

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Glen Silverstein :

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 12th day of December, 1980, he served the within notice of Decision by mail upon Glen Silverstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Glen Silverstein

1560 E. 91st St.

Brooklyn, NY

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
12th day of December, 1980.

Jean Schuttz

J Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

Glen Silverstein :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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Cigarette Tax :
under Article 20 of the Tax Law
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State of New York
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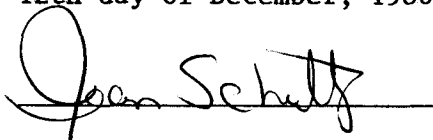
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by mail upon Lawrence Hochheiser the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

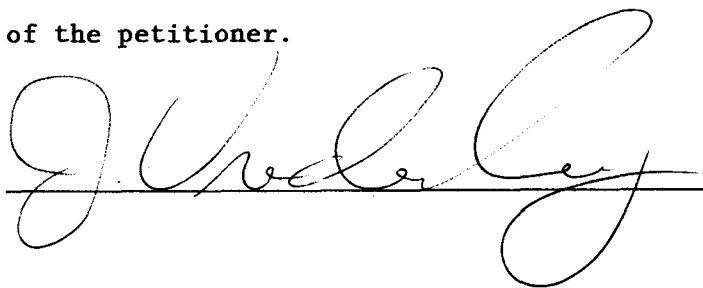
Mr. Lawrence Hochheiser
405 Lexington Ave.
New York, NY 10017

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
12th day of December, 1980.





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

December 12, 1980

Glen Silverstein
1560 E. 91st St.
Brooklyn, NY

Dear Mr. Silverstein:

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
Lawrence Hochheiser
405 Lexington Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GLENN SILVERSTEIN	:	DECISION
for a Hearing to Review a Determination of	:	
Cigarette Tax under Article 20 of the Tax	:	
Law for the Year 1976.	:	

Petitioner, Glenn Silverstein, 1560 East 91st Street, Brooklyn, New York, filed a petition to review a determination of cigarette tax under Article 20 of the Tax Law (File No. 18268).

A formal hearing was held before Stanley Buchsbaum, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 21, 1980. Petitioner appeared by Lawrence Hochheiser, Esq. (Kenneth V. Aronson, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether the penalty imposed under section 481.1(b) of the Tax Law was excessive.

FINDINGS OF FACT

1. On March 10, 1977, the Audit Division issued a Notice of Determination of Tax Due under the Cigarette Tax Law (Article 20, section 481.1(b) of the Tax Law) against Glenn Silverstein. The notice imposed a penalty of \$5.00 per carton for 100 cartons and \$4.00 per carton for 33 cartons of cigarettes seized on December 9, 1976, for a total penalty of \$632.00.

2. In a sworn application for a search warrant, Daniel McCarthy of the Special Investigations Bureau of the Department of Taxation and Finance stated

that an anonymous telephone call informed the Bureau that a 1974 green Chevrolet Sedan, License number 122AXM (New York), was delivering untaxed cigarettes in the vicinity of East 40th Street and Church Avenue in Brooklyn. The records of the New York Motor Vehicle Bureau revealed that the car was owned by Gertrude Aronofsky of 3690 Ladonia Street, Seaford, New York.

On November 21, 1976, the car was found, parked in front of 156 East 91st Street, Brooklyn. Surveillance was established at that location, and at 1:00 P.M. on December 2, 1976, a white woman with blonde hair was seen placing a package in the trunk, which Mr. McCarthy, based on his experience, concluded was the size and shape of and contained approximately 15 cartons of cigarettes. At 1:40 P.M. of that day, two young white men left the building at East 91st Street, entered the car and drove to 1360 East 102nd Street, Brooklyn, where they removed a brown package containing approximately 10 cartons of cigarettes and entered the building, remaining inside for about ten minutes. At about 2:10 P.M. on the same day, they drove to Preston Court, west of Ralph Avenue and, after removing a brown package containing approximately 10 cartons of cigarettes, entered a garage. Five minutes later, they entered the car, drove to East 40th Street and Church Avenue, parked the car and left.

The records of the Department of Taxation and Finance, State of New York, revealed that Gertrude Aronofsky was not a registered agent, wholesaler or licensed dealer of cigarettes in this State and that 156 East 91st Street was not an established location of any agent licensed to sell or store cigarettes in this State.

On the basis of 28 years of experience in law enforcement, conversations with known sellers, and courses in the method of operations used by sellers of untaxed cigarettes, it was Mr. McCarthy's opinion that the described activities seen by him constituted a typical untaxed cigarette selling operation.

Accordingly, a search warrant was issued by a judge of the Criminal Court of the City of New York, County of Kings.

3. Thereafter, the petitioner herein and one Paul Aronofsky were apprehended and charged in the Criminal Court with the possession of untaxed cigarettes. It was the first time that either had been arrested in New York State. They pleaded guilty to possession of a lesser number of cigarettes than the entire amount and each paid a fine of \$100.00. Since they were youthful offenders, the record of the criminal case was sealed.

Counsel for petitioner conceded that the total number of cartons seized was 143 (10 cartons were deducted in determining the penalty).

4. Counsel for petitioner contended that, as a matter of law, the penalty for the same 133 cartons cannot be imposed separately on petitioner herein and on Paul Aronofsky because it is a joint liability and that payment of \$632.00 should satisfy the liability of both.

CONCLUSIONS OF LAW

A. That on December 9, 1976, petitioner, Glenn Silverstein, was in possession or control of 143 cartons of cigarettes which did not bear New York tax stamps.

B. It is unnecessary to consider whether two participants engaged in the possession and transportation of untaxed cigarettes can be subject to a total tax penalty in excess of the amount which could be imposed on one acting alone. Tax Law, section 481.1(b) authorizes

"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."

Thus, with each carton containing 200 cigarettes, and the penalty of \$5.00 per carton, the highest penalty imposed on petitioner is so far less than the

permitted penalty of \$100.00 per carton that even if the penalties imposed on petitioner herein and on Paul Aronofsky are added together, the total falls far below the maximum authorized. Hence, even if petitioner's contention concerning the limits on penalties imposed on two or more participants in the possession and transportation of unstamped cigarettes were sound, it would not alter the power to impose the penalty actually imposed on the petitioner.

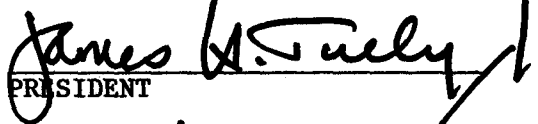
C. That the penalty imposed on petitioner was proper and should not be reduced.

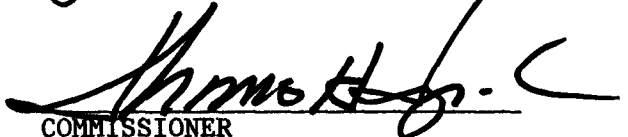
D. That the petition of Glenn Silverstein is denied and the Notice of Determination of Tax Due is sustained.

DATED: Albany, New York

DEC 12 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER