

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

January 24, 1983

Sun Drugs of Glen Cove, Inc.
Alma Katz & Abe Katz (Dec'd)
215 Forest Ave.
Glen Cove, NY 11542

Dear Mrs. Katz:

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
Lester E. Levin
Rifkin, Levin & Lebowitz
501 Fifth Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Sun Drugs of Glen Cove, Inc.
Alma Katz & Abe Katz (Dec'd)

: 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 6/1/74 - 8/31/77.

State of New York
County of Albany

Kathy Pfaffenbach, 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 24th day of January, 1983, she served the within notice of Decision by certified mail upon Sun Drugs of Glen Cove, Inc., Alma Katz & Abe Katz (Dec'd) the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sun Drugs of Glen Cove, Inc.
Alma Katz & Abe Katz (Dec'd)
215 Forest Ave.
Glen Cove, NY 11542

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
24th day of January, 1983.

Kathy Pfaffenbach

Annice O'Daylund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sun Drugs of Glen Cove, Inc. :
Alma Katz & Abe Katz (Dec'd) :

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 6/1/74 - 8/31/77.

State of New York
County of Albany

Kathy Pfaffenbach, 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 24th day of January, 1983, she served the within notice of Decision by certified mail upon Lester E. Levin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lester E. Levin
Rifkin, Levin & Lebowitz
501 Fifth Ave.
New York, NY 10017

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
24th day of January, 1983.

Kathy Pfaffenbach

Annice A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SUN DRUGS OF GLEN COVE, INC.	:	DECISION
ALMA KATZ and ABE KATZ (DECEASED)	:	
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, 1974	:	
through August 31, 1977.	:	

Petitioners, Sun Drugs of Glen Cove, Inc., Alma Katz and Abe Katz (deceased), 215 Forest Avenue, Glen Cove, New York 11542, 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, 1974 through August 31, 1977 (File Nos. 24449, 24450 and 24451).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 28, 1982. Petitioner appeared by Rifkin, Levin & LeBowitz (Lester E. Levin, CPA). The Audit Division appeared by Paul B. Coburn (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioners' sales and use tax due upon an analysis of petitioner's purchases for a period of three months.

FINDINGS OF FACT

1. Sun Drugs of Glen Cove, Inc. ("Sun Drugs") operated a retail pharmacy. Sun Drugs sold, among other things, therapeutic drugs as well as cosmetics, cigarettes, candy, and gift items.

2. On September 20, 1978, as the result of an audit, the Audit Division issued to each petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$46,398.98 in tax, plus \$10,767.89 in penalty and \$13,119.86 in interest, for a total of \$70,286.73. Notices were issued to Mr. Abe Katz as president of Sun Drugs and to Mrs. Alma Katz as secretary-treasurer of Sun Drugs.

3. The auditors performed their audit by examining the purchases reflected on Sun Drugs' books. The purchases as per the books of \$1,688,362.00 for the audit period were adjusted by a reduction of \$37,000.00 to reflect an increase in inventory and by a reduction of \$20,204.00 to reflect accommodation sales. The resulting adjusted purchases used for the audit were \$1,631,158.00. The purchases of Sun Drugs for the period September 1, 1976 through November 30, 1976 were broken down into various categories, and analyzed. Of the \$1,631,158.00 of total purchases over the audit period, taxable purchases were found to be \$812,329.00. A mark-up ratio based on cost and sales price was determined for each item and applied to total purchases for that item. Thus, as a result of the audit, total taxable sales were determined to be \$1,216,023.00. Since Sun Drugs reported \$602,933.00 on its returns for the audit period, additional taxable sales were determined to be \$613,070.00. This resulted in an additional tax liability of \$45,106.85.

4. The auditors found Sun Drugs' expense purchases to be nominal during the audit period and considered the tax paid when due.

5. Fixtures and equipment acquired by Sun Drugs during the audit period amounted to \$31,259.00. Since invoices in the amount of \$18,459.00 were not presented to the auditors, tax on these purchases of fixtures and equipment

was assessed in the amount of \$1,292.13. The auditors determined that the balance of \$12,800.00 constituted expenditures for capital improvements and consequently were not subject to tax.

6. During the audit period, Sun Drugs maintained a set of books and records which were audited monthly by an accounting firm. The following books and records were available to the Audit Division at the time of the audit: general ledger, sales journal, Federal income tax returns for the audit period, sales tax returns, cancelled checks, and purchase invoices.

7. The cash registers utilized by Sun Drugs were equipped with a tax key. However, Sun Drugs determined its reported taxable sales by estimating that thirty to thirty-two percent of its gross sales were subject to sales tax. Its practice of estimating the portion of its sales which were subject to sales and use tax establishes that its records were insufficient to determine sales and use tax liability.

8. Petitioners' representative maintained at the hearing that the Audit Division should have reviewed the purchase records for the entire audit period.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, in part, that if a return required to be filed is incorrect or insufficient the Tax Commission shall determine the amount of tax due on the basis of that information which may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices such as purchases.

B. That resort to the use of a test period to determine the amount of tax due must be based upon an insufficiency of record keeping which makes it virtually impossible to determine such liability and make a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44). Sun Drugs

did maintain books and records which were available to the Audit Division. These records, however, were insufficient for the verification of taxable sales and the proper collection of taxes thereon as evidenced by Sun Drugs' practice of estimating its reported taxable sales. Therefore, the Audit Division properly utilized an analysis of purchases to determine the sales and use taxes due. In addition, petitioners have not presented any evidence which would establish that the analysis of purchases for a three month period resulted in an incorrect determination of sales and use tax due for the audit period.

C. That since petitioners did not establish at the hearing that Sun Drugs had the particular invoices required by section 1135 of the Tax Law, which were the basis for tax imposed on the purchase of fixtures and equipment, the portion of the asserted deficiency pertaining to Sun Drugs' purchases of fixtures and equipment is sustained.

D. That the petition of Sun Drugs of Glen Cove, Inc., Alma Katz and Abe Katz (deceased) is denied.

DATED: Albany, New York

JAN 24 1983

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER

P 278 401 689

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO <u>SUN DRUGS & GLEN COVE, IND.</u>			
STREET AND NO. <u>Alma Katz + Abe Katz (Rec'd)</u>			
<u>215 Forest Ave.</u>			
P.O., STATE AND ZIP CODE <u>Glen Cove, NY 11542</u>			
POSTAGE	\$		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	¢	
	OPTIONAL SERVICES	SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
		RETURN RECEIPT SERVICE	¢
	SHOW TO WHOM AND DATE DELIVERED	¢	
	SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢	
	SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢	
SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢		
TOTAL POSTAGE AND FEES \$			
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

P 278 401 690

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO <u>HESTER E. LEVIN</u>			
STREET AND NO. <u>Rifkin, Levin + Lebowitz</u>			
<u>501 Fifth Ave.</u>			
P.O., STATE AND ZIP CODE <u>New York, NY 10017</u>			
POSTAGE	\$		
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	¢	
	OPTIONAL SERVICES	SPECIAL DELIVERY	¢
		RESTRICTED DELIVERY	¢
		RETURN RECEIPT SERVICE	¢
	SHOW TO WHOM AND DATE DELIVERED	¢	
	SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢	
	SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢	
SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢		
TOTAL POSTAGE AND FEES \$			
POSTMARK OR DATE			

PS Form 3800, Apr. 1976