

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Glusker-Emkay Sales Corp. :
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 Period :
10/74 - 10/77. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 7th day of October, 1983, she served the within notice of Decision by certified mail upon Glusker-Emkay Sales Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Glusker-Emkay Sales Corp.
91 Center St.
Ellenville, NY 12428

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
7th day of October, 1983.

Susan Powell

Connie Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 7, 1983

Glusker-Emkay Sales Corp.
91 Center St.
Ellenville, NY 12428

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, 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 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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GLUSKER-EMKAY SALES CORP.	:	DECISION
for a Hearing to Review a Determination of	:	
Cigarette Tax under Article 20 of the Tax Law	:	
for the Period October 1974 through October	:	
1977.	:	

Petitioner, Glusker-Emkay Sales Corp., 91 Center Street, Ellenville, New York 12428, filed a petition for a hearing to review a determination of cigarette tax under Article 20 of the Tax Law for the period October 1974 through October 1977 (File No. 22983).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on October 18, 1982 at 1:15 P.M. Petitioner appeared by its President, Eugene Glusker. The Audit Division appeared by Paul B. Coburn, Esq. (Harry Kadish, Esq., of counsel).

ISSUE

I. Whether certain cigarettes sold by petitioner to the Orange County Home and Infirmary were exempt from the imposition of Cigarette Tax under Article 20 of the Tax Law.

II. Whether a penalty imposed against petitioner for the sale of unstamped cigarettes as described above may be abated.

FINDINGS OF FACT

1. On January 9, 1978, the Audit Division issued to petitioner, Glusker-Emkay Sales Corp., a Notice of Determination of Tax Due Under Cigarette Tax

Law. This Notice was the result of an audit by the Audit Division covering the period October 1974 through October 1977.

2. The above Notice specified that during the period February 1976 through October 1977, a total of 4,160 cartons of unstamped cigarettes (cartons containing packages of cigarettes not bearing tax stamps as called for under Article 20 of the Tax Law) were sold by petitioner to the "County of Orange - Home and Infirmary-Goshen". The Audit Division computed tax due, plus penalty, as follows:

Tax Due on 4,160 cartons x \$1.50 =	\$6,240.00
Penalty	911.86
Total Tax and Penalty	<u>\$7,151.86</u>

3. The field audit report upon which the instant deficiency is based stated, in part, as follows:

"[f]rom 2/10/76 unstamped cigarettes sold to Orange County Home and Infirmary were resold, were ordered and paid for by patients. Sales from 2/10/76 to 10/26/77 were disallowed. Prior to that time, cigarettes were purchased by the infirmary for distribution to the patients."

4. Petitioner is, and was during the period at issue, engaged in the business of selling cigarettes to various customers as a duly licensed agent for the sale of wholesale cigarettes.

5. Among the petitioner's customers during the period at issue was the Orange County Home and Infirmary ("Orange County Home") located in Goshen, New York. Orange County Home is a residence for indigent persons, maintained and operated by Orange County, New York.¹

6. Petitioner first became involved in selling cigarettes to Orange County Home on or about March 14, 1974, following acceptance of petitioner's

¹ At the hearing, it was conceded by the Audit Division that the Orange County Home is a subdivision of a governmental unit (Orange County).

bid by the Orange County Department of Social Services as the lowest bid to supply cigarettes to Orange County Home under a contract commencing on or about March 14, 1974 and continuing through February 19, 1975.

7. The bid price submitted by petitioner to Orange County did not include Federal and state taxes. The Notice to Bidders supplied to petitioner by Orange County contained the following language in its opening paragraph:

"[B]ecause the cigarettes listed below are not for re-sale purposes and will be used only by the residents of the Orange County Home & Infirmary, we hereby request that the bidders deduct the tax from their quotation."

8. After acceptance of the above bid on or about March 5, 1974, petitioner sold cigarettes to Orange County Home, without collecting tax, through and including the period at issue herein. No subsequent bid to renew or continue the contract of sale was requested by Orange County or submitted by petitioner, nor was the contract of sale formally renewed beyond the February 19, 1975 expiration date specified. Petitioner's president, Eugene Glusker, explained at the hearing that "...because of the experience they had with us, they continued buying from us without submitting it to bid, because apparently, they liked our price and service and did not bother to ask for bids anymore. So that our dealings with them was (sic) on the original bid. And then, unless there was an increase in price by the cigarette companies, there would be no reason for changing the price."

9. Prior to and during a portion of the period at issue, the cigarettes purchased by Orange County Home were distributed free of charge to the residents of the Orange County Home. However, on or about February 10, 1976, Orange County Home changed this practice of free cigarette distribution, and for the remainder of the period at issue the cigarettes purchased by Orange County Home

were not distributed to the residents free of charge but rather were resold to the residents, at cost, by Orange County Home.

10. Petitioner asserts it had no knowledge of the change in policy by Orange County Home, and believed that all cigarettes it sold to Orange County Home were subsequently distributed free of charge to the residents, in accordance with the terms of the original bid. Petitioner asserts further that even after the above change of policy, whereby Orange County Home began to sell cigarettes to its residents, such sales by Orange County Home were made at cost with no expectation or realization of profit on the sales by Orange County Home.

CONCLUSIONS OF LAW

A. That, with certain specified exceptions, subdivision 1 of section 471 of the Tax Law imposes a tax (at a specified rate) on all cigarettes possessed for sale in the state by any person. Subdivision 2 of section 471, in pertinent part, further provides:

"It is intended that the ultimate incidence of and liability for the tax shall be upon the consumer, and that any agent or dealer who shall pay the tax to the tax commission shall collect the tax from the purchaser or consumer. Except as hereinafter provided, the tax shall be advanced and paid by the agent."

B. That for purposes of Article 20 of the Tax Law, a "sale" is defined as "...any transfer of title or possession or both, exchange or barter, conditional or otherwise, in any manner or by any means whatever or any agreement therefor." [Tax Law §470(3)]. Furthermore, a "retail sale" or "sale at retail" is defined as "...a sale to a consumer or to any person for any purpose other than resale." [Tax Law §470(4)]. See also 20 NYCRR 331.2.

C. That in an Opinion of the Attorney General (1959 Op. Atty. Gen. 106) it was stated that purchases of cigarettes and other tobacco products by agencies of the State and its municipalities for distribution and not for

resale to patients in their institutions were not subject to tax. This opinion cited subdivision 2 of section 471 of the Tax Law and, in pertinent part, provided:

"[s]ince this tax is on the consumer, the familiar rule that neither the State nor its subdivisions are included within the provisions of a general tax law unless included therein by express language or by necessary implication is applicable (citations omitted). There being no such language or implication present and the State and its municipalities being the consumer where the purchases are not made for resale,...the purchases referred to herein are exempt² from tax under Article 20,...". (1959 Op. Atty. Gen. 106)

D. That during a portion of the period at issue herein, petitioner sold cigarettes to the Orange County Home which then, in turn, resold these cigarettes to its residents. Notwithstanding the fact that the residents purchased the cigarettes at cost, with no "profit" being taken by Orange County Home, such transactions constituted sales by Orange County Home to its residents as the ultimate consumers of the cigarettes. Furthermore, notwithstanding the competitive bidding provisions specified in section 103 of the General Municipal Law, neither renewed bidding nor renewal of the contract of sale were undertaken or offered after the February 19, 1975 expiration date of the original contract. Upon expiration of the original contract, with no rebidding or renewal thereof, petitioner should have been put on notice to periodically re-inquire as to the

² Regulations of State Tax Commission which were enacted after the period at issue herein provide:

"Sales to the State and subdivisions. The statute does not exempt sales of cigarettes made by the State, a political subdivision thereof, or any agency or instrumentality thereof. Hence, such sales are subject to tax."

(20 NYCRR 335.3; effective November 7, 1979)

perceived tax exempt status of its continuing sales to Orange County Home. By so inquiring, petitioner should reasonably have learned of the February 10, 1976 change in policy by the Home, and thus thereafter ceased tax free sales to the Home. Accordingly, those sales occurring after expiration of the contract and after the Home's February 10, 1976 change of policy from free distribution of cigarettes to resale of cigarettes, as determined and reflected by the Audit Division on the Notice of Determination, were properly subject to tax and thus petitioner, despite its asserted lack of actual knowledge, remains liable for the tax due on such sales.

E. That the State Tax Commission may, in its discretion, remit all or any portion of a penalty imposed under section 481(1)(a) or (b) of the Tax law. In view of all the facts and circumstances presented herein, including specifically petitioner's lack of actual knowledge of the change in policy by Orange County Home, the penalty imposed against petitioner is cancelled.

F. That the petition of Glusker-Emkay Sales Corp. is granted to the extent that the penalty imposed is abated, but is in all other respects denied and the Notice of Determination dated January 9, 1978, as modified by abatement of the penalty, is sustained.

DATED: Albany, New York

OCT 07 1983

STATE TAX COMMISSION

Radwin W. Clev
PRESIDENT

COMMISSIONER
Mark
COMMISSIONER
James L.

J. abstanti
F. H. King