

## BUREAU OF LAW

## MEMORANDUM

*Miscellaneous Tax Determinations**Cigarette Tax**A-2**Fiorito, Anthony J.*

TO: The State Tax Commission

FROM: Alfred Rubinstein, Hearing Officer

SUBJECT: ANTHONY J. FIORITO  
Application to review a determination  
assessing cigarette taxes under Article  
20 of the Tax Law for the year 1966.

A hearing on the above entitled matter was scheduled to be held before me at 80 Centre Street, New York, New York, on November 16, 1967. Taxpayer defaulted in appearing.

The issue involved a penalty assessment of \$25 per carton on untaxed cigarettes in taxpayer's possession in excess of 25 cartons.

A telephone call was received by Milton Weiss, Supervising Excise Tax Examiner, on August 24, 1966, from John A. Cooney, of the Maryland Cigarette Tax Unit, advising that a 1966 Ford pick-up truck bearing Delaware registration plate 39749 and pulling a U-Haul trailer bearing Massachusetts registration plate C-1311 had left North Carolina on August 23, 1966 bound for New York with a load of cigarettes. The truck and trailer emerged from the Holland Tunnel that afternoon and the taxpayer, who was driving the truck, on being asked whether he was carrying cigarettes, denied any knowledge of the cargo, stating that he had been told by his employer, the owner of the trailer, to pick up the trailer in New Jersey that morning.

Detective Bahill of the New York City Police Department was called to 80 Centre Street, the place to which the taxpayer had been requested to proceed, and after ascertaining, by telephone, from one Tamby, the owner of the trailer, that the trailer was missing, directed that the trailer be opened. 2,290 cartons of untaxed cigarettes were found in the trailer and were seized.

On prosecution for misdemeanor under section 481(2) of the Tax Law a motion to suppress the evidence on the ground of illegal search and seizure was granted on January 24, 1967, and the District Attorney thereupon consented to dismissal. Thereafter, on March 1, 1967, the Miscellaneous Tax Bureau issued determination No. 635 imposing penalties of \$25 per carton against the taxpayer, in the total sum of \$56,625, pursuant to section 481(1)(b) of the Tax Law. On March 23, 1967, a letter of protest was received from the taxpayer in which he requested "re-examination" and which letter was construed to constitute a timely application

for hearing as required by section 478 of the Tax Law.

Section 481(1)(b) of the Tax Law permits the imposition of a penalty of \$25 for each untaxed carton of cigarettes in excess of 25 cartons in the possession of any person, and provides for determination and review only pursuant to section 478. The taxpayer having defaulted in appearance, the sole question to be determined is whether the dismissal on the granting of the motion to suppress the evidence in the prior criminal prosecution on the ground of illegal search and seizure affects the power of the Tax Commission to determine a deficiency for penalties based on taxpayer's possession of the contraband cigarettes. In view of taxpayer's failure to appear and submit any evidence or explanation with respect to his possession of the cigarettes and the truck and trailer that had been reported in North Carolina, it would appear that a proper basis for the determination exists.

In Leogrando v. State Liquor Authority, 19 N Y 2d 418, the Court of Appeals upheld cancellation of a license after a hearing at which no objection was made to introduction of evidence, claimed afterward to be constitutionally inadmissible, on the ground that neither the court nor the administrative body was required to pass on the constitutional question, no issue with respect thereto having been raised at the hearing. It would appear, consequently, on the authority of the Leogrando case, that the evidence supporting the determination is admissible.

Accordingly, I am of the opinion that the determination should be sustained. The decision of the Tax Commission should be substantially in the form submitted herewith.

/s/

ALFRED RUBINSTEIN

**Hearing Officer**

December 11, 1967  
AR:lb  
Enc.

12-15-67

A. B. MANLEY  
1/16/68

IN THE MATTER OF THE APPLICATION  
OF  
ANTHONY J. FIORITO  
FOR A HEARING TO REVIEW A DETERMINATION  
OF THE STATE TAX COMMISSION ASSESSING  
CIGARETTE TAXES UNDER ARTICLE 20 OF THE  
TAX LAW FOR THE YEAR 1966.

**The State Tax Commission hereby finds:**

(1) That on August 24, 1966, the taxpayer transported into the State of New York and possessed therein 2,290 cartons of untaxed cigarettes; that at that time, the taxpayer was neither an agent authorized to affix tax stamps to untaxed cigarettes in New York, nor a common or contract carrier or warehouseman lawfully transporting or storing untaxed cigarettes in New York; that the taxpayer at that time did not have in his possession invoices or delivery tickets showing the names and addresses of the seller, purchaser, quantity, brands and identity of the person liable for the payment of the taxes on the cigarettes in his possession; that the taxpayer has not, within 24 hours of the transportation into New York of the said cigarettes filed a use tax return and paid the tax on the said cigarettes.

(2) That on March 1, 1967, the Miscellaneous Tax Bureau issued Determination No. 635 imposing penalties of \$25 per carton on each carton of untaxed cigarettes in the possession of the taxpayer in excess of 25 cartons, in the total sum of \$56,625; that on March 23, 1967, the taxpayer filed a letter protesting against the determination imposing penalties against him, requesting "re-examination" of the matter.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

**DECIDES:**

(A) That on August 24, 1966, the taxpayer possessed within the State 2,290 cartons of untaxed cigarettes in violation of the provisions of Article 20 of the Tax Law; that the tax on said cigarettes was not paid when due; that the taxpayer was the person liable for payment of taxes on said untaxed cigarettes within the meaning and intent of section 481 of the Tax Law.

(B) That the taxpayer filed a timely appeal for a hearing to review the determination imposing against him penalties of \$25 per carton of each carton on untaxed cigarettes in his possession in excess of 25 cartons, in the total sum of \$56,625.

(C) That the taxpayer has defaulted in appearance and has failed to sustain the burden of proof on the issues, in accord with section 471 of the Tax Law.

(D) That, accordingly, the determination imposing penalties of \$25 per carton on each carton on untaxed cigarettes in the possession of the taxpayer on August 24, 1966, in excess of 25 cartons, and in the total sum of \$56,625 is correct; that the amount set forth therein is due and owing together with other statutory charges, if any; that said determination does not

include any tax or charge which could not have been lawfully demanded and that the taxpayer's application for review with respect thereto be and the same is hereby denied.

Dated: Albany, New York this 17th day of January, 1968.

**STATE TAX COMMISSION**

/s/

JOSEPH H. MURPHY

**PRESIDENT**

*Bruce Manley*  
**COMMISSIONER**

**COMMISSIONER**