

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sarah Micalizzi :
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 :
3/24/79. :

AFFIDAVIT OF MAILING

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 May, 1982, he served the within notice of Decision by certified mail upon Sarah Micalizzi, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sarah Micalizzi
2520 Cropsey Ave.
Brooklyn, NY 11214

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 May, 1982.




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

May 5, 1982

Sarah Micalizzi
2520 Cropsey Ave.
Brooklyn, NY 11214

Dear Ms. Micalizzi:

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

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
SARAH MICALIZZI
for Redetermination of a Deficiency or for
Refund of Cigarette Tax under Article 20 of
the Tax Law for the Year 1979.

DECISION

Petitioner, Sarah Micalizzi, 2520 Cropsey Avenue, Brooklyn, New York 11214, filed a petition for redetermination of a deficiency or for refund of cigarette tax under Article 20 of the Tax Law for the year 1979 (File No. 28783).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 4, 1981 at 10:30 A.M. Petitioner appeared on her own behalf and by her husband, Frank Micalizzi. The Audit Division appeared by Paul B. Coburn, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner was in possession or control of 2,161 cartons of cigarettes not bearing New York State cigarette tax stamps.

FINDINGS OF FACT

1. On January 3, 1980, the Audit Division issued a Notice of Determination of Tax Due under Cigarette Tax Law, Article 20, Section 481.1(b) to petitioner Sarah Micalizzi, imposing a penalty upon her of \$4.00 per carton for 300 cartons of cigarettes and \$2.00 per carton for 1,861 cartons of cigarettes seized on March 24, 1979, for a total penalty of \$4,922.00.

2. During the course of an investigation, excise tax investigators of the Department of Taxation and Finance placed petitioner's home under surveillance and applied for and obtained a search warrant. At approximately 10:30 A.M. on March 24, 1979, two investigators observed a blue panel truck backing into the driveway of the premises toward the garage. One Joseph Olivieri emerged from the truck and rang the doorbell. A woman answered, spoke with Olivieri, then proceeded with him to the garage and opened it with a key. Olivieri commenced unloading packages from the truck which the investigators concluded, based upon their experience, were half-cases of cigarettes, each containing 30 cartons. After Olivieri had removed four or five half-cases from the truck and placed them on the floor of the garage, the investigators approached, identified themselves and showed the search warrant. When they asked the woman for her name, she identified herself as Sarah Micalizzi. The investigators then arrested Mrs. Micalizzi and Oliveri.

3. In the garage on shelves were cartons of various brands of cigarettes. The investigators examined several cartons and found they bore North Carolina cigarette tax stamps. The investigators counted 611 cartons of cigarettes on the garage shelves and 1,557 cartons in the truck. (The former figure included those cartons that had been removed from the truck and placed on the garage floor).

4. On July 24, 1979, in the Supreme Court, State of New York, Kings County, petitioner was convicted of the misdemeanor of possession of untaxed cigarettes, upon entry of a plea of guilty. She was sentenced to three years probation and fined \$500.00.

5. Approximately a month prior to petitioner's arrest, Olivieri (whom she did not then know) had telephoned her, told her he knew she was experiencing financial difficulties and asked her if she "was interested in making money to survive". He delivered approximately 150 cartons per week for three weeks thereafter; petitioner paid for the cartons upon delivery.

CONCLUSIONS OF LAW

A. That paragraph (b) of subdivision 1 of section 481 of the Tax Law authorizes the State Tax Commission to impose "a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person".

B. That "possession" may be defined as "[t]hat condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons". Black's Law Dictionary 1325 (rev. 4th ed. 1968). A person may have possession of personal property, even in the absence of actual custody, "if the chattel is under his control and in a place where it must have been put by his act or in his behalf, or where the chattel is within his power in such a sense that he can and does command its use". 63 Am. Jur. 2d Property §39 (1972).

C. That petitioner was in possession or control of the 611 cartons of cigarettes on the garage shelves and floor, which cartons did not bear New York cigarette tax stamps. However, petitioner was not in possession or control of the 1,557 cartons of cigarettes in the panel truck operated by Olivieri.

D. That the petition of Sarah Micalizzi is granted to the extent indicated in Conclusion of Law "C", and that the penalty imposed upon her under the Notice of Determination is reduced to the amount of \$1,802.00.

DATED: Albany, New York

MAY 05 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER