

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Donald G. Vivello :  
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 1980. :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Donald G. Vivello, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald G. Vivello  
850 Nichols Rd.  
Deer Park, NY 11729

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  
28th day of September, 1983.

Susan Powell

Connie R. Hagelund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Donald G. Vivello :  
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 1980. :  
\_\_\_\_\_

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Alan D. Lasher the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alan D. Lasher  
847 Annadale Rd.  
Staten Island, NY 10312

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  
28th day of September, 1983.

Susan Powell

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

Connie Hagelund

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

September 28, 1983

Donald G. Vivello  
850 Nichols Rd.  
Deer Park, NY 11729

Dear Mr. Vivello:

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 Law 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  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Alan D. Lasher  
847 Annadale Rd.  
Staten Island, NY 10312  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
DONALD G. VIVelo	:	DECISION
for a Hearing to Review a Determination of	:	
Cigarette Tax under Article 20 of the Tax Law	:	
for the Year 1980.	:	

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Petitioner, Donald G. Vivello, 850 Nichols Road, Deer Park, New York 11729, filed a petition for a hearing to review a determination of cigarette tax under Article 20 of the Tax Law for the year 1980 (File No. 29301).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on April 30, 1982 at 9:15 A.M. Petitioner appeared by Alan D. Lasher, Esq. The Audit Division appeared by Paul B. Coburn (Irwin Levy, Esq., of counsel).

ISSUE

Whether the amount of the penalty asserted against petitioner based upon the seizure of untaxed cartons of cigarettes should be reduced.

FINDINGS OF FACT

1. On April 16, 1980 the Audit Division issued to petitioner a Notice of Determination of Tax Due under Cigarette Tax Law in the amount of \$1,960.00. The Notice was issued because of the seizure of 680 cartons of cigarettes subject to a penalty. The amount of the penalty asserted by the Audit Division was determined by applying a penalty of \$4.00 per carton to the first 300 cartons of cigarettes and a penalty of \$2.00 per carton to the remaining 380 cartons of cigarettes.

2. Petitioner's representative admitted at the hearing the events which were the basis of the penalty asserted.

3. On February 13, 1980 petitioner was observed operating a Blue Ford Van bearing a New Jersey license plate traveling north toward the Staten Island Expressway on a service road. Untaxed cigarettes were seen inside the van. Thereafter, petitioner was advised of his rights and arrested. The van was examined at the World Trade Center and found to contain 690 cartons of untaxed cigarettes.

4. Petitioner's arrest was reported in a newspaper.

5. Petitioner engaged the services of an attorney after his arrest. On March 11, 1980 petitioner pled guilty to a class A misdemeanor based upon the possession of untaxed cigarettes and was fined \$1,000.00.

6. When petitioner pled guilty in the State court proceedings he was advised by his attorney that his plea of guilty would satisfy all charges. Petitioner was also advised to plead guilty in order to be able to keep his job until he had sufficient time with the New York City Department of Sanitation to retire.

7. Following his conviction in the State court, petitioner was arrested in Norfolk, Virginia by the Federal Government. Petitioner engaged the services of an attorney a second time following this arrest. Eventually, he pled guilty to a federal offense relating to the untaxed cigarettes and was sentenced to five years probation. Petitioner is currently serving this sentence.

8. Petitioner was also advised by the attorney he retained in the federal court proceeding that a plea of guilty would satisfy all charges.

9. At the time petitioner was arrested in New York he was driving his brother's van which had untaxed cigarettes in it. Petitioner's brother was

driving petitioner's automobile which had cartons of untaxed cigarettes in it. Both vehicles were impounded. Petitioner's license plate was stolen while his car was impounded. Thereafter, petitioner's license plate was utilized on a car that was involved in robberies. This caused the Police Department to call petitioner on the telephone. Petitioner became distressed as a result of these telephone calls.

10. Petitioner had never been arrested for any offense prior to the time he was arrested in New York and had not engaged in the trafficking of untaxed cigarettes prior to the incident which was the basis for the asserted penalty.

CONCLUSIONS OF LAW

A. That section 481-1(b) of the Tax Law provides that the "...tax commission may 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." This section further provides that the Tax Commission may, in its discretion, remit all or a portion of this penalty.

B. That in view of the fact that petitioner willfully chose to engage in an illegal course of conduct, the penalty asserted by the Audit Division was appropriate and is sustained. Petitioner has not presented any evidence warranting a reduction of the penalty.


C. That the petition of Donald G. Vivello is denied.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 28 1983

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

REQUEST FOR BETTER ADDRESS

Requested by	<del>Tax Appeals Bureau</del> Room 107 - Bldg. #9 State Campus Albany, New York 12227	Unit	<del>Tax Appeals Bureau</del> Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request	11/17/83
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition
	F - Dec. - 9/28/83
Name	Donald G. Vivelo
Address	850 Nichols Rd. Deer Park, N.Y. 11729

## Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input checked="" type="checkbox"/> Other:	Unclaimed

Searched by	Section	Date of Search
D.P.		11/17/83

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER





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

September 28, 1983

Donald G. Vivelò  
850 Nichols Rd.  
Deer Park, NY 11729

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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  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Alan D. Lasher  
847 Annadale Rd.  
Staten Island, NY 10312  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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of	:	
DONALD G. VIVelo	:	DECISION
for a Hearing to Review a Determination of	:	
Cigarette Tax under Article 20 of the Tax Law	:	
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B. That in view of the fact that petitioner willfully chose to engage in an illegal course of conduct, the penalty asserted by the Audit Division was appropriate and is sustained. Petitioner has not presented any evidence warranting a reduction of the penalty.

C. That the petition of Donald G. Vivello is denied.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 28 1983

Rodriguez GW Clun  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

Mark J. [Signature]  
COMMISSIONER