

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Mandel Tobacco Co., Inc. :

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 Period 2/1/75-1/31/76. :

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 22nd day of February, 1980, he served the within notice of Decision by mail upon Mandel Tobacco Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mandel Tobacco Co., Inc.  
441 E. 12th St.  
New York, NY 10009

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  
22nd day of February, 1980.

Joanne Knapp



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

February 22, 1980

Mandel Tobacco Co., Inc.  
441 E. 12th St.  
New York, NY 10009

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

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In the Matter of the Application  
of  
MANDEL TOBACCO CO., INC.  
for a Hearing to Review a Determination  
under Article 20 of the Tax Law for the  
Period February 1, 1975 through  
January 31, 1976.

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DECISION

Applicant, Mandel Tobacco Co., Inc., 441 East 12th Street, New York, New York, filed an application for a hearing to review a determination under Article 20 of the Tax Law for the period February 1, 1975 through January 31, 1976 (File No. 16056).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 20, 1978. This hearing was a continuation of a formal hearing held on November 14, 1977 before Harry Isler, Hearing Officer. At the June 20, 1978 formal hearing, applicant appeared pro se. The Miscellaneous Tax Bureau appeared by Peter Crotty, Esq. (Paul A. Lefebvre, Esq. and James Morris, Esq., of counsel).

ISSUE

Whether a cigarette tax is due under section 471, subdivision 1, of the Tax Law on certain cigarettes stolen from a registered agent's premises, prior to affixing cigarette tax stamps.

FINDINGS OF FACT

1. On August 4, 1976, a Notice of Determination of Tax Due under Cigarette Tax Law was issued to applicant, concerning taxes due under Article 20 of the Tax Law for the period February 1, 1975 through January 31, 1976. The determination, as stated in a Ten Day Notice dated June 30, 1976, was for "net

understamping [of] 41,540 stamps." According to the Ten Day Notice, tax due at \$.15 per stamp was \$6,231.00, plus penalty of \$560.79, for a total of \$6,791.79.

2. Applicant is a wholesale tobacco business with premises at 441 East 12th Street, New York, New York. As a registered agent, applicant is authorized to affix tax stamps on cigarettes under section 472 of the Tax Law. Applicant purchases cigarettes from manufacturers and sells them to licensed retailers. All of applicant's sales are made in New York State.

3. On or about January 10, 1976, applicant's premises were burglarized and 41,540 packages of unstamped cigarettes were stolen.

#### CONCLUSIONS OF LAW

A. That the cigarette tax is imposed on "all cigarettes possessed ... for sale" (Tax Law, §471, subd. 1). While the "ultimate ... liability for the tax shall be upon the consumer" (Tax Law, §471, subd. 2), the tax is levied at the time the cigarettes are possessed for sale. Matter of Mandel Tobacco Co., Inc. v. State Tax Comm., 58 AD2d 930, 397 NYS2d 23. (Motion for leave to appeal was denied by the Court of Appeals on January 10, 1978.)

B. That in Matter of Mandel Tobacco Co., Inc. v. State Tax Commission, supra, the Appellate Division, Third Department, said:

As a practical matter, to accept the petitioner's argument that the tax is not owing unless and until the stamps are physically affixed to the cigarettes would almost certainly encourage agents, in order to insure themselves against cigarette tax liability in the event of theft, to wait until the last minute before affixing the stamps. Such delay would, as respondent points out, hinder its inspection and enforcement efforts (see Lewiston-Auburn United Grocers, Inc. v. Johnson, 253 A.2d 338 [Me.]).

C. That the penalty is waived, since applicant's delay in paying the tax was excusable (Tax Law, §481, subd. 1(a)). At the time the Ten Day Notice and Notice of Determination were issued, applicant was challenging the action of the Miscellaneous Tax Bureau in levying tax on other unstamped cigarettes

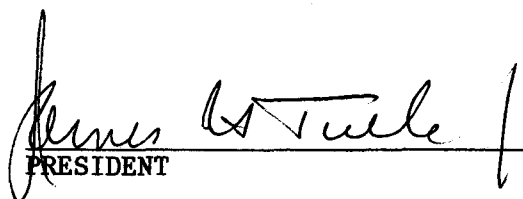
stolen earlier from its premises. The Appellate Division, Third Department, did not decide this matter until July 21, 1977. Matter of Mandel Tobacco Co., Inc. v. State Tax Commission, supra.

D. That the application of Mandel Tobacco Co., Inc. is granted to the extent that the penalty is waived; that the Miscellaneous Tax Bureau is hereby directed to modify the Notice of Determination issued on August 4, 1976; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 22 1980

  
PRESIDENT

  
COMMISSIONER

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COMMISSIONER