STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

Warchem, 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 6/1/76-6/15/79.

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon Warchem, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

•

David Jarchuck

Warchem, Inc. 5 E. 8th St. New York, NY 10003

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 6th day of February, 1985.

Authorized to administer oaths pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of

Warchem, 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 6/1/76-6/15/79.

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon Morris Turetzky, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morris Turetzky Turetzky, Sternheim & Co. 114 Liberty St. New York, NY 10006

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.

David Janhuch

Sworn to before me this 6th day of February, 1985.

Authorized to administer oaths pursuant to Tax Law section 174

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

February 6, 1985

Warchem, Inc. 5 E. 8th St. New York, NY 10003

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

STATE TAX COMMISSION

In the Matter of the Petition

of

WARCHEM, 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 June 15, 1979.

Petitioner, Warchem, Inc., 5 East 8th Street, New York, New York 10003, 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 June 15, 1979 (File No. 42419).

A formal hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 22, 1984 at 9:15 A.M. Petitioner appeared by Turetzky, Sternheim & Co. (Isaac Sternheim, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

- I. Whether petitioner timely filed a petition for revision of a determination of tax due.
- II. Whether the Audit Division properly determined additional sales tax due from petitioner for the period June 1, 1976 through June 15, 1979.

FINDINGS OF FACT

1. On July 3, 1979, the Audit Division received a Notification of Sale,
Transfer or Assignment in Bulk which indicated the purchaser as QID Chemists,
Inc. and the seller as Warchem, Inc., the petitioner herein. The date of sale

was June 15, 1979 and a bulk sales tax of \$400.00 was paid by the purchaser on fixed assets of \$5,000.00.

- 2. On September 6, 1979, the Audit Division, based on the findings of a field audit of petitioner's records through the period August 31, 1975, issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for tax due of \$36,923.07, plus penalty of \$5,963.98 and interest of \$5,121.52, for a total amount due of \$48,008.57 for the period June 1, 1976 through June 15, 1979.
- 3. The Audit Division, as a result of additional information, discovered during the field audit that petitioner had operated a luncheonette which was discontinued on October 14, 1977. As a result of this information, the liability of Warchem, Inc. was reduced for the period September 1, 1977 through June 15, 1979. Accordingly, on December 1, 1981, the Audit Division issued to petitioner a Notice of Assessment Review for adjusted tax due of \$20,189.23, plus penalty and interest of \$6,400.01, for a total amount due of \$26,589.24.
- 4. On January 6, 1981, petitioner's representative filed a petition in reference to the Notice of Assessment Review. Petitioner did not claim that it never received the notice dated September 6, 1979. Both notices and the petition indicated the same address for petitioner.
- 5. Petitioner's representative alleged that, at the time of the mailing of the notice dated September 9, 1979, a strike was in progress by the union employees of a restaurant located next to the premises of petitioner. They were purportedly not allowing anybody in or out of the building and the surrounding stores were closed due to the strike. Consequently, it was alleged that petitioner was not receiving any mail and did not receive the notice. The strike lasted approximately 30 days. The petitioner failed to present any

documentary or other substantial evidence to support these allegations. It was further alleged that the notice was probably returned to Albany. There is no evidence in the file to indicate that the notice was returned to Albany.

6. On July 29, 1980, petitioner resold the business to Chang's Chemist, Inc.

CONCLUSIONS OF LAW

- A. That section 1138(a)(1) of the Tax Law provides, in part, that a notice of determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving notice of such determination, shall apply to the Tax Commission for a hearing.
- B. That petitioner failed to comply with section 1138(a)(1) of the Tax Law. Therefore, the taxes due were finally and irrevocably fixed. However, based on the Notice of Assessment Review, the tax due has been adjusted to \$20,189.23.
- C. That since a timely petition was not filed, the State Tax Commission does not have jurisdiction to render a decision with respect to Issue II.
- D. That the petition of Warchem, Inc. is denied and the adjusted tax due is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 0 6 1985

COMMISSIONER

COMMISSIONER

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