

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MAHER A. FAKHOURI	:	DETERMINATION
	:	DTA NO. 820906
for Revision of a Determination or for Refund of Cigarette	:	
Tax under Article 20 of the Tax Law for the Period Ended	:	
August 29, 2003.	:	

Petitioner, Maher A. Fakhouri, 111 Spackenkill Road, Poughkeepsie, New York 12603, 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 August 29, 2003.

On July 19, 2006, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the ground that the pleadings fail to state a cause of action for relief, or in the alternative, there are no material issues of fact and that as a matter of law the motion for summary determination should be granted. Petitioner's response was due August 21, 2006, which started the 90-day period for issuing this determination. The Division of Taxation appeared by Mark F. Volk, Esq. (Michele W. Milavec, Esq., of counsel). Petitioner appeared *pro se*. Based upon the pleadings and motion papers, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner, Maher A. Fakhouri, was in possession or control of unstamped cigarettes and, if so, whether summary determination should be granted in favor of the Division of Taxation because there are no facts in dispute and the facts mandate a determination in favor of the Division.

II. Whether the penalty imposed against petitioner for the possession or control of unstamped cigarettes was excessive.

FINDINGS OF FACT

1. On August 27, 2003, the Division of Taxation (“Division”) received information from the United States Postal Service stating that petitioner, Maher A. Fakhouri, had received numerous shipments marked “cigarettes.” The shipments originated outside the United States and were received at petitioner’s post office box.

2. On August 29, 2003, Division investigators confronted petitioner at his residence. Thereafter, petitioner and his attorney gave 190 cartons of untaxed cigarettes to the investigators. Subsequently, petitioner signed a property receipt which identified the cigarettes which had been seized. The cigarettes were marked “US tax exempt for use outside US.”

3. Petitioner admitted to the Division’s investigators that he ordered the cigarettes over the Internet. Thereafter, petitioner was charged with one class D felony and one class E felony for violation of Tax Law § 1814 for possession of unstamped untaxed cigarettes and willfully attempting to evade or defeat the taxes imposed by Article 20 of the Tax Law.

4. As part of the forgoing criminal proceedings, petitioner executed an affidavit which stated, in pertinent part, that on August 15, 2003, he purchased cigarettes from an Internet company and that on August 29, 2003, he was arrested and charged with the two crimes of possession for sale of cigarettes and attempt to evade or defeat cigarette tax. Petitioner asserted that he made a mistake by believing the advice given to him by an Internet site with regard to purchasing and possessing cigarettes. According to petitioner, he did not have any intention to sell the cigarettes and did not know anyone who would purchase the cigarettes from him. Petitioner explained that he found an Internet web site which sold cigarettes for less money and planned on giving the cigarettes to his family and friends as Christmas gifts. In his affidavit, petitioner also noted that he was a recent graduate of a law school and was scheduled to take the New York State Bar Exam. Petitioner expressed concern that an arrest and conviction would prevent him from practicing law. Petitioner concluded that after realizing that the purchase and possession of the cigarettes was illegal, he fully complied with law enforcement personnel and,

after being promised that he could plead to a violation, he allowed law enforcement personnel to search his house and confiscate all of the cigarettes.

5. On May 24, 2004, petitioner entered a plea of guilty to a violation of Tax Law § 1814(a)(1) which is an attempt to evade or defeat tax imposed by Article 20 of the Tax Law, a misdemeanor.

6. The Division issued a Notice of Determination (Assessment number L-024283900), dated July 23, 2004, to petitioner which asserted that a penalty was due in the amount of \$27,750.00. The Notice explained that on August 29, 2003, petitioner was found to be in possession of unstamped or unlawfully stamped cigarettes or untaxed tobacco products. As a result, a penalty was imposed under Article 20 of the Tax Law. The notice was premised upon the Division's finding petitioner in possession of 190 cartons of untaxed cigarettes. In order to calculate the amount of the penalty, the Division exempted the first five cartons and then multiplied the remaining 185 cartons by a penalty of \$150.00 per carton.

SUMMARY OF PETITIONER'S POSITION

7. Petitioner filed a petition with the Division of Tax Appeals which asserted: that he did not pay the cigarette tax because he was duped by an illegal Internet supplier; that he cooperated with the district attorney's office; that the market value of the cigarettes forfeited totaled \$8,550.00; that doubling the cigarette tax would amount to an assessment of \$5,700.00 and not the proposed amount of \$27,750.00; that the Attorney General announced that the United States Postal Service would stop shipping illegal cigarettes; that the Attorney General announced an agreement with the vendor to stop selling on the Internet; that the Division has not provided a complete copy of the case file to petitioner as requested in January 2005; and, that the Conciliation Conferee proposed reducing the assessment to \$18,500.00 but petitioner offered \$2,850.00.

CONCLUSIONS OF LAW

A. Section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in part, that a motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

This section further provides that a motion for summary determination is subject to the

same provisions as a motion for summary judgment pursuant to CPLR 3212 (20 NYCRR 3000.9[c]). “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 317).

B. Tax Law § 481(1)(b)(i) provides, in pertinent part, as follows:

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 forgoing section further provides that:

The commissioner in the commissioner’s discretion, may remit all or part of such penalty. Such penalty shall be paid to the department and disposed of as hereinafter provided with respect to moneys derived from the tax. (Tax Law § 481[1][b][iii]).

C. On May 24, 2004, petitioner, in full satisfaction of the two felony charges, pled guilty in Poughkeepsie Town Court to a misdemeanor set forth in Tax Law § 1814(a)(1). This section states as follows:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by article twenty of this chapter or the payment thereof shall, in addition to other penalties provided by law, be guilty of a misdemeanor.

D. Petitioner has acknowledged that he was in possession or control of unstamped cigarettes and that he committed the forgoing misdemeanor. Indeed, having pled guilty to a

violation of Tax Law § 1814(a)(1) for willfully attempting to evade or defeat the cigarette tax, 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). Under the circumstances, petitioner was unquestionably in possession or control of unstamped cigarettes and the Division was authorized to impose a penalty pursuant to Tax Law § 481(1)(b)(i).

E. Petitioner avers a series of facts to support the argument that the Division's assertion of the Tax Law § 481(1)(b) penalty at \$150.00 per carton was excessive. The weight to be accorded these facts is governed by certain guidelines. A properly issued statutory notice is presumed to be correct (*Matter of Tavolacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174, *Matter of Leogrande*, Tax Appeals Tribunal, July 18, 1991, *affd Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 944, *lv denied* 81 NY2d 704, 595 NYS2d 398; *Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001, *confirmed* 305 AD2d 738, 757 NYS2d 911). In order to establish that the penalty imposed by the Commissioner should be reduced, petitioner would have to demonstrate by clear and convincing evidence that the amount of the penalty imposed was an abuse of discretion (*Matter of Vinter, supra*).

F. The facts asserted by petitioner do not establish that the amount of the penalty imposed was an abuse of discretion. The record shows that the Division received information from the United States Postal Service stating that petitioner received numerous shipments marked "cigarettes." The shipments originated from a location outside the United States and were received at petitioner's post office box. When confronted, petitioner turned over 190 cartons of cigarettes marked "US tax exempt for use outside US." Under the circumstances, the facts alleged by petitioner either alone or in combination do not establish that it was an abuse of discretion for the Commissioner to impose the maximum fine allowed by law (*see, Matter of*

Vinter, supra). Therefore, petitioner has not raised an issue of fact requiring a trial (CPLR 3212[b]).¹

G. The motion for an order dismissing the petition and granting summary determination to the Division of Taxation is granted, the petition of Maher Fakhouri is denied and the Division's Notice of Determination, dated July 23, 2004, is sustained.

DATED: Troy, New York
November 20, 2006

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE

¹ It is noteworthy that petitioner did not allege any prejudice from the failure to produce the case file.