

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Surfway Pharmacy, Inc. :
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 12/1/74 - 11/30/77. :
_____ :

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 18th day of January, 1984, he served the within notice of Decision by certified mail upon Sol Lipper, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sol Lipper
1270 E. 72nd St.
Brooklyn, NY 11234

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
18th day of January, 1984.

David Parchuck

James A. Hayman
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Surfway Pharmacy, Inc.
c/o Jack Vitale, President
2810 Surf Ave.
Brooklyn, NY 11224

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
Sol Lipper
1270 E. 72nd St.
Brooklyn, NY 11234
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
SURFWAY 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, 1974	:	
through November 30, 1977.	:	

Petitioner, Surfway Pharmacy, Inc., c/o Jack Vitale, President, 2810 Surf Avenue, Brooklyn, New York 11224, 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, 1974 through November 30, 1977 (File No. 24887).

A formal hearing was held before Julius Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 2, 1983 at 11:00 A.M. and continued before Arthur Johnson, Hearing Officer on June 14, 1983 at 9:15 A.M. Petitioner appeared by Sol Lipper, CPA. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioner, Surfway Pharmacy, Inc., operated a drug store located at 2810 Surf Avenue, Brooklyn, New York.
2. On October 10, 1978, at 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 December 1, 1974 through November 30,

1977 for taxes due of \$28,253.03, plus penalty and interest of \$13,877.97, for a total of \$42,131.00.

3. Petitioner had executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue to February 19, 1979.

4. On audit, the Audit Division analyzed purchase invoices for the months of March and October, 1977 to determine those purchases which would result in taxable sales when resold. The purchases were categorized as follows: nontaxable drugs, cigarettes and cigars, candy, cards and general taxable. A markup was computed for each category of purchases using the current cost and selling prices of selected items within that category. Total purchases were then categorized based on the same proportion found for the test months. The individual markups were applied to taxable purchases by category to determine taxable sales of \$511,505.00. Petitioner reported taxable sales of \$158,342.00 leaving additional taxable sales of \$353,163.00 and tax due thereon of \$28,253.03.

The Audit Division allowed for the following losses from theft in its determination:

<u>DATE</u>	<u>AMOUNT OF LOSS</u>	<u>LOSS OF TAXABLE PURCHASES</u>
9-23-77	\$ 8,172	\$2,987
10-1-77	14,603	6,143
10-15-77	7,389	1,501

5. In addition to the above thefts, petitioner submitted New York City Police reports and information provided by insurance adjusters which substantiated the following burglary losses during the audit period:

<u>DATE</u>	<u>AMOUNT OF LOSS</u>	<u>LOSS OF TAXABLE PURCHASES</u>
May 16, 1976	\$12,450.00	\$12,450.00
December 19, 1976	19,327.50	17,127.50
February 26, 1977	9,018.00	9,018.00
March 2, 1977	3,517.00	3,517.00 ¹
March 10, 1977	11,500.00	5,405.00 ¹
April 18, 1977	13,500.00	6,345.00 ¹
August 25, 1977	16,000.00	7,520.00 ¹
	<u>\$85,312.50</u>	<u>\$61,382.50</u>

Petitioner also claimed that a fire in the latter part of 1975 destroyed merchandise worth \$45,000.00 of which \$32,000.00 was reimbursed by its insurance company. No evidence was adduced to support such a claim.

6. Petitioner estimated the taxable sales reported on sales tax returns filed for the periods under audit.

CONCLUSIONS OF LAW

A. That the audit procedures followed by the Audit Division in Finding of Fact "4" were used to verify the accuracy of the taxable sales reported by petitioner; that such procedures disclosed a significant discrepancy with reported taxable sales to conclude that petitioner's estimate of taxable sales was understated and that the books and records were inadequate and unreliable.

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 George Korba v. State Tax Commission, 84 A.D.2d 655; Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

B. That the audit gave consideration to theft losses that petitioner was able to substantiate at the time of audit; however, as indicated in Finding of

¹ Petitioner did not substantiate the taxable merchandise lost in these burglaries. Therefore, the taxable amount was determined based on the relationship between taxable purchases and nontaxable purchases found for the test months of March and October, 1977.

Fact "5" petitioner submitted evidence of additional burglary losses it suffered during the audit period. Therefore, the additional taxes due shall be reduced to reflect such losses.

C. That the petition of Surfway Pharmacy, Inc. is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 10, 1978; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JAN 18 1984

STATE TAX COMMISSION

Rodica Avchen
PRESIDENT

Francis R Koenig
COMMISSIONER

Michael J. Smith
COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Exc.</i>	
<i>Surway Pharmacy</i>	
Street and No. <i>2818 Surf Ave.</i>	
P.O., State and ZIP Code <i>Brooklyn, NY 11224</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

P 440 976 712

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Sol Lipper</i>	
Street and No. <i>1270 E. 72nd St.</i>	
P.O., State and ZIP Code <i>Brooklyn, NY 11234</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