

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AJAZ PASHA MOUGHAL	:	SMALL CLAIMS DETERMINATION DTA NO. 820363
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, Ajaz Pasha Moughal, 94-42 46th Avenue, Elmhurst, New York 11373, 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 hearing¹ was held before James Hoefer, 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).

Since neither party reserved time for the submission of post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the small claims hearing was held.

ISSUE

Whether the Division of Taxation properly determined that petitioner was a person in possession of or had control of 100 cartons of unstamped or illegally stamped cigarettes and, as such, was liable for a penalty in the sum of \$14,250.00 imposed pursuant to Tax Law § 481(1)(b)(i).

¹ At petitioner's request, the small claims hearing held herein was combined with the petition filed by his sister Nailia Haider under DTA # 820362. Although one record was made for both matters, separate determinations have been issued based on the combined hearing.

FINDINGS OF FACT

1. In July 2003, United States Customs Service² inspectors at John F. Kennedy (“JFK”) Airport determined that six large boxes which had been mailed from Pakistan contained cartons of cigarettes. Two of the boxes were addressed to petitioner Ajaz Pasha Moughal at his 94-42 46 Avenue, Elmhurst, New York 11373 address. The other four boxes, two each, were addressed to petitioner’s brother, Ali Moughal, at 538 Graham Avenue, Apt. 1, Brooklyn, New York and his brother-in-law, Sayjad Haider (a/k/a Mohammed Sayjad Haider), at 538 Graham Avenue, Apt. 3, Brooklyn, New York.

2. The U.S. Customs Service did not allow the six boxes to clear through customs, but instead informed the Division of Taxation (“Division”) of the existence of the six boxes of cigarettes. On July 24, 2003, an investigator from the Division opened all six boxes at JFK Airport and discovered that each box contained 50 cartons of Benson & Hedges cigarettes. None of the packages of cigarettes contained New York State tax stamps. All six boxes were resealed.

3. The Division, in conjunction with United States Postal Service authorities, arranged for a controlled delivery of the six boxes of unstamped cigarettes to take place on September 9, 2003. At approximately 9:30 A.M. on September 9, 2003, a United States Postal Service employee attempted to deliver the two boxes of unstamped cigarettes which were addressed to petitioner at 94-42 46 Avenue, Elmhurst, New York 11373. Petitioner’s wife initially answered the door and was willing to sign for the packages as petitioner had just gone to bed. At the postal employee’s insistence, petitioner was awakened and he personally took delivery of the boxes and signed the postal delivery receipt. The postal service employee then exited the building.

4. Immediately after the postal service employee left the building, inspectors from the Division entered and seized the two unopened boxes of unstamped cigarettes. Petitioner was

² The United States Customs Service (now part of U.S. Customs and Border Protection) is the portion of the Federal government dedicated to keeping illegal products outside of U.S. borders.

read his Miranda rights and he refused to answer any questions without the presence of his attorney. Soon after the investigators entered his home petitioner began to experience chest pains and, having a history of heart problems, petitioner was immediately transported to a local hospital by ambulance.

5. Petitioner was ultimately placed under arrest and criminal charges were filed under Tax Law § 1814(a)(2), a class E felony, asserting that petitioner was a “person who willfully attempts in any manner to evade or defeat the taxes imposed by article twenty of this chapter or payment thereof on (i) twenty thousand cigarettes or more . . .” and Tax Law § 1814(e)(1), also a class E felony, as a “person, other than an agent licensed by the commissioner, who willfully possesses or transports for the purpose of sale twenty thousand cigarettes or more. . . .” On or about January 27, 2004, petitioner entered a plea of guilty to Tax Law § 1814(e)(1) in full satisfaction of all charges brought against him. Petitioner was sentenced to a one year period of conditional discharge to expire on January 26, 2005 and he also assigned to the Queens District Attorney his right, title and interest to \$2,933.00 of cash which was seized from his home pursuant to a search warrant which was executed on September 9, 2003.

6. It is undisputed that Ali Moughal, petitioner’s brother, was involved in the operation of a retail deli/grocery store business and that this operation has been caught on several occasions selling unstamped Benson & Hedges cigarettes, the same brand of cigarettes found in the two boxes addressed to petitioner. While petitioner admitted that his name has been associated with and used in the retail deli/grocery store business operated by Ali Moughal, he maintains that said association and use existed only because his brother had poor credit. During the search of petitioner’s residence many business and financial records were found pertaining to the operation of a store on Hillside Avenue in Queens, New York. The retail deli/grocery store business which petitioner’s brother operated was located on Hillside Avenue in Queens, New York.

7. On November 24, 2003, the Division issued a Notice of Determination to petitioner asserting that he was liable for a civil penalty in the sum of \$14,250.00. The penalty was

imposed pursuant to Tax Law § 481(1)(b)(i) at the maximum rate of \$150.00 per carton for 95 cartons of unstamped cigarettes. Although 100 cartons of unstamped cigarettes were found, Tax Law § 481(1)(b)(i) provides that the penalty of \$150.00 per carton be imposed for every carton in excess of five cartons of unstamped or unlawfully stamped cigarettes.

CONCLUSIONS OF LAW

____A. Tax Law § 481(1)(b)(i) provides, in pertinent part, that “the commissioner 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 penalty imposed by Tax Law § 481(1)(b)(i) can be waived in whole or in part by the commissioner in the commissioner’s discretion (Tax Law § 481[1][b][iii]).

B. On or about January 27, 2004, petitioner, in full satisfaction of the two class E felony charges, pled guilty in Queens County Criminal Court to a violation of Tax Law § 1814(e)(1). Tax Law § 1814(e)(1) states as follows:

Any person, other than an agent licensed by the commissioner, who willfully possesses or transports for the purpose of sale twenty thousand or more cigarettes subject to the tax imposed by section four hundred seventy one of this chapter in any unstamped or unlawfully stamped packages or who willfully sells or offers for sale twenty thousand or more cigarettes in any unstamped or unlawfully stamped packages in violation of article twenty of this chapter shall be guilty of a class e felony.

C. In the instant matter petitioner asserts that he was not a person in possession of or had control over the 100 cartons of untaxed cigarettes delivered to his residence and, as such, he cannot be held liable for the penalty imposed by Tax Law § 481(1)(b)(i). Initially, I note that the doctrine of collateral estoppel would prevent petitioner from raising this defense. In ***Matter of Planit*** (Tax Appeals Tribunal, February 7, 1991), the Tribunal stated:

The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action an issue clearly raised in a prior action and decided against that party or those in privity with that party (***Matter of Choi v. State of New York***, 74 NY2d 933, 550 NYS2d 267, 269; ***Ryan v. New York Tel. Co.***, 62 NY2d 494, 478 NYS2d 823, 826). In order to invoke this doctrine there must be an identity of issue which has

necessarily been decided in the prior action and is decisive of the present action and there must have been a full and fair opportunity to contest the prior decision (*Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 NY2d 147, 531 NYS2d 876, 878; *Schwartz v. Public Adm'r of County of Bronx*, 24 NY2d 65, 298 NYS2d 955, 960). The party seeking the benefit of collateral estoppel must meet the burden of showing the identity of the issues in the present litigation and the prior determination (*Kaufman v. Eli Lilly & Co.*, 65 NY2d 449, 492 NYS2d 584, 588).

Having pled guilty in Queens County Criminal Court to a class E felony violation of Tax Law § 1814(e)(1) for possessing or transporting for sale untaxed cigarettes or for selling or offering for sale untaxed cigarettes, petitioner cannot now relitigate this same issue here by contending that he was not a person in possession or control of these same untaxed cigarettes for purposes of Tax Law § 481(1)(b)(i) (see, *Matter of Bayridge Supermarket, Inc.*, Tax Appeals Tribunal, January 2, 2003; *Matter of Fahy*, Tax Appeals Tribunal, April 5, 1990).

D. Even if petitioner was not collaterally estopped from arguing this issue, the evidence adduced in the instant matter is sufficient to show that he was a person in possession or control of the untaxed cigarettes at issue and, as such, subject to the penalty imposed by Tax Law § 481(1)(b)(i). The unstamped cigarettes in question were addressed to petitioner and he willingly accepted delivery of the illegal contraband. There is also evidence in the record to establish that petitioner had significant ties to the retail deli/grocery store business operated by his brother and that said retail deli/grocery store business has in the past been engaged in the sale of unstamped cigarettes which were the same brand contained in the two boxes delivered to petitioner's residence.

E. The petition of Ajaz Pasha Moughal is denied and the Division's Notice of Determination dated November 24, 2003 is sustained in its entirety.

DATED: Troy, New York
October 23, 2006

/s/ James Hoefer
PRESIDING OFFICER