

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>AMBICA NEWS CORP.</b>	:	DETERMINATION DTA NO. 819497
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period April 10, 2002.	:	

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Petitioner, Ambica News Corp., 89-08 Sutphin Boulevard, Jamaica, New York 11435-3715, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period April 10, 2002.

A small claims hearing was held before Arthur S. Bray, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on July 20, 2004 at 2:45 P.M. Petitioner appeared by Rupam Patel. The Division of Taxation appeared by Mark F. Volk, Esq. (John Walther).

Since neither party herein elected to reserve time to file a brief, the three-month period for the issuance of this determination began as of the date the hearing was held.

***ISSUE***

Whether petitioner is liable for the penalty imposed by the Division of Taxation for failure to display a valid New York State Certificate of Registration for the retail sale of cigarette or tobacco products for the 2002 calendar year.

***FINDINGS OF FACT***

1. Petitioner, Ambica News Corp. (“Ambica”), was incorporated by an attorney on May 30, 2000. It started business in July 2001. At the time of its incorporation, the president of the business, Harsad Patel, thought that his attorney had done everything that was legally necessary.

2. On July 11, 2001, the Division of Taxation (“Division”) conducted a routine inspection of the business and ascertained that Ambica did not have a current valid certificate of registration. Thereafter, the Division advised Ambica not to sell cigarettes or tobacco products until it obtained a valid certificate.

3. As a result of the foregoing violation, the Division issued a notice (assessment number L-020281141-7) which asserted a penalty under the Cigarette Tax Law in the amount of \$2,000.00.

4. The Division issued a separate notice (assessment number L-023335996-4) which asserted a penalty under the Cigarette Tax Law in the amount of \$50.00 for the period ending February 28, 2001. The basis for this assessment is not set forth in the record.

5. On April 10, 2002, the Division conducted a second inspection of the business and determined that Ambica again did not have a current certificate of registration on display.

6. The violation on April 10, 2002 led the Division to issue a Notice of Determination, dated September 13, 2002, which asserted a penalty under Article 20 of the Tax Law in the amount of \$3,500.00.

7. On April 10, 2002, Mr. Rupam Patel, the accountant for Ambica, mailed another application for registration to the Division. The application included a check in the amount of \$100.00, which is the yearly registration fee.

8. When Ambica was inspected for the second time, Mr. Harsad Patel called his representative and asked what became of a prior application which was purportedly filed. The representative replied that he had a copy of the application but it was his understanding that it is the Division's practice to send the certificate of registration to the place where the business is conducted. The representative then faxed a copy of the most recent application to Ambica which placed it on display.

9. At the hearing, petitioners submitted a copy of a check, dated January 5, 2004, which was drawn on the account of Ambica News Corp. in the amount of \$2,017.10 and made payable to the order of the Commissioner of Taxation and Finance. The following notation appears at the top of the check:

Assessment I.D. # L-020281141-7 \$1,967.10  
Assessment I.D. # L-023335996-4 \$ 50.00

***SUMMARY OF PETITIONER'S POSITION***

10. Petitioner presented testimony that, in February 2002, Mr. Harsad Patel asked his representative, Mr. Rupam Patel, to prepare an application for a certificate of registration. Thereafter, Mr. Rupam Patel prepared the application and gave it to his client for filing. The application was allegedly filed by Mr. Harsad Patel in March 2002. Petitioner never received a response to the application and there was no follow-up.

Petitioner's representative further maintains that it was a coincidence that the subsequent mailing of the application for a renewal of the certificate of registration on April 10, 2002 occurred on the same day that the store was being inspected.

11. Petitioner also offered testimony that sometime after the second inspection, Mr. Rupam Patel reached an agreement over the telephone with an individual, employed by the Division in Albany, that a payment of \$2,000.00 would be sufficient to satisfy both the first and

second violations. According to Mr. Harsad Patel, he paid the \$2,000.00 thinking that everything was resolved. When he received the second notice, he called his representative who, in turn, called someone in Albany. The representative was then told that the \$2,000.00 was applied to the first violation. Petitioner submits that it was an error for the Division to have applied the \$2,000.00 solely to the first assessment.

12. According to petitioner, \$2,000.00 constitutes six to eight-month's profits and the Division agreed over the telephone that \$2,000.00 was too much for a small store to pay. He also argues that once the application was mailed on April 10, 2002, it is assumed that the Division received the application at the same time.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 480-a(1)(a) provides that:

On and after January first, nineteen hundred ninety-one, every retail dealer shall publicly display a certificate of registration from the department in each place of business in this state through which it sells cigarettes or tobacco products at retail. A retail dealer who has no regular place of business shall publicly display such certificate on each of its carts, stands, trucks or other merchandising devices through which it sells cigarettes or tobacco products in this state.

A "retail dealer" is defined in Tax Law § 470(9) as "[a]ny person other than a wholesale dealer engaged in selling cigarettes or tobacco products."

B. During the period in issue, Tax Law § 480-a(3) provided, in applicable part, that:

In addition to any other penalty imposed by this chapter: (a) Any retail dealer who violates the provisions of this section shall, after due notice and an opportunity for a hearing, for a first violation be liable for a civil fine not less than five hundred dollars but not to exceed two thousand dollars and for a second or subsequent violation within three years following a prior finding of violation be liable for a civil fine not less than one thousand dollars but not to exceed three thousand five hundred dollars. . . .

C. Petitioner has not disputed that it met the definition of a "retail dealer" during the period in issue. Further, petitioner has not questioned the Division's assertion that it did not

have a certificate of registration on display at the time of the second inspection. Under the statute, this factor is decisive of the outcome of this matter.

Petitioner's claim that it filed an application for a certificate of registration in March 2002 and another time in April 2002 of is no consequence. The Tax Law requires that the certificate of registration be publicly displayed (Tax Law § 480-a[1][a]) and renewed each calendar year (Tax Law § 480-a[1][c]). The filing of the application for a certificate of registration does not meet this requirement. Here, following the first inspection, petitioner was well aware that it needed to file an application for a certificate of registration. It was also aware that it should not have been selling cigarettes before it was able to display the certificate. Having chosen not to follow the law, the penalty was properly imposed.

D. Petitioner argues that it had an agreement with the Division that its payment of \$2,000.00 would satisfy both notices. The evidence in the record does not support petitioner's contention. The law is settled that a taxpayer has the right to direct how its payments should be applied (*Matter of Donahue*, Tax Appeals Tribunal, December 8, 1994; *Matter of Myer*, Tax Appeals Tribunal, May 17, 1990). Here, the check making the payment of a little more than \$2,000.00 specifically listed two assessments, L-020281141-7 and L-023335996-4. Under the circumstances, it would have been an error for the Division to have applied any portion of this payment to the notice which asserted a penalty of \$3,500.00. It is noteworthy that the agreement was never placed in writing and there is no evidence as to whom the representative spoke.

E. The petition of Ambica News Corp. is denied, and the Notice of Determination dated September 13, 2002 is sustained.

DATED: Troy, New York  
September 30, 2004

/s/ Arthur S. Bray  
PRESIDING OFFICER