

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Marlen Amusement 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 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 5th day of February, 1981, he served the within notice of Decision by mail upon Marlen Amusement Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Marlen Amusement Co., Inc.
58 Jay St.
Rochester, NY 14608

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
5th day of February, 1981.

Conrad R. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Marlen Amusement 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 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 5th day of February, 1981, he served the within notice of Decision by mail upon Charles A. Schiano the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Charles A. Schiano
1 E. Main St.
Suite 500, Wilder Building
Rochester, NY 14614

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
5th day of February, 1981.

Connie A. Hagelund

J. Vredenburg

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

February 5, 1981

Marlen Amusement Co., Inc.
58 Jay St.
Rochester, NY 14608

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
Charles A. Schiano
1 E. Main St.
Suite 500, Wilder Building
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MARLEN AMUSEMENT CO., INC. : DECISION
for a Hearing to Review a Determination under :
Article 20 of the Tax Law for the Year 1976. :
:

Petitioner, Marlen Amusement Co., Inc., 58 Jay Street, Rochester, New York 14608, filed a petition for a hearing to review a determination under Article 20 of the Tax Law for the year 1976 (File No. 24935).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on July 17, 1980 at 2:45 P.M. Petitioner appeared by Charles A. Schiano, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Ellen Purcell, Esq., of counsel).

ISSUES

I. Whether applicant was in possession or control of 18 cartons and 5 packages of cigarettes in unstamped packages.

II. Whether the penalty of \$900.00 imposed against applicant for unlawful possession of unstamped cigarettes was proper.

FINDINGS OF FACT

1. A Notice of Determination of Tax Due under Cigarette Tax Law (Article 20, Section 481.1(b)) in the amount of \$900.00 was mailed to petitioner, Marlen Amusement Co., Inc. on March 8, 1979. Said notice imposed a penalty of \$100.00 per carton on 8 cartons and \$100.00 on an additional 5 packages of cigarettes out of 18 cartons and 5 packages of cigarettes siezed on December 28, 1976.

2. An application for license as wholesale dealer of cigarettes received by the Department of Taxation and Finance on April 14, 1976 listed Abraham Hamza as president and stockholder of Marlen Amusement Co., Inc. which was incorporated on January 4, 1968. Notice of any change in the officers or stockholders of said corporation was never received by the Department.

3. Marlen Amusement Co., Inc distributed and serviced cigarette machines in and about the City of Rochester, New York. Pursuant to an anonymous tip, unstamped cigarettes were found in the cigarette vending machine located at Amiels Restaurant. In all, five cigarette vending machines belonging to petitioner at various locations were found to contain 18 cartons and 5 packages of unstamped cigarettes. Machines and cigarettes were seized by the authorities. Abraham Hamza was indicted on February 24, 1977 for selling ten cartons of untaxed cigarettes in violation of section 481(2) of the Tax Law in the County of Monroe. On September 28, 1978 he pleaded guilty to selling untaxed cigarettes. On December 21, 1978 he was fined \$1,000.00 on one count, and the remaining nine counts were unconditionally discharged.

4. An employee hired by petitioner to pick up cartons of cigarettes from the warehouse to service the cigarette vending machines rarely saw unstamped cigarette packages and when he did, he noticed that the carton was stamped on the outside due to the malfunction of the stamping machine. He reported this to no one. The manager of petitioner knew of an instance of unstamped cigarettes in five vending machines. He instructed the employee "to get rid of the (unstamped) cigarettes".

CONCLUSIONS OF LAW

A. That 18 cartons and 5 packages of unstamped or unlawfully stamped cigarettes were in the possession or under the control of petitioner Marlen Amusement Co., Inc. on December 28, 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 or fraction thereof found in unstamped or unlawfully stamped packages in excess of 2,000 such cigarettes in the possession or under the control of any person. Since each carton contains 200 cigarettes and each package contains 20 cigarettes, the penalty of \$900.00 (\$100.00 for each of the 8 cartons plus another \$100.00 for 5 packages) was proper.

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 which is the amount determined by the Audit Division to be due.

D. That the petition of Marlen Amusement Co., Inc. is denied and the Notice of Determination of Tax Due dated March 8, 1979 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 05 1981


PRESIDENT


COMMISSIONER


COMMISSIONER