

## BUREAU OF LAW

## MEMORANDUM

*Misc. Tax Determinations*  
*Cigarette Tax A-Z*  
*Saulowitz and Maicoroni*

TO: **The State Tax Commission**

FROM: **Vincent P. Molineaux, Hearing Officer**

SUBJECT: **Saulowitz and Maicoroni**

**Application for Revision or Refund of  
Cigarette Tax Under Article 20 of the  
Tax Law**

A hearing on the above matter was held before me at 80 Centre Street, New York, N. Y., on May 17, 1967.

The factual question at issue is whether or not the taxpayer filed a timely application for hearing under section 478 of the Tax Law (Cigarette Tax - Article 20). The question of law that must be resolved is whether or not the assessment which may have been based upon evidence illegally seized for the purposes of the Penal Law is jurisdictionally defective so that failure to file a timely application for hearing is no bar to the defective assessment.

Saulowitz and Maicoroni were apprehended by the New York City Police on January 5, 1966 with 335 cartons of untaxed cigarettes in an automobile. Petitioner Saulowitz also had in his possession \$2,400 in cash which was seized by the police along with the cigarettes. Both parties were served with summonses and, after several hearings in court, the charges were dismissed due to inadmissible evidence.

The City of New York issued a cigarette tax assessment dated February 7, 1967 for 7,500 cartons less the 335 cartons seized, or 7,165 cartons.

Cigarette tax files of Miscellaneous Tax Bureau indicate that Saulowitz had been engaged in untaxed cigarette traffic before. Based upon that and the New York City assessments, the Miscellaneous Tax Bureau issued the Notice of Determination in question on May 25, 1966.

On January 17, 1967, the Department received a letter from Healey and Halpert, Esqs. dated January 13, 1967 requesting a hearing, which date was more than 30 days after the Notice of Determination.

In the course of the hearing, no evidence or argument was presented to indicate that application for revision pursuant to section 478 of the Tax Law had been made within 30 days after giving of the notice, as required by that section.

In the case 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, therefore, that on the authority of the Leogrando case that the mere existence of an illegal search and seizure does not render void the act of the administrative agency but is assertable only as a defense. Consequently, I am of the opinion that the taxpayer's failure to file a timely application must result in a dismissal of the application and that the question of fact as to whether or not there was an illegal search and seizure need not be decided by the State Tax Commission.

In the case of Michael Bone v. State Tax Commission (decided Supreme Court Albany County, August 29, 1968, Korman J.) a proceeding was instituted by the taxpayer to review a cigarette tax assessment which was based upon an estimate of the amount of cigarettes used. In that case the taxpayer filed an untimely application to review the cigarette tax assessment based upon an estimated amount of cigarettes purchased. The operating bureau denied the application because of untimely filing. The Supreme Court in an Article 78 proceeding instituted by the taxpayer held that the Commissioner's act in assessing was an arbitrary one. Although Mr. Bush, handling the matter, states that he presented the issue of the untimely filing of the application to the court, the court ignored that issue. This matter is presently pending appeal. Although there may be room for argument that an assessment if arbitrarily issued is jurisdictionally void so that the filing of a late application does not prohibit a review thereof, here the question of the arbitrariness of the assessment was not raised by the attorney. The sole issue raised was the illegality of the search and seizure. Accordingly, I have prepared a proposed decision dismissing the application on the ground of untimeliness of filing and I recommend that it be signed by the Commission.

If you agree, please sign one original and three copies of the proposed decision and return them to the Law Bureau together with the file for further disposition.

/s/

VICENT P. MOLINEAUX

HEARING OFFICER

VPM:jum

Enc.

March 11, 1968

3-18-68

**STATE OF NEW YORK**  
**STATE TAX COMMISSION**

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**IN THE MATTER OF THE APPLICATION**

**OF**

**ISIDORE SEULOWITZ**  
**AND**  
**JOHN MAICORONI**

**FOR REVISION OR REFUND OF CIGARETTE**  
**TAX UNDER ARTICLE 20 OF THE TAX LAW**  
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Isidore Seulowitz and John Maicoroni, through their attorneys, Healey and Halpert, having requested a hearing on Warrant No. M-602588 for cigarette tax issued under Article 20 of the Tax Law and a hearing having been held at the office of the State Tax Commission, 80 Centre Street, New York, N. Y., on Wednesday, May 17, 1967, before Vincent P. Melineaux, Hearing Officer of the Department of Taxation and Finance, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the Miscellaneous Tax Bureau, having determined, pursuant to personal investigation and other information in the files of the Department of Taxation and Finance kept in the ordinary course of business by that Department, that Isidore Seulowitz and John Maicoroni had failed to file returns required by Article 20 of the Tax Law, issued a Determination of Tax, No. 103 dated May 25, 1966 in the amount of \$10,747.30 under Article 20 of the Tax Law against Isidore Seulowitz and John Maicoroni and written notice thereof was given to the said Seulowitz and Maicoroni.

(2) That a letter of Healey and Halpert, Esqs., dated January 13, 1967, was received in the Department of Taxation and

Finance January 17, 1967 requesting a hearing on the said determination, No. 103.

(3) That more than 30 days elapsed between the Notice of Determination and the application for hearing.

Therefore the State Tax Commission hereby  
DECIDES:

(A) That application for hearing was not made by  
Soulowitz and Maicoreni within the 30 days provided in Section 478  
of the Tax Law and

(B) That the application for a hearing is hereby  
dismissed.

Dated: Albany, New York this 3rd day of April , 1968.

**STATE TAX COMMISSION**

/s/

JOSEPH H. MURPHY

**PRESIDENT**

/s/

A. BRUCE MAMLEY

**COMMISSIONER**

/s/

SAMUEL E. LEPLER

**COMMISSIONER**