

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WISSAM SALMAN SALAMEH : DETERMINATION
for Revision of a Determination or for Refund of Cigarette : DTA NO. 816972
Tax under Article 20 of the Tax Law for the Period Ended :
October 1, 1996. :

Petitioner, Wissam Salman Salameh, 2 Morross Court, Dearborn, Michigan 48126, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended October 1, 1996.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York on September 30, 1999 at 9:30 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Justine Clarke Caplan, Esq., of counsel).

ISSUES

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

FINDINGS OF FACT

1. At the time of the events which gave rise to the penalty at issue in this matter, petitioner, Wissam Salman Salameh, was employed delivering pizza for an establishment in Michigan. On September 11, 1996, petitioner was approached by Zeyed Nassar of Dearborn, Michigan with an offer of a way for petitioner to earn additional money. Mr. Nassar suggested that petitioner drive to New York in a rented van, take delivery of a quantity of cigarettes and transport them back to Mr. Nassar. As compensation, Mr. Nassar offered to pay petitioner \$200.00 for his services and to reimburse petitioner for the cost of the van. At the time this offer

was made, Mr. Nassar assured petitioner that all he had to do was bring the cigarettes to him. Mr. Nassar also told petitioner that he was not being asked to do anything illegal.

2. Petitioner accepted the offer and rented the van using his credit card. Thereafter, Mr. Nassar reimbursed petitioner for the cost of the van. On September 12, 1996, petitioner arrived in New York and stayed at the Blue Falls Motel in Niagara Falls. He waited at the motel for two days until it was time to pick up the cigarettes.

3. Petitioner was given directions by Mr. Nassar on where to go to pick up the cigarettes and what route to take. On September 14, 1996, petitioner left the motel to go to the Indian reservation at Lewiston, New York.

4. When he arrived at the reservation, petitioner went to the Blanket Smoke Shop and asked for Frank or his son Mark. He did not know their last names. Thereafter, petitioner met Frank and told him that "Z" (Nassar) sent him. Frank told petitioner to drive the van into the building. Thereafter, Frank and his son loaded the van with cases of cigarettes. It is petitioner's belief that 2,500 cartons of cigarettes were placed in the van. Petitioner noticed the cigarettes being put into the van but the absence of cigarette stamps did not look unusual to him because it was his understanding that Michigan did not have a stamp for cigarettes at the time. After he left the reservation, the plan was for petitioner to meet Mr. Nassar near the Pennsylvania state line after the last toll in New York.

5. When the van was loaded with the cigarettes, petitioner drove to the New York State Thruway. While en route in New York, petitioner was stopped by a police officer. The officer asked what was in the truck and petitioner replied that there were cigarettes. The officer asked petitioner what he was doing with the cigarettes and petitioner replied that he was delivering them to Zeyed Nassar.¹ Upon inspection, petitioner was found to have in his possession 2,661 cartons or 532,000 cigarettes in unstamped, untaxed packages.

¹ Mr. Nassar instructed petitioner that when he reached a particular location, he was to call Mr. Nassar's pager number. It was anticipated that Mr. Nassar would call petitioner back at a particular pay phone in order to give further instructions on what should be done with the cigarettes.

6. Petitioner explained to the police officer that because the cigarettes belonged to Zeyed Nassar he assumed that Zeyed Nassar had paid for them. The police officer replied that petitioner's actions were against the law and that the cigarettes needed to have a New York State stamp. Petitioner then told the officer that in Michigan, where he resided, there is no cigarette stamp and that he did not know that a stamp was needed in New York.

7. Petitioner was charged with one count of speeding, a felony count of possession of untaxed cigarettes in violation of Tax Law § 1814(e) and a felony count of attempting to evade or defeat the tax on cigarettes and tobacco products in violation of Tax Law § 1814(a)(2). After spending a week in jail, petitioner's parents appeared and secured his release.

8. On September 19, 1996, petitioner appeared at the Westfield Town Court in order to enter a guilty plea. During the court proceedings, the prosecuting attorney advised the court that petitioner would be convicted of a misdemeanor in satisfaction of all of the charges if he pled to a particular charge. Thereafter, petitioner pled guilty to one misdemeanor count of attempting to evade or defeat the tax on cigarettes and tobacco products (Tax Law § 1814[a][1]) in satisfaction of all of the charges pending against him and was sentenced to a \$1,000.00 fine plus a \$90.00 surcharge and time served. At the time of the plea, petitioner answered yes to the question of whether it was his intent to evade or defeat the tax on the cigarettes he purchased in New York. Petitioner made this admission because he was told that the plea would resolve the matter.

9. The Division of Taxation issued a Notice of Determination, dated April 13, 1998, which assessed a penalty against petitioner in the amount of \$262,200.00.

10. At the time of the hearing, petitioner had just turned 25 years old and was employed delivering pizza and providing valet parking.

SUMMARY OF THE PARTIES' POSITIONS

11. At the hearing, petitioner argued that the cigarettes were not his and that he did not sell them to anyone. Petitioner noted that he was delivering the cigarettes as an employee.

Petitioner also argued that the Division should not have asserted that additional tax was due because he was told that the matter would be concluded at the time of his guilty plea.

12. The Division argued that the assessment should be sustained in full because there is a presumption that cigarettes are subject to tax when a person is traveling on the public highways with untaxed cigarettes. It maintained that petitioner has not provided any documents to show that tax was paid on these cigarettes.

CONCLUSIONS OF LAW

A. Tax Law § 474(1) states that:

Every person who shall possess or transport any unstamped cigarettes upon the public highways, roads or streets of the state, shall be required to have in his actual possession invoices or delivery tickets for such cigarettes. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the cigarettes transported, and the name and address of the person who has or shall assume the payment of the tax. The absence of such invoices or delivery tickets shall be prima facie evidence that such person is a dealer in the cigarettes in this state and subject to the provisions of this article.

Tax Law § 481(2)(a) states:

The possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages or more than two hundred fifty cigars or more than five pounds of tobacco by any person other than an agent or distributor, as the case may be, at any one time shall be presumptive evidence that such cigarettes or tobacco products are subject to tax as provided by this article.

Tax Law § 481(1)(b) provides, in pertinent part, 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 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. . . . The commissioner of taxation and finance, in his discretion, may remit all or part of such penalty.

B. Here, it is undisputed that petitioner was in possession and control of unstamped cigarettes. Moreover, there is no evidence that petitioner was in possession of invoices or delivery tickets for such cigarettes. Under these circumstances, petitioner is liable for the penalty imposed by Tax Law § 481(1)(b). The imposition of the criminal penalties at the time of

the guilty plea has no bearing upon the civil penalty imposed by the section of the Tax Law set forth above.

C. At the hearing, petitioner complained that he could not pay the penalty imposed by the Division. This objection raised the issue of the amount of the penalty.

As set forth above, Tax Law § 481(1)(b) gives the Commissioner the discretion to impose a penalty of *not more than* \$100.00 for each 200 cigarettes or fraction thereof in excess of 2,000 cigarettes in unstamped or unlawfully stamped packages. Here, petitioner was found to have in his possession 2,661 cartons or 532,200 cigarettes in unstamped packages. In apparent reliance upon the provisions set forth above, the Division issued a Notice of Determination assessing a penalty in the amount of \$262,200.00.

D. The appropriate standard of review of a discretionary act by the Division is a de novo review standard (*Matter of OK Petroleum Products Corp.*, Tax Appeals Tribunal, November 1, 1990).

E. Here, the Division did not present any reason why it imposed a penalty of \$262,000.00. Therefore, it is impossible to know whether the Division considered the nature, number and degree of the violation (*see, Matter of Allied Grocers Cooperative*, Tax Appeals Tribunal, November 30, 1989, *confirmed* 162 AD2d 791, 557 NYS2d 707).

The record shows that petitioner was transporting in excess of 2,600 cartons of unstamped cigarettes when he was stopped by the police. Clearly, this is a serious violation of the law which warrants a significant sanction. Presumably, this was the reason why the Division imposed nearly the maximum penalty allowed by law.

The difficulty with the sanction imposed by the Division is that it does not take into account the presence of numerous mitigating factors. In this regard, it should be borne in mind that the statute affords the Commissioner wide latitude in determining the appropriate amount of penalty to impose. The petitioner in this case is a young man with obviously limited financial resources. He transported the cigarettes as an employee of another individual and not as part of

his own business enterprise. It is also significant that there is no evidence that petitioner ever transported unstamped cigarettes on any other occasion. Under these circumstances, it is concluded that the penalty imposed by the Division is grossly excessive and that a penalty of \$2,620.00 is adequate to achieve the goals of imposing a sanction upon petitioner and deterring petitioner and others in petitioner's position from transporting unstamped cigarettes in New York State.

F. The petition of Wissam Salman Salameh is granted to the extent of Conclusion of Law "E" and the penalty asserted in the Notice of Determination, dated April 13, 1998, is reduced to \$2,620.00; except as so granted, the petition is otherwise denied and the Notice of Determination, as modified, is sustained together with such penalties as may be lawfully due.

DATED: Troy, New York
March 9, 2000

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE