

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of Petition :
 of :
DEL LABORATORIES, INC. :
for redetermination of deficiency or :
for refund of franchise tax under :
Article 9-A of the tax law for 1968 :
and 1969. :

Del Laboratories, Inc. having filed petition for redetermination of deficiency or for refund of franchise tax under Article 9-A of the tax law for 1968 and 1969, and a hearing having been held on May 9, 1973 before John J. Genevich, Hearing Officer of the Department of Taxation and Finance, at the office of the State Tax Commission, 80 Centre Street, New York City, at which hearing Robert Solomon, Esq. of Counsel, and Elio Carlino, Assistant Treasurer of the corporation, appeared personally and testified on behalf of the taxpayer, and the record having been duly examined and considered by the State Tax Commission,

It is hereby found:

(1) Del Laboratories, Inc. received permission to file a combined return on behalf of itself and certain wholly owned affiliated corporations beginning with the calendar year 1964. The group shared the same manufacturing facilities and was engaged in the production of cosmetics and drugs and containers for those products.

(2) In its combined returns for 1968 and 1969 the taxpayer included three newly acquired wholly owned affiliates without receiving permission. Based on a field audit examination, the Corporation Tax Bureau excluded one corporation, Mary Chess Retail Shops, Inc., from the combined return and issued notices of deficiency computed as follows:

1968

Combined business capital	\$18,115,950.00
Tax at 1-1/4 mills	22,645.00
Subsidiary capital tax	42.00
Total tax	22,687.00
Tax reported	12,623.00
Deficiency	\$ 9,064.00

1969

Combined business capital	\$18,257,745.00
Tax at 1-1/4 mills	22,822.00
Subsidiary capital tax	23.00
Total tax	22,845.00
Less investment tax credit	7,217.00
Net tax	15,628.00
Tax reported	9,553.00
Deficiency	\$ 6,075.00

(3) Mary Chess Retail Shops, Inc., unlike the other affiliates permitted in the combined return, is not engaged in manufacturing. Its activities consist of operating five retail stores, three in New York, one in West Virginia and the other in Washington, D.C. These stores sell products of non-related entities in addition to those of the affiliated group. Products of non-related entities represent about one-third of the total sales of Mary Chess Retail Shops, Inc. The sales of the affiliated group aggregated over \$16,000,000 in 1968, of which Mary Chess Retail Shops, Inc. sold less than \$200,000. This proportion did not change to any extent in 1969.

(4) The manufacturing group does not have a regular place of business outside New York, so that its business allocation percentage is 100%. Inclusion of the small retail outlet, Mary Chess Retail Shops, Inc., would permit the corporations in the combined return to allocate their business income and capital, thereby reducing the business allocation from 100% to 66.7046% for 1968 and 72.7892% for 1969.

(5) Section 211.4 of Article 9-A of the tax law reads in part:

"In the discretion of the tax commission, any taxpayer, which owns or controls either directly or indirectly

substantially all the capital stock of one or more other corporations... may be required or permitted to make a report on a combined basis covering any such other corporations...."

The State Tax Commission hereby

DECIDES:

(A) Mary Chess Retail Shops, Inc. was properly excluded from the combined returns for 1968 and 1969. The affiliated group does not operate a unitary business as far as retail selling activities are concerned, since the excluded affiliate sold less than 1% of the products manufactured by the group. The remaining companies in the affiliated group, sharing the same manufacturing facilities, and selling at the wholesale level, qualify as a unitary business. In addition, inclusion of Mary Chess Retail Shops, Inc. in the combined return would produce an improper tax result for two reasons: (1) it would permit all of the corporations in the combined return to allocate their business income and capital, thereby assigning a substantial portion of such income and capital outside New York, although Mary Chess Retail Shops, Inc. is the only affiliate doing business outside New York and (2) the property, receipts and wage factors of Mary Chess Retail Shops, Inc. would share in the more than 99% of the income and capital of the manufacturing group which was derived from sales in which it did not participate, since it sold less than 1% of the products of the group. If Mary Chess Retail Shops, Inc. sold all of the goods produced by the affiliated companies, it would be part of the unitary business and its inclusion in a combined return would produce a proper tax result.

(B) The notices of deficiency for 1968 and 1969 are affirmed, together with interest in accordance with Section 1084 of Article 27 of the tax law.

Dated: Albany, New York
this 27th day of November 1973.

STATE TAX COMMISSION

Mauro A. Pracauer
President

Abner M. Mankin
Commissioner

Wilton H. Mankin
Commissioner