

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ADEL ABUZOID : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 822182
Cigarette Tax under Article 20 of the Tax Law for the :
Period Ended October 26, 2005. :

Petitioner, Adel Abuzaid, 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.

Petitioner, by his representative, Philip J. Vecchio, Esq., brought a motion dated December 2, 2008 seeking summary determination in the above-referenced matter pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Together with the Notice of Motion, petitioner filed an affirmation of Mr. Vecchio dated December 2, 2008. The Division of Taxation (Division), appearing by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel), filed an affirmation of Mr. Ostwald in opposition to the motion on December 22, 2008. Also on December 22, 2008, the parties filed a stipulation of facts with attached exhibits. Accordingly, the 90-day period for the issuance of this determination began on December 22, 2008. Based upon the motion papers, the affirmations, the stipulation of facts and attached exhibits, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether, under the instant facts and circumstances, where petitioner was in possession of or had control of unstamped or unlawfully stamped cigarettes and had previously pled guilty to a

crime arising from such possession or control, the imposition of penalty pursuant to Tax Law § 481(1)(b)(i) violates the double jeopardy clause of the Fifth Amendment, the excessive fines clause of the Eighth Amendment or petitioner's equal protection rights under the Fourteenth Amendment.

FINDINGS OF FACT¹

1. For the tax period ended October 26, 2005, petitioner, Adel Abuzaid, purchased 620 cartons of cigarettes in unstamped or unlawfully stamped packages from inspectors from the Petroleum, Alcohol, Tobacco Bureau of the Division of Taxation (Division).

2. On May 19, 2006, petitioner entered a guilty plea in Schenectady County Court to the crime of attempted possession or transportation of unstamped or unlawfully stamped cigarettes for the purpose of sale in violation of Tax Law § 1814(e)(2). Such plea was in full satisfaction of all criminal charges against petitioner. Petitioner was sentenced to a period of probation not to exceed five years.

3. During his plea allocution in Schenectady County Court, petitioner admitted, under oath, that on or about March 11, 2005, he did willfully transport or possess for sale 180 cartons of cigarettes (36,000 cigarettes) bearing what petitioner believed to be counterfeit New York State tax stamps.

4. On November 13, 2006, the Division issued to petitioner a Notice of Determination which assessed penalty of \$93,000.00. The penalty assessed against petitioner was calculated by multiplying 620 cartons by \$150.00 per carton. The penalty assessment includes the 180 cartons of unstamped or unlawfully stamped cigarettes with respect to which petitioner pled guilty.

¹ The facts were stipulated by the parties. The stipulation also recites the procedural history of this matter and summarizes Tax Law § 481(1)(b).

CONCLUSIONS OF LAW

A. 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]).

B. In the present matter, upon review of the stipulated facts and attached exhibits, it is clear that there are no material facts in dispute and it is appropriate to resolve this matter by summary determination.

C. Tax Law § 471 imposes a tax on all cigarettes possessed in New York State for purposes of sale. Although it is the intent of the law that the ultimate incidence of the cigarette tax will fall upon the consumer, the tax is paid by licensed cigarette agents who purchase cigarette tax stamps from the Division's designated bank and affix such stamps on individual packages of cigarettes as evidence of payment (*see* 20 NYCRR 74.1[b]). All cigarettes within the state are presumed subject to tax under Tax Law § 471 until the contrary is established (*see* Tax Law § 471[1]).

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

In addition to any other penalty imposed by this article, the commissioner (A) 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

E. As noted in the stipulated facts, petitioner was in possession or control of 620 cartons of unstamped or unlawfully stamped cigarettes and therefore properly subject to penalty pursuant to Tax Law § 481(1)(b)(i).

F. While petitioner does not dispute that he was in possession or control of unstamped or unlawfully stamped cigarettes within the meaning of Tax Law § 481(1)(b)(i), he asserts that the imposition of such penalties under the facts and circumstances present in this matter would deprive him of his constitutional rights against double jeopardy and excessive fines, and his rights to equal protection.

G. First, petitioner contends that the imposition of a penalty under Tax Law § 481(1)(b)(i) in this case would subject him to double jeopardy in violation of his rights under the Fifth Amendment.² The double jeopardy clause protects against multiple criminal punishments for the same offense (*Witte v. United States*, 515 US 389, 396 [1995]). While it is well settled that the double jeopardy clause is generally not implicated by the imposition of a civil fine (*see e.g. Helvering v. Mitchell*, 303 US 391, 399 [1938]), petitioner notes that in *United States v. Halper* (490 US 435 [1989]), the Court held that, in rare cases, a civil penalty following a criminal conviction may constitute a second punishment for double jeopardy purposes.

Subsequently, however, in *Hudson v. United States* (522 US 93 [1997]), the Court largely abrogated its decision in *Halper*, stating: “We believe that *Halper*’s deviation from longstanding double jeopardy principles was ill considered” (522 US at 101). The Court then applied such longstanding principles accordingly.

Application of longstanding double jeopardy principles to the facts of this matter consistent with the Court’s decision in *Hudson* requires first a determination of whether the penalty under the statute in question, i.e., Tax Law § 481(1)(b)(i), was intended by the

² The Tax Appeals Tribunal has sustained the imposition of penalties under Tax Law § 481(1)(b)(i) following a guilty plea to a criminal charge arising out of the same conduct (*see Matter of Fakhouri*, Tax Appeals Tribunal, July 5, 2007; *Matter of Bayridge Supermarkets*, Tax Appeals Tribunal, January 2, 2003; *Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001). Those decisions, however, did not address the question of double jeopardy.

Legislature to be civil or criminal in nature (*United States v. Ward*, 448 US 242, 248 [1980]).

The fact that authority to impose the subject penalty was conferred on an administrative agency is prima facie evidence that the Legislature intended to provide for a civil sanction (*Hudson v. United States*, 522 US at 103). Further, the existence of a criminal sanction, i.e., Tax Law § 1814(e), for the same conduct also indicates that the Legislature intended a civil fine under Tax Law § 481(1)(b)(i) (*People v. Lynch*, 52 AD2d 1066, 384 NYS2d 327 [4th Dept 1976]). It is clear, therefore, that the Legislature intended Tax Law § 481(1)(b)(i) to be civil in nature.

Having concluded that the Legislature intended a civil penalty in Tax Law § 481(1)(b)(i), “only the clearest proof” that the proceeding is so punitive that it may not legitimately be viewed as civil in nature will override such intent (*United States v. Ursery*, 518 US 267, 278 [1996]).

There is no such proof present in the instant matter. Historically, money penalties have not been viewed as punishment for double jeopardy purposes (*Helvering v. Mitchell*, 303 US at 399).

Furthermore, while the penalties imposed under Tax Law § 481(1)(b)(i) may serve as a deterrent, a traditional goal of criminal punishment, the presence of such a purpose is insufficient to render the sanction criminal (*Pathak v. De Buono*, 251 AD2d 818, 677 NYS2d 182, 183 [3rd Dept 1998]).

Pursuant to *Hudson*, then, Tax Law § 481(1)(b)(i) is clearly a civil statute and penalties imposed thereunder are not “punishment” for purposes of the double jeopardy clause.

Accordingly, the clause does not bar the imposition of penalties in this case.

H. Petitioner also contends that the imposition of penalties in this case at \$150.00 per carton constitutes an excessive fine in violation of petitioner’s Eighth Amendment rights, particularly where, as here, the Division seeks to impose this penalty following petitioner’s conviction sentencing for violating Tax Law § 1814(e)(2).

The Tax Appeals Tribunal has addressed the generic issue of whether imposition of the maximum penalties under Tax Law § 481(1)(b) was excessive. In *Matter of Bayridge Supermarket* (Tax Appeals Tribunal, January 2, 2003), the Tribunal found that, based upon the petitioner's "conduct in repeatedly acting in contravention of the Tax Law, we find that the penalties imposed are appropriate." More recently, in *Matter of Fakhouri* (Tax Appeals Tribunal, July 5, 2007), the Tribunal, relying on its decision in *Matter of Vinter* (Tax Appeals Tribunal, September 27, 2001, *appeal dismissed Matter of Vinter v. Comm'r of Taxation & Fin.*, 305 AD2d 738, 757 NYS2d 911 [3rd Dept 2003]), upheld the imposition of penalties, stating that, since "there are no statutory guidelines for the exercise of the Commissioner's discretion in imposing a penalty pursuant to Tax Law § 481(1)(b) . . . it is not necessary for the Division to have considered any mitigating factors prior to the imposition of the penalty at issue since this is neither mandated by statute nor regulation."

The specific issue of whether penalties imposed under Tax Law § 481(1)(b) could, under certain circumstances, violate the excessive fines clause of the Eighth Amendment (and Article I, § 5 of the New York State Constitution) has not been addressed by the Tribunal.

The excessive fines clause "limits the government's power to extract payments, whether in cash or in kind, as 'punishment for some offense'" (*Austin v. United States*, 509 US 602, 609-610 [1993] [emphasis added, citation omitted]). Cash payments are thus fines for purposes of the clause "if they constitute punishment for an offense" (*United States v. Bajakajian*, 524 US 321, 328 [1998]). In the context of a civil forfeiture proceeding following a criminal conviction, the Court of Appeals has held that where such a forfeiture "serves, at least in part, deterrent and retributive purposes" such forfeiture is "punitive and subject to the excessive fines clause"

(*County of Nassau v. Canavan*, 1 NY3d 134, 139-140, 770 NYS2d 277 [2003] citing *Austin v. United States*, 509 US at 619-622; *United States v. Bajakajian*, 524 US at 328-329).

In the present matter it is apparent that the \$150.00 per carton maximum penalty under Tax Law § 481(1)(b)(i) serves, at least in part, a deterrent purpose. Indeed, the Tribunal has noted that the increase in the amount of the maximum penalty under Tax Law § 481(1)(b) pursuant to Laws of 2000 (ch 262) was “to be a more effective deterrent against cigarette smuggling” (*Matter of Bayridge Supermarket*). Accordingly, the penalties at issue are subject to the excessive fines clause.

A fine is excessive under the Eighth Amendment if it is “grossly disproportional to the gravity of the defendant’s offense” (*United States v. Bajakajian*, 524 US at 334; *see also County of Nassau v. Canavan*, 1 NY3d at 140). The penalties at issue of \$150.00 per carton are ten times the \$15.00 per carton cigarette tax imposed pursuant to Tax Law § 471(1). This disparity notwithstanding, petitioner has failed to show that the subject penalties are in fact so grossly disproportional as to violate the Eighth Amendment. Indeed, considering the costs of enforcement of Article 20 of the Tax Law, a significant portion of the penalties necessarily serve the remedial purpose of compensating the government for its cost in discovering petitioner’s illegal activity (*see United States v. Halper*, 490 US at 446 [“The government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas.”]). Furthermore, the potential loss to the State in revenue from the sale of unstamped or illegally stamped cigarettes is undoubtedly significant. Under such circumstances, and considering the minimal criminal penalty incurred by petitioner, it cannot be fairly said that the penalties imposed in this matter are grossly disproportional and thus excessive under the Eighth Amendment.

I. Petitioner also contends that the application of Tax Law § 481(1)(b)(i) against him in this matter denies him his equal protection rights given the Division of Taxation's policy of nonenforcement of Article 20 with respect to on-reservation sales of cigarettes to non-Indian consumers.

Petitioner's contention is without merit. The Division of Taxation's policy of forbearance in its enforcement of Article 20 with respect to on-reservation sales of cigarettes to non-Indian consumers does not violate the equal protection rights of off-reservation retailers (*New York Association of Convenience Stores v. Urbach*, 275 AD2d 520, 712 NYS2d 220 [3rd Dept 2000], *appeal dismissed* 95 NY2d 931, 721 NYS2d 606 [2000], *lv denied* 96 NY2d 717, 730 NYS2d 790 [2000], *cert denied* 534 US 1056 [2001]).

J. The petition of Adel Abuzaid is in all respects denied and the penalty asserted in the Notice of Determination, dated November 13, 2006, is sustained.

DATED: Troy, New York
March 19, 2009

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE