

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**MOHAMED MUGALLI** : ORDER  
for Revision of a Determination or for Refund of Cigarette : DTA NO. 821890  
Tax under Article 20 of the Tax Law for the Period Ended :  
October 26, 2005. :

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Petitioner, Mohamed Mugalli, 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 26, 2005.

On January 14, 2008, 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 relief, and 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 February 13, 2008, which started the 90-day period for issuing this determination. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michele W. Milavec, Esq., of counsel). Petitioner appeared by John E. Flemma, Esq. Based upon the pleadings and motion papers, Catherine M. Bennett, Administrative Law Judge, renders the following order.

\_\_\_\_\_ ***ISSUE***

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

***FINDINGS OF FACT***

1. The Division's Office of Tax Enforcement (OTE) and the New York State Police conducted an investigation of petitioner, Mohamed Mugalli, suspected owner of Mugalli's Deli in Utica, New York, for alleged illegal activities, including but not limited to possession and sale of unstamped and untaxed cigarettes in violation of Article 20 of the Tax Law, and conspiracy to commit the crime of criminal possession of a forged instrument in the first degree.

2. Commencing with a transaction on April 20, 2005, the OTE prepared a report detailing the various purchases of unlawfully stamped cigarettes by petitioner. Between April 2005 and October 2005, petitioner purchased no fewer than 1,572 cartons of unstamped or unlawfully stamped cigarettes from OTE undercover investigators. On occasion, petitioner indicated he had a large customer base for cigarette sales in Syracuse.

3. On October 26, 2005, OTE investigators and the New York State Police conducted a reverse cigarette sale sting operation in Rotterdam, New York, where petitioner purchased and was in possession of unstamped or unlawfully stamped cigarettes and petitioner was arrested on the scene. Thereafter, petitioner was indicted for the following crimes: conspiracy in the fourth degree in violation of Penal Law § 105.10(1), a class E felony; attempted criminal possession of a forged instrument in the first degree in violation of Penal Law § 110.00 and § 170.30, a class D felony; attempt to evade or defeat the cigarette and tobacco products tax in violation of Tax Law § 1814(a)(2)(i), a class E felony; attempt to evade or defeat the cigarette and tobacco products tax in violation of Tax Law § 1814(a)(1), a class A misdemeanor; and attempted possession or transportation of unstamped or unlawfully stamped cigarettes for the purpose of sale in violation of Tax Law § 1814(e)(2), a class E felony.

4. On March 22, 2006, petitioner entered a plea of guilty to and was convicted of attempted criminal possession of a forged instrument in the first degree in violation of Penal Law §§ 110.00 and 170.30, a class D felony, under count 279 of Indictment #A1005-1 in Schenectady County Court, and did so in response to the Judge's following question:

Mr. Mugalli, is it true that on or about October 26, 2005, in the County of Schenectady and State of New York, with knowledge that it was forged and with intent to defraud, deceive, or injure another, you did attempt to possess a forged instrument consisting of an issue of stamps or other valuable instrument issued by a government or governmental instrumentality, to wit: at the aforementioned time and place, you, with intent to defraud, deceive, or injure another, did attempt to possess 350 cartons of cigarettes, which is 70,000 cigarettes, bearing a counterfeit New York State tax stamp, said stamp being an issue of stamps or other valuable instruments issued by a government or governmental instrumentality, all contrary to the provisions in such case made and provided?

Petitioner answered in the affirmative.

5. The Division issued a Notice of Determination (Notice number L-027919940), dated November 13, 2006, to petitioner which asserted that a penalty was due in the amount of \$235,800.00. The notice explained that on October 26, 2005, 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 1,572 cartons of untaxed unstamped cigarettes. The penalty was originally calculated by multiplying the number of cartons (1,572) by \$150.00, the penalty for every 200 untaxed cigarettes, also equivalent to carton. However upon subsequent review of the penalty calculation, the Division realized the first five cartons or 1,000 cigarettes should have been exempt from the calculation. Thus, the Division corrected the penalty to be \$235,050.00 (1,572 cartons minus 5 exempt cartons times \$150.00).

#### ***SUMMARY OF PETITIONER'S POSITION***

6. Petitioner maintains that he was induced by representatives of the Division to become involved in a sting operation involving the purchase and sale of unlawfully stamped cigarettes, and claims that the Division's representative approached petitioner and sought to sell him cigarettes, alleging that the tax stamp affixed to the bottom of the package was legal. Petitioner asserts that the Division deliberately continued to allow petitioner to purchase cigarettes which the agent knew were illegal, and thus, petitioner believes that the Division induced him to purchase 1,572 cartons of cigarettes, resulting in the penalty at issue herein.

### **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 [1985]).

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. . . .

C. On March 22, 2006, petitioner entered a plea of guilty in Schenectady County Court to attempted criminal possession of a forged instrument in the first degree in violation of Penal Law §§110.00 and 170.30, a class D felony. Penal Law §110.00 states that:

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

Penal Law §170.30 states as follows:

A person is guilty of criminal possession of a forged instrument in the first degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in section 170.15 [which includes stamps issued by a government or government instrumentality].

D. In accordance with his guilty plea, petitioner has acknowledged that he was in possession or control of 350 cartons of unstamped cigarettes and that he committed the forgoing

criminal act. However, the Division maintains that petitioner should be held responsible for the penalty on 1,567 cartons of cigarettes. Since the plea did not cover the balance of cigarettes allegedly purchased by petitioner, there remain questions of fact that require a hearing, and are not appropriate for disposition by summary determination.

E. The motion for an order dismissing the petition and granting summary determination to the Division of Taxation is denied, and the matter will proceed to be scheduled for a hearing by the Division of Tax Appeals in due course.

DATED: Troy, New York  
May 8, 2008

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE