

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 of :
Santiago Distributors, 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 for the Year 1981. :

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 21st day of May, 1982, he served the within notice of Decision by certified mail upon Santiago Distributors, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Santiago Distributors, Inc.
1298 Dekalb Ave.
Brooklyn, NY 11211

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
21st day of May, 1982.

Annex A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Santiago Distributors, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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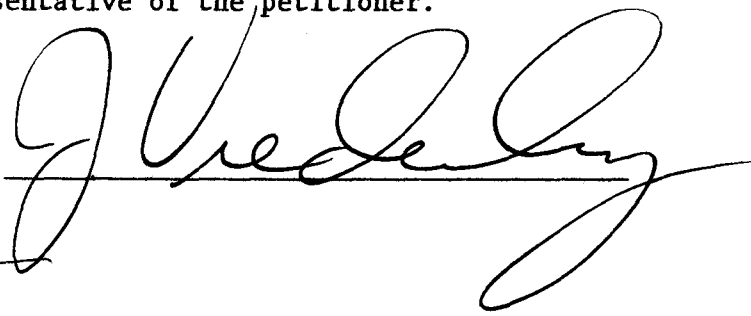
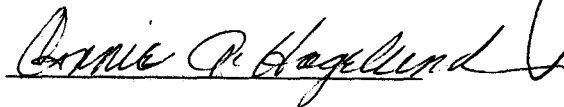
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 21st day of May, 1982, he served the within notice of Decision by certified mail upon James P. Pepe the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James P. Pepe
327 Graham Ave.
Brooklyn, NY 11211

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
21st day of May, 1982.

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

May 21, 1982

Santiago Distributors, Inc.
1298 Dekalb Ave.
Brooklyn, NY 11211

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
James P. Pepe
327 Graham Ave.
Brooklyn, NY 11211
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
SANTIAGO DISTRIBUTORS, INC.
for a Hearing to Review the Denial or Revocation
of a License as a Wholesale Dealer of Cigarettes:
under Article 20 of the Tax Law.

DECISION

Petitioner, Santiago Distributors, Inc., 1298 Dekalb Avenue, Brooklyn, New York 11211, filed a petition for a hearing to review the denial or revocation of a license as a wholesale dealer of cigarettes under Article 20 of the Tax Law (File No. 32194).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 15, 1981 at 1:45 P.M. Petitioner appeared by James Patrick Pepe, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioner is entitled to a default judgment in its favor, by reason of nonreceipt of the Audit Division's answer.

II. Whether petitioner's failure to disclose, on its application for a license as a wholesale dealer of cigarettes, a criminal conviction of one of its officers, which conviction was revealed in a subsequent application, constituted sufficient cause for the revocation of its license.

FINDINGS OF FACT

1. On March 10, 1978, petitioner, Santiago Distributors, Inc., filed with the Audit Division an Application for License as a Wholesale Dealer of Cigarettes,

which indicated an incorporation date for petitioner of April 25, 1978 and listed as officers Wilfredo Santiago, president, and Salvador Santiago, Jr., treasurer-secretary. The application was completed by another merchant on petitioner's behalf and was signed by Wilfredo Santiago. A negative response was given to the question, "Has any officer of this business entity ever been convicted of a crime?"

The Audit Division approved petitioner's application on May 16, 1978.

2. On January 5, 1981, Mr. Pepe (petitioner's representative) filed on petitioner's behalf a further application for a license as a wholesale cigarette dealer, due to its change of business location. This application indicated that an officer had been convicted of a crime, and appended thereto was a certificate of disposition. According to the certificate, on July 27, 1967, Salvador Santiago was convicted of assault in the third degree, upon entry of a guilty plea, in the Supreme Court of the State of New York, Kings County. The Court sentenced him to a jail term but suspended execution of the sentence.

The assault arose through a relationship with a paramour.

3. On January 14, 1981, the Audit Division denied petitioner's application for a license for its new location because of the misstatement contained in petitioner's original application. Petitioner timely requested a hearing and filed a perfected petition.

4. Mr. Paul Lefebvre, as the Audit Division's representative, prepared an answer to the perfected petition and a letter of transmittal, dated August 12, 1981 and addressed to James P. Pepe, 327 Graham Avenue, Brooklyn, New York 11211. Mr. Lefebvre also prepared a copy of the answer and letter for delivery to the Tax Appeals Bureau of the State Tax Commission. On August 12, 1981, he

deposited both copies in the Department of Taxation and Finance mail. The Tax Appeals Bureau received its copy.

5. At the formal hearing, Mr. Pepe made an oral motion for a default decision against the Audit Division, for the reason that petitioner had not been served with an answer.

6. It is petitioner's position that Salvador Santiago had no intent to mislead the Audit Division in the first application, and it was only through his honest revelation in the second application that his criminal record was disclosed; further that Mr. Santiago's initial failure to disclose his conviction is insignificantly related to petitioner's qualifications and fitness to hold a license.

7. Salvador Santiago did not have any part in filing petitioner's original application nor did the merchant who completed it question him. Mr. Santiago's brother, Wilfredo, had no knowledge of Salvador's arrest and conviction; Wilfredo lived with his grandparents in Brooklyn, Salvador with his father in Keasbey, New Jersey.

8. Mr. Pepe was retained by petitioner, among other things, to incorporate the business and to file an application for a license as a wholesale buyer of alcoholic beverages. In connection with his preparation of such application, Mr. Pepe interviewed the corporate principals and asked each if he had ever been convicted of any crime. Salvador Santiago initially replied that he had not, but upon Mr. Pepe's further inquiries, revealed his 1967 arrest and conviction. Mr. Santiago had been under the misapprehension that the records of his arrest and conviction were sealed; in effect, that he had no record.

Also in connection with such application, on June 16, 1978, Salvador Santiago obtained a Certificate of Good Conduct from the New York City Police Department.

All applications thereafter made to the State Liquor Authority, including an Application for a Warehouse Permit dated June 6, 1980, revealed Salvador Santiago's criminal record.

CONCLUSIONS OF LAW

A. That the Rules of Practice and Procedure before the State Tax Commission, sections 601.6(a)(4) and 601.10(a)(1), provide petitioner an opportunity and a means to make a motion to this Commission for a determination on default for failure of the Law Bureau to answer the petition within the prescribed time period, i.e., 60 days from the date the Secretary to the Commission acknowledged receipt of an acceptable perfected petition. All motions must be made in writing, on notice to the adverse party. There is no provision for oral motions at a formal hearing.

Petitioner neglected to properly avail itself of the above-outlined procedure, during the 65-day period between the date the answer became due and the date of the hearing.

Mailing is a proper method of service for pleadings under the Rules. 20 NYCRR 601.13(a). The Audit Division's representative deposited two copies of the answer, one properly addressed to petitioner's attorney and one to the Tax Appeals Bureau, in the departmental mail. Assuming arguendo that this proof offered by the Audit Division is insufficient to give rise to a presumption that the answer was mailed [see Richardson on Evidence §80 (10th ed. 1973)], the regulation requiring service of an answer within a certain period is directory only. Matter of Hamelburg v. Tully, Albany County Special Term,

Prior, Jr., J., April 16, 1979; Matter of Santoro v. State Tax Commission, Albany County Special Term, Conway, J., January 4, 1979.

Furthermore, the allegations contained in the answer consisted of paraphrase of portions of the applicable statute (Tax Law section 480) and certain facts established by the jurisdictional documents. Accordingly, petitioner was in no way prejudiced by nonreceipt of the answer. See Matter of Bower v. State Tax Commission, No. 41374 (3d Dept., February 18, 1982) [TSB-H-81(102.1)I].

Petitioner's motion for a default decision in its favor is hereby denied.

B. That no person may do business as a wholesale dealer of cigarettes unless he has been granted and publicly displays in his place of business a license granted by the Department of Taxation and Finance. The State Tax Commission may refuse to issue or may suspend or revoke such license, as follows:

"The tax commission may for cause refuse to issue, or may suspend or revoke a wholesaler's license, or may forbid a retail dealer to continue selling cigarettes, after an opportunity for hearing has been afforded. A violation of any provision of this article or of any regulation issued under it shall be cause to refuse to issue, or to suspend or revoke a license or to forbid a retail dealer to continue selling cigarettes." Tax Law section 480.

Mr. Santiago's criminal conviction approximately eleven years prior to petitioner's original application for a license does not demonstrate petitioner's unfitness to conduct business as a wholesale cigarette dealer nor would such conviction constitute cause for revocation of petitioner's license. See Matter of Big V Vending Corp., State Tax Commission, March 15, 1979 [TSB-H-79(7)M]; Correction Law section 752. Consequently, the inadvertent neglect to disclose such conviction (possibly founded on Mr. Santiago's misunderstanding about the

disposition of the charges against him) is insufficient cause for revocation.

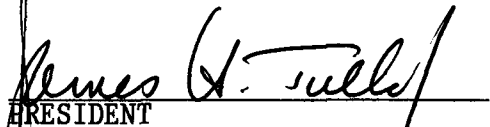
Cf. Matter of Nicholson v. Ambach, 80 A.D.2d 690 (3d Dept. 1981). The initial failure to disclose does not evince any lack of honesty or integrity on the part of petitioner's principals, especially where followed by full revelation.

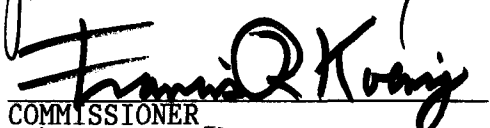
C. That the petition of Santiago Distributors, Inc. is granted to the extent indicated in Conclusion of Law "B"; that the revocation of petitioner's license as a wholesale dealer of cigarettes is annulled; and that the Audit Division is hereby directed to process the application of Santiago Distributors, Inc.


DATED: Albany, New York

MAY 21 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER