

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>AMSTERDAM TOBACCO, INC.</b>	:	DECISION
for Revision of Determinations or for Refunds of	:	DTA NOs. 820294
Cigarette Tax under Article 20 of the Tax Law for	:	and 820317
the Period March 6, 2003 and August 20, 2003	:	
through July 28, 2004.	:	

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Petitioner, Amsterdam Tobacco, Inc., filed an exception to the determination of the Administrative Law Judge issued November 20, 2006. Petitioner appeared by DeGraff, Foy, Holt-Harris, Kunz & Devine, LLP (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michelle M. Helm, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was held on June 20, 2007 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether the Division of Taxation properly denied petitioner's claim for redemption or refund of cigarette tax stamps and prepaid sales tax on the basis of petitioner's failure to prove the destruction of certain cigarette tax stamps.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Amsterdam Tobacco, Inc., is a wholesale tobacco distributor in New York City, that has been in operation since 1924. Marvin Gutlove is petitioner's owner.

On June 9, 2003, petitioner submitted to the Transaction and Transfer Tax Bureau (“TTTB”) of the Division of Taxation (“Division”) a Claim for Redemption/Refund of Cigarette Tax Stamps and Prepaid Sales Tax, Form CG-114. The claim requested a total refund of \$71,977.58, consisting of cigarette tax and prepaid sales tax.

On or about July 3, 2003, petitioner sent two boxes to the Division’s TTTB-FACCTS-Cigarette Tax Unit in Albany by United Parcel Service (“UPS”) bearing rolls of the wax paper on which the cigarette stamps are originally found. The rolls of wax paper in the boxes had small pieces of stamp on some portions and only smudged remains on other sections of the paper. A refund request accompanied the boxes. The Division located a wood cabinet where the boxes could be locked and stored.

The Division introduced into evidence copies of the UPS labels retained by the Division from the two boxes sent to the Division by David Gutlove, Amsterdam Tobacco Company, 1614 Amsterdam Avenue, New York, NY 10031, to the Division’s Cigarette Tax unit designated on the UPS label as “DEPT TTTB-FACCTS-CIGARETTES TAX.” The UPS tracking labels indicated they were 1 of 2 and 2 of 2, and each label indicated a weight of 10 lbs. The labels bore the following UPS Ground tracking numbers: 1Z150X210339488984 and 1Z150X210339488993.

The tracking numbers on the UPS customer receipts submitted into evidence by petitioner matched those submitted by the Division into evidence. On petitioner’s receipts, also designated as 1 of 2 and 2 of 2, the weight stated on each label was 30 lbs. In addition, the shipping cost stated on each label was \$14.10, with insured value and miscellaneous cost of \$174.65 and \$.21 respectively on both.

Once the Division received the boxes from petitioner, it organized their contents, evaluated them in connection with petitioner’s refund claim dated June 2, 2003, and consolidated the rolls of wax paper into one box. The Division could not find any stamps on the sheets of wax paper,

could not determine the number of stamps in question or on what basis petitioner was requesting a refund, and denied the refund in full.

By correspondence dated September 3, 2003, the TTTB issued to petitioner a letter denying the refund claim of \$71,977.58. The denial letter indicated that the refunds were being denied for the following reasons:

- 1) We are unable to determine when the stamps were purchased due to the fact that stamp serial numbers were illegible.
- 2) The New York State tax law does not allow for a refund of partial stamps.

Petitioner submitted to the Division's TTTB a Claim for Redemption/Refund of Cigarette Tax Stamps and Prepaid Sales Tax, Form CG-114, dated September 28, 2004. The claim requested a total refund of \$30,850.23, consisting of cigarette tax of \$24,726.18 and prepaid sales tax of \$6,124.05.

By correspondence dated December 14, 2004, the TTTB issued to petitioner a letter denying the refund claim in part for the period August 20, 2003 through July 28, 2004, in the amount of \$29,927.37. The denial letter indicated that based on a review of petitioner's claim, the documentation submitted did not meet the Division's requirements for a valid refund, due to the following:

- 1) We are unable to determine when the stamps were purchased due to the fact that stamp serial numbers were illegible.
- 2) The New York State tax law does not allow for a refund of partial stamps.

Larry Wood of the Division's Cigarette Tax Unit set forth the procedures for the type of refund claims in issue in this proceeding. Referring to Form CG-114, page 2, the Division's "For Department Use Only Box" contains the following statement: "I certify that I have examined the packages of cigarettes to which the stamps described on the front of this form were attached and have removed or destroyed the stamps in the following quantities and denominations." This portion of the form is utilized when the Division visits a taxpayer's place of business to

determine if there were tax stamps attached to packs of cigarettes that the Division believed were valid, that were then removed or destroyed in certain quantities and denominations. This section is additionally completed when stamps sent into the Cigarette Tax Unit must be reviewed and a determination is made as to the amount of refund to be issued before the stamps are destroyed. In this case, neither of petitioner's refund forms contained any information in this section because the refund claim was missing the verification from audit personnel and the Division had not approved any stamps to be destroyed.

Two affidavits of John Sprawka, the Business Unit Manager for Meyercord Revenue, Inc. ("Meyercord"), were introduced into evidence by the Division. Meyercord, the manufacturer of the tax stamps, would affix the stamps to a roll which are thereafter sold to the cigarette agents designated in the Division's agent bank. Mr. Sprawka is responsible for all aspects of printing and selling cigarette tax stamps, and in the course of his duties, has become familiar with the nature of the cigarette stamping process used by New York State and has had the opportunity to witness numerous rolls of stamps prior and after application to cigarette packs. The first affidavit establishes that Meyercord is the sole manufacturer of New York State cigarette tax stamps, and that 97% of the New York State Fuson stamps are applied with heat and pressure using Meyercord's automatic stamping machines. Attached to the first affidavit is a roll of paper, approximately 6 feet in length which contains small remnants of cigarette tax stamps that are typical of that provided by Meyercord. According to Meyercord, it would be normal for small remnants of stamps to remain on the wax paper after the stamp was transferred, and the company considered the stamp transfer successful if approximately 80% or more of the stamp was transferred, leaving 20% or less of each stamp on the paper.

The second affidavit establishes that Meyercord undertook a marketing effort to keep Meyercord customers apprised of the availability of wax for this process from a new distributor. Additionally, attached to this affidavit was a six page printout listing any service calls or repair work done by Meyercord for petitioner from February 1996 through April 2005, including the

periods in issue. If petitioner had reported such a problem, Meyercord's business practice is to immediately have a technician sent to fix the problem and record the same on the report. The report shows predominantly routine maintenance calls and does not indicate any repairs near the March 6, 2003 period, of the nature that would have affected the stamp application process in such a way as to have caused stamps to be damaged or destroyed. There were three service calls made by Meyercord to petitioner between August 20, 2003 and July 28, 2004 that were other than routine. One on August 26, 2003 indicating a "belt drive defect," one on January 20, 2004 with a notation of "box cam loose," and another on February 17, 2004 which was noted as "ADJ P.F. Pawls." No explanation was provided concerning the nature of the repairs undertaken during these particular calls.

Through the testimony of the Division's Director of Enforcement, Thomas Stanton, and the Special Assistant to the Deputy Commissioner of Enforcement, Emanuel Urzi, petitioner established that on occasion Mr. Gutlove and other cigarette distributors complained about problems with the Meyercord machine. The primary complaint was that the stamp would not transfer, and part or all of the stamp would remain on the wax paper. Sometimes the heating machine would destroy stamps.

Mr. Stanton also established that petitioner and Mr. Gutlove have a reputation in the industry that is highly regarded and of high integrity and a recent audit of petitioner resulted in no tax due.

The Division established by testimony that when a stamping agent has requested a refund for damaged or unused stamps, the agent would keep the flap or roll of paper on which the stamp originally appeared showing the portion of the stamp that remained on the paper, as well as the cigarettes which were only partially stamped due to the defect in the process. Petitioner herein only produced rolls of paper which had small portions of remaining stamps, or mere stamp smudges, and did not produce for the Division the packs of cigarettes which were only partially stamped, or damaged.

Petitioner introduced into evidence a video tape of the stamping machine in process, to show the speed at which the operation takes place, and a manual heat stamping process to further illustrate some of the potential failures in the stamping processes.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

Tax Law § 476 authorizes the refund of cigarette taxes under certain circumstances, and provides, in relevant part, as follows:

Whenever any cigarettes upon which stamps have been placed or tobacco products upon which the tax has been paid . . . have become unfit for use and consumption or unsalable, or have been destroyed, . . . or . . . the commissioner of taxation and finance shall have determined that any tax imposed by this article shall have been paid in error, the agent, dealer or tobacco products distributor, as the case may be, shall be entitled to a refund of the actual amount of tax so paid, provided application therefor is filed with the commissioner of taxation and finance within two years after the stamps were affixed to such cigarettes or the tax was paid upon such tobacco products . . . . If the commissioner of taxation and finance is satisfied that any dealer is entitled to a refund he shall issue to such dealer stamps of sufficient value to cover the refund of the tax on cigarettes or may, subject to audit by the comptroller, make a refund of the tax on cigarettes or on tobacco products. No person shall sell or offer for sale any stamp or stamps issued under this article except by written permission of the commissioner of taxation and finance. The commissioner of taxation and finance may redeem unused stamps lawfully in possession of any person. The commissioner of taxation and finance may prescribe necessary rules and regulations concerning refunds, sales of stamps, and redemptions under the provisions of this article (emphasis added).

The Department's regulations (20 NYCRR 77.1), the Administrative Law Judge observed, amplify the provisions of Tax Law § 476. Of relevance here is 20 NYCRR 77.1(a)(2)(iii) which provides:

(iii) A dealer who makes an application for a refund on the basis of cigarettes, in packages upon which stamps have been placed, which have been destroyed must preserve the packages of cigarettes, to the extent possible, in their original dated containers until such time as the department can inspect such packages or until notified otherwise by the department. The provisions of this section with respect to cigarettes destroyed shall also apply with the same force and effect to cigarette stamps which have been affixed to packages of cigarettes and which stamps have been subsequently damaged so as to be considered worthless (emphasis added).

The Administrative Law Judge noted that the Department's regulations (20 NYCRR 77.2) also provide for an alternative procedure when unused stamps are in issue:

(a) The Department of Taxation and Finance may redeem unused cigarette stamps lawfully in the possession of any person. Consequently, the department may buy back from licensed cigarette agents or former agents:

- (1) unaffixed stamps for which the agent no longer has a need or is no longer qualified to affix;
- (2) unaffixed stamps from the inventory of an agent in liquidation;
- (3) unaffixed stamps which have been so damaged as to be worthless or unfit for use;
- (4) unaffixed stamps which have been superseded by stamps of a newer design or denomination; or
- (5) any other unaffixed stamps in similar instances where the department deems redemption appropriate.

With the exception of duly appointed or licensed fiscal agents or agent banks, no person shall sell or offer for sale to other than the department any stamp or stamps issued pursuant to article 20 of the Tax Law, except upon written permission of the Commissioner of Taxation and Finance.

(b) The Department of Taxation and Finance will redeem unused stamps for the actual amount of cigarette tax paid for such stamps provided an application for redemption is filed with the department within two years after the date that the unused stamps were purchased or within the time provided for in section 77.1(d)(2) of this Part. In no event shall an application for redemption be filed where cigarette tax stamps have been purchased on a credit basis pursuant to section 74.2(c) of this Title and where such stamps have not been paid for in full. All unused stamps for which an application for redemption is filed must accompany the application and such claim must be sent to the department by registered mail. However, where registered mail is not feasible because of the volume of the stamps to be redeemed, the department may arrange for receipt of the unused stamps in an alternative manner.

(c) If the Department of Taxation and Finance is satisfied that unused stamps should be redeemed, it may, subject to audit by the Comptroller, make a refund of the cigarette tax paid. No interest shall be paid by the department on such refunds.

Petitioner here sought a refund for damaged stamps due to a malfunction in its stamping mechanism. The Administrative Law Judge noted that there is no dispute that stamps could be damaged or destroyed in the tax stamping process. The Administrative Law Judge posed the two primary questions in this matter as, i) what is petitioner's burden of proof, and ii) whether petitioner has carried its burden to prove entitlement to a refund for stamps it claimed were unable to be applied to cigarettes in the usual process.

Petitioner claimed that a recent audit had exonerated it, since it was concluded that there was zero tax due, and since the audit conclusion accounted for all cigarettes, the only way the

audit balances is if the damaged stamps are counted. The Administrative Law Judge noted that the audit referred to covered the period June 1, 2000 through May 31, 2003. Although the first refund claim<sup>1</sup> falls within the audit period, the second does not. Another problem, the Administrative Law Judge noted, is that the Division's auditor was not present at petitioner's place of business to address the refund claim issues, but rather, he was there to count petitioner's inventory. Thus, the Administrative Law Judge was dubious whether a determination of inventory count under an audit procedure would satisfy the steps needed to be taken for a refund on damaged stamps. The Administrative Law Judge noted that if that had been the case, the auditor should have signed the Division's verification on Form CG-114, certifying that certain cigarette packages concerning the destroyed stamps had been examined. This was not done. Accordingly, the Administrative Law Judge found petitioner's argument must fail.

Petitioner next asserted that the application by the Division of 20 NYCRR § 77.1 is in error. That regulation concerns itself with cigarette packages that are damaged, or stamps that are affixed to packages, which stamps are subsequently damaged, so as to be considered worthless. Instead, petitioner argued that it is regulation 20 NYCRR § 77.2. That is controlling here, providing guidance in the situation of the redemption of unused stamps, such as unaffixed stamps that have been so damaged as to be worthless or unfit for use.

The Administrative Law Judge determined that the Division properly applied 20 NYCRR § 77.1, and that 20 NYCRR § 77.2 is not applicable to these facts. First, the Administrative Law Judge noted, 20 NYCRR § 77.2 deals with "unused" stamps the are "unaffixed." The Administrative Law Judge found that remnants of stamps in this case clearly showed that the stamps were "used." The evidence herein showed remaining smudges of stamps, small remaining portions of stamps in a vast minority of cases. The Administrative Law Judge found that the extent to which they no longer remained in their original form on the wax rolls, indicates

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<sup>1</sup>The Administrative Law Judge here used the term "assessment."



some element of having been used. The Administrative Law Judge found that although the issue of whether they were affixed or unaffixed is not relevant having determined they were “used,” the only manner in which this could have been resolved is by having the Division inspect the cigarette packages involved in the faulty application process, and verify the results. This was not done, and there was no evidence as to what happened to such cigarette packages.

The Administrative Law Judge emphasized that the issue is whether the stamps in this matter were actually damaged or destroyed and if so, was the Division able to see evidence of that by an opportunity to inspect the damaged stamps and the corresponding cigarette packs. As to the Division’s application of 20 NYCRR § 77.1, what was required of petitioner was preservation of the packs of cigarettes to which the stamps in question were allegedly affixed. Had they been properly retained for inspection by the Division, then their destruction or the damaged stamps only partially affixed would have sufficed. The Administrative Law Judge noted that if some cigarette packages only had stamps partially affixed, no proof was ever provided by petitioner.

Another issue raised by petitioner was whether a portion of stamps delivered to the Division by UPS were misplaced by the Division’s employees and are thus not being considered in the resolution of this matter, such that a portion of actual “unused” stamps may have existed, and were eligible for redemption.

In order to guard against fraud and to prevent tax stamps from being utilized illegally, 20 NYCRR § 77.2, which provides for the redemption of unused stamps, also requires that in order to qualify for redemption, an agent must include, with his application for redemption, all unused stamps. There is a large discrepancy between the weight noted on the two sets of UPS labels introduced by the parties, representing the stamps as delivered to the Division. In addition, the actual weight appears to fall somewhere between 20 and 60 lbs., and closer to 60 than 20. Inasmuch as petitioner has the burden of explaining even this discrepancy, as to how the labels were created, whether the weight was estimated, and other pertinent information, the

Administrative Law Judge found there was simply insufficient evidence of lost stamps.

The Administrative Law Judge acknowledged that the integrity of both petitioner and Mr. Gutlove were clearly established by the testimony of the Division's employees. However, the Administrative Law Judge found that petitioner did not do the things that were required if it was to prevail here. Specifically, the Administrative Law Judge noted that petitioner could have notified the Division immediately upon the occurrence of any damage to stamps, having a Division employee verify the actual damage, alert Meyercord to the problem it was having and request a service call. The Administrative Law Judge observed that given the number of years petitioner has been in this business, it seems likely that petitioner knew what the procedures were for this type of problem, and given Mr. Gutlove's good relationship with the Division, if he was unaware of such procedures, he could have easily gained access to such information.

As for petitioner's argument that faulty machinery was the cause for the damaged stamps, there is no evidence that the Meyercord equipment was repaired during the March 6, 2003 refund period, nor that Meyercord was contacted to remedy any problem. There were, however, three service calls made by Meyercord to petitioner between August 20, 2003 and July 28, 2004 that were other than routine. Although the Administrative Law Judge found it possible that repairs may have resulted from a problem in the stamp application process in the manner described by petitioner, such repairs were not established at the hearing and no information was provided to explain the Meyercord service notations. The Administrative Law Judge also found that the testimony regarding the general complaints involving the Meyercord stamping machine, lacked specificity and was insufficient, without more, to warrant granting a refund. Additionally, the Administrative Law Judge observed, petitioner failed to retain the packs of cigarettes with the allegedly damaged stamps for the Division's review. Therefore, the Administrative Law Judge denied the petition.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that it has carried its burden of proving its entitlement to a refund of damaged and destroyed cigarette stamps due to a malfunction by its cigarette stamping machine. In this regard, petitioner argues that the Administrative Law Judge used the incorrect regulation in deciding this matter. Petitioner argues, as it did below, that the correct regulation to be used in this case is 20 NYCRR 77.2, because the cigarette stamps were unfit for use. It also continues to argue that the Department did not safeguard all of the stamps and stamp remnants that were sent for refund.

The Division maintains that petitioner did not provide the proof necessary to obtain a refund inasmuch as petitioner failed to contact the Division when the claimed destruction of stamps occurred, and failed to provide unused stamps for redemption. Additionally, the Division dismisses as without merit petitioner's claim that a malfunctioning stamping machine destroyed the tax stamps.

***OPINION***

Petitioner argues that the correct regulation to be used in this case is 20 NYCRR 77.2, because the subject cigarette stamps were unuseable. However, petitioner's evidence, if anything, shows that the stamps were used. The waxed sheets that held the stamps have, at most, stamp remnants remaining, and those remnants are insufficient to be legible. We view these waxed sheets as the best evidence that the stamps have been used in some way. How they were used or what they were affixed to and their condition upon affixation is not in evidence. If the stamps were damaged in their affixation or damage to the cigarette packaging, then the correct regulation to apply would be 20 NYCRR 77.1, not section 77.2 as urged by petitioner. Section 77.1 of the regulations requires that where a dealer seeks a refund of cigarette tax based on damage to the tax stamps or the packaging that the dealer "must preserve the packages of cigarettes, to the extent possible, . . . until such time as the department can inspect such packages or until notified otherwise by the department" (20 NYCRR 77.1[a][2][iii]). This requirement

“shall also apply with the same force and effect to cigarette stamps which have been affixed to packages of cigarettes and which stamps have been subsequently damaged so as to be considered worthless” (id). We agree with the Administrative Law Judge that the evidence does not support the conclusion that the Department was contacted for the purpose of requesting an inspection of damaged stamps or damaged cigarette packages. Therefore, we must conclude that petitioner has not carried its burden of proof.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Amsterdam Tobacco, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Amsterdam Tobacco, Inc. are dismissed; and
4. The cigarette tax refund denials dated September 3, 2003 and December 14, 2004 are sustained.

DATED: Troy, New York  
December 20, 2007

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
President

/s/ Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

/s/ Robert J. McDermott  
Robert J. McDermott  
Commissioner