

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Daniel Bernard
d/b/a Port Ewen Pharmacy :

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 6/1/77 - 11/30/80.

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 3rd day of October, 1985, he served the within notice of Decision by certified mail upon Daniel Bernard, d/b/a Port Ewen Pharmacy the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Daniel Bernard
d/b/a Port Ewen Pharmacy
177 Broadway
Port Ewen, NY 12466

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
3rd day of October, 1985.

David Parchuck

James P. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of

Daniel Bernard :
d/b/a Port Ewen Pharmacy

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Period 6/1/77 - 11/30/80.

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 3rd day of October, 1985, he served the within notice of Decision by certified mail upon Joseph F. Koenig, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph F. Koenig
715 Broadway
Kingston, NY 12401

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
3rd day of October, 1985.

David Parchuck

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

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

October 3, 1985

Daniel Bernard
d/b/a Port Ewen Pharmacy
177 Broadway
Port Ewen, NY 12466

Dear Mr. Bernard:

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
Joseph F. Koenig
715 Broadway
Kingston, NY 12401
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DANIEL BERNARD	:	
D/B/A PORT EWEN PHARMACY	:	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, 1977	:	
through November 30, 1980.	:	

Petitioner, Daniel Bernard d/b/a Port Ewen Pharmacy, 177 Broadway, Port Ewen, New York 12466, 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, 1977 through November 30, 1980 (File No. 33749).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on March 13, 1985 at 1:15 P.M. Petitioner appeared by Joseph F. Koenig PA. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the audit procedures used by the Audit Division in an examination of petitioner's books and records were proper and, if so, whether the additional sales tax due determined as a result of said audit was correct.

FINDINGS OF FACT

1. On March 20, 1981, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner, Daniel Bernard d/b/a Port Ewen Pharmacy, for taxes

due of \$10,266.62, plus interest of \$1,585.58, for a total amount due of \$11,852.20 for the period June 1, 1977 through November 30, 1980.

2. The petitioner executed consents extending the statute of limitations for issuing an assessment of sales and use taxes due for the period at issue to March 20, 1981.

3. On June 18, 1981, the petitioner timely filed a petition for a hearing to review the Notice of Determination. The petitioner claims that the assessment is based on data biased in favor of the Audit Division; that allowances which should have been allowed were not allowed; and that the audit was based on merchandise purchased, and not sales of merchandise purchased.

4. It is the position of the Audit Division that the audit which it conducted followed generally accepted accounting procedures and tests, consistent with the nature of the petitioner's business, and in accordance with the requirements of section 1138 of the Tax Law.

5. During the period at issue, the petitioner operated a pharmacy at 177 Broadway, Port Ewen, New York. The Audit Division performed two audits of petitioner. The first audit, a statistical sampling method audit, involved the random selection by the auditor of merchandise purchase invoices for the period December 1, 1978 through November 30, 1979. The petitioner agreed to the audit method and sample period selected. The auditor determined a taxable purchase percentage of 32.167%, a markup percentage of 49.108%, and the percentage of items withdrawn for personal use of .84041%. The auditor next applied these percentages to merchandise purchases for the period at issue and determined additional taxable sales of \$139,132.00 (after allowances for taxable sales reported and sales to exempt organizations) and additional sales tax due of \$9,739.24. It was subsequently determined that 116 purchase invoices were

missing for the test period and that therefore the test period was not valid as a statistical sample. It was therefore determined that a second audit was necessary.

6. For the second audit, the auditor reviewed merchandise purchase invoices (with the exception of the missing invoices) for the entire period December 1, 1978 through November 30, 1979. The auditor determined a taxable purchases percentage of 24.561% and a markup percentage of 53.396%. The percentage of items withdrawn for personal use determined on the first audit was used for the second audit. The auditor applied these percentages to merchandise purchases for the entire audit period and determined additional taxable sales of \$94,072.00 (after allowances for taxable sales reported and sales to exempt organizations) and additional sales tax due of \$6,585.04.

7. The auditor also determined use tax due on a repair job of \$24.50 and use tax due on taxable items withdrawn for personal use of \$109.41. These items were not contested by the petitioner. The total additional sales and use tax which the Audit Division now claims to be due is \$6,718.95.

CONCLUSION OF LAW

A. That, in view of the missing purchase invoices (see Finding of Fact "5"), the petitioner failed to maintain books and records required under section 1135(a) of the the Tax Law. Without proper books and records, the Audit Division was unable to verify taxable sales reported or to determine such sales accurately. It was therefore, proper and correct for the Audit Division to determine the petitioner's taxable sales from available information as provided in section 1138(a) of the Tax Law. (See Matter of Chartair, Inc. v. State Tax Commission, 64 A.D.2d 44).

B. That the audit procedures used by the Audit Division in an examination of petitioner's books and records were proper (see Finding of Fact "6").

C. That once established that the Audit Division selected a method of calculation reasonably designed to reflect the tax due, it was incumbent upon petitioners to show by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous. It cannot be said from the testimony or evidence presented at the hearing that petitioner has sustained his burden. (See Matter of Carmine Rest. v. State Tax Commission, 99 A.D.2d 581.)

D. That the petition of Daniel Bernard d/b/a Port Ewen Pharmacy is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 20, 1981, as adjusted by the Audit Division (see Finding of Fact "7"), is sustained.

Dated: Albany, New York

OCT 03 1985

I abstain!!
Thomas R. Koehn

STATE TAX COMMISSION

Raduica A. Ciu
PRESIDENT

COMMISSIONER

[Signature]
COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-448-014 PS Form 3800, Feb. 1982	Sent to <i>Doniel Bernard</i>	
	Street and No. <i>177 Broadway</i>	
	P.O. State and ZIP Code <i>Part Cove NY 12406</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		

P 153 387 560

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-448-014 PS Form 3800, Feb. 1982	Sent to <i>Joseph F. Krenig</i>	
	Street and No. <i>715 Broadway</i>	
	P.O. State and ZIP Code <i>Vincennes NY 12401</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		