

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

PHILIP MORRIS INCORPORATED

DETERMINATION

for Revision of a Determination or for refund of:
Cigarette Tax under Article 20 of the Tax Law
for the Period May 17, 1983 through July 31,
1983.

Petitioner, Philip Morris Incorporated, 120 Park Avenue, New York, New York 10017, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period May 17, 1983 through July 31, 1983 (File No. 53446).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on July 18, 1986 at 9:15 A.M., with all briefs to be submitted by February 10, 1987. Petitioner appeared by James W. Shea, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the Audit Division's determination of cigarette tax due on stolen cigarettes pursuant to Tax Law § 471-a was correct.

FINDINGS OF FACT

1. On March 27, 1984, the Audit Division issued to petitioner, Philip Morris Incorporated ("Philip Morris"), a Notice of Determination of Tax Due Under Cigarette Tax Law Article 20, Section 471-a for the period May 17, 1983 through July 3, 1983. Said notice assessed tax due in the sum of \$262,962.00 and interest of \$16,224.39 for a total amount due of \$279,186.39. The notice set forth the explanation and computation of the assessment as follows:

"An audit of your records for the two robberies which occurred May 17, 1983 and July 3, 1983 disclosed the following:

Robbed from warehouse 5/17/83	1,171 cases
Returned by FBI	<u>107 cases</u>
Remainder	1,064 cases

1,064 cases x 12,000 = 12,768,000 cigarettes

Robbed from truck	971 cases
Returned by FBI	<u>142 cases</u>
Remainder	829 cases

829 cases x 12,000 = 9,948,000 cigarettes

Robbed from McLean Trucking Terminal	980 cases
Returned by FBI	<u>786 cases</u>
Remainder	194 cases

194 cases x 12,000 = 2,328,000 cigarettes

1,252,200 packs of cigarettes x 21¢ per pack	\$262,962.00
Interest	<u>16,224.39</u>
Total Amount Due	\$279,186.39

2. Philip Morris is a corporation duly organized and existing under the Laws of the Commonwealth of Virginia and is engaged in the manufacturing of tobacco products which are sold throughout the United States. Philip Morris maintains its executive offices in New York.

3. In May of 1983, Philip Morris contracted with McLean Trucking Company to transport its product, 971 cases of cigarettes from its factory in Virginia to a public warehouse in Port Chester, New York. When the driver attempted to enter the warehouse on May 17, 1983, he was restrained at gunpoint while the tractor-trailer with cigarettes was driven off by armed gunmen. The same men also removed a quantity of warehouse inventory including 1,171 cases of Philip Morris' brands of cigarettes, loaded them into a truck owned by the warehouse, and drove off. Both the truck owned by the warehouse and the truck owned by McLean Trucking Company were later recovered in the State of New Jersey. Some

of the cigarettes, 142 cases of the warehouse inventory and 107 cases of the inventory in the truck, were also recovered in New Jersey.

4. On or about July 3, 1983 another tractor-trailer loaded with 980 cases of Philip Morris' cigarettes, en route from the taxpayer's factory in Richmond, Virginia to the public warehouse in Port Chester, New York, was hijacked at the McLean Trucking Terminal in Newburgh, New York. The tractor was later recovered in Clifton, New Jersey and the trailer in Secaucus, New Jersey.

5. The public warehouse in Port Chester, New York and the McLean Trucking Company are entities independent of the taxpayer.

6. The cigarettes in both instances were en route to the warehouse in Port Chester, New York for storage and ultimate distribution to wholesalers in New York and Connecticut, who would in turn sell their cigarettes to retail dealers in their respective states.

7. Philip Morris applied for and received a Certificate of Authority, as Agent of the State Tax Commission, to purchase, affix and cancel adhesive cigarette tax stamps and to affix meter stamps. Said certificate was issued December 1, 1975. Philip Morris used the certificate to purchase confiscated cigarettes at New York State auctions in order to insure that old or stale cigarettes would not reach the market place.

8. As a result of the thefts, the Audit Division assessed use tax pursuant to Article 20, section 471-a of the Tax Law.

CONCLUSIONS OF LAW

A. That Tax Law § 471-a states, in pertinent part, as follows:

"There is hereby imposed and shall be paid a tax on all cigarettes used in the state by any person on and after April first, nineteen hundred eighty-three, except that no tax shall be imposed (1) if the tax provided for in section four hundred seventy-one is paid [sales tax], (2) on the use of cigarettes which are exempt from the tax imposed by

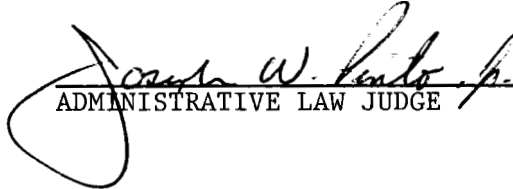
said section, or (3) on the use of four hundred or less cigarettes, brought into the state on, or in the possession of any person.... For purposes of this article, the word 'use' means the exercise of any right or power actual or constructive and shall include but is not limited to the receipt, storage or any keeping or retention for any length of time, but shall not include possession for sale.'

B. That the theft of 1,252,200 packs of cigarettes within the State of New York did not constitute use as that term is defined in Tax Law § 471-a. The cigarettes were still in the sales distribution process when stolen and not possessed by the manufacturer, the warehousemen or common carrier as a consumer but only for the purpose of facilitating a sale. The instant situation falls within the exemption outlined in Tax Law section 471-a, wherein it states that "use" does not include possession for sale. (Harder's Express, Inc. v. State Tax Commn., 70 AD2d 1010.) In Harder's Express, Inc., the Tax Commission imposed cigarette use tax liability on a common carrier for cigarettes stolen en route. The court found said determination to be an unreasonable interpretation of Article 20 of the Tax Law. Although the instant situation involves a manufacturer and registered agent, the salient facts are indistinguishable. The cigarettes were in the sales distribution process when stolen, they had not reached a registered agent authorized to affix tax stamps and the possession of the cigarettes by either the common carrier or warehousemen acting in behalf of the manufacturer can not be interpreted within the meaning and intent of section 471-a as the exercise of any right or power actual or constructive other than for the purpose of sale.

C. That the petition of Philip Morris Incorporated is granted and the Notice of Tax Due under Cigarette Tax Law Article 20, Section 471-a dated March 27, 1984 is hereby cancelled.

DATED: Albany, New York

SEP 03 1987


ADMINISTRATIVE LAW JUDGE