

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GUTLOVE & SHIRVINT, INC. :
 : DETERMINATION
 : DTA NO. 817216
for Revision of a Determination of a License Suspension
Pursuant to the Cigarette Tax, and for Violation of Cigarette:
Marketing Standards under Articles 20 and 20-A of
the Tax Law for the Year 1997. :

Petitioner, Gutlove & Shirvint, Inc., 39-26 23rd Street, Long Island City, New York 11101, filed a petition for revision of a determination of a license suspension pursuant to the cigarette tax, and for a violation of cigarette marketing standards under Articles 20 and 20-A of the Tax Law for the year 1997.

A hearing was commenced before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 14, 2000 at 10:30 A.M., and continued to completion on April 18, 2000 at 10:30 A.M. with all briefs to be submitted by July 21, 2000, which date began the six-month period for the issuance of this determination. Petitioner appeared by Schulte Roth & Zabel, LLP (Michael S. Feldberg, Esq. and Noah D. Genel, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel).

ISSUE

Whether Gutlove & Shirvint, Inc. issued to its customer, Cigpak, Inc., a \$200.00 rebate in violation of the Cigarette Marketing Standards Act.

FINDINGS OF FACT

1. On July 17, 1998, the Division of Taxation (“Division”) issued to petitioner, Gutlove & Shirvint, Inc. (“G & S, Inc.”), a Notice of Determination under New York State Tax Law (Assessment # C980715001) assessing a civil fine (penalty) in the amount of \$20,000.00. The notice stated that the penalty was being imposed for a violation of the Cigarette Marketing Standards Act which had occurred on November 7, 1997. On the same date, the Division issued to petitioner a Notice of Proposed Suspension of Licenses as Cigarette Agent and Cigarette Wholesaler. The notice stated that the proposed suspension would be for a period of seven days and was in addition to the civil fine of \$20,000.00. According to the notice, the fine and suspension were being imposed for the following reason:

On or about November 7, 1997, Gutlove and Shirvint, through its sales representative, paid or attempted to pay a rebate of two hundred dollars (\$200) to its customer CigPak Inc. and /or Rashad Iqbal, a principal of CigPak Inc. This rebate was in return for CigPak Inc.’s purchase of eight hundred (800) cartons of cigarettes, resulting in the actual price charged to CigPak Inc. being lower than the minimum specified by Article 20-A, §483(b).

The notice went on to state that the sale at a price below cost is a violation of the Cigarette Marketing Standards Act, Tax Law § 484 (a)(1) and (2).

2. G & S, Inc., wholly owned by Joseph Ruda, is a wholesale distributor of cigarettes, candy and tobacco. It is licensed as a wholesale distributor of cigarettes and tobacco products. On the date of the incident at issue, Carl Nappi was a commissioned salesman for G & S, Inc. as well as for one other distributor.

3. The Division had a First Alert Program in which it sought cooperation with various businesses holding licenses, such as cigarette agents, wholesalers and retailers, in identifying potential sources of violations of the Cigarette and Tobacco Products Tax and the Cigarette

Marketing Standards Act. Pursuant to this program, Mr. Emanuel Urzi, Special Assistant to the Deputy Commissioner of the Office of Tax Enforcement, met with Mr. Arthur Katz, Executive Director of the New York State Association of Tobacco and Candy Distributors (the "Association"), to discuss the problem of rebating in the industry. Rebating involves the payment by wholesalers to the purchasers of cigarettes which has the effect of reducing the purchase price of the cigarettes below the legal minimum. At this meeting Mr. Katz informed Mr. Urzi that Carl Nappi was working undercover for the Association gathering evidence that certain wholesalers, including G & S, Inc., were involved in rebating. The Association had entered into a contract with Carl Nappi on June 1, 1993 in which Mr. Nappi agreed to provide information to the Association and to cooperate with New York State, and the Association agreed to reimburse Mr. Nappi for his expenses. At the time of the hearing, the Association had paid Mr. Nappi \$15,268.69 in expenses. Mr. Leonard Schwartz, Chairman Emeritus of the Association and a past Chairman of the Association, is the owner of Globe Wholesale Company, a competitor of petitioner.

4. During the above described meeting, Mr. Katz informed Mr. Urzi that on November 7, 1997, at approximately 12:00 P.M., Carl Nappi would be delivering to Cigpak, Inc. a \$200.00 rebate on behalf of G & S, Inc. in conjunction with an order of cigarettes. Cigpak, Inc. is owned by Rashad Iqbal and is located at 84 West Suffolk Avenue, Central Islip, New York. Mr. Nappi had brought Cigpak to petitioner as a customer. Senior Investigator Velardi and Excise Tax Investigator Muller, both of the Office of Tax Enforcement, were directed by Mr. Urzi to go to Cigpak, Inc. on November 7, 1997. While at Cigpak, Inc., the two investigators observed Mr. Nappi attempt to give Mr. Iqbal \$200.00 which Mr. Nappi stated was for the purchase of 800

cartons of cigarettes being delivered at the time. Both Mr. Nappi and Mr. Iqbal were issued summonses for violations of the Cigarette Marketing Standards Act.

The investigators seized the purchase invoices from G & S, Inc. to Cigpak, Inc. dated November 7, 1997. The invoices indicated that 600 cartons of cigarettes were delivered on that date. The invoices also indicate that petitioner charged Cigpak, Inc. \$20.36 per carton of cigarettes, which was the legal minimum wholesale cigarette price on November 7, 1997.

CONCLUSIONS OF LAW

A. Tax Law § 484(a) provides, in relevant part, that it shall be unlawful and a violation of article 20-A:

(1) [f]or any agent, wholesale dealer or retail dealer, with intent to injure competitors or destroy or substantially lessen competition, or with intent to avoid the collection or paying over of such taxes as may be required by law, to advertise, offer to sell, or sell cigarettes at less than cost of such agent[,] wholesale dealer or retail dealer, as the case may be.

(2) [f]or any wholesale dealer:

(A) to induce or attempt to induce or to procure or attempt to procure the purchase of cigarettes at a price less than the cost of the agent with respect to sales to wholesale dealers; or

(B) to induce or attempt to induce or to procure or attempt to procure any rebate or concession of any kind or nature whatsoever in connection with the purchase of cigarettes.

Tax Law § 484(5)(A) provides that:

[u]pon a first violation of any of the provisions of this article, after due notice and opportunity for a hearing, the commissioner may suspend the license of any agent or wholesale dealer for a period of not more than thirty days or impose a civil fine not to exceed twenty thousand dollars or both such suspension and fine.

B. The record supports a finding that on November 7, 1997, Carl Nappi paid or attempted to pay \$200.00 to the owner of Cigpak, Inc., Rashad Iqbal. Unfortunately for the Division's

position, the evidence introduced at the hearing does not support the other elements of the alleged violation of the Cigarette Marketing Standards Act. The invoices from petitioner to Cigpak, Inc. for the date in question show a total delivery of 600 cartons of cigarettes, not the 800 cartons as claimed by the Division on its Notice of Proposed Suspension. Mr. Nappi was a commissioned salesman for petitioner as well as another wholesale distributor, so it cannot be inferred that the rebate came from G & S, Inc. Most importantly, there is nothing in the record that actually links the \$200.00 payment to G & S, Inc. The uncontroverted testimony of Mr. Ruda established that petitioner did not pay or authorize Mr. Nappi to pay the rebate to Cigpak, Inc. Although not conclusive, the evidence does point to the Association as the possible source of the rebate. Documents in the record suggest that the Association reimbursed Carl Nappi for the \$200.00 paid or attempted to be paid on November 7, 1997 to Cigpak, Inc. In light of the lack of evidence connecting petitioner to the \$200.00 payment, the credible testimony of Mr. Ruda and the evidence suggesting the Association as the source of the \$200.00, the fine and proposed suspension cannot be upheld.

C. The petition of Gutlove and Shirvint, Inc. is granted, and the Notice of Determination and Notice of Proposed Suspension, both dated July 17, 1998, are canceled.

DATED: Troy, New York
December 28, 2000

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE