

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BI LAN JIANG	:	DECISION
	:	DTA NO. 819340
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Period February 23, 2001.	:	

Petitioner Bi Lan Jiang, 148 Madison Street, Apt. 9-E, New York, New York 10002, filed an exception to the determination of the Administrative Law Judge issued on June 17, 2004. Petitioner appeared by Stephen K. Seung, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michelle Helm, Esq., of counsel).

Petitioner filed a brief in support of her exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

ISSUE

Whether petitioner was a person in possession of or who had control of unlawfully stamped cigarettes and, as such, is liable for the penalty imposed pursuant to Tax Law § 481(1)(b).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact “1,” “2,” “5” and “6” which have been modified. The Administrative Law Judge’s findings of fact and the modified findings of fact are set forth below.

We modify finding of fact “1” of the Administrative Law Judge’s determination to read as follows:

During the afternoon of February 23, 2001, Investigator Angela Murray, of the Division of Taxation (“Division”), testified that she received a telephone call from Detective Jung, of the New York City Police Department (“NYPD”) stating that the NYPD had followed an individual carrying a bag of cigarettes to an apartment where a large quantity of untaxed cigarettes were found. Thereafter, Investigator Murray and her immediate supervisor, Senior Investigator Mars, went to the building where the apartment was located. When they arrived at the apartment building, they were met by a detective who directed them to an apartment on the second floor. As Investigator Murray walked up the stairs, she noticed boxes of cigarettes located on the second floor. The investigators proceeded to the front of the apartment and observed a young male, whom they were told was approximately 16 years old, wearing handcuffs. Petitioner was inside the apartment and the investigators spoke to her from the door. From their vantage point, the investigators observed half cases of cigarettes throughout the apartment.¹

We modify finding of fact “2” of the Administrative Law Judge’s determination to read as follows:

Investigators Murray and Mars went back downstairs and called their supervisor, Investigator Amaral, in order to advise him of what was found. The investigators estimated that there were well over 500 cartons of cigarettes outside of the apartment. In accordance with Mr. Amaral’s instructions, the investigators returned to the apartment and asked petitioner for permission to

¹We modified finding of fact “1” of the Administrative Law Judge’s determination to more accurately reflect the record.

enter. Petitioner gave the investigators permission to enter and, thereafter, additional boxes of cigarettes were discovered in locations such as under the bed and in the closet. Investigator Murray testified that in response to an inquiry from Investigator Mars, petitioner stated that the cigarettes within and outside the apartment belonged to her and that they were being warehoused in the apartment for her business. Investigator Murray also testified that petitioner provided the investigators with the name and location of the business. The questions from the investigators to petitioner were allegedly translated by a NYPD detective in order to avoid any misunderstanding regarding what was being asked and the meaning of the response.²

The investigators then made a second call to Investigator Amaral to inform him of what they had learned and to determine if petitioner committed any previous offenses. When Supervising Investigator Amaral checked the Division's record keeping system, he learned that about a year prior to the seizure at issue here, investigators went to petitioner's business and found cigarettes with stamps from Virginia, unstamped cigarettes and alcohol. At the time, the business was being operated by petitioner's husband. Consequently, he was given a summons for the violations and was also told that he was not permitted to have cigarettes with out-of-state stamps.

Following the second telephone call, the Division decided to seize the cigarettes and an evidence custodian was called to the location. Thereafter, the cigarettes were counted and brought to Two World Trade Center. In total, 1,131.1 cartons of cigarettes were seized. Petitioner was taken into custody by the NYPD.

²We modified finding of fact "2" of the Administrative Law Judge's determination to more accurately reflect the record.

We modify finding of fact “5” of the Administrative Law Judge’s determination to read as follows:

Several days after the seizure, Investigator Murray received a telephone call from petitioner’s attorney asking when petitioner could have her cigarettes returned. Petitioner was informed that in order to have the cigarettes returned, she would have to give the Division invoices proving that they were purchased from a legitimate wholesaler. Thereafter, petitioner’s representative called again to request that the cigarettes be returned and he was given the same answer. Several days later, Investigator Murray received a facsimile from petitioner’s attorney with a copy of several invoices. According to the case history report, petitioner’s attorney advised that petitioner had proof of purchase for 570.8 cartons of the seized cigarettes. In order to investigate the invoices, the Division went to the legitimate wholesalers in the area, where petitioner said that the cigarettes were bought, and showed the invoices to the wholesalers. The wholesalers provided a sworn affidavit stating that some of the invoices were accurate. The invoices that did not state the name and address of the business were not regarded as valid. Of the several invoices which were provided, the Division ascertained that two were legitimate.³

We modify finding of fact “6” of the Administrative Law Judge’s determination to read as follows:

Following their investigation, Investigator Murray called petitioner’s representative to set up a meeting. Subsequently, a meeting was held at Two World Trade Center wherein petitioner was told by Investigator Amaral that only two of the invoices came from legitimate wholesalers and that the legitimate invoices did not account for the large volume of cigarettes which were seized. Investigator Amaral informed petitioner’s attorney that although his client was only claiming 560 cartons of cigarettes, 1,114 cartons were seized. The case history report noted that petitioner’s attorney was surprised by the seizure of an additional 550 cartons. Near the end of the meeting, petitioner and her attorney were advised that a portion of the cigarettes would not be returned because they did not have an authorized stamp on them. In

³We modified finding of fact “5” of the Administrative Law Judge’s determination to more accurately reflect the record.

particular, petitioner was not entitled to the Virginia stamped cigarettes, the Connecticut stamped cigarettes or the in-bond or duty-free cigarettes. When this was explained to petitioner and her representative, petitioner stated that the cigarettes were being held there by her son for someone known as the “fat man.” In response, the Division asked how to get in touch with this person. Petitioner replied that she did not know and that the Division would need to schedule an appointment with her husband and son to find out more about this person.⁴

Petitioner’s husband, accompanied by petitioner’s representative, brought additional invoices to a subsequent meeting at the Division’s offices. However, petitioner’s husband did not have any additional information on the individual known as the fat man. The Division investigated the new invoices and determined that, in total, the invoices supported the return of 592.4 cartons of cigarettes and, on August 10, 2001, the 592.4 cartons were returned.

In a memorandum dated January 28, 2002, the Petroleum, Alcohol and Tobacco Bureau of the NYPD referred this matter to the Division for the assessment of tax, fines and penalties as well as any additional action deemed appropriate.

The Division issued a Notice of Determination, dated May 20, 2002, which asserted that a penalty was due in the amount of \$80,055.00. In order to determine the amount of the penalty, the Division subtracted five cartons, which were deemed for personal use, from the cartons of cigarettes which were considered contraband (538.7) and multiplied the remainder (533.7) by a penalty of \$150.00 per carton of contraband cigarettes. Petitioner was assessed because, at the time of the seizure, she stated that the cigarettes belonged to her.

⁴We modified finding of fact “6” of the Administrative Law Judge’s determination to more accurately reflect the record.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that, during the period at issue, Tax Law § 481(1)(b) provided that the Commissioner of Taxation and Finance may impose a penalty of not more than \$150.00 for each two hundred cigarettes or fraction thereof in excess of one thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person. The Administrative Law Judge stated that it was undisputed that contraband cigarettes were found on the premises of petitioner's apartment. He observed, however, that the issue to be determined was whether petitioner was a person in possession of or who had control of unlawfully stamped cigarettes, thereby subjecting her to the imposition of the penalty.

The Administrative Law Judge rejected petitioner's arguments that the search of her apartment was illegal because she did not consent to the search and that Investigator Murray's testimony regarding a conversation between Investigator Mars and petitioner was hearsay and should not have been considered.

The Administrative Law Judge found that, based on the credible testimony of Investigator Murray, petitioner consented to the search of her apartment. Further, the Administrative Law Judge held that this testimony was not hearsay because it was not offered for the truth of a fact asserted in an out of court statement but concerned what the witness personally heard.

The Administrative Law Judge also found that the record was clear that petitioner knowingly and voluntarily consented to the entry because the questions from the investigators to petitioner were translated by a NYPD detective in order to avoid any misunderstanding regarding what was being asked and what the response was.

The Administrative Law Judge noted that from outside of the apartment, the investigators were able to observe that there were half cases of cigarettes throughout the apartment. Further, the investigators were lawfully in the apartment by virtue of petitioner's consent. Therefore, the Administrative Law Judge found that even if petitioner did not expressly consent to a search, the large volume of cigarettes located outside of her apartment and the observation of additional half cases of cigarettes in the apartment provided probable cause to believe that regulated activity was taking place in the apartment. The Administrative Law Judge concluded that this gave the Division the authority, pursuant to Tax Law § 474, to lawfully enter the apartment and seize the inventory.

The Administrative Law Judge rejected petitioner's contention that a new hearing was warranted, finding that petitioner voluntarily chose to appear at the hearing without counsel and must abide by the consequences of that decision. The Administrative Law Judge also denied petitioner's claim that the penalty was too great. The Administrative Law Judge concluded the attempt to utilize erroneous invoices to have the contraband cigarettes returned evidenced a lack of contrition. The Administrative Law Judge also found it significant that a large number of contraband cigarettes were found in petitioner's possession and that petitioner's store was involved in the sale of contraband cigarettes in the past. The Administrative Law Judge found petitioner's defense that her son brought the cigarettes to her apartment without her knowledge inadequate as a matter of law and lacking credibility. The Administrative Law Judge held that, under the circumstances, the penalties imposed were appropriate.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that prior to her hearing, she had produced evidence that of the cigarettes seized on February 23, 2001, at least 592.4 cartons were legally in her possession. Petitioner claims that at the hearing, she participated without benefit of counsel in a hearing conducted in a language that she did not understand, with only her daughter present to try to act as an interpreter. Petitioner seeks, among other relief, a new hearing and alleges that it was error on the part of the Administrative Law Judge to deny her request for a new hearing.

Petitioner maintains that she had no control or possession of the cigarettes seized outside of her apartment, which is clearly a public area, and it was her son, and not her, who brought cigarettes into the building and into this public area.

Petitioner argues that there were irregularities in the testimony of the Division's witness such that the number of cartons of cigarettes seized was inconsistently stated and the number of faxed invoices by petitioner that were considered illegitimate because they did not bear a company seal was inconsistent. Further, the Division's witness only testified that another investigator saw cigarettes within petitioner's apartment, and not that the witness saw them.

Petitioner claims that the Administrative Law Judge incorrectly found that petitioner sought the return of all the seized cigarettes. Petitioner alleges that she consistently claimed only those cigarettes which she was legally entitled to possess. Petitioner maintains that there is no evidence that she knew the number of cartons of cigarettes in the hall either before or after she moved the cigarettes from the apartment into the hall.

Based on the testimony, petitioner maintains that there is no evidence that any of the illegally stamped cigarettes were in the apartment rather than in the hall. Rather, the only

testimony concerning the viewing of illegal cigarettes was of the cigarettes in the hall. If there were any illegal cigarettes in the apartment, based on the testimony regarding the numbers found in the hall and in the apartment, it could only have been a very small number of cartons, at best.

Petitioner asserts that given the situation in which petitioner found herself, with investigators in the hallway, her son in handcuffs, her inability to understand English and without evidence that anyone present at that time (other than petitioner and her son) spoke the Fujianese dialect, it is questionable at best what petitioner admitted to. Petitioner asserts that she is a native Fujianese speaker, which is a minority dialect in China, and less common than the Mandarin or Chinese dialects. Petitioner points out that while the police officer present at the time of the seizure may have spoken Chinese, there is no evidence that he either spoke or understood the Fujianese dialect.

Petitioner also objects to the imposition of the maximum fine available under the law as well as relying on petitioner's husband's prior violation of possession of illegal cigarettes as a factor in determining the appropriate penalty.

In opposition, the Division argues that the Administrative Law Judge properly determined that no warrant was required when petitioner's apartment was searched because petitioner gave permission for entry into her apartment. Further, the Division maintains that no search warrant was required because the contraband cigarettes were in plain view of the Division's Investigators from outside the apartment. The Division also argues that Tax Law § 474(4) provides ample authority to have searched petitioner's premises without a warrant. The Division agrees with the Administrative Law Judge's refusal to grant petitioner a new hearing as it was petitioner's choice to appear without representation.

OPINION

Tax Law § 481(1)(b) provides as follows:

In addition to any other penalty imposed by this article, the commissioner of taxation and finance may impose a penalty of not more than one hundred fifty dollars for each two hundred cigarettes, or fraction thereof, in excess of one thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person.

The only issue, therefore, is whether petitioner was in possession or control of unstamped or unlawfully stamped cigarettes.

There is no question that petitioner was in possession of certain cigarettes in her apartment on February 23, 2001 although the record is not clear as to where the illegally stamped cigarettes were found. Investigator Murray estimated that there were “well over 500 cartons” of cigarettes lying on the steps leading to the floor of the building on which petitioner’s apartment was located and outside of the apartment (Tr., p. 12). The remainder of the cigarettes were located in petitioner’s apartment. Approximately half of the 1,131 cartons of cigarettes seized on February 23, 2001 were illegally stamped while the remainder bore valid New York stamps.

Even if all the illegally stamped cigarettes seized were outside of petitioner’s apartment on February 23, 2001, petitioner has not met her burden of proof to show that such cigarettes were not in her possession or under her control at that time. In support of her claim, petitioner testified that she was unaware of her son’s activity in regard to transporting illegally stamped cigarettes and that she was not at home when he brought the cigarettes into her apartment building. It would be an unwarranted conclusion to hold, based solely on petitioner’s testimony, that petitioner’s minor son was completely responsible for transporting and storing over 500 cartons of illegally stamped cigarettes outside of and possibly inside of petitioner’s apartment

without petitioner's knowledge or consent, at the same time that petitioner herself was using the apartment to store cigarettes.

While the penalty imposed by Tax Law § 481(1)(b) is severe, its severity does not change petitioner's burden of proof in this proceeding. Petitioner's arguments on exception regarding an illegal search, language difficulties and discrepancies in the Division's own records notwithstanding, petitioner presented no evidence at her hearing to substantiate these claims. As a result, we find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Bi Lan Jiang is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Bi Lan Jiang is denied; and
4. The Notice of Determination, dated May 20, 2002, is sustained.

DATED: Troy, New York
March 31, 2005

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner