

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

November 10, 1983

276 West 125th St. Co., Inc.
276 W. 125th St.
New York, NY 10027

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
Isaac Sternheim
Turetzky, Sternheim & Co.
114 Liberty St., Suite 204
New York, NY 10006
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
276 West 125th St. Co., 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 6/1/76-5/31/79. :

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 276 West 125th St. Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

276 West 125th St. Co., Inc.
276 W. 125th St.
New York, NY 10027

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. Brunelle

Connie Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
276 WEST 125TH STREET CO., 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 June 1, 1976	:	
through May 31, 1979.	:	

Petitioner, 276 West 125th Street Co., Inc., 276 West 125th Street, New York, New York 10027, 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, 1976 through May 31, 1979 (File No. 30406).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 11, 1983 at 1:15 P.M. with additional evidence to be submitted by March 15, 1983. Petitioner appeared by Isaac Sternheim, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether the Audit Division's use of a "test period" audit as a basis for determining petitioner's taxable sales was proper.

II. Whether the additional taxable sales resulting from the use of such procedure were correct.

III. Whether penalty and that portion of interest exceeding the minimum statutory rate should be cancelled.

FINDINGS OF FACT

1. Petitioner, 276 West 125th Street Co., Inc., operated a drug store located on 125th Street in Harlem.

2. On February 20, 1980, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1976 through May 31, 1979 for taxes due of \$17,684.22, plus penalty and interest of \$8,881.56, for a total of \$26,565.78.

A Notice of Assessment Review was subsequently issued which deleted the taxes assessed for the period ending May 31, 1976 and revised the taxes due to \$16,109.26.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1976 through February 29, 1979, to March 20, 1980.

4. Petitioner's books and records did not separately account for taxable sales, nontaxable sales or sales tax collected. Petitioner estimated the taxable sales reported on sales tax returns filed for the period at issue.

On audit, the Audit Division analyzed purchase invoices for the months of June, 1976, September, 1977 and February, 1979 to determine those purchases that would result in a taxable sale when resold. The purchases were categorized as follows: cards, film, novelties, miscellaneous, health and beauty, cosmetics and perfume, household, tobacco, candy and prosthetic aids. Taxable items represented 42.1 percent of total purchases based on the above analysis for the period June 1, 1976 through August 31, 1976 and 41.3 percent for periods thereafter (prosthetic aids were not taxable effective September 1, 1976).

Said percentages were applied to total purchases for the respective period to

determine taxable purchases of \$48,979 and \$439,263. The total taxable purchases, after adjusting for a 3 percent pilferage allowance, were then categorized as above based on the same proportion found for the test months. A markup was computed for each category of purchases using the current costs and selling prices of selected items within that category. The individual markups were applied to the total purchases by category to determine taxable sales of \$808,446.00. Petitioner reported taxable sales of \$620,735.00 leaving additional taxable sales of \$187,711.

Use taxes found due of \$1,092.44 on fixed assets are not in dispute.

5. The Audit Division erroneously included nontaxable items amounting to \$348.40 in computing the taxable ratios and the percentage of taxable health and beauty purchases.

6. Petitioner sold cosmetics and perfumes to Allou Distributors, Inc. at cost. Such sales amounted to \$10,000.00 per year.

Allou issued a resale certificate to petitioner covering these purchases.

7. Petitioner distributed advertising flyers regularly which advertised special sale merchandise. The advertised items were sold at a minimal markup.

The Audit Division's markup test included some sale items; however, the test did not consider a sufficient variety nor did it give sufficient weight to the volume of such items.

Petitioner submitted a markup test which included items regularly on sale as well as the items in the Audit Division's test. Petitioner's test showed the following markup percentages: cards 100%, film 24.1%, novelties 81.9%, miscellaneous 61%, health and beauty 35.3%, cosmetics and perfume 64.3%, household 33.7%, candy 83.9%, prosthetics 95.6% and tobacco 25.8%.

Petitioner argued that the markup for the categories of cards, novelties, miscellaneous, cosmetics and perfume and prosthetic aids should be reduced by an additional 10 percent to allow for sale items in categories not included in the markup test. Petitioner offered no substantial evidence to support such an allowance.

8. Petitioner's merchandise is displayed openly on the aisle shelves and on the floor in cardboard cases with easy accessibility for shoplifting.

9. An audit of petitioner's books and records for the period September 1, 1971 through May 31, 1974 showed that 45 percent of gross sales were taxable sales. The audit at issue herein disclosed a taxable ratio of 42 percent. Petitioner estimated that 31 percent of its sales were taxable on sales tax returns for the audit period.

10. Petitioner argued that purchase invoices were available for the entire audit period and should have been used by the auditor in determining the taxable purchases.

CONCLUSIONS OF LAW

A. That petitioner failed to maintain the books and records required by section 1135 of the Tax Law and that as such, the Audit Division could not verify taxable sales reported or determine such sales with any exactness.

That when books and records are inadequate, "test period" and percentage markup audits are permissible (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D. 2d 44; Matter of Sakran v. State Tax Commission, 73 A.D. 2d 989).

B. That the markup test performed by the Audit Division did not give adequate consideration to the discount nature of petitioner's operation; that the markup percentages indicated in Finding of Fact "7" more accurately reflect the actual markups.

C. That in accordance with Finding of Fact "6", purchases in the category of cosmetics and perfume shall be reduced by \$30,000 and the taxable sales recomputed.

That petitioner is not liable for the tax on the sales to Allou Distributing, Inc. pursuant to section 1132(c) of the Tax Law.

D. That the percentage of taxable purchases to total purchases shall be adjusted based on Finding of Fact "5".

E. That petitioner's pilferage losses were 5 percent as opposed to the 3 percent allowed on audit.

F. Petitioner failed to establish that its underreporting of taxable sales was due to reasonable cause and not wilful neglect. Accordingly, the penalty and interest applicable to the revised taxes due are sustained.

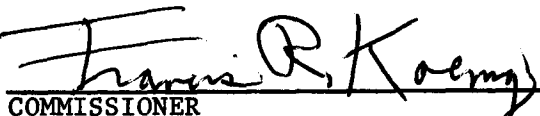
G. That the petition of 276 West 125th Street Co., Inc. is granted to the extent indicated in Conclusions of Law "B" "C" "D" and "E"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 20, 1980; and that, except as so granted, the petition is in all other respects denied.

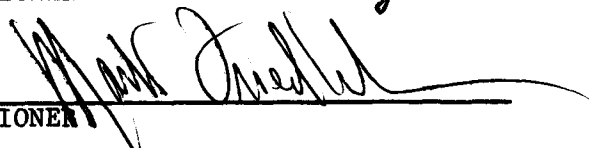
DATED: Albany, New York

STATE TAX COMMISSION

NOV 10 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 316 222
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
276 W 125 St Co Lma	
Street and No.	
276 W 125 St	
P.O., State and ZIP Code	
NY NY 10027	
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 470 316 223
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Isaac Steinhorn	
Street and No.	
1141 Liberty St #204	
P.O., State and ZIP Code	
NY NY 10006	
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