

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JANU CORPORATION : DETERMINATION
 : DTA NO. 819538
for Redetermination of a Notice of Proposed Refusal to :
Relicense as a Wholesale Dealer of Cigarettes under :
Articles 20 and 20-A of the Tax Law for the Year 2003. :

Petitioner, Janu Corporation, 5 Dolson Avenue, Middletown, New York 10940, filed a petition for redetermination of a notice of proposed refusal to relicense as a wholesale dealer of cigarettes under Articles 20 and 20-A of the Tax Law for the year 2003.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on August 21, 2003 at 9:15 A.M., with all briefs to be submitted by September 12, 2003. Petitioner appeared by Dinesh Patel. The Division of Taxation appeared by Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly refused to relicense petitioner as a wholesale dealer of cigarettes.

FINDINGS OF FACT

1. Petitioner, Janu Corporation d/b/a Budget Express, filed an Application for License as a Wholesale Cigarette Dealer, Form CG-100-W, with the Division of Taxation (“Division”) on July 1, 2002. The application requested relicensing as a wholesale dealer of cigarettes.

Petitioner's place of business is listed as 5 Dolson Avenue, Middletown, New York. Bhautika Patel is the 100% shareholder of the stock of the corporation and its president. Janu Corporation d/b/a Budget Express operated a retail convenience store at 6 Dolson Avenue, across the street from the claimed address of the wholesale dealer.

2. On December 27, 2002, the Division, in the course of reviewing the application for a license, sent petitioner a letter requesting the percentage of the corporation's cigarette sales which are sold at retail. Petitioner, by Bhautika Patel, responded that 20% of the corporation's cigarette sales are sold at retail.

3. In its Application for Registration as a Sales Tax Vendor, Form DTF-17, dated July 30, 2002, petitioner stated that 95% of its business activity was operating the retail convenience store and 5% of its business activity consisted of the wholesale dealing of cigarettes.

4. On August 23, 2002, two investigators from the Office of Tax Enforcement conducted a cigarette and tobacco product regulatory inspection at the corporation's retail premises located at 6 Dolson Avenue, Middletown, New York. The investigators observed that the business was making wholesale and retail sales from this location, that there were no walls separating the wholesale section of the store from the retail section and there was only one entrance/exit in the building. The investigators explained to the store manager, Ankur Patel, that he was in violation of the Tax Law by selling cigarettes at wholesale and retail prices from the same location. The investigators further explained that if the two business operations were to occupy the same building, compliance with the law required that each section of the business had to have a separate room, counter, cash register and entrance/exit. The store manager was issued a summons pursuant to Tax Law § 1829 for being in violation of the Cigarette Marketing Standards Act, Tax Law Article 20-A, a class B misdemeanor.

5. On October 11, 2002, Ankur Patel entered a plea of guilty to the lesser charge of disorderly conduct under, Penal Law § 240.20 and paid a fine of \$200.00.

6. On April 7, 2003, two investigators from the Office of Tax Enforcement conducted a cigarette wholesale license premise inspection of petitioner, at 5 Dolson Avenue, Middletown, New York. The location was being used to store approximately 200 cartons of cigarettes, but lacked a business sign, employees, cash registers, business records or other indicia that a wholesale cigarette business was being operated there. The investigators concluded that petitioner was operating the retail business, including the sale of cigarettes, and the wholesale cigarette business from the same location at 6 Dolson Avenue, Middletown, New York.

7. On December 30, 2002, the Division issued to petitioner a Notice of Proposed Refusal to Relicense as a Wholesale Dealer of Cigarettes under Articles 20 and 20-A of the Tax Law. The proposed refusal to relicense provided the following reasons for the Division's determination:

1) You have failed to maintain a separate premises for your retail cigarette business as required by Tax Law Section 483(a)(2) and 20 NYCRR 80.2(b).

2) Janu Corporation, a wholesale dealer of cigarettes, sells 20% of the cigarettes it purchases at retail. This level of retail sales activities by a wholesale dealer is a violation of the Cigarette Marketing Standard Act. (Tax Law Sections 480.2(f), 480.3(a)(ii), 484(a)(1), 20 NYCRR 72.2(6), 82.1).

8. Sales invoices for the period April 2003 through August 2003 indicate that 100% of the sales of the Janu Corporation, Budget Express Wholesale, went to Janu Corporation, Budget Express, the retail convenience store located at 6 Dolson Avenue.

9. A premises inspection of petitioner's wholesale business location at 5 Dolson Avenue was conducted by two excise tax investigators for the Office of Tax Enforcement on September 2 and 3, 2003. Arriving at 3:45 P.M., the location appeared to be closed, with no lights on in the

building, no activity noted and the door locked, although the sign on the front of the building indicated the business hours to be 7:00 A.M. to 4:00 P.M. The store manager of the businesses at both 5 and 6 Dolson Avenue, Dinesh Patel, husband to Bhautika Patel, opened the door to 5 Dolson Avenue. The investigators discovered 28 half cases of cigarettes in the customer area of the store, half of these cases contained full cigarette cartons while the cartons in the other half of the cases were empty. In the rear storage area the investigators found 75 half cases of cigarettes, all with empty cigarette cartons. A large quantity of blank pre-printed "Budget Express" invoices were found, which the manager stated were used to fill wholesale orders. The printed address on the invoices was 6 Dolson Avenue, although a "5" was written over the "6" in pen. The telephone number on the invoices did not match the telephone number on the store's sign, and when called rang at the retail store location at 6 Dolson Avenue.

On the first day of the inspection, petitioner was unable to provide invoices for incoming purchases, records of products sold or a customer list. During the second day of the inspection, petitioner provided shipping invoices from two suppliers, which revealed 1,396 cartons of cigarettes purchased during the period August 13, 2003 to August 29, 2003. A review of sales invoices of Janu Corporation, wholesale dealer, for a two-month period indicated only 100 to 120 cartons of cigarettes were sold to customers other than petitioner's retail store. Petitioner also provided a handwritten wholesale customer list of 20 customers. A check of the Division's database indicated that only three of these customers had reported purchasing cigarettes from petitioner, the most recent purchase occurring in October 2002. The remaining 17 names were either fictitious companies, companies that were not licensed to purchase cigarettes or companies that reported wholesale purchases from dealers other than petitioner.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 483(a)(2), a “wholesale dealer” is defined as:

any person, other than an agent, who sells cigarettes to retail dealers or other persons for purposes of resale only and who maintains a separate warehousing facility for the purpose of receiving and distributing cigarettes and conducting its wholesale business. If such person is also a retail dealer, such person shall maintain separate premises for such retail business. (*See also* 20 NYCRR 80.2[b].)

The results of the three inspections of the business premises conducted by the Office of Tax Enforcement establish that petitioner was in violation of Tax Law § 483(a)(2). During the August 23, 2002 inspection, the investigators observed that the business was making wholesale and retail sales from the same location, that there were no walls separating the wholesale section of the store from the retail section and there was only one entrance/exit in the building. In April 2003, the investigators discovered that, although the location was being used to store approximately 200 cartons of cigarettes, it lacked a business sign, employees, cash registers, business records or other indicia that a wholesale cigarette business was being operated there. Finally, during the first day of the two-day inspection that was conducted in September 2003, the investigators arrived at 3:45 P.M. and noticed that the location appeared to be closed, with no lights on in the building, no activity noted and the door locked, even though the sign on the front of the building indicated the business hours to be 7:00 A.M. to 4:00 P.M. Of the 103 half cases of cigarettes found on the premises, the investigators discovered 89 to be filled with empty cigarette cartons. Invoices for the wholesale business contained a telephone number which rang in the retail store. Based on the results of the inspections, it must be concluded that petitioner was in violation of Tax Law § 483(a)(2).

B. The Cigarette Marketing Standards regulations provide, in relevant part, that:

[w]hile it is recognized that agent, wholesale dealer, chain store and retail dealer activities are not mutually exclusive, the intent and the integrity of the cigarette marketing standards . . . necessitate that substantially all of an agent's, CMSA wholesale dealer's, chain store's or CMSA retail dealer's cigarette activities, be activities for which an agent, CMSA wholesale dealer or chain store, respectively, is licensed or registered, or in the case of a CMSA retail dealer, be activities comprising sales of cigarettes to consumers. That is, a person who wishes to purchase and/or sell cigarettes in this State pursuant to any one section of this Part, shall not conduct secondary cigarette activities in excess of 10 percent of such person's total cigarettes activities (20 NYCRR 82.1[a]).

In order to avoid violating the above-quoted regulation, substantially all (i.e., 90 percent or more) of a wholesale dealer's cigarette activities must pertain to cigarettes sold for purposes of resale. Thus, a wholesale dealer may not sell more than 10 percent of its wholesale purchases at retail.

Petitioner, by its president, in response to a question by the Division, stated that 20% of the corporation's cigarette sales are sold at retail. Sales invoices for the period April 2003 through August 2003 indicate that 100% of the sales of the Janu Corporation, Budget Express Wholesale, went to Janu Corporation, Budget Express, the retail convenience store located at 6 Dolson Avenue. Shipping invoices from two suppliers revealed that 1,396 cartons of cigarettes were purchased during the period August 13, 2003 to August 29, 2003. A review of sales invoices of Janu Corporation, wholesale dealer, for a two-month period indicated only 100 to 120 cartons of cigarettes were sold to customers other than petitioner's retail store. Taken together, the evidence establishes that petitioner is using its wholesale license to purchase cigarettes for the purpose of supplying its retail operation in excess of the 10 percent limitation, and is therefore in violation of 20 NYCRR 80.2 (b)(1).

C. According to Tax Law § 480.2(f), the Commissioner of Taxation and Finance may refuse to license an applicant where such applicant files an application under this section and in considering such application the commissioner determines that:

[s]uch applicant or any controlling person has been finally determined to have violated any of the provisions of this article or article twenty-A of this chapter, or any rule or regulation adopted pursuant to this article or article twenty-A of this chapter.

As it has been established that petitioner was in violation of Tax Law § 483(a)(2), 20 NYCRR 80.2(b) and 20 NYCRR 82.1, the Division properly refused to relicense Janu Corporation as a wholesale dealer of cigarettes.

D. The petition of Janu Corporation is denied, and the Division of Taxation's refusal to relicense Janu Corporation as a wholesale dealer of cigarettes under Articles 20 and 20-A of the Tax Law is sustained.

DATED: Troy, New York

September 25, 2003

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE