

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Frederick W. Fessler :

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 1976. :

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 17th day of August, 1979, he served the within notice of Decision by mail upon Frederick W. Fessler, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frederick W. Fessler

60 Shirley Dr.

W. Seneca, NY 14218

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
17th day of August, 1979.

Carmen Kottler

Jay J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of
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Cigarette Tax :
under Article 20 of the Tax Law
for the Year 1976. :

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 17th day of August, 1979, he served the within notice of Decision by mail upon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sirs
McNamara & Fitzhenry, Esqs.
Ellicott Sq. Bldg., Suite 400
Buffalo, NY 14203

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
17th day of August, 1979.

Carmen Mottalini

Jay F. Vredenburg



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

August 17, 1979

Frederick W. Fessler
60 Shirley Dr.
W. Seneca, NY 14218

Dear Mr. Fessler:

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,

A handwritten signature in cursive script, reading "Michael Alexander".

cc: Petitioner's Representative
McNamara & Fitzhenry, Esqs.
Ellicott Sq. Bldg., Suite 400
Buffalo, NY 14203
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
FREDERICK W. FESSLER : DECISION
for a Hearing to Review a Determination :
under Article 20 of the Tax Law for the :
Year 1976. :
:

Applicant, Frederick W. Fessler, 60 Shirley Drive, West Seneca, New York 14218, filed an application for a hearing to review a determination under Article 20 of the Tax Law for the year 1976 (File No. 16794).

A formal hearing was held before Alan R. Golkin, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on August 18, 1977 at 1:15 P.M. Petitioner appeared by William J. Fitzhenry, Esq. The Miscellaneous Tax Bureau appeared by Peter Crotty, Esq. (Andrew Haber, Esq., of counsel).

ISSUES

I. Whether applicant was in possession or control of 887 cartons of cigarettes in unstamped or unlawfully stamped packages.

II. Whether the penalty of \$2.00 per carton on 877 cartons of such cigarettes should be reduced.

FINDINGS OF FACT

1. A Notice of Determination of Tax Due under Cigarette Tax Law (Article 20, Section 481.1(b) was mailed to applicant, Frederick W. Fessler, on June 28, 1976. Said determination imposed a penalty of \$2.00 per carton on 877 cartons of cigarettes seized on March 10, 1976.

2. In a letter dated September 20, 1976, applicant's attorney requested a hearing to review the aforesaid determination. Said letter was treated as a timely application for a hearing.

3. Applicant offered no proof that the aforesaid Notice was defective or deficient, and, in fact, sought only remission or mitigation of the penalty.

4. Applicant has no criminal record and is not connected with organized crime.

5. Applicant owns a modest home and no other realty and is employed regularly, from which income he is able to meet his needs and amortize his debts.

6. Applicant has no savings (as a result of this incident which gave rise to the penalty assessed in the aforesaid Notice) and is in debt. Payment of the tax due in this matter, in whatever amount, can be made by applicant only through additional borrowing.

CONCLUSIONS OF LAW

A. That 887 cartons of unstamped or unlawfully stamped cigarettes were in the possession or under the control of applicant, Frederick W. Fessler, on March 10, 1976.

B. That under section 481.1(b) of the Tax Law, the State Tax Commission may impose a penalty of not more than \$100.00 for each 200 cigarettes found in unstamped or unlawfully stamped packages in excess of 2,000 such cigarettes in the possession or under the control of any person. Thus, the penalty imposed against applicant could have been as much as \$100.00 per carton or a total of \$87,700.00.

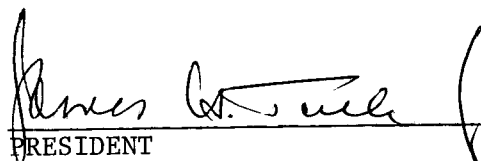
C. That although the State Tax Commission, in its discretion, may remit all or part of the penalty under section 481.1(b) of the Tax Law, the record in this case does not justify a reduction in the penalty to less than \$1,754.00, which is the amount determined by the Miscellaneous Tax Bureau to be due.

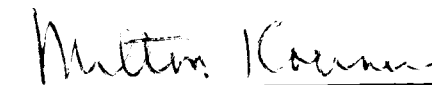
D. That the application of Frederick W. Fessler is denied and the Notice of Determination of Tax Due dated June 28, 1976 is sustained.


DATED: Albany, New York

AUG 17 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER