

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

May 2, 1984

Dominick Palma  
159 7th Avenue  
Brooklyn, NY 11215

Dear Mr. Palma:

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  
Albert Benson  
Benson & Hochhauser  
160 Old Country Rd.  
Hicksville, NY 11801  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Dominick Palma :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax :  
under Article 28 & 29 of the Tax Law for the :  
Period 9/1/74-2/28/78. :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 2nd day of May, 1984, he served the within notice of Decision by certified mail upon Dominick Palma, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dominick Palma  
159 7th Avenue  
Brooklyn, NY 11215

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
2nd day of May, 1984.

*David Parchuck*

*Conrad A. Haglund*  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Dominick Palma :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax :  
under Article 28 & 29 of the Tax Law for the :  
Period 9/1/74-2/28/78. :

State of New York }  
ss.:  
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 2nd day of May, 1984, he served the within notice of Decision by certified mail upon Albert Benson, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Albert Benson  
Benson & Hochhauser  
160 Old Country Rd.  
Hicksville, NY 11801

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
2nd day of May, 1984.

David Parchuck

Bernie Rotepund  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
DOMINICK PALMA : 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 September 1, :  
1974 through May 31, 1979.

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Petitioner, Dominick Palma, 159 Seventh Avenue, Brooklyn, New York 11215, 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 September 1, 1974 through May 31, 1979 (File No. 35296).

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 10, 1983 at 9:15 A.M. with all briefs to be submitted by March 26, 1983. Petitioner appeared by Albert Benson, CPA. The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether petitioner filed a timely petition within ninety days after giving of notice as required by Tax Law §1138(a); and if so,

II. Whether the field audit performed by the Audit Division properly reflected the additional sales tax due from petitioner.

FINDINGS OF FACT

1. Petitioner operates a pharmacy selling drug items and taxable sundries. The Audit Division performed a field audit on petitioner's books and records covering the period September 1, 1974 through May 31, 1979. As a result

thereof, the Audit Division issued two notices of determination and demand for payment of sales and use taxes due on December 20, 1979. The first notice covered the period September 1, 1974 through February 28, 1978 and asserted tax due of \$4,954.41 plus interest of \$1,450.16 for a total of \$6,404.57. The second notice covered the period March 1, 1978 through May 31, 1979 and asserted tax due of \$1,840.96 plus interest of \$154.49 for a total of \$1,995.45.

2. Petitioner executed four consents to extend the period of limitation for the issuance of an assessment, the last extending the period to March 20, 1980.

3. On audit, the Audit Division reviewed purchase invoices made available for the year 1977. The Audit Division categorized the purchases and determined the following percentages of total purchases were taxable upon resale:

Sundries	20.5%
Cigarettes	3.6%
Candy	2.0%
Cosmetics	7.5%

A markup test was then performed using purchase invoices from April, 1978 and selling prices as of May, 1978 which resulted in the determination of the following markups:

Sundries	52.99%
Cigarettes	16.78%
Candy	44.24%
Cosmetics	53.73%

Petitioner made purchases of \$307,840.00 for the period September 1, 1974 through August 31, 1977. The Audit Division made an allowance of 1½ percent or \$4,618.00 for pilferage which was intended to include merchandise broken and otherwise not sold. An adjustment for personal use of purchases was also made in the amount of \$3,000.00. The remaining purchases were categorized based on the percentages previously determined and the appropriate markups applied

thereon. The Audit Division determined taxable sales of \$145,849.00 for the period September 1, 1974 through August 31, 1977. Petitioner reported taxable sales of \$93,724.00 for the same period, a margin of error of 55.62 percent. The Audit Division applied this margin of error to the taxable sales reported for the entire audit period September 1, 1974 through May 31, 1979 to update its audit findings and determined taxable sales of \$232,409.00. Petitioner reported taxable sales of \$149,344.00 for this period. The Audit Division held the difference of \$83,065.00 as additional taxable sales and determined the additional tax due of \$6,645.20.

The Audit Division also determined use tax due of \$150.18 on purchases withdrawn for personal use; however, this amount is not at issue.

4. On or about June 25, 1981, petitioner was contacted by the Tax Compliance Bureau regarding the payment of the aforesaid taxes. Petitioner notified the Department, first by phone call and then by follow-up correspondence that the field audit results were not agreed to, that a petition had been filed and that he was awaiting a hearing on the matter.

5. At the hearing, the Audit Division introduced a copy of a petition which was in its file into evidence. This copy of the petition bore a typed preparation date of March 1, 1980. Penned in was a date of October 23, 1981 and a circled "X" indicating place for signature. Mr. Palma signed the copy where designated. This copy of the petition bore no Departmental indate stamp as to when it was received.

6. Petitioner testified that a copy of the petition was signed and mailed when received from his accountant and was sent in an envelope provided by the accountant through regular U.S. mail. It was the accountant's practice to

prepare an original typed petition, date it and send photocopies to his clients for signature and mailing.

7. Petitioner argued that all the purchases marked up on audit were not sold at retail. Petitioner purchased cosmetics from Max Factor which were resold to Atlantic Merchandising for resale. These sales, at cost, amounted to \$4,014.00 during 1976 and 1977 and were made as an accomodation due to the inability of either petitioner or Atlantic meeting minimum sales requirements by Max Factor. This argument was raised at the conclusion of the field audit and noted in the field audit report. Petitioner, however, failed to substantiate the claim until the hearing.

8. Petitioner further argued that the allowance made for pilferage was insufficient in that such losses were more likely 3 to 4 percent based on petitioner's estimate. Also, broken merchandise and outdated merchandise could not be sold. Petitioner did not support these arguments by any substantial evidence.

#### 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, such as purchases. Said section also provides that such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the Tax Commission for a hearing or unless the Tax Commission of its own motion shall redetermine the same.

B. That the procedures used by the Audit Division to verify sales receipts were proper and in accordance with the provisions of section 1138(a) of the Tax Law.

C. That the burden of proof is on the petitioner to show that he filed a timely petition. That the petitioner by uncontested testimony that a copy of the petition was signed and mailed when received from his accountant, sustained his burden of proof (see Finding of Fact "6"). The Audit Division, in the absence of a date stamp, and with admitted possession of a petition in its file, could not contradict petitioner's testimony (see Finding of Fact "5").


D. That petitioner sustained the burden of proof to show that \$4,014.00 in cosmetic purchases were sold for resale and therefore not subject to sales tax.


E. That the petition of Dominick Palma is granted to the extent indicated in Conclusions of Law "C" and "D" above; that the Audit Division is directed to accordingly modify the notices of determination and demand for payment of sales and use taxes due issued December 20, 1979; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 02 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



P 470 315 488

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Albert Benson</i>	
Street and No. <i>Benson Sachanaw</i>	
P.O., State and ZIP Code <i>160 Old Country Rd</i>	
Postage <i>Wickerville NY 11801</i>	
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 470 315 487

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Emmick Palma</i>	
Street and No. <i>159 7th Ave.</i>	
P.O., State and ZIP Code <i>Brooklyn NY 11215</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	

PS Form 3800, Feb. 1982