

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
NAILA HAIDER : ORDER
 : DTA NO. 820362
for Revision of a Determination or for Refund of :
Cigarette Tax under Article 20 of the Tax Law for the :
Period Ended September 9, 2003. :

Petitioner, Naila Haider, 438 May Street, Naugatuck, Connecticut 06077, 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 September 9, 2003.

A small claims hearing was held before James Hofer, Presiding Officer, at the offices of the Division of Tax Appeals, 400 Oak Street, Garden City, New York on July 24, 2006 at 1:30 P.M. Petitioner appeared by Mohammad S. Pasha. The Division of Taxation appeared by Mark F. Volk, Esq. (Paula Tunkel).

The Presiding Officer issued a determination on October 23, 2006 which granted the petition and canceled the Notice of Determination, dated November 24, 2003.

By letter dated November 21, 2006, petitioner, by her representative, Mohammad S. Pasha, filed an application for costs under Tax Law § 3030. The Division of Taxation, appearing by Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel), filed a letter in opposition to the application on January 3, 2007, which date began the 90-day period for the issuance of this order.

Based upon petitioner's application for costs, the Division's letter in opposition, the determination issued October 23, 2006, and all pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner is entitled to an award of costs pursuant to Tax Law § 3030.

FINDINGS OF FACT

1. As a result of a sting operation, petitioner was arrested at her home for taking delivery of two boxes of unstamped cigarettes which were addressed to her husband. Each box contained 50 cartons of cigarettes. The criminal charges were adjourned in contemplation of dismissal.

2. Petitioner told the investigators from the Tax Department that the cigarettes were for her brother, who operated a retail store and who had been caught selling unstamped cigarettes in the past. In addition, she told the investigators she and her husband did not smoke and had no prior incidents like this one.

3. The Division of Taxation issued a Notice of Determination to petitioner on November 24, 2003, in which it asserted that petitioner was liable for a civil penalty of \$14,250.00 pursuant to Tax Law § 481(1)(b)(i).

4. The presiding officer determined that petitioner did not knowingly possess or have control of the unstamped cigarettes in issue and therefore was not liable under the provisions of Tax Law § 481(1)(b)(i). The presiding officer found that there was no evidence that petitioner knew from first-hand knowledge that the boxes contained cigarettes or that she was involved in the purchase of the cigarettes. The presiding officer placed emphasis on petitioner's inability to speak English proficiently, the fact that the cigarettes were not addressed to her and the lack of evidence in the record demonstrating her involvement with the purchase, sale or transportation of

cigarettes. The presiding officer found that she merely signed for the boxes on behalf of her husband, not knowing what they contained. In so finding, he granted petitioner's petition and canceled the Notice of Determination, believing it was a fair and equitable resolution.

5. The application for costs, dated November 21, 2006, contained an unsworn statement by petitioner which merely stated that she "fully prevailed" in her small claims proceeding and was eligible for reasonable administrative costs pursuant to Tax Law § 3030. Ms. Haider asked for \$6,000.00 in criminal defense costs in a related matter charged by her attorney, Usman Ahmad, but for which she submitted no itemized bill or statement of services. In addition, she requested the fees of Mohammad S. Pasha in the sum of \$9,300.00 for his work in assisting Ms. Haider in presenting her case. Mr. Pasha is not a professional tax representative, listing himself on the power of attorney as petitioner's "brother-in-law and cousin."

Mr. Pasha stated, in an unsworn attached statement, that he spent 186 hours researching the Tax Law and preparing for the criminal and civil cases. At a rate of \$50.00 an hour, his fee was \$9,300.00. He stated that he incurred administrative expenses for transportation, postage and stationery, which he estimated to be about \$400.00, but had no receipts and therefore did not ask for reimbursement. With the undocumented attorney fee, total costs claimed by petitioner amounted to \$15,300.00.

6. The Division argues that the application for costs must fail because it failed to contain a sworn statement or other evidence that petitioner's net worth did not exceed two million dollars; that petitioner did not provide an itemized statement or bill from Usman Ahmad, Esq., for fees paid in a related criminal matter; and that the Division's position was substantially justified thus preventing petitioner from being the prevailing party in this matter.

CONCLUSIONS OF LAW

A. Tax Law § 3030(a) provides, generally, as follows:

In any administrative or court proceeding which is brought by or against the commissioner in connection with the determination, collection, or refund of any tax, the prevailing party may be awarded a judgment or settlement for:

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the department, and

(2) reasonable litigation costs incurred in connection with such court proceeding.

Reasonable administrative costs include reasonable fees paid in connection with the administrative proceeding, but incurred after the issuance of the notice or other document giving rise to the taxpayer's right to a hearing. (Tax Law § 3030[c][2][B].) The statute also provides that fees for the services of an individual who is authorized to practice before the Division of Tax Appeals are treated as fees for the services of an attorney. (Tax Law § 3030[c][3].)

B. A prevailing party is defined by the statute as follows:

[A]ny party in any proceeding to which [Tax Law § 3030(a)] applies (other than the commissioner or any creditor of the taxpayer involved):

(i) who (I) has substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) who (I) within thirty days of final judgment in the action, submits to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed . . . and (II) is an individual whose net worth did not exceed two million dollars at the time the civil action was filed

(B) Exception if the commissioner establishes that the commissioner's position was substantially justified.

(i) General rule. A party shall not be treated as the prevailing party in a proceeding to which subdivision (a) of this section applies if the commissioner establishes that the position of the commissioner in the proceeding was substantially justified.

(ii) Burden of proof. The commissioner shall have the burden of proof of establishing that the commissioner's position in a proceeding referred to in subdivision (a) of this section was substantially justified, in which event, a party shall not be treated as a prevailing party.

(iii) Presumption. For purposes of clause (i) of this subparagraph, the position of the commissioner shall be presumed not to be substantially justified if the department, inter alia, did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

* * *

(C) Determination as to prevailing party. Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or (i) in the case where the final determination with respect to tax is made at the administrative level, by the division of tax appeals, or (ii) in the case where such final determination is made by a court, the court. (Tax Law § 3030[c][5].)

C. It is concluded that petitioner was not the prevailing party within the meaning and intent of Tax Law § 3030 because the Division was substantially justified in issuing the Notice of Determination based upon its chosen audit methodology. The factors which weighed most heavily in the mind of the presiding officer were factors which were unknown to the Division when it issued the Notice of Determination in this matter. The presiding officer determined from his interpretation of the tax statutes in issue that petitioner did not knowingly possess or control unstamped cigarettes. He based this conclusion on petitioner's inability to speak English, which caused confusion on the day the cigarettes were delivered to her and in her statements to the authorities. The cigarettes were not addressed to her and the presiding officer believed her to be credible when she stated that she did not know what the boxes contained. The presiding officer

determined that she merely signed for the boxes on behalf of her husband and never had possession and control of the cigarettes as defined in the statutes, thus reaching what he considered a fair and equitable resolution of the matter.

However, this conclusion did not diminish the Division's substantial justification for issuing the notice in this matter. In *Matter of Vinter* (Tax Appeals Tribunal, September 27, 2001), the Tribunal clearly stated that there is no requirement that petitioner intend to sell or purchase the cigarettes or have specific knowledge of the circumstances. It is sufficient only that petitioner have possession and control to be liable for the penalty imposed by Tax Law § 481(1)(b). It was not denied that petitioner was in actual physical possession and control of the cigarettes at the time of her arrest. Further, the fact that the presiding officer found that the equities of this matter commanded the result he reached, indicated that he believed the interpretation of Tax Law § 481(1)(b) as presented in the *Vinter* case would yield a severe result that justified equitable remediation. Hence, the Division's actions, guided by the Tax Law and interpreted by *Vinter* were substantially justified.

D. Further, it is determined that petitioner has not met the definition of a prevailing party because she failed to establish her expenses. She alleged that she incurred an expense of \$6,000.00 in attorney fees allegedly paid to Usman Ahmad, Esq., in a related criminal matter. However, she submitted no itemized bill for his services. In addition, she is not entitled to expenses incurred in a related criminal matter because it is not included in the definition of court proceeding or administrative proceeding in the statute (Tax Law § 3030[c][2], [6], [7]). Since the fees for Mr. Pasha include unsegregated charges for the administrative and criminal proceedings, the entire fee charged by Mr. Pasha must be denied as well.

Finally, and as a third independent basis for denying the relief sought, petitioner has not established that she is an individual whose net worth did not exceed two million dollars at the time the action was filed as explicitly required by Tax Law § 3030(c)(5)(A)(ii).

E. The application for costs of Naila Haider is denied.

DATED: Troy, New York
March 15, 2007

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE