

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**STOP AT PORT BOULEVARD, INC.** :  
for Review of a Denial, Suspension, Cancellation, Refusal : DETERMINATION  
or Revocation of a License, Permit, Appointment or : DTA NO. 821672  
Registration under Article 20 of the Tax Law. :

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Petitioner, Stop at Port Boulevard, Inc., c/o Parul Shah, 553 Port Washington Boulevard, Port Washington, New York 11050, filed a petition for review of a denial, suspension, cancellation, refusal or revocation of a license, permit, appointment or registration under Article 20 of the Tax Law.

An expedited hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 15, 2007 at 10:30 A.M. The petition was received by the Division of Tax Appeals on April 27, 2007, which date began the 30-day period for the issuance of this determination (20 NYCRR 3000.18[b]). However, by a letter dated May 1, 2007, petitioner requested that the hearing date herein be changed from May 11, 2007 to May 15, 2007 so that the 30-day period for the issuance of this determination was extended for an additional four days. Petitioner appeared by Mark L. Groothuis, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michelle M. Helm, Esq., of counsel).

***ISSUE***

Whether the Division of Taxation properly refused to allow petitioner's appointment as a distributor of tobacco products.

***FINDINGS OF FACT***

1. The Registration/Bond Unit, within the Transaction and Transfer Tax Bureau/ Fuel, Alcohol, Cigarette and Carrier Tax Section ("TTTB/FACCTS") of the Audit Division, issued a Notice of Proposed Refusal to Appoint as a Distributor of Tobacco Products Under Article 20 of the New York State Tax Law, dated January 19, 2007, to petitioner, Stop At Port Blvd., Inc. This notice provided the following explanation for the proposed refusal to appoint petitioner as a distributor of tobacco products:

On December 12, 2006, John Prehm and Frank Beekman did a premise inspection and interview as part of the application process. During the inspection Parul Shah was found to be in possession of 1,293 cigars, several pounds of tobacco an [sic] over 11 cartons of unstamped cigarettes without being licensed. The invoices presented for the above product detailed that the product was delivered to the previous business at this address. It appears that Parul Shah was using the licenses of the previous business to obtain product. The product was seized and eight (8) summonses were issued for various Cigarette Marketing Standards Act and Excise Tax Law violations.

Operating as a Distributor of Tobacco Products without prior approval (New York State Tax Law Article 20, Section 480.2[e] and 480.1[a]).

The New York State Tax Law provides that the department may refuse to appoint or license the application if it has cause to believe that such appointment or licensing would jeopardize the revenue due under Article 20 of the Tax Law. (New York State Tax Law, Chapter 60, Article 12-A, Section 480.2[e]).

2. In the petition dated April 25, 2007 signed by Parul Shah, petitioner's president, no specific errors made by the Division of Taxation ("Division") were specified. Neither were any relevant facts asserted in the petition, which merely included copies of the notice of refusal to

appoint, detailed in Finding of Fact “1”, and a conciliation order dated April 13, 2007 denying petitioner’s request for relief filed with the Bureau of Conciliation and Mediation Services.

3. Petitioner filed with the Division a Form MT-202 (Application for a License as a Wholesale Dealer of Tobacco Products or an Appointment as a Distributor of Tobacco Products) dated October 20, 2006 and signed by Parul A. Shah, under the title president. This application also noted Ms. Shah’s 100% ownership of petitioner. In its application, petitioner estimated that it “expected” to import or cause to import each month into New York State for sale tobacco products with “the total wholesale price” of \$800.00.

4. Petitioner had taken over the lease to 553 Port Washington Blvd. in Port Washington on Long Island as an assignee from a corporation whose handwritten name is difficult to decipher on the assignment and assumption of lease dated October 6, 2006. The prior tenant at the assigned premises was noted as KRM Cigar King, Inc., on the assignment while an attached rider noted the tenant as an individual named Mitalben Mehta. The consideration paid by petitioner for the assignment was \$10.00, and the rider attached to the assignment listed “minimum annual rent” for the assigned premises as follows:

Period	Monthly Installment	Minimum Annual Rent
1/1/06 to 12/31/07	\$ 2,335.58	\$28,026.96
1/1/07 <sup>1</sup> to 12/31/08	2,405.64	28,867.68
1//1/08 to 12/31/09	2,477.50	29,733.60

5. Petitioner received a Certificate of Authority, validated October 12, 2006, authorizing it to collect sales and use taxes, and a Retail Dealer Certificate of Registration for Cigarettes and

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<sup>1</sup> It is unknown if this date is noted in error since the prior period ended on December 31, 2007 as shown. Similarly, the starting date of 1/1/08 for the next period appears to be in error as well.

Tobacco Products, validated October 17, 2006, authorizing it to sell cigarettes and tobacco products.

6. In response to the application, the Registration/Bond Unit sent petitioner an application acknowledgment letter dated October 24, 2006 with an advisory that “the submission of an application does not permit you to conduct business.” This letter also specified that, “You may conduct business only if and when your application is approved and you are duly licensed.”

Furthermore, the letter included the following notice in bold type:

**Conducting any unauthorized business in this capacity is a violation of the tax law and may result in the denial of your application and may subject you to civil and/or criminal penalties.**

7. The Registration/Bond Unit, as part of its application review process, contacted the Division’s Office of Tax Enforcement on October 24, 2006 to request (i) a “premises inspection” of petitioner’s business and (ii) that they interview “the owner/responsible person(s).”

8. On December 11, 2006, John Prehm and Frank Beekman, two investigators from the Division’s Office of Tax Enforcement, conducted an inspection of petitioner’s premises and interviewed Parul Shah, the president and 100% shareholder of petitioner. The investigators discovered numerous Tax Law violations, which resulted in a misdemeanor information against Parul Shah for the following offenses:

Criminal charge	Statutory basis in Tax Law Article 37 (Crimes and Other Offenses, Seizures and Forfeitures)	Description of charge
Count 1	Tax Law § 1814(a)(1)	Attempted to evade and defeat the NYS tobacco tax by possessing for the purpose of sale untaxed tobacco product (cigars)
Count 2	Tax Law § 1814-a(a)	While not appointed as a tobacco products distributor, imported or caused to import tobacco product in excess of fifty cigars for sale within the state

Count 3	Tax Law § 1814(j)(1)	Had in her custody, possession or control more than 500 cigars upon which tobacco taxes had not been assumed or paid.
Count 4	Tax Law § 1814(h)	Did not maintain, possess, or produce for purposes of examination, invoices for tobacco product.
Count 5	Tax Law § 1814(a)(1)	Attempted to evade and defeat the NYS cigarette tax by possessing for the purpose of sale unstamped packages of cigarettes.
Count 6	Tax Law § 1814(d)	In possession of unstamped packages of cigarettes for the purpose of sale.
Count 7	Tax Law § 1814(a)(1)	Attempted to evade and defeat the NYS tobacco tax by possessing for the purpose of sale untaxed tobacco product.
Count 8	Tax Law § 1829	Did sell cigarettes at less than the cost of a retail dealer contrary to cigarette marketing standards.

On December 11, 2006, the date of the inspection of petitioner's premises, Investigator Prehm issued eight appearance tickets to Ms. Shah, directing her to appear on February 16, 2007 at Nassau First District Court in Hempstead, New York. The tickets conform to the eight counts detailed above. According to petitioner's representative who appeared at the expedited hearing, Ms. Shah anticipated working out an agreement on the criminal prosecution. He pointed out that on April 19, 2007 petitioner's name was substituted for Ms. Shah's name in the criminal prosecution and that the corporation anticipated pleading guilty to a single violation which would be satisfied by the payment of a fine of \$7,500.00.

9. Investigator Prehm testified at the expedited hearing held in this matter. A credible witness, he conducted the inspection of petitioner's premises in a professional and reasonable manner in the face of an emotional Ms. Shah, who was fearful of the government inspectors and who has difficulty communicating in English. Most important, it must be emphasized that the

investigators identified themselves upon entering the premises and showed Ms. Shah their government identification cards. Although the investigator reasonably viewed her behavior as “evasive,” to some extent her response to the inspection may have been affected by cultural and language differences. Included in the record is a copy of a notice<sup>2</sup> to Parul Shah pursuant to CPL 710.30 which sets forth Investigator Prehm’s summary of statements made by Ms. Shah to him in the course of his inspection, as follows:

Ms. Shah stated that she was the sole owner and operator of Stop At Port Blvd., Inc.

Ms. Shah stated that she first began operating the business at the beginning of October, 2006.

Ms. Shah stated that she did not have any invoices (cigarette/cigar/tobacco) for the product displayed and being offered for sale inside her store.

Ms. Shah stated that she ordered cigarettes and tobacco products from HLA, Tri-State Candy, and other distributors located out of New York State, under the name 553 News.

Ms. Shah stated that she and/or her employees ordered cigars and tobacco from out of state distributors.

Ms. Shah stated that neither she, nor her business, was [a] licensed distributor of tobacco products.

Ms. Shah further stated that she did not pay the required excise taxes on the cigars and/or tobacco that she ordered from these out of state distributors.<sup>3</sup>

Ms. Shah stated that these cigars and/or tobacco products were sold at retail at her store.

Ms. Shah stated that she conducted a walk-through, and examination of the store inventory prior to buying the store, and that she was aware that unstamped/untaxed cigarettes were contained in the store inventory, and located on the store shelving.

Ms. Shah stated that she sold old More brand cigarettes at a “special offer” price of two packs for six dollars.

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<sup>2</sup> The prosecution in the criminal matter brought against Ms. Shah in the Nassau County First District Court gave notice to her by this formal notice that it intended to utilize such statements in pressing the criminal counts as detailed in Finding of Fact “8”.

<sup>3</sup> As noted in Finding of Fact “13”, petitioner on March 14, 2007 would later pay taxes due on “cigar acquisitions” as detailed therein.

10. Parul Shah who testified at the expedited hearing did not contradict in any substantive fashion her statements to Inspector Prehm as set forth in Finding of Fact “9”. Petitioner did not offer any documents or written evidence in support of its petition.

11. As a result of their inspection of petitioner’s premises on December 11, 2006, the investigators seized 2.6 cartons of untaxed cigarettes, .2 cartons of Texas stamped cigarettes, cigars<sup>4</sup> and tobacco products<sup>5</sup>, invoices<sup>6</sup> reflecting the importation into New York State of untaxed cigars and tobacco products during the time frame that petitioner was in operation, the 2006 certificate of registration for 553 News, Inc., the certificate of authority for 553 News, Inc., the Distributor of Tobacco Products license for 553 News, Inc., and the 2006 and 2007 certificates of registration of Stop at Port Blvd., Inc.

12. On January 17, 2007, as a result of the violations of Tax Law Article 20, Tax on Cigarettes and Tobacco Products, as detailed in Finding of Fact “8”, the Division’s Office of Tax Enforcement submitted a referral form to the Registration/Bond Unit within TTTB/FACCTS recommending that petitioner’s application for appointment as a distributor of tobacco be denied. Based upon this recommendation and the additional review of petitioner’s application by Gary R. Zirpoli, an excise tax technician in the Registration/Bond Unit, the Notice of Proposed Refusal to Appoint as a Distributor of Tobacco Products dated January 19, 2007, as detailed in Finding of Fact “1”, was issued to petitioner.

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<sup>4</sup> A form EN-651, Office of Tax Enforcement Property Receipt/Release, dated December 11, 2006, carefully itemized the 1,298 cigars seized noting in 27 separate categories the particular type and brand of cigar.

<sup>5</sup> Another form EN-651, also dated December 11, 2006, carefully itemized the 29 types of tobacco products seized.

<sup>6</sup> The invoices, consisting of 17 pages and with order dates running from October to December of 2006, show 553 News, Inc., as the purchaser of the cigars and tobacco products.

13. On March 14, 2007, petitioner filed a Distributor of Tobacco Products Tax Return for the period October 1, 2006 through December 2006<sup>7</sup> indicating that it had “cigar acquisitions” during such period with a “total wholesale price” of \$26,086.00.<sup>8</sup> On a schedule attached to the return, petitioner listed the names of ten suppliers from whom it made such “cigar acquisitions” as follows:

Tobacco Supplier	Wholesale Price
Altadis USA Inc.	\$ 2,953.63
J.C. Newman Cigar Co.	4,029.32
Santa Clara	2,953.40
H.J. Bailey Co.	1,621.70
Davidoff of Geneva	4,114.00
Ashton Distributors	3,823.19
General Cigar Co.	4,551.04
Cao International	1,364.70
Oliva Cigar Co.	114.27
Drew Estate Cigar Co.	561.18
Total	\$26,086.43

Petitioner on this tax return computed “New York State tobacco products tax” due of \$7,764.08 on its “taxable total wholesale price of tobacco products” of \$20,984.00, after subtracting \$5,102.00 for “unfit for use and consumption or unsalable or destroyed” tobacco products

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<sup>7</sup> No day in December was specified on the return.

<sup>8</sup> Presuming that the return covered a three-month period, such “cigar acquisitions” represented a monthly total of approximately \$8,700.00, well in excess of the \$800.00 amount of tobacco products which petitioner indicated it “expected” to import or cause to be imported each month into New York State for sale on its application as detailed in Finding of Fact “3”.

<sup>9</sup> In contrast, on the schedule where petitioner itemized such “cigar acquisitions,” it used the heading “cigar & other tobacco products.” (Emphasis added.)

“returned back to suppliers” from the \$26,086.43 itemized above (\$26,086.43 less \$5,102.00 equals \$20,984.43).

14. On December 11, 2006, the date of the inspection of petitioner’s premises, as noted in Finding of Fact “11”, petitioner’s certificates of registration for 2006 and 2007 were seized. In addition, the Office of Tax Enforcement issued to petitioner a Notice of Suspension of Registration as a Retail Dealer of Cigarettes and/or Tobacco Products on December 11, 2006. Nonetheless, as of the date of the expedited hearing in this matter, petitioner was once again, with the approval of the Division, operating as a retail dealer of cigarettes and /or tobacco products. However, the record does not disclose the specific date on which petitioner was permitted to resume operation as a retailer of cigarettes and tobacco products.

#### ***CONCLUSIONS OF LAW***

A. Parul Shah, petitioner’s president, feels strongly that her cigar and tobacco business has been punished severely for its failure to comply with the requirements of Article 20 of the Tax Law, which in the words of petitioner’s representative was the product of Ms. Shah’s naivete and a new tobacco business owner’s confusion. Petitioner argues that it never “intended” to violate the provisions of the Tax Law governing the sale of tobacco products and makes an equitable appeal that the Division’s refusal to allow its appointment as a distributor of tobacco products be countermanded. Without such appointment, petitioner contends she cannot compete in a competitive marketplace if she is required to purchase her cigars from “subjobbers” and not directly from manufacturers.

B. Petitioner’s equitable appeal is rejected since it is beyond the scope of analysis necessary for resolving the issue of whether the Division of Taxation properly refused to allow

petitioner's appointment as a distributor<sup>10</sup> of tobacco products. As detailed in Finding of Fact "8," petitioner violated eight specific provisions of the Tax Law. Such violations provide a reasonable basis for the Division's refusal to allow petitioner's appointment as a distributor of tobacco products. Petitioner mistakenly confuses this administrative matter with a criminal proceeding where Ms. Shah's "intention" might be relevant. Furthermore, the burden of proof was not on the Division but rather on petitioner to show error on the part of the Division in issuing its Notice of Proposed Refusal, as detailed in Finding of Fact "12" (*see*, State Administrative Procedure Act § 306[1]). Such notice was reasonably based upon the recommendation of the Division's Office of Tax Enforcement which conducted a thorough and professional inspection of petitioner's premises and discovered the range of violations detailed above. Consequently, pursuant to Tax Law § 480(2)(e) and (3)(a)(ii), petitioner's failure to comply with the provisions of Article 20 provided a proper basis for refusing to appoint petitioner as a distributor. Petitioner has done nothing to undermine the rational basis for the decision of the Registration/Bond Unit to issue its Notice of Proposed Refusal. In sum, the Division acted in a reasonable fashion in refusing to appoint petitioner as a "distributor" and did not "abuse its discretion" in so refusing (*see, Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001, *petition dismissed* 305 AD2d 738, 757 NYS2d 911).

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<sup>10</sup> Tax Law § 470(12) provides the following definition, in relevant part, of "distributor":  
"Any person who imports or causes to be imported into this state any tobacco product (in excess of fifty cigars or one pound of tobacco) for sale . . . and any person within . . . the state who is authorized by the commissioner of taxation and finance to make returns and pay the tax on tobacco products sold, shipped or delivered by him to any person in the state."

In contrast, Tax Law § 470(8) defines "wholesale dealer" as follows:  
"Any person who (a) sells cigarettes or tobacco products to retail dealers or other persons for purposes of resale, or (b) owns, operates or maintains one or more cigarette tobacco product vending machines in, at or upon premises owned or occupied by any other person, or (c) sells cigarettes or tobacco products to an Indian nation or tribe or to a reservation cigarette seller on a qualified reservation."

C. Moreover, the Division of Tax Appeals lacks equitable powers (*see, Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003). Furthermore, even if equity were to be considered, a review of the record discloses support for Investigator Prehm's opinion that the behavior of petitioner's president with regard to meeting the obligations of Tax Law Article 20 was more in the nature of "evasive" than the result of her naivete and inexperience. As noted in Finding of Fact "6", petitioner was provided with an extremely clear warning, in no less than *bold type*, by a letter dated October 24, 2006 that, "Conducting any unauthorized business in this capacity is a violation of the tax law and may result in the denial of your application and may subject you to civil and/or criminal penalties." Yet petitioner did just so, conducting unauthorized business in tobacco products, after receipt of this letter. Further, even at the hearing, Ms. Shah was not completely forthcoming. The fact that her husband has worked for several years for convenience stores which sell cigarettes and has operated petitioner along with Ms. Shah, a fact not openly disclosed, adds further weight to this negative view. Her explanation that she holds herself out as the 100% owner of petitioner because it will bring "luck" to her husband and family if only she is designated the owner does not ring true. In addition, on its application for appointment as a dealer, as detailed in Finding of Fact "3", petitioner estimated that it expected to import tobacco product with a total wholesale price of \$800.00. In fact, as noted in Finding of Fact "13", over a three-month period, it imported tobacco product with a wholesale price of \$26,086.43 or nearly \$9,000.00 on a monthly basis.

D. Nonetheless, as noted in Finding of Fact "14", it is observed that the Division has permitted petitioner to resume its operation as a *retailer* of tobacco products. Consequently, petitioner should put its energy into operating its retail business in conformance with all requirements of Tax Law Article 20, thereby reestablishing credibility with the Division. If

petitioner's violations of Tax Law Article 20 were, in fact, the result of the confusion or naivete of petitioner's president, petitioner will have moved up along its apparent learning curve and its reapplication at some future date for appointment as a distributor of tobacco products may well be considered in a favorable light by the Division.

E. This result may seem severe to petitioner whose president has an entrepreneurial spirit, which should be commended. Nonetheless, the sale of cigars and tobacco products, given the potential for abuse, is tightly regulated, and the Division's enforcement of Tax Law Article 20, for both economic and health<sup>11</sup> reasons, is a critical task. In this instance, it may be properly concluded that the Division has not abused its enforcement powers but rather has proceeded in a professional and thorough fashion. In addition, it should be noted that although Ms. Shah testified that she was fearful when the two tax enforcement investigators entered her store and conducted their inspection, they properly identified themselves by displaying their government identifications and conducted their inspection in a reasonable fashion. The Division was not required to obtain a search warrant before conducting its administrative inspection of the tobacco retail store operated by petitioner (*see, Donovan v. Dewey*, 452 US 594, 69 L Ed 2d 262), there is simply no basis for excluding the fruits of their inspection from being considered in this review if that is what petitioner is suggesting. In short, it is concluded that the issuance of a Notice of Proposed Refusal to Issue a Certificate of Authority by the Division of Taxation to petitioner was reasonable.

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<sup>11</sup> One of the violations detailed in Finding of Fact "8" involves the selling of cigarettes contrary to cigarette marketing standards. Common sense dictates that higher pricing, as required by cigarette marketing standards, discourages the consumption of cigarettes and tobacco products.

F. The petition of Stop At Port Blvd, Inc. is denied, and the Notice of Proposed Refusal to Appoint as a Distributor of Tobacco Products dated January 19, 2007 is sustained.

DATED: Troy, New York  
May 24, 2007

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE