

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Fred Bauer :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Cigarette Tax :

under Article 20 of the Tax Law

for the Year 1975. _____ :

State of New York

County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Decision by mail upon Fred Bauer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fred Bauer

1771 Anne Rd.

Merrick, Long Island, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this

28th day of September, 1979.

STATE OF NEW YORK
STATE TAX COMMISSION

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Cigarette Tax :

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for the Year 1975. :

State of New York

County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of September, 1979, he served the within notice of Decision by mail upon Leon Port the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Leon Port
Port & Port
123 Hicks St.
Brooklyn, NY 11201

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
28th day of September, 1979.



STATE OF NEW YORK
STATE TAX COMMISSION
TAX APPEALS BUREAU
ALBANY, NEW YORK 12227

STATE TAX COMMISSION

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

September 28, 1979

Fred Bauer
1771 Anne Rd.
Merrick, Long Island, NY

Dear Mr. Bauer:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 478 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

cc: Petitioner's Representative
Leon Port
Port & Port
123 Hicks St.
Brooklyn, NY 11201
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :

of :

FRED BAUER :

DECISION

for a Hearing to Review a Determination :
under Article 20 of the Tax Law for the
Year 1975. :

Applicant, Fred Bauer, 1771 Anne Road, Merrick, New York, filed an application for a hearing to review a determination under Article 20 of the Tax Law for the year 1975 (File No. 17529).

A formal hearing was held before Neil Fabricant, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 5, 1977 at 1:15 P.M. Applicant appeared by Port and Port, Esqs. (Leon Port, Esq., of counsel). The Miscellaneous Tax Bureau appeared by Peter Crotty, Esq. (Irving Atkins and Frank Levitt, Esqs., of counsel).

ISSUE

Whether the penalty of \$54,864.00 imposed on applicant pursuant to section 481.1(b) of the Tax Law for possession of or control over 27,442 cartons of cigarettes which did not bear New York tax stamps is proper.

FINDINGS OF FACT

1. Applicant, Fred Bauer, was issued a Notice of Determination of Tax Due under the Cigarette Tax Law (Article 20, subdivision 1(b) of section 481) on October 27, 1976. Said Notice provided that 27,432 cartons of cigarettes subject to a penalty of two dollars per carton were seized on October 31, 1975, for a total penalty of \$54,864.00.

2. Cigarettes were seized late at night on October 31, 1975 at a premises at 318 Faile Street, Bronx, New York. The search conducted at said premises was made on the basis of a search warrant issued by Supreme Court Justice Luigi Marano of the Supreme Court, County of Kings, issued on October 31, 1975.

3. Applicant, Fred Bauer, along with two other individuals, was arrested thereafter, the date of applicant's arrest being November 1, 1975. Subsequently, on November 19, 1975, applicant pleaded guilty to forgery in the third degree, a Class A misdemeanor, and was fined \$400.00. This offense relates to the meter used in imprinting the stamp on cigarette packs.

4. On July 2, 1976, at a hearing which involved the other two individuals before Judge Milones in the Criminal Court of the City of New York, County of New York, the search warrants (on which the search and seizure of the cigarettes here involved was at issue) were found defective and the evidence obtained in the search (the seized cigarettes) was suppressed.

5. No evidence other than the search and seizure was proffered connecting applicant to unstamped or unlawfully stamped cigarettes.

CONCLUSIONS OF LAW

A. That evidence excluded in a criminal proceeding as the fruits of an illegal search is not admissible at the administrative level.

Finn's Liquor Shop Inc. v. State Liquor Authority 24 N.Y.2d 647, cert. den. 396 US 840.

B. That absent the evidence obtained from the illegal search, the record does not otherwise contain facts supportive of the conclusion that applicant was in possession of or had control over cigarettes in unstamped or unlawfully stamped packages.

C. That the application of Fred Bauer is granted and the Notice of Determination issued against applicant on October 27, 1976 is cancelled.

DATED: Albany, New York

SEP 28 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER