field audit was performed on the books and records of Pearlstone Pharmacy, Inc. On audit, the Audit Division reviewed purchases made by petitioner during March, April and May, 1978 and determined that 24.5 percent of such purchases were taxable upon resale. It then performed a markup test and determined that petitioner's average markup on taxable items was 52.5 percent.

The markup was applied to 24.5 percent of the total purchases made from December 1, 1975 through November 30, 1978 and taxable sales were determined to be \$116,295.23. Petitioner reported taxable sales of \$136,618.00 on sales and use tax returns filed for that period. The Audit Division therefore accepted the returns as filed and concluded that no additional sales taxes were due.

2. Petitioner, by signature of Donald J. Coyne, its secretary, executed a consent to extend the period of limitation for the issuance of an assessment to December 20, 1979.

3. On April 18, 1979, Pearlstone Pharmacy, Inc. filed an Application for Credit or Refund of State and Local Sales or Use Tax covering the period December 1, 1975 through November 30, 1978. Petitioner sought a refund of sales tax paid of \$3,839.00 on the grounds that it erroneously reported its sales tax collections based on the result of the aforementioned field audit.

4. The Audit Division denied the refund claimed on February 20, 1980 on the grounds that there was no basis for the claim. It was the Audit Division's position that adequate records were not maintained from which an exact amount of refund that petitioner might be entitled to could be determined.

5. Petitioner utilized a cash register with the following categories of receipts:

Key	I	-	Sales Tax
	II	-	Drugs
	III	-	Cigarettes
	IV	-	Prescriptions
	V	-	Toiletries

The total receipts in the above categories were posted daily by petitioner to a daybook and from the daybook posted to a more formal cash receipts journal by petitioner's accountant. These records were submitted.

Petitioner's accountant combined receipts from register Key #II, Drugs and #V, Toiletries for a combined entry to the cash receipts journal identified as Cosmetics. Since this category now contained both taxable and exempt sales, the taxable sales were estimated on sales and use tax returns filed by reporting 2/3 of the Cosmetics account as taxable sales. Cigarette sales were not included in taxable sales as reported by petitioner. The cash register tapes were not submitted; however, other than the categorization of sales, they did not identify the individual items being sold.

5. Petitioner's refund sought in the amount of \$3,839.00 is premised on the difference in sales tax recorded in its books of \$7,090.00 and the sales tax remitted of \$10,929.00 as estimated. Petitioner acknowledged that human error might exist in recording tax collections but such error would be less than one percent.

CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law provides that every person required to collect tax shall keep records of every sale including a true copy of each sales slip.

B. That section 1138(a) of the Tax Law provides for the determination of tax due from such information as may be available when records maintained are not sufficient to show an exact amount of taxable sales. The audit procedure used by the Audit Division was authorized by such section to verify taxable sales; however, such procedures are not satisfactory for the purpose of proving that a refund is due. (Matter of Murray Saltzman d/b/a Evans Drug Store, State Tax Commission, December 3, 1982.) Moreover, petitioner lacked verification of proper tax collections made.

C. That the petition of Pearlstone Pharmacy, Inc. is denied and the refund denial of February 20, 1980 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Paculstone Pharmacy Inc.	
Street and No.	
73-16 Roosevelt Ave	
P.O., State and ZIP Code	
JACKSON HTS NY 11372	
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 470 316 220

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
David Laseten	
Street and No.	
150 Broad Haller Rd	
P.O., State and ZIP Code	
Molville NY 11747	
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