

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Lawrence Rodia

:

: 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 1977. :

State of New York
County of Albany

David Parchuck, 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 11th day of February, 1983, he served the within notice of Decision by certified mail upon Lawrence Rodia, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lawrence Rodia
1458 81st St.
Brooklyn, NY 11228

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
11th day of February, 1983.

David Parchuck

Annice Adagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of
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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 1977.:

State of New York
County of Albany

David Parchuck, 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 11th day of February, 1983, he served the within notice of Decision by certified mail upon Frank J. Santo the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank J. Santo
67 Wall St.
New York, NY 10005

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
11th day of February, 1983.

David Parchuck

Constance A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

February 11, 1983

Lawrence Rodia
1458 81st St.
Brooklyn, NY 11228

Dear Mr. Rodia:

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
Frank J. Santo
67 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
LAWRENCE RODIA	:	DECISION
for a Hearing to Review a Determination of	:	
Cigarette Tax under Article 20 of the Tax Law	:	
for the Year 1977.	:	

Petitioner, Lawrence Rodia, 1458 81st Street, Brooklyn, New York 11228, filed a petition for a hearing to review a determination of cigarette tax under Article 20 of the Tax Law for the year 1977 (File No. 26050).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 4, 1981 at 1:15 P.M. Petitioner appeared by Frank J. Santo, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner was in possession or control of packages of cigarettes which bore no New York cigarette tax stamps and, therefore, is subject to a penalty imposed pursuant to section 481.1(b) of the Tax Law.

FINDINGS OF FACT

1. On May 9, 1979 the Audit Division issued a Notice of Determination of Tax Due under Section 481.1(b) of the Tax Law against Lawrence Rodia imposing a penalty of \$740.00 for 162 cartons of cigarettes seized on August 19, 1977.

2. Lawrence Rodia filed a Perfected Petition, signed August 23, 1979 wherein petitioner stated that the following error was made by the Audit

Division: "Petitioner was not found guilty of possession of untaxed cigarettes".
Petitioner also requested a hearing.

3. At the hearing, the Audit Division submitted the Notice of Determination of Tax Due, the Perfected Petition, the Answer thereto, the power of attorney of petitioner's representative and correspondence from the attorney-representative requesting notification of the hearing.

4. Petitioner's representative argued that the burden of proof was upon the "State".

5. The Answer submitted by the Audit Division "[a]dmits the allegation contained in item (12) of the Perfected Petition that Petitioner was not found guilty of possession of untaxed cigarettes, but alleges affirmatively that Petitioner was charged with a felony complaint for violation of Article 20, Section 481(2) of the Tax Law with possession of over 100 cartons of cigarettes, not bearing New York State Tax Stamps; and by the process of 'plea bargaining' Petitioner was permitted to plead guilty to a charge of Disorderly Conduct under section 240.20 of the Penal Code and was fined \$100.00 in the Criminal Court of the City of New York, County of Kings, before Judge Luis M. Neco on October 28, 1977."

6. The Audit Division offered no documentary or other substantial evidence that Lawrence Rodia had in his possession unstamped cigarettes.

CONCLUSION OF LAW

A. That section 306(1) of the State Administrative Procedure Act provides, in pertinent part: "...[e]xcept as otherwise provided by statute, the burden of proof shall be on the party who initiated the proceeding."

B. That section 471.1 of the Cigarette Tax Law provides, in pertinent part:

"...It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof." (Emphasis added).

Furthermore, section 481.1(b) of the Cigarette Tax Law provides, in part, that:

"...the tax commission may impose a penalty...for...cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person." (Emphasis added).

C. That determinations of an administrative agency must be supported by substantial evidence as found in the record taken as a whole. 300 Gramatan Ave. Associates v. State Division of Human Rights, 45 N.Y.2d 176, Matter of Klein v. State Tax Commission, 55 A.D.2d 982, (3rd Dep't., 1977), aff'd. 43 N.Y.2d 812. Thus, although petitioner bears the burden of proof in this case, there must be some evidence in the record showing petitioner was in possession or control of unstamped or unlawfully stamped cigarettes, in order to support a determination imposing a penalty against petitioner under section 481.1(b) of the Cigarette Tax Law.

D. That the record in this case does not disclose substantial documentary or other evidence as is required in order to sustain a determination that petitioner was in possession or control of unstamped cigarettes within the meaning and intent of section 481.1(b) of the Tax Law. See Matter of Gaspare R. Marchese, State Tax Comm., May 3, 1978. See also Matter of Thomas F. Gleason v. State Tax Commission, 76 A.D.2d 1035, (3rd Dep't., June 1980).

E. That the petition of Lawrence Rodia is granted and the Notice of Determination issued May 9, 1979 is cancelled.

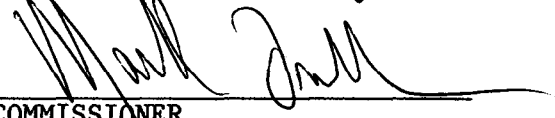
DATED: Albany, New York

FEB 11 1983

STATE TAX COMMISSION

ACTING 
PRESIDENT


COMMISSIONER


COMMISSIONER