

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Wylie Distribution & Warehousing, Inc.

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 17th day of October, 1980, he served the within notice of Decision by mail upon Wylie Distribution & Warehousing, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Wylie Distribution & Warehousing, Inc.
540 Main St.
Tonawanda, NY 14150

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
17th day of October, 1980.

Deborah A. Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Wylie Distribution & Warehousing, Inc. :
for Redetermination of a Deficiency or a Revision :
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Cigarette Tax :
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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 17th day of October, 1980, he served the within notice of Decision by mail upon Thomas C. D'Agostino 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. Thomas C. D'Agostino
Kogler and Runfolo
Suite 600, 17 Court St.
Buffalo, NY 14202

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
17th day of October, 1980.

Deborah A. Bank

J. Vredenburg

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

October 17, 1980

Wylie Distribution & Warehousing, Inc.
540 Main St.
Tonawanda, NY 14150

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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Thomas C. D'Agostino
Kogler and Runfola
Suite 600, 17 Court St.
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
WYLIE DISTRIBUTION & WAREHOUSING, INC. : DECISION
for a Hearing to Review a Determination :
under Article 20 of the Tax Law for the :
Year 1976. :

Petitioner, Wylie Distribution & Warehousing, Inc., 540 Main Street, Tonawanda, New York 14150, filed a petition for a hearing to review a determination under Article 20 of the Tax Law for the year 1976 (File No. 17732).

A formal hearing was held before Alan R. Golkin, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on September 19, 1978 at 3:00 P.M. Petitioner appeared by Mattar, Mattar, D'Agostino, Kogler & Runfola (Thomas C. D'Agostino, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Barry Bresler, Esq., of counsel).

ISSUE

Whether petitioner is liable for cigarette taxes on cigarettes stolen from its warehouse when the cigarettes were delivered by a common carrier acting on instructions from the manufacturer to petitioner for storage, until picked up by a common carrier acting on instructions from the manufacturer to deliver the cigarettes to someone other than petitioner.

FINDINGS OF FACT

1. Petitioner operates a storage and warehouse business at various locations in Western New York, but is not a licensed agent or wholesale dealer for cigarettes.

2. Petitioner did not file Cigarette Tax returns for the tax year 1976.

3. Petitioner's storage facility was burglarized by unrelated third parties causing the theft of 18,345 cartons of unstamped cigarettes, and two unrelated individuals pled guilty to said theft and were sentenced on the said plea.

4. The stolen cigarettes were never recovered and no cigarette taxes have ever been paid to New York State on said cigarettes.

5. The stolen cigarettes had been delivered to petitioner's storage facility by common carrier on instructions from various cigarette manufacturers, and were to be held in storage until picked up by common carrier acting under the instruction of said manufacturer for delivery to persons other than petitioner.

6. The Miscellaneous Tax Bureau issued a Notice of Determination of Tax Due, dated June 29, 1976, under Article 20 of the Tax Law for \$27,517.50 in tax (18,345 cartons at \$1.50 per carton) plus \$3,026.93 in penalties.

7. Petitioner at all times relied upon professional advice from its attorneys and accountants regarding the filing of tax returns.

CONCLUSIONS OF LAW

A. That section 471 of the Tax Law imposes a tax on all cigarettes possessed in the state by any person for sale. It is presumed, under said section, 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 is upon the person in possession of the cigarettes.

B. That section 470.3 of the Tax Law defines "Sale" as follows:

"'Sale' means any transfer of title or possession or both, exchange or barter, conditional or otherwise, in any manner or by any means whatever or any agreement therefor."

C. That even if petitioner could be deemed to have "possessed in the state" the subject cigarettes and the theft from the warehouse clearly effected

a transfer of that "possession" from petitioner to the thieves, petitioner clearly did not acquire that possession so that it could transfer possession to the thieves. Accordingly, petitioner did not possess the cigarettes for sale within the meaning of section 471 of the Tax Law. (Harder's Express, Inc. v. State Tax Commission, 402 N.Y.S.2d 721 (Sup. Ct. Albany Co. 1978) aff'd mem., 418 N.Y.S.2d 199 (3rd Dept. 1979)).

D. That the petition of Wylie Distribution & Warehousing, Inc. is granted and the Notice of Determination of Tax Due is cancelled.

DATED: Albany, New York

OCT 17 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

REQUEST FOR BETTER ADDRESS

For. Dec. (20) 10-17.

10/17 17730 44
161-06-65-91 AAS7

Requested by <i>J. Vredenburg</i>	Unit Tax Appeals Bureau Room 107 - Bldg. #9 State Capitol Albany, New York 12227	Date of Request 11/11/80
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number <i>14</i>	Date of Petition <i>NC</i>
Name <i>Wylie Distribution & Warehousing, Inc.</i>	
Address <i>540 - Main St. Tonawanda, N.Y.</i>	

14150

Results of search by Files

<input checked="" type="checkbox"/> New address:	<i>Wylie Distribution & Warehousing, Inc. P.O. Box 1030 Station K - 511 Hamden St. Buffalo, N.Y. 14210</i>	
<input type="checkbox"/> Same as above, no better address		
<input checked="" type="checkbox"/> Other:	<i>James R. Miller 877 Delaware Ave Apt 219 Buffalo, NY 14210 540-94 6162 (Home)</i>	<i>Monica J. Maffioletti 226 Fenwood Ave Buffalo, NY 14204</i>
Searched by <i>C. Roberts</i>	Section <i>Corp. Files</i>	Date of Search <i>11/3/80</i>

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

TA 26 (9-79)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227



Wylie Distribution & Warehousing, Inc.
540 Main St.
Tonawanda, NY 14150

Handwritten: B/A
Handwritten: [Signature]

Handwritten: Sent 11/17/80

STATE OF NEW YORK
STATE TAX COMMISSION

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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 14th day of November, 1980, he served the within notice of Decision by mail upon Wylie Distribution & Warehousing, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Wylie Distribution & Warehousing, Inc.
P.O. Box 1030 Station D
519 Hamburg St.
Buffalo, NY 14210

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
14th day of November, 1980.

Deborah A Bank

