

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MAX’S SMOKES, INC.	:	ORDER
	:	DTA NO. 821897
for Review of a Notice of Proposed Cancellation	:	
of a License as a Wholesale Dealer of Cigarettes	:	
and as a Wholesale Dealer of Tobacco Products	:	
under Article 20 of the Tax Law.	:	

Petitioner, Max’s Smokes, Inc., filed a petition for review of a notice of proposed cancellation of a license as a wholesale dealer of cigarettes and as a wholesale dealer of tobacco products under Article 20 of the Tax Law.

Petitioner, by its representative, Allen & Overy, LLP (Michael S. Feldberg, Esq., of counsel), brought a motion filed June 9, 2008, seeking summary determination in the above-referenced matter pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b). The Division of Taxation appeared in opposition to the motion by its representative Daniel Smirlock, Esq. (Michelle M. Helm, Esq.). The parties completed their submissions by July 30, 2008, which date began the 90-day period for issuance of this Order.

After due consideration of the motion, the supporting affidavit of Michael S. Feldberg, Esq., the 14 exhibits attached thereto, the Division of Taxation’s letter brief in opposition, the affidavit of Thomas Stanton, the exhibit attached thereto, and the reply affidavit of Michael S. Feldberg, Esq., and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner has established that there are no material and triable issues of fact such that, as a matter of law, summary determination can be made in its favor.

FINDINGS OF FACT

1. Petitioner, Max's Smokes, Inc., was licensed, in or about July 1998, as a Wholesale Cigarette Dealer and a Wholesale Dealer of Tobacco Products. As a wholesale dealer, petitioner is engaged in the sale of cigarettes and tobacco products to retail dealers or other persons for purposes of resale.

2. In connection with being relicensed by the Division of Taxation (Division) as a wholesale dealer, petitioner filed an Application for a License as a Wholesale Cigarette Dealer Other than Those Who Only Operate Vending Machines (Form CG-100-W), dated August 26, 2002, a Personal Questionnaire (Form CG-100-P), dated August 30, 2002, and a Cigarette Agent/Wholesaler-Lessor Identification (Form CG-100-L), dated August 7, 2002. The Form CG-100-W and the Form CG-100-P were each signed by Max Ruda under the title President/Treasurer of Max's Smokes, Inc. The Form CG-100-L, which identifies Gutlove & Shirvint, Inc. (G&S) as the entity from whom petitioner leases its business premises and as petitioner's only supplier of cigarettes, bears a "Signature of lessor" which is not clearly legible. However, inasmuch as the Form CG-100-L identifies Joseph Ruda as the "controlling person" of the lessor, G&S, and the signature line is followed by the title President/Treasurer on the line "Title of lessor," it is presumed that it is Joseph Ruda's signature on Form CG-100-L. Joseph Ruda is Max Ruda's son.

3. The foregoing forms state, and it is undisputed, that petitioner's business address as well as its storage location, is 39-25 23rd Street, Long Island City, New York, and that G&S's business address is 39-26 23rd Street, Long Island City, New York. These two addresses are located across the street from each other. The forms also consistently reflect the relationship between petitioner and G&S as a debtor/creditor relationship, in which petitioner is a premises lessee (sub-lessee) and customer of G&S, its supplier of cigarettes.

4. The person listed on Form CG-100-W as petitioner's sole owner and shareholder (at Item 7-c), and its sole officer and director (at Item 7-e and f) is Max Ruda, owning 100% of petitioner's stock and holding the offices of president and treasurer. Form CG-100-P, as filed by Max Ruda, also lists his title as petitioner's president/treasurer, and describes his role as petitioner's chief operating officer. Max Ruda's duties and authority on behalf of petitioner, as set forth on Form CG-100-W (at Item 7[c] and [e]) and on Form CG-100-P (at Item 4[c]), are as follows:

- Signing checks on the company's bank account;
- Signing the business's tax returns;
- Paying creditors;
- Making the final decision on which bills are to be paid;
- Conducting the business' general financial affairs;
- Filing returns or paying taxes imposed;
- Complying with any other requirement of the Tax Law;
- Ordering, receiving or picking up cigarette stamps.

5. Item 10 to Form CG-100-W asks:

Was any application for a license or permit under the cigarette laws of this state or country, or of any other state or country, ever made by the applicant, applicant's spouse, or *controlling person* as defined in Item 20? (emphasis added)

In response to this question, the box for "No" is checked.

6. Item 20 on both Form CG-100-W and Form CG-100-P contain the following identical paragraph:

For purposes of this application, the term **controlling person** means any person who is an officer, director, or partner (or, in the case of limited liability company, an officer, member or a person having, with respect to such limited liability company, authority analogous to that of an officer or director with respect to a corporation) of an applicant for an agent's or wholesale dealer's license under Article 20 of the Tax Law, or if the applicant is a corporation, a shareholder, directly or indirectly, owning more than 10% of the number of shares of voting stock of such corporation. *It also includes persons who do or will exercise authority within the business comparable to the authority normally exercised by corporate officers, regardless of the form of business organization or lack of actual title* (bold emphasis as in original) (italicized emphasis added).

7. Form CG-100-W-I (Instructions for Form CG-100-W)¹ defines a "controlling person" in the identical manner and terms as are set forth at Item 20 above and provides, with respect to Items 7(e) and 7(f), and Item 10(b), in its item-by-item instructions for completing Form CG-100-W, as follows:

Items 7(e) and 7(f)- You must provide a complete actual home address for each person listed. List officers and *controlling persons* in 7(e) or directors in 7(f). Include all employees responsible for the [duties enumerated above in Finding of Fact 4]. (Emphasis added.)

Item 10(b) - Include the name of applicant or spouse, and/or *controlling person*, address of premises, date filed and disposition. Give the license or permit number if issued. (Emphasis added.)

Form CG-100-W-I includes, among the "Other requirements for a license", the filing of a:

Personal Questionnaire, Form CG-100-P, (including all attachments required with this form) for each owner, officer, shareholder or any other person who would be defined as a **Controlling Person**. These may be mailed separately if the **controlling person** desires confidentiality. (Bold emphasis added; italicized material as in original.)

¹ Pursuant to State Administrative Procedure Act § 306(4), official notice is hereby taken of the contents of Department of Taxation and Finance Form CG-100-W-I.

8. Form CG-100-P-I (Instructions for Form CG-100-P)² specifies, with regard to “Who must file this form”, that:

A separate *Personal Questionnaire* is required for each **controlling person** of an applicant for license as a *cigarette agent*, a *cigarette wholesaler*, a tobacco products wholesaler, or for appointment as a tobacco products distributor. (Bold emphasis added; italicized material as in original.)

Form CG-100-P-I goes on to define a “controlling person” in the identical manner and terms as are set forth in Form CG-100-W-I and at Item 20 of Form CG-100-W and Form CG-100-P.

9. In addition to specifying the duties and authority to be exercised, as set forth in Finding of Fact 4, the instructions to Form CG-100-P require the filer to “List any other duties that you have regarding your participation in significant business decisions, such as”:

- supervising the preparation of tax returns and insuring remittance of tax;
- authority for management of business;
- knowledge and control over financial affairs;
- authority to pay or direct payment of creditors;
- responsibility for maintaining/managing business records;
- the authority to deal with the business’s tax accountant or tax counsel;
- authority to negotiate with the Tax Department or to sign any of the following: tax returns, consents extending the periods of limitation, power of attorney, audit method election agreements, consents fixing tax (for example *Statement of Proposed Audit Adjustment*), installment payment agreements;
- responsibility for handling business receipts;
- authority to negotiate loans/borrow money for business or guaranteeing of business loans;
- authority to hire or fire employees. (Italicized material as in original.)

10. By a notice dated March 26, 2007, the Division proposed to cancel petitioner’s license as a wholesale dealer of cigarettes and tobacco products upon four specified grounds. Petitioner challenged this proposed cancellation by filing a Request for a Conciliation Conference and, thereafter, a petition. The Division filed its answer to the petition and, pursuant to permission

² Pursuant to State Administrative Procedure Act § 306(4), official notice is hereby taken of the contents of Department of Taxation and Finance Form CG-100-P-I.

granted, an amended answer asserting two additional grounds for cancellation. The six grounds upon which the Division proposes cancellation are as follows:

- a) By virtue of a symbiotic relationship between petitioner and G&S, petitioner has reduced its cost of doing business by the Cigarette Marketing Standards Act (CMSA) wholesale dealer, thereby inducing or procuring a rebate in violation of Tax Law § 480(3)(b)(i);
- b) Petitioner has failed to provide its employees with disability and workers' compensation insurance in violation of Tax Law § 480(1)(e);
- c) Petitioner committed fraud or deceit in the initial procurement of its license by failing to identify Joseph Ruda as a controlling person on its Application for License as a Wholesale Cigarette Dealer in violation of Tax Law § 480(3)(b)(i);
- d) Petitioner has failed to maintain a secure and separate warehousing facility in violation of Tax Law § 480(1)(d);
- e) Petitioner has failed to notify the Division of any change to the information shown on its application for a license, in violation of 20 NYCRR 72.1(c)(1), in that while petitioner's application lists Max Ruda as the sole individual responsible for running petitioner's daily operations, Division investigations have revealed that Joseph Ruda, and others, are intricately involved in running petitioner's operations.
- f) Petitioner has collected New York State tobacco products tax from its customers, yet petitioner has never been registered to collect such tax, nor filed any tobacco products tax returns, or remitted the tax it collected, in violation of Tax Law § 480(3)(a)(ii).

11. In response to the foregoing grounds and in support of its motion for summary determination petitioner maintains, upon the affidavit and reply affidavit of Michael S. Feldberg, Esq., and the exhibits attached thereto, as follows:

- a) With respect to Ground A: Petitioner has not induced, attempted to induce, procured or attempted to procure any rebate or concession of any kind, and in fact has not committed any CMSA violation by benefitting from a reduction of the "cost of the wholesale dealer" or the "cost of doing business by the CMSA wholesale dealer." Petitioner asserts that its cigarettes are priced pursuant to the presumptive minimum markup method, consisting of the basic cost of the cigarettes plus the presumptive minimum

markup specified by statute for wholesale dealers. As a result, petitioner claims that its actual cost of doing business is irrelevant. Petitioner also notes that the penalty for a first CMSA violation of this nature is not license cancellation, as proposed by the Division, but rather is license suspension for a specified period of time, or a fine, or both.

b) With respect to Ground B: Petitioner submitted the Information Page New Policy, dated May 24, 2002, Information Page Revised, dated May 24, 2003, and Information Page Renewal Policy dated March 28, 2004, and the same page dated March 28, 2005, March 27, 2006 and March 28, 2007, thereafter, from the State Insurance Fund Policy No. Q13216247 as evidence that it maintained workers' compensation coverage for its employees. Petitioner submitted the Declarations Page, dated April 24, 2002, from Zurich American Insurance Company Policy No. 1623999001 as evidence that it maintained disability coverage for its employees. The latter page indicates the "Approx. No. of Employees Covered" as "1," while the former pages provide no information as to the number of employees covered.

c) With respect to Ground C: Petitioner alleges that its license application was accurately and correctly completed and submitted. Petitioner maintains in this regard that the license application does not ask the applicant to list "controlling persons" of the applicant business, or to list persons who are "intricately involved in running" the applicant's business operations. Since Max Ruda owns 100% of petitioner's stock, and is its sole officer and director, petitioner maintains that its application was accurate, correct and complete as filed listing Max Ruda, only, as petitioner's sole shareholder, officer and director and, by definition, petitioner's only "controlling person."

d) With respect to Ground D: Petitioner asserts that it continues to maintain a separate and secure warehouse facility at its business address, 39-25 23rd Street, Long Island City, New York, the address listed as its only storage location on its license application. Petitioner notes that as a result of the Division's allegation that such premises do not constitute a separate and secure warehouse facility, it has also entered into a sublease of premises located at 821 Lydig Avenue, Bronx, New York, a facility purportedly previously approved by the Division as a separate and secure warehouse facility for another licensed wholesale tobacco dealer. Petitioner applied for permission to relocate its warehouse facility to this address and thus, in essence, petitioner asserts that it has, in fact, two separate and secure warehouse facilities.³

³ The division has denied petitioner's request to relocate its warehouse facility and maintains that the premises at 821 Lydig Avenue do not constitute a separate and secure warehouse facility per Tax Law § 483(a)(2) and 20 NYCRR 80.2(b)(2)(i).

e) With respect to Ground E: Petitioner alleges, consistent with subparagraph c above, that its license application was accurately and correctly completed in that petitioner provided all of the required information called for in the application. In turn, since the application does not, according to petitioner, ask the applicant to list persons “responsible for running the daily operations” or persons “intricately involved in running business operations,” and since Max Ruda remains petitioner’s sole shareholder, officer and director, there has been no change in the information requested and supplied initially on petitioner’s application and thus petitioner was under no obligation to notify the Division of any change to the information shown on the application.

f) With respect to Ground F: Petitioner alleges that it has not been appointed by the Division as a distributor or been authorized to collect and remit tobacco taxes. In this respect, petitioner alleges that it is not in the category of businesses to which such obligations apply, and thus has not been registered to collect such taxes, or to file returns or remit payments.

12. The Division, through its letter brief and upon the affidavit of Thomas Stanton, maintains its position that any and all of the grounds asserted for cancellation of petitioner’s license remain valid. The Division alleges that other than Max Ruda, petitioner has no employees of its own and instead utilizes and allows the owner and staff of employees at G&S to carry out its day-to-day operations. While it is alleged that petitioner reimburses G&S for certain expenses it incurs on behalf of petitioner, there has been no substantiation of such reimbursement. The Division asserts that as a result of this operating situation where G&S conducts petitioner’s day-to-day business, petitioner’s real cost of doing business has been reduced. The Division does not dispute that petitioner purchases cigarettes from G&S (its only supplier) at a stated invoice price, i.e., at “basic cost.” However, the Division asserts that the absence of proof that petitioner pays any other actual operating costs results in petitioner’s “cost of the wholesale dealer” and “cost of doing business by the CMSA wholesale dealer,” as defined, being substantially reduced such that petitioner caused its cigarettes to be sold under cost, a situation which constitutes an illegal rebate or concession.

13. The Division also alleges that its investigations, inspections of petitioner's premises, reviews of petitioner's records, and personal interviews have revealed that none of petitioner's day-to-day activities, and indeed none of petitioner's activities are carried out at petitioner's location, notwithstanding that petitioner's books and records reflect ongoing sales of cigarettes and tobacco products by petitioner. In this regard, the Division maintains there are no cigarettes or tobacco products received, stored at, or distributed from petitioner's location at 39-25 23rd Street, Long Island City, New York, and that no business equipment is located at such premises. To the contrary, the Division alleges that all of petitioner's activities, including taking telephone orders for cigarettes and tobacco products, filling and delivering such orders, invoicing such orders and collecting and processing payments therefor, maintaining books and records and performing banking activities are conducted in the name of petitioner by the owner and employees of G&S at its 39-26 23rd Street premises. The Division further maintains that petitioner's address as listed on its bank statements and checks is 39-26 23rd Street, Long Island City, New York, which is G&S's address. The Division also alleges that certain of petitioner's tax returns reflect petitioner's address while others reflect the address for G&S, and that petitioner's tax returns have been signed by persons other than Max Ruda, including a number of different employees of G&S. In sum, the Division alleges that Max Ruda is an absentee owner and that his son, Joseph Ruda, is actually operating petitioner's business but has never been identified to the Division as a "controlling person" on the license application or on the other required forms filed by petitioner. The Division notes that it has never been advised by petitioner of any changes in the circumstances under which petitioner operates to the extent they are different than presented in petitioner's license application and related required filings.

14. The Division's response to petitioner's motion includes certifications that the Division has not licensed or registered petitioner as a Distributor of Tobacco Products and has no record of receiving any Tobacco Products Tax Returns filed by petitioner for any of the years 2003 through 2007. The Division also provided a listing of petitioner's sales invoices for the month of September 2005, as well as certain of the actual sales invoices for such month, as exemplars, purporting to show that petitioner was collecting tobacco products tax from its customers, notwithstanding that it was not licensed or registered to do so, and was not remitting such amounts allegedly collected as taxes.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]).

The motion shall be granted if, upon all 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, therefor, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]).

B. The standard with regard to a motion for summary determination has been set forth numerous times. A motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR." (20 NYCRR 3000.9[c]; *see also Matter of Service Merchandise, Co.*, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a "drastic remedy and

should not be granted there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943 [1965]; *see Daliendo v. Johnson*, 147 AD2d 312 [1989]). Because it is the “procedural equivalent of a trial” (*Museums at Stony brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]), undermining the notion of a “day in court,” summary determination must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, *affd* 26 AD2d 729 [1966]). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from the undisputed facts, the motion must be denied (*Gerard v. Inglese*, 11 AD2d 381 [1960]).

C. From all of the evidence submitted on this motion there is no doubt that, excepting only the issue of whether petitioner was procuring or inducing a rebate (i.e., Ground A for license cancellation) for which summary determination is appropriate, material and triable issues of fact exist which rest at the very heart of this case such that petitioner’s motion for summary determination must be denied.

D. Dealing first with the issue of procuring or inducing a rebate in violation of Tax Law § 484(a)(2)(B), the Division posits that petitioner has sold its cigarettes below cost because it has not established the payment of any actual costs, including operating expenses, in addition to the stated invoice price for cigarettes it paid to its supplier G&S. The Division does not dispute that petitioner paid the stated invoice price, or basic cost, for the cigarettes it purchased, but maintains that the symbiotic relationship between the two entities enabled petitioner not to incur further costs such that the “cost of the wholesale dealer” (Tax Law § 483[7][b][2][A]) and the “cost of doing business by the CMSA wholesale dealer” (20 NYCRR 82.3[b][2][i]) has been substantially reduced for petitioner. Regardless of whether or not petitioner actually reimbursed G&S for any expenses borne by G&S on petitioner’s behalf, or what petitioner’s actual cost of doing business

may have been, it has been and is petitioner's claim herein that it does not price its cigarettes upon the basis of its actual costs, but rather does so under the presumptive minimum markup method (Tax Law § 483[b][2][B]). Under this method, petitioner prices its cigarettes at basic cost plus the statutorily set minimum markup of .625% of the basic cost of cigarettes for sales to chain stores and 3% of the basic cost for sales to CMSA retail dealers (*id.*; 20 NYCRR 82.3[b][2][ii]). The Division has not provided evidence or argument, or otherwise disputed petitioner's claim that this is the method under which petitioner priced and sold its cigarettes. Although the Division introduced invoices with regard to at least some transactions, it has not claimed or otherwise made any offer to show that petitioner did not correctly compute the price of its cigarettes under this method. Rather, the Division continues to address its argument to the claim that petitioner's actual costs have been reduced as a result of the services provided to petitioner by G&S. However, by using the presumptive minimum markup method of pricing, the selling price for petitioner's cigarettes is simply determined by statute and petitioner's actual cost of doing business is irrelevant to such calculation. Accordingly, under these facts, there is no apparent CMSA violation as to pricing, and summary determination will be granted in petitioner's favor on this issue only.⁴

E. As to the balance of the grounds alleged in support of license cancellation, the parties take positions and espouse facts which are clearly at odds and in dispute. Petitioner alleges that its license application and other related required filings were complete, correct and accurate as

⁴ Even if the CMSA violation alleged, inducing or procuring a rebate as the result of the pricing of petitioner's cigarettes, had been established on undisputed facts the dismissal of Ground A would remain appropriate. That is, the sanction sought by the Division, license cancellation, is not one which follows from a first CMSA violation of the type alleged. The Division has not alleged or proven any prior pricing violations, and thus even if a violation had been proven herein, the same would be a first violation and the penalty therefor is either license suspension for not more than 30 days, or a fine not to exceed \$20,000.00, or both (*see* Tax Law § 484[a][5][A]).

submitted to the Division. Most specifically, petitioner maintains that such forms list and supply information for Max Ruda, only, because he is the only person for whom information is requested and required to be supplied on such forms. The Division, in contrast, directly opposes this argument, premised upon its allegations that Max Ruda is an absentee owner and that other persons, including Joseph Ruda, are in fact conducting all aspects of petitioner's business operations. Petitioner admits that employees of another entity, G&S, may be paid to carry out certain functions on behalf of petitioner. However, petitioner does not concede that such employees are petitioner's employees, or that authority and control over petitioner has been ceded to or taken over by other persons. Implicit in this position is that Max Ruda not only continues to possess authority and control over petitioner, as is set forth in its license application and other related required documents, but also that he in fact continues to exercise such authority and control as the "controlling person" of the licensee. This situation clearly presents the factual question of Max Ruda's actual involvement in petitioner versus the involvement and alleged de facto operation and control of petitioner by others, including Joseph Ruda. This difference in factual position bears directly on the question of whether other persons, in addition to or in replacement of Max Ruda, are or have become "controlling persons" with respect to petitioner.

If the Division's asserted facts are correct it would appear, at a minimum, that petitioner's license application and related required documents were not completely, accurately and correctly filed in accordance with the terms set forth on the face of such application and the other forms, or with the instructions thereto (*see* Findings of Fact 5 through 8). Petitioner, of course, may argue otherwise on both factual or legal grounds. Further, if the Division's asserted facts are correct such that Max Ruda, who would appear under petitioner's license application and other submitted documents to be petitioner's only employee, is not involved in petitioner's operations,

the question of whether others may be considered de facto employees of petitioner subject to the provisions and coverage requirements of disability and workers' compensation insurances arises. In addition, if as the Division alleges, petitioner's business is being carried on by other persons from a location other than petitioner's location, the question arises as to whether petitioner is maintaining a secure separate warehousing facility from which its business is conducted per Tax Law § 480(1)(d); § 483(a)(2) and 20 NYCRR 80.2(b)(2)(i). Finally, while petitioner points out it is not in the category of businesses to which tobacco tax registration, collection, and payment obligations apply, there is some evidence that petitioner was charging such tax to its customers. Without further development of the facts on this question, it is not possible to resolve what impact such circumstances have, if any, on the subject proposed cancellation of petitioner's license.

F. Ultimately, the parties' factual positions, most specifically concerning the actual manner in which petitioner's business is being operated, are insufficiently developed in some respects and, to the extent more fully developed, are in direct opposition. Without making any determination of credibility, it is concluded that there clearly exist material and triable issues of fact in dispute, and summary determination other than with respect to Ground A as discussed above is not appropriate at this juncture, and a hearing in this matter is warranted.

G. Petitioner's motion for summary determination is granted to the extent set forth in Conclusion of Law D but is otherwise denied; to the extent language in the Division's letter brief

indicates the Division requests or cross-moves for summary determination the same is, likewise, denied; and a hearing on the issues will be conducted in due course as scheduled.⁵

DATED: Troy, New York
October 23, 2008

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

⁵ As part of its moving papers, petitioner requested an award of costs pursuant to Tax Law § 3030. This request is premature (*see* Tax Law § 3030[b]), and the same is therefore denied.