

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
City Tobacco Ltd., Inc. :
for a Hearing to Review the Denial or Revocation :
of a License as a Wholesale Dealer of Cigarettes :
under Article 20 of the Tax Law. :

AFFIDAVIT OF MAILING

State of New York :
ss.:
County of Albany :

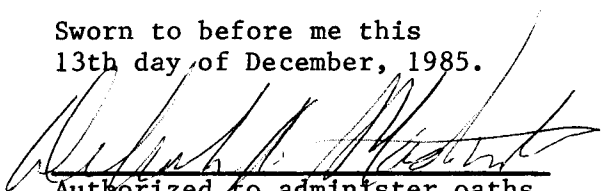
Connie A. Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, that she is over 18 years of age, and that on the 13th day of December, 1985, she served the within notice of Decision by certified mail upon Robert R. Race, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert R. Race
300 Park Ave. South 10th Fl.
New York, NY 10010

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
13th day of December, 1985.


Authorized to administer oaths
pursuant to Tax Law section 174



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

December 13, 1985

City Tobacco Ltd., Inc.
1 Ruland Place
Rockaway Beach, NY 11693

Gentlemen:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Robert R. Race
300 Park Ave. South 10th Fl.
New York, NY 10010
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
CITY TOBACCO, LTD. : DECISION
for a Hearing to Review the Denial or Revocation :
of a License as a Wholesale Dealer of Cigarettes :
under Article 20 of the Tax Law. :

Petitioner, City Tobacco, Ltd., 1 Ruland Place, Rockaway Beach, New York 11693, filed a petition for a hearing to review the denial or revocation of a license as a wholesale dealer of cigarettes under Article 20 of the Tax Law (File No. 57934).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 9, 1985 at 9:00 A.M. Petitioner appeared by Robert R. Race, Esq. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division's denial of petitioner's application for a license as a wholesale cigarette dealer was proper.

FINDINGS OF FACT

1. On November 16, 1984, Quickee Deelite of New York, Ltd. ("Quickee Deelite"), 1 Ruland Place, Rockaway Beach, New York, filed with the Audit Division an Application for License as a Wholesale Dealer of Cigarettes. This application indicated an incorporation date of 1984, and listed as officers Douglas Filardo, president and Andrew Frank, treasurer-secretary. The application

was signed by Douglas Filardo. A negative response was given to the question, "Has any officer of this business entity ever been convicted of a crime?"

2. Three days later, on November 19, 1984, City Tobacco Ltd. ("City Tobacco"), also of 1 Ruland Place, Rockaway Beach, New York, filed an Application for License as a Wholesale Dealer of Cigarettes. The information on this application, the listing of officers, etc., was identical to that on the application received from Quicke Deelite. As with Quicke Deelite's application, City Tobacco's application was signed by Douglas Filardo and a negative response was given to the question, "Has any officer of this business entity ever been convicted of a crime?"

3. By a letter dated December 28, 1984, the Bureau of Tax Investigations advised petitioner that its "application for license as a wholesale dealer of cigarettes has been denied for cause." No further explanation for denial was provided, although petitioner was advised that it was entitled to a hearing concerning the denial of its application.

4. By a letter dated January 8, 1985, petitioner requested a hearing to review the denial of its application for a license as a wholesale dealer of cigarettes.

5. It was not until petitioner received the Audit Division's Answer dated August 1, 1985, that it was provided with an explanation of the reason its application for license was denied. More specifically, the Answer provided as follows:

"a) On December 3, 1984 Excise Tax Investigators Montalbano and Linhart visited the premises at 1 Ruland Place, Rockaway Beach, New York. At that time there were three desks in an office located at the rear of the premises. Two of the desks were occupied by Douglas Filardo and Andrew Frank, the third desk was occupied by one Robert Resnick.

b) Robert Resnick had been associated with another corporation which had previously conducted business as a wholesaler of cigarettes upon the premises located at 1 Ruland Place and which business terminated upon revocation of its license as a wholesale dealer of cigarettes because of violations of Article 20 of the Tax Law.

c) Although not formally an officer of Petitioner, Robert Resnick appeared to be involved in the conduct of Petitioner's business."

6. In or about 1983, while working at Queens Tobacco, Douglas Filardo and Robert Resnick received an offer to work for one Bernard Gold, who operated a wholesale tobacco business known as Associated Wholesale. This offer was accepted and Messrs. Filardo and Resnick worked for Associated Wholesale for approximately one year until the business was sold. During this period of time, Andrew Frank was also employed by Associated Wholesale.

7. After Associated Wholesale was sold, the three men decided to buy their own wholesale cigarette business, namely Nassau Suffolk Wholesalers ("Nassau Suffolk"). Prior to purchasing Nassau Suffolk, the three men commenced operating its business. Mr. Filardo testified that the three did not check, but rather "took it for granted", that Nassau Suffolk was possessed of a cigarette wholesaler's license. Although the exact time sequence is unclear, it appears that the three were orally informed that Nassau Suffolk had no such license and, thereafter, Messrs. Filardo and Frank, together with one Kent Vecchio, filed an application for a wholesaler's license for Nassau Suffolk. Mr. Resnick was not listed on such application.

8. On November 15, 1984, a summons was issued to Mr. Resnick for failing to possess a wholesale cigarette license with regard to the operation of Nassau Suffolk.

9. An Audit Division Special Investigations Bureau report with regard to the pending application for Nassau Suffolk as filed by Messrs. Filardo, Frank and Vecchio revealed the following:

"The investigators were present at premises on Thursday, November 15, 1984 to conduct the inspection. We were met by Mr. Robert Resnick who identified himself as a partner with Kent Vecchio. Mr. Resnick said they have been operating the company for several months but as of this date did not possess a Wholesale Cigarette Tax license. An inspection of invoices for cigarettes purchased revealed that Boro Hall Tobacco and B. Epstein Tobacco, Newark, N.J. were their suppliers. The last invoice was dated November 14, for the purchase of \$5,400 of cigarettes from Boro Hall. An inspection of the cigarettes on the floor found them to be properly stamped and accounted for by invoice.

Summons #3032 was issued to Mr. Resnick for failing to possess a New York State Wholesale Cigarette License. The summons is returnable December 18, 1984 at 1st District Court, Mineola, N.Y." (emphasis as in original document).

10. In view of the foregoing, and believing the application would be denied based on the summons issued to Mr. Resnick, the purchase of Nassau Suffolk was not completed. Instead, Messrs. Filardo and Frank decided to open their own wholesale cigarette business.

11. Mr. Resnick was the owner of Quickee Deelite, which was engaged in the business of selling "slush" type drinks and was primarily active in such business during the summer months.¹ Messrs. Filardo and Frank had not, as of November 16, 1984, received corporate "papers" (specific "papers" were not specified in the record) for City Tobacco. Accordingly, Mr. Resnick "sold" the use of Quickee Deelite, which was not then actively conducting business, to Messrs. Filardo and Frank for purposes of applying for the wholesaler's license. Three days later, on November 19, 1984, City Tobacco's "papers" arrived and

1 Although Quickee Deelite had been incorporated, no stock had ever been issued.

Messrs. Filardo and Frank applied for the wholesaler's license for City Tobacco (see Findings of Fact "1" and "2").

12. Mr. Filardo explained that Mr. Resnick "sold" the use of the then-dormant Quickee Deelite to Messrs. Filardo and Frank so they could apply for the license. Mr. Filardo noted that he and Mr. Frank did not seek legal advice before applying as Quickee Deelite, but rather just did it to stay in business, with their intent being to re-apply or change over to City Tobacco when the papers for City Tobacco arrived. The consideration, if any, paid for the use of Quickee Deelite was not specified.

13. City Tobacco rents space for its operations in premises located at 1 Ruland Place, Rockaway Beach, New York, which premises are owned by Ruland Realty, Inc. ("Ruland"). Mr. Resnick is, in turn, one of Ruland's three shareholders and its vice-president. Ruland was incorporated on September 13, 1983 and purchased the subject premises on September 14, 1983 from Res Bro, Inc. Four or five other stores in addition to City Tobacco operate at 1 Ruland Place.

14. Mr. Resnick is, as the landlord, present at the premises several times each month to collect rent, make repairs, etc. He is also a personal friend of Mr. Filardo and "stops in to socialize". However, he is not an owner, officer or director of City Tobacco, does not sell cigarettes with Messrs. Filardo and Frank, and is in no way involved with the business operations of City Tobacco.

15. City Tobacco's main business is supplying candy and novelties. Mr. Filardo explained that, as a practical matter, in order to keep such candy and novelty accounts, his customers expect him to be able to supply cigarettes at wholesale. It was to be able to maintain the existing accounts that City Tobacco sold cigarettes without a wholesaler's license after commencing operations

at 1 Ruland Place. Mr. Filardo noted that the license had been applied for and he believed it would be granted almost immediately.

16. Although Mr. Filardo admitted to selling cigarettes without a wholesaler's license, following the rejection of the instant application based on his association with Mr. Resnick, there was no allegation of purchases or sales of unstamped or untaxed cigarettes by City Tobacco.

17. Mr. Resnick has worked for and/or been a principal of numerous businesses holding wholesaler's licenses and, in one instance, a cigarette agent's license. In addition to the summons noted in Finding of Fact "5-c", Mr. Resnick also entered, in 1980, a plea of guilty to a violation of the U.S. Code with regard to cigarette sales. The specific violation was not detailed in the record.

18. Subsequent to the hearing herein, petitioner's representative supplemented the record by a letter stating that Mr. Resnick had moved from New York to Florida to operate his Quicke Deelite slush drink business there and, further, that City Tobacco is in the process of purchasing the premises at 1 Ruland Place from Ruland Realty, Inc.

CONCLUSIONS OF LAW

A. That no person may do business as a wholesale dealer of cigarettes unless he has been granted and publicly displays in his place of business a license granted by the Department of Taxation and Finance. The State Tax Commission may refuse to issue or may suspend or revoke such license, as follows:

"The tax commission may for cause refuse to issue, or may suspend or revoke a wholesaler's license, or may forbid a retail dealer to continue selling cigarettes, after an opportunity for hearing has been afforded. A violation of any provision of this article or of any regulation issued under it shall be cause to refuse to issue, or to suspend or revoke a license or to forbid a retail dealer to continue selling cigarettes." (Tax Law section 480).

B. That licensing of a corporation as a wholesale dealer of cigarettes pursuant to Article 20 of the Tax Law requires consideration of the qualifications of the corporate principals. (Matter of Wilson's & Conklin's Modern Vending, Inc., State Tax Commission, August 22, 1977.) The refusal to grant a license for cause must be based on good cause, i.e., grounds which may be properly considered under the statute, and it must be supported by evidence. (53 C.J.S. Licenses section 38; Hoster v. Holz, 3 N.Y.2d 639)

C. That 20 NYCRR 331.4 defines a wholesale dealer as follows:

"A wholesale dealer is any person who sells cigarettes for the purpose of resale only. Included in this definition are manufacturers, jobbers, sub-jobbers, and all others who sell cigarettes to the retail trade. One who customarily sells cigarettes to the retail trade is a wholesaler even though he also sells at retail. A wholesale dealer is also any person who owns, operates or maintains one or more cigarette vending machines in, at or upon premises owned or occupied by any other person. Every wholesale dealer must procure a license." (emphasis as in original).

D. That petitioner has shown, by the evidence presented, that Mr. Resnick is not involved with the conduct of petitioner's business operations. Past relationship notwithstanding, petitioner, through its principals Messrs. Filardo and Frank, here attempted to legitimately comply with the requirements of Tax Law section 480 and obtain the requisite wholesaler's license. Given that the primary objection to licensure was the perceived presence of Mr. Resnick as part of petitioner's business operation, and that petitioner has shown Mr. Resnick not to be involved, it follows that it is reasonable to grant a wholesaler's license to petitioner. This decision does not sanction operation without a license, but rather recognizes petitioner's efforts to comply with Tax Law section 480 and obtain such license. Finally, it is noted that such license, though hereby granted is, at any time in the future, subject to revocation for cause as established.

E. That the application of City Tobacco, Ltd. for a license as a wholesale dealer of cigarettes is granted and the Audit Division is directed to process such application and issue a license.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985

PRESIDENT

Francis R. Koeng

COMMISSIONER

Mark J. ...

COMMISSIONER

I dissent.
Edmund A. ...

TA 26 (9-79)

STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227

CLAIM CHECK NO.

☐ HOLD



DATE

12-20

1ST NOTICE

2ND NOTICE

12-25

RETURN

1-4

FINAL NOTICE

Detached
for F.B.I.
Feb. 1978

CERTIFIED

P 684 313 020

MAIL

City Tobacco Ltd., Inc.

1 Ruland Place

Rockaway Beach, NY 11693

UNCLAIMED

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

December 13, 1985

City Tobacco Ltd., Inc.
1 Ruland Place
Rockaway Beach, NY 11693

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Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Robert R. Race
300 Park Ave. South 10th Fl.
New York, NY 10010
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
CITY TOBACCO, LTD.
for a Hearing to Review the Denial or Revocation
of a License as a Wholesale Dealer of Cigarettes
under Article 20 of the Tax Law.

DECISION

Petitioner, City Tobacco, Ltd., 1 Ruland Place, Rockaway Beach, New York 11693, filed a petition for a hearing to review the denial or revocation of a license as a wholesale dealer of cigarettes under Article 20 of the Tax Law (File No. 57934).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 9, 1985 at 9:00 A.M. Petitioner appeared by Robert R. Race, Esq. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

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FINDINGS OF FACT

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c) Although not formally an officer of Petitioner, Robert Resnick appeared to be involved in the conduct of Petitioner's business."

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Messrs. Filardo and Frank applied for the wholesaler's license for City Tobacco (see Findings of Fact "1" and "2").

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18. Subsequent to the hearing herein, petitioner's representative supplemented the record by a letter stating that Mr. Resnick had moved from New York to Florida to operate his Quickee Deelite slush drink business there and, further, that City Tobacco is in the process of purchasing the premises at 1 Ruland Place from Ruland Realty, Inc.

CONCLUSIONS OF LAW

A. That no person may do business as a wholesale dealer of cigarettes unless he has been granted and publicly displays in his place of business a license granted by the Department of Taxation and Finance. The State Tax Commission may refuse to issue or may suspend or revoke such license, as follows:

"The tax commission may for cause refuse to issue, or may suspend or revoke a wholesaler's license, or may forbid a retail dealer to continue selling cigarettes, after an opportunity for hearing has been afforded. A violation of any provision of this article or of any regulation issued under it shall be cause to refuse to issue, or to suspend or revoke a license or to forbid a retail dealer to continue selling cigarettes." (Tax Law section 480).

B. That licensing of a corporation as a wholesale dealer of cigarettes pursuant to Article 20 of the Tax Law requires consideration of the qualifications of the corporate principals. (Matter of Wilson's & Conklin's Modern Vending, Inc., State Tax Commission, August 22, 1977.) The refusal to grant a license for cause must be based on good cause, i.e., grounds which may be properly considered under the statute, and it must be supported by evidence. (53 C.J.S. Licenses section 38; Hoster v. Holz, 3 N.Y.2d 639)

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D. That petitioner has shown, by the evidence presented, that Mr. Resnick is not involved with the conduct of petitioner's business operations. Past relationship notwithstanding, petitioner, through its principals Messrs. Filardo and Frank, here attempted to legitimately comply with the requirements of Tax Law section 480 and obtain the requisite wholesaler's license. Given that the primary objection to licensure was the perceived presence of Mr. Resnick as part of petitioner's business operation, and that petitioner has shown Mr. Resnick not to be involved, it follows that it is reasonable to grant a wholesaler's license to petitioner. This decision does not sanction operation without a license, but rather recognizes petitioner's efforts to comply with Tax Law section 480 and obtain such license. Finally, it is noted that such license, though hereby granted is, at any time in the future, subject to revocation for cause as established.

E. That the application of City Tobacco, Ltd. for a license as a wholesale dealer of cigarettes is granted and the Audit Division is directed to process such application and issue a license.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985

PRESIDENT

Francis Q Koemig
COMMISSIONER

Mark J. [unclear]
COMMISSIONER

*I dissent.
Rodney Allen Chen*