

STATE TAX COMMISSION

James R. Haggard
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

Connie A. Haywood
Authorized to administer oaths
pursuant to Tax Law section 174

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

September 21, 1984

Katharyn Chemists, Inc.
c/o Robert Levy
211 Cornwell Ave.
Valley Stream, NY 11580

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Michael D. Tucker
210 East 35th St.
Brooklyn, NY 11203
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
KATHARYN CHEMISTS, 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 March 1, 1976 :
through April 15, 1979.

Petitioner, Katharyn Chemists, Inc., c/o Robert Levy, 211 Cornwell Avenue, Valley Stream, New York 11580, 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, 1976 through April 15, 1979 (File No. 34271).

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 27, 1984 at 9:15 A.M. Petitioner appeared by Michael D. Tucker, CPA. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

- I. Whether the Audit Division properly determined additional sales taxes due from petitioner based on an examination of available books and records.
- II. Whether the penalty and that portion of interest exceeding the minimum statutory rate asserted against petitioner should be cancelled.

FINDINGS OF FACT

1. Petitioner, Katharyn Chemists, Inc., operated a drug store located at 952 McDonald Avenue, Brooklyn, New York. The business was sold on April 15, 1979.

2. On June 20, 1979, 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 April 15, 1979 for taxes due of \$19,598.00, plus penalty and interest of \$6,784.43, for a total of \$26,382.43. The taxes due on said notice were estimated by reason of petitioner's failure to submit books and records for audit. Thereafter, books and records were provided to the Audit Division. An audit of such records disclosed additional taxes due of \$23,571.68.

On February 19, 1981, the Audit Division issued a Notice of Assessment Review which revised the tax assessed on the foregoing notice to \$14,142.08. The revision consisted of reducing the estimated tax in certain periods to the amount found due on audit. The taxes due for the periods ending May 31, 1976, November 30, 1976 and February 28, 1977 were underestimated, but, the statute of limitations barred the Audit Division from assessing additional tax for these periods. On February 25, 1981, the Audit Division issued a second notice to petitioner covering the period December 1, 1977 through November 30, 1978 for taxes due of \$4,456.32, plus penalty and interest of \$2,452.50, for a total of \$6,908.82. This notice was issued to increase the estimated tax to the audited tax due for those periods which were not barred.

3. On audit, the Audit Division analyzed purchase invoices for the months of August, 1978 and March, 1979 to determine those purchases that would result in taxable sales when resold. The purchases were categorized as follows: sundries, cigarettes, cigars, candy, greeting cards and perfume. These taxable items represented 57.61 percent of total purchases analyzed.

Markup percentages were computed for each category of purchases. At the time the audit was conducted petitioner was no longer in business; therefore,

the Audit Division based the markups on the current costs and selling prices of the purchaser of the business. The resultant markup percentages were: sundries - 58.71%, cigarettes - 25.71%, cigars - 25.40%, and candy - 69.16%. A markup test was not performed for greeting cards and perfume. Instead, the auditor used markups of 100% and 66.67%, respectively, which were obtained from office experience.

Total purchases for the audit period (after allowing 1% for pilferage) were then categorized as above, based on the same proportion found for the test months. The foregoing markup percentages were applied to the total purchases by category to determine taxable sales of \$617,501.00. Petitioner reported taxable sales of \$322,855.00 for the same period, leaving additional taxable sales of \$294,646.00 and tax due thereon of \$23,571.68.

4. Petitioner's books and records did not account for taxable sales or sales tax collected. Petitioner estimated the taxable sales reported on sales tax returns filed for the period at issue. Petitioner reported 19 percent of gross sales as taxable until March, 1978 at which time the taxable percentage was increased to 35 percent.

Petitioner did not maintain cash register tapes or other verifiable records of receipts.

5. Petitioner submitted an analysis of purchase invoices which showed that taxable purchases were 54.14 percent of the purchases analyzed. Petitioner's sample used every 20th invoice for a 16 month period. The analysis did not include cash purchases.

6. The Audit Division had previously audited petitioner's books and records for the period March 1, 1973 through February 29, 1976. This audit disclosed a taxable ratio of 59.5 percent and a deficiency of \$21,922.90. The

markup percentages found during this audit period were as follows: sundries - 59.7%, cigarettes - 19.4%, cigars - 24.8%, candy - 48.5%, and perfume - 66.67%.

7. Petitioner argued that the markups determined based on the purchaser's business were excessive because the purchaser charged higher prices in order to recover increased operating expenses. Petitioner further argued that the pilferage allowance was insufficient although no evidence was produced to show the extent of such losses.

There was no significant difference between the markups used on the audit herein and the markups found on the prior audit.

8. Petitioner took the position that the imposition of penalty and interest was improper since it at all times acted in good faith.

CONCLUSIONS OF LAW

A. That petitioner failed to maintain the books and records required by section 1135 of the Tax Law. The audit procedures followed by the Audit Division in Finding of Fact "3" were used to verify the accuracy of the taxable sales reported by petitioner. These procedures disclosed a significant discrepancy between audited taxable sales and reported taxable sales, so as to conclude that petitioner's estimate of taxable sales was understated and that available books and records were inadequate and unreliable. When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 A.D.2d 223, mot. for lv. to app. den., 44 N.Y.2d 645).

Accordingly, the Audit Division's determination of additional taxable sales and sales taxes due was proper pursuant to section 1138(a) of the Tax Law (Matter of Korba v. New York State Tax Commission, 84 A.D.2d 655, mot. for lv. to app. den., 56 N.Y.2d 502; Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

B. That petitioner failed to overcome its burden to demonstrate by clear and convincing evidence that the amount of tax assessed was erroneous (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 A.D.2d 576).

C. That section 1145(a)(1) of the Tax Law authorizes the imposition of penalty and interest for failure to file a return or pay over any tax when due. Said section also provides for the Tax Commission's remission of penalty and that portion of interest exceeding the minimum statutory rate in the event that such failure was due to reasonable cause and not due to willful neglect.


After an earlier audit of petitioner's books and records disclosed a gross understatement of taxable sales, petitioner made no effort to correct this situation as evidenced by the results of the second audit. Therefore, the Audit Division properly imposed penalty and interest on the additional taxes found due for the period March 1, 1976 through April 15, 1979.

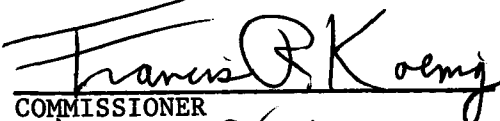
D. That the petition of Katharyn Chemists, Inc. is denied and the notices of determination and demands for payment of sales and use taxes due issued June 20, 1979, as revised February 19, 1981 and February 25, 1981, are sustained.

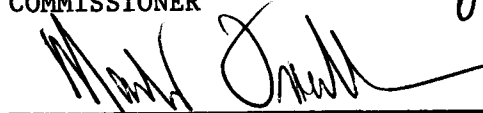
DATED: Albany, New York

STATE TAX COMMISSION

SEP 21 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 168 654

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517 PS Form 3800, Feb. 1982	Sent to <i>Edward & Neta Gallan</i>	
	Street and No. <i>Box 450</i>	
	P.O., State and ZIP Code <i>Piedmont, PA 18950</i>	
	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		

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517 PS Form 3800, Feb. 1982	Sent to <i>Michael D. Tucker</i>	
	Street and No. <i>Box 2 - 35th St.</i>	
	P.O., State and ZIP Code <i>Piedmont, NY 11203</i>	
	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		