

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
The Koger Co., Inc. :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Cigarette Tax :
under Article 20 of the Tax Law. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Kathy Pfaffenback, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of September, 1981, she served the within notice of Decision by certified mail upon The Koger Co., Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

The Koger Co., Inc.
Attn: Joseph Koenigsberger
635-637 Morris Park Ave.
Bronx, NY 10460

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
4th day of September, 1981.

Dannia A. Hagelord

Kathy Pfaffenback

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

September 4, 1981

The Koger Co., Inc.
Attn: Joseph Koenigsberger
635-637 Morris Park Ave.
Bronx, NY 10460

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 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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
THE KOGER CO., INC. : DECISION
for a Hearing to Review a License Denial under :
Article 20 of the Tax Law.

Petitioner, The Koger Co., Inc., 635-637 Morris Park Avenue, Bronx, New York, 10460, filed a petition for a hearing to review a license denial under Article 20 of the Tax Law (File No. 31925).

A formal hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 17, 1981 at 1:15 P.M. Petitioner appeared by Joseph Koenigsberger, President. The Department of Taxation and Finance appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether the denial of petitioner's application for a license as an agent to purchase New York State tax stamps and affix same on cigarettes was proper.

FINDINGS OF FACT

1. Petitioner is licensed as a wholesale cigarette dealer. In or about the month of October, 1980, petitioner made an application for appointment as a New York State Cigarette agent, with authority to purchase unstamped cigarettes and to purchase and affix New York State Cigarette tax stamps.

2. Petitioner's application was, in effect, denied by the Department of Taxation and Finance on November 13, 1980. A letter addressed to petitioner from Alfred Donati, Jr., Deputy Commissioner and Director of the Special Investigation Bureau read, in part, as follows:

"The letters of intent from G. A. Georgopulo & Co. and Nat Sherman Inc. which were submitted are not acceptable as letters from cigarette manufacturers as required for appointment. Such letters of intent must be from two or more of the major cigarette manufacturers. A list of cigarette manufacturers acceptable to this office is attached for your information.

When letters from two or more cigarette manufacturers have been received as requested in our letter dated October 27, 1980, all of the material in connection with your request for appointment will be processed."

The Department apparently found no fault with any other aspect of petitioner's application; accordingly the issue in this case can be narrowed to whether the Department may require an applicant to produce letters of intent to sell cigarettes to such applicant from two major manufacturers of cigarettes.

2. G. A. Georgopulo & Co., Incorporated, ("Georgopulo") of 48 Stone Street, New York, New York, is primarily an importer of tobacco products. It also manufactures cigarettes, although it could not be categorized as a major manufacturer of cigarettes.

4. Nat Sherman, Inc. ("Sherman") is a tobacconist located at 711 Fifth Avenue, New York, New York. It also manufactures cigarettes but, like Georgopulo, is a relatively minor manufacturer.

5. The Department concedes that Georgopulo and Sherman each manufacture a small quantity of cigarettes, but maintains that letters of intent from two major cigarette manufacturers are required. Petitioner, on the other hand, claims that since it submitted letters of intent from two cigarette manufacturers, the application should be granted.

6. At the hearing, the Department introduced a copy of a list of cigarette producers showing that six tobacco companies (none of which were Georgopulo or Sherman) accounted for 99.97 percent of all cigarettes sold in 1976. All other manufacturers accounted for only .03 percent according to the list. The

Department's witness could not identify the source of the list, except to say that it appeared in a vending machine trade publication several years prior to the hearing.

CONCLUSIONS OF LAW

A. That 20 NYCRR 331.6(a) defines the term "agent" as follows:

"(a) An agent is a person appointed by the Tax Commission to purchase and affix tax stamps. The State places upon him much of the responsibility for the honest and expeditious collection of the tax. In addition to purchasing and affixing the stamps, he must make proper accounting to the Tax Commission for all cigarettes bought and sold, and all stamps bought and affixed. Every agent other than the State or the city must file a bond guaranteeing the proper discharge of his agency, and, if he desires to purchase stamps on credit, he may be required to file another bond, in triplicate, to secure such credit purchases. For his services the agent will receive the commission described in section 333.5 of this Subchapter."

B. That 20 NYCRR 331.6(b) provides in pertinent part, as follows:

"(b) Necessarily, the relationship between the Tax Commission and the agent must, at all times, be one of good faith and cooperation. Should any agent fail to comply with the requirements imposed by the statute and the rules and regulations of the Tax Commission, his agency and his wholesaler's license, if he has one, will be suspended or revoked. The Tax Commission will appoint as its agent:

* * *

(2) any dealer who establishes to its satisfaction that he is a bona fide dealer selling cigarettes to the wholesale or retail trade, that he has an established place of business in which he carries a stock of cigarettes, that he is financially responsible and, in addition thereto, that he is further classified within one of the following paragraphs:

(i) a manufacturer located within the State who sells cigarettes within the State;

(ii) a dealer, either wholesale or retail, located within this State, who receives cigarettes on a regular basis direct from two or more manufacturers of cigarettes,

or who obtains at least 60 percent of his monthly receipts of cigarettes from sources outside the State;

(iii) a manufacturer or dealer located outside the State who sells or delivers cigarettes to customers within the State."

C. That nowhere in the above regulations is it required that the manufacturers referred to in 20 NYCRR 331.6(b)(2) must be included among the six largest producers of cigarettes in the United States. Accordingly, since petitioner has submitted letters of intent from two manufacturers of cigarettes and has apparently complied with all other requirements, his application for a license as an agent to purchase and affix New York State tax stamps should be approved.

D. That the petition of The Koger Co., Inc. is granted.

DATED: Albany, New York

SEP 04 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER