

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition
of
SADDAM MASHAAL ALSEMI
for Revision of a Determination or for Refund of
Cigarette Tax under Article 20 of the Tax Law for the
Period April 8, 2016.

DECISION
DTA NO. 828270

Petitioner, Saddam Mashaal Alselmi, filed an exception to the determination of the Administrative Law Judge issued March 19, 2020. Petitioner appeared by The Antonious Law Firm (Jacqueline S. Kafedjian, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was held by teleconference on September 24, 2020, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly asserted penalty against petitioner pursuant to Tax Law § 481 (1) (b) (i).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact 11, which we have modified for clarity. The Administrative Law Judge’s findings of fact and the

the Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

1. On September 16, 2015, the Division of Taxation's (Division's) Criminal Enforcement Division performed a regulatory inspection of Holly Deli and Grocery, Inc. (the deli), located at 2520 Linden Boulevard, Brooklyn, New York. The inspection uncovered 28.5 cartons of untaxed cigarettes. As a result, the deli's certificate of registration to sell cigarettes was immediately revoked by the Division. Petitioner, Saddam Mashaal Alselmi, was an employee of the deli; although he was not present when the inspection commenced, he arrived sometime after and told the Division's investigators that he was the manager. The Division's report of investigations states as follows:

“The inspection revealed a total of 28.5 cartons of various brands . . . Virginia and Georgia stamped cigarettes. Of which 5.0 cartons were in a magnetic trap directly to the right of the register the remaining 23.5 cartons was [sic] in a moving shelf next to the turn table window behind the register.

The store's 2015 C of R was suspended and a Notice of Suspension Letter was issued to the Al Selmi [sic] . . .

Al Selmi [sic] was in charge of the store, he paid vendors. Al Selmi [sic] stated that he has been working at the store for two years. In lieu of arrest this writer issued Al Selmi [sic] a summons # 4417504913 for NYSTL 1814(b) Possession for sale untaxed cigarettes with a court date of 12/10/15 returnable to NY Criminal Court located at 346 Broadway, Manhattan.

At time of inspection Al Selmi [sic] was unable to produce an invoice for cigarettes, but produced an invoice for tobacco from American trading [sic] Corp. The business has a current beer & wine license from SLA. . .

Two additional employees were present identified as Hassan Mahmood Al Manzilli [sic] . . .and Antonio Lora. . .

This writer explained to all present at the business that the owner/manager needs to call NYSDTF regarding his C of R which is currently suspended and that the business cannot sell cigarettes, cigars or tobacco products without it.”

There is no indication that either Mr. Almanzilli or Mr. Lora were issued summonses. The criminal charges on the summonses issued to petitioner were eventually dismissed.

2. Petitioner testified that he did not realize that he was selling untaxed cigarettes prior to the September 16, 2015 regulatory inspection and was assured by the store's owner, Saef Ali, that nothing would happen to him personally if he continued selling untaxed cigarettes. Petitioner stated that he was told that all legal ramifications would fall to the store.

3. As a result of the regulatory inspection, the Division placed the deli and an apartment located above the deli under surveillance. While under surveillance, the Division's investigators observed what appeared to be cigarettes being delivered to the deli and the apartment on various occasions. Between March 17, 2016 and April 8, 2016, undercover investigators purchased cigarettes bearing Virginia tax stamps from the deli. The purchase price of each of these packs of cigarettes was \$6.50. On April 1 and 8, 2016, petitioner was photographed selling untaxed cigarettes during the undercover cigarette buys. According to the Division's investigator who testified at the hearing in the matter, the average retail price of a pack of cigarettes in New York City during 2016 was approximately \$13.00.

4. The Division introduced various photographs that its investigators took during their surveillance of the deli and the apartment. The photographs generally depict individuals entering and/or exiting the apartment carrying bags and or boxes that the Division believed to be cigarettes based upon the size and shape of the packages. It was the Division's investigator's belief that cigarettes were being stored at the apartment, which was referred to as a "stash." Petitioner is not in any of the photographs taken during the surveillance of the apartment. Mr. Almanzilli, however, appears in several of the photographs.

5. Based upon the surveillance and the undercover cigarette purchases, the Division's investigators obtained search warrants for the deli and for the apartment.

6. On April 8, 2016, the Division executed the search warrants for searches of the apartment and the deli. The search warrant of the apartment yielded 149 cartons of cigarettes bearing Virginia tax stamps and two cartons of cigarettes bearing counterfeit New York tax stamps. No one was in the apartment at the time the warrant was executed. The search warrant of the deli uncovered 68.4 cartons of cigarettes. Specifically, 5.8 cartons of cigarettes bearing only New York State tax stamps were found in a black bag behind the register counter; 4.6 cartons of cigarettes bearing Virginia tax stamps were found in a trap adjacent to the cash register; one pack of cigarettes bearing a Virginia tax stamp was found in the cash register; 25.8 cartons of cigarettes bearing Virginia tax stamps and one pack of cigarettes with only a New York tax stamp was found in a wall trap next to a turn window near the register counter; and 32 cartons of cigarettes bearing Virginia tax stamps were located in a wall trap between the deli counter and the register counter. When the search warrants were executed, Mr. Almanzilli was in possession of the keys to the deli and the apartment as well as the storage containers in the apartment where the Division's investigators located the untaxed cigarettes uncovered during the search. As a result of the search, the locks to the apartment were damaged. After the search was concluded, the Division's investigators secured it with locks and put the keys on the key ring taken from Mr. Almanzilli that had the store keys on it.

7. During the execution of the search warrant, petitioner told one of the Division's investigators that he was the deli's manager and that he sold the cigarettes for \$6.50 a pack. When the Division's investigators questioned Mr. Almanzilli, he stated that he was an employee and petitioner was the deli's manager.

8. Both petitioner and Mr. Almanzilli were arrested as a result of the untaxed cigarettes seized pursuant to the search warrants. Prior to being brought to the police station, petitioner requested that the Division's investigators give the key ring to Sammy Ali. According to petitioner, Sammy Ali was a friend of the deli's owner, Saef Ali.

9. On the day of petitioner's arrest, a criminal complaint was filed in Kings County that charged him with crimes pursuant to Tax Law §§ 1814 (a) (i); (c) (1); (b) and New York City Administrative Code §§ 11-4012 (a) (1); (b) and (c) (1) relating to the untaxed cigarettes seized during execution of the search warrant at the deli. Mr. Almanzilli was charged with the same offense as petitioner for the cigarettes seized at the deli and was also charged with a variety of offenses for the cigarettes seized at the apartment.

10. On July 6, 2016, petitioner pled guilty to a disorderly conduct charge and agreed to restitution of \$2,200.00 to be paid to the Division in full satisfaction of the criminal charges filed against him. During the plea hearing, the Assistant District Attorney stated that the plea agreement did not encompass any civil penalties asserted by the Division. Petitioner's defense counsel stated that petitioner understood that to be the case.

11. On September 28, 2016, the Division issued petitioner a notice of determination (notice number L-045485549), which asserted penalty of \$38,040.00 and advised petitioner as follows:

“On 04/08/16, you were found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.

Therefore, penalty is imposed under article 20 of the New York State Tax Law.”

The penalty assessment is based on petitioner's asserted possession of the cigarettes discovered in the deli during the search on April 8, 2016. As noted, 68.4 cartons were found. A penalty of

\$600.00 per carton in excess of five cartons (1,000 cigarettes) was imposed (63.4 cartons x \$600.00 = \$38,040.00).

12. At the hearing in this matter, petitioner testified that he was never manager of the deli, but merely a cashier. Instead, petitioner testified that Mr. Almanzilli was the deli's manager and lived in the apartment. Petitioner acknowledged that as a result of the September 16, 2015 regulatory inspection, he knew that untaxed cigarettes were being sold, but was assured by the deli's owner that there would no adverse ramifications to him as he was only a cashier. Petitioner stated that, on April 8, 2016, while he was aware of, and had control of, the cigarettes in an around the register, he had no access to, or knowledge of, the 32 cartons of cigarettes located in the wall trap between the deli counter and the register counter or the 5.8 cartons found in a black bag. Petitioner testified that after his arrest on April 8, 2016, he quit his job at the deli and lost everything. He testified that his wife and child went to stay with her father, and he was forced to stay with a friend who he identified as "Sammy." When questioned as to Sammy's last name, petitioner was unwilling or unable to provide a name.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by citing the relevant sections of the Tax Law that provide for an imposition of a penalty on a person in possession or control of unstamped or unlawfully stamped cigarettes. The Administrative Law Judge noted that the penalties at issue were asserted against petitioner for his possession of more than 1,000 unstamped cigarettes. The Administrative Law Judge summarized petitioner's central argument that the notice of determination should be canceled because he was merely a cashier at the store and was neither in possession nor control of the unstamped cigarettes. In the alternative, petitioner argued that the amount of the penalty should be reduced to reflect the unstamped

cigarettes found in and near the cash register and not the unstamped cigarettes discovered between the register and deli counter, of which petitioner claimed to have no knowledge.

The Administrative Law Judge then described the burden of proof allocated to petitioner, who must show by clear and convincing evidence that the Division improperly asserted the penalty here at issue. Concluding that petitioner failed to meet such burden, the Administrative Law Judge noted that petitioner's testimony that he was not a manager of the store was in conflict with the Division's investigation report and testimony of one of its investigators. The Administrative Law Judge determined that petitioner's denial of his status as a manager of the store, standing alone, was insufficient to meet the burden of proof.

The Administrative Law Judge then addressed petitioner's argument that the Division abused its discretion in imposing the maximum penalty permitted under the statute. The Administrative Law Judge rejected petitioner's argument, finding that because there are no statutory guidelines for exercise of the Division's discretion in imposing the penalty, it was beyond the jurisdiction of the Division of Tax Appeals to impose requirements on the Division where none are provided by the statute. Accordingly, the Administrative Law Judge denied the petition and sustained the notice of determination.

ARGUMENTS ON EXCEPTION

Petitioner argues on exception that the Administrative Law Judge erred in concluding that the Division properly imposed the penalty. Specifically, petitioner argues that the Administrative Law Judge's reliance on the Division's investigation reports and testimony, consisting of what petitioner alleges to be double hearsay, was a violation of petitioner's right to confront witnesses under the 6th Amendment to the Constitution of the United States and SAPA § 306. Petitioner also asserts, as he did below, that he was only a cashier at the store and not a manager as alleged

by the Division, and as such, cannot be in possession or control of the unstamped cigarettes discovered during the execution of the search warrant. Petitioner states that the penalty should be reduced to an amount reflecting the unstamped cigarettes found in and around the cash register and should not include penalties for unstamped cigarettes found between the register and deli counters or in the black bag behind the register counter, of which he had no knowledge.

The Division argues that Administrative Law Judge correctly concluded that the penalty here at issue was properly imposed on petitioner as a person in possession or control of unstamped cigarettes. With regard to petitioner's constitutional argument, the Division counters that petitioner had prior notice of the investigation reports and investigators named therein but failed to object to any of the reports at the hearing. Petitioner was never denied an opportunity to subpoena any investigator named in the reports and thus, according to the Division, petitioner was afforded his right to confront witnesses under the 6th Amendment to the United States Constitution and SAPA § 306. The Division also argues that petitioner's employment status, whether cashier or manager, does not change the fact that petitioner was observed selling untaxed cigarettes and admitted that he knew it was illegal to do so, and thus the penalty was properly imposed on petitioner.

OPINION

A tax on cigarettes is imposed pursuant to Tax Law § 471 (1), which provides, in relevant part:

“There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale . . . [s]uch tax on cigarettes shall be at the rate of four dollars and thirty-five cents for each twenty cigarettes or fraction thereof . . . [s]uch tax is intended to be imposed upon only one sale of the same package of cigarettes. It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof.”

Tax Law § 481 (1) (b) (i) establishes a penalty for the possession or control of untaxed cigarettes, which provides, in relevant part, as follows:

“In addition to any other penalty imposed by this article, the commissioner may (A) impose a penalty of not more than six hundred 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”

Petitioner argues that he was in fact a cashier at the store, and not a manager, and thus he lacked possession and control of the unstamped cigarettes and cannot be found liable for the penalty provided under Tax Law § 481 (1) (b). Petitioner bears the burden of proving by clear and convincing evidence that the Division improperly imposed the penalty (*Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001, *dismissed on other grounds*, 305 AD2d 738 [3d Dept 2003]; *Jay's Distributors, Inc. v Boone*, 148 AD3d 1237 [3d Dept 2017], *lv denied* 29 NY3d 918 [2017], *rearg denied* 30 NY3d 1039 [2017]).

As a threshold matter, we note the penalty provided by Tax Law § 481 (1) (b) (i) may be imposed on “any” person in possession or control of unstamped cigarettes. The definition of the term “person” for purposes of the statute includes an individual, but is not otherwise limited to managerial or other employment status (*see* Tax Law § 470 [3]). Furthermore, Tax Law § 481 (1) (b) (i) provides for the imposition of the penalty on persons in possession *or* in control of unstamped cigarettes. Thus, possession of unstamped cigarettes, even in the absence of control, represents a basis for imposition of the penalty distinct from control of such unstamped cigarettes.

We agree with the Administrative Law Judge that petitioner did not meet his burden of showing that the Division improperly assessed the penalty for possession of unstamped cigarettes. Petitioner denies that he identified himself as a manager of the store during the regulatory inspection and when the search warrant was executed, but did not offer evidence other

than his testimony at the hearing that this was not the case. As noted, the Administrative Law Judge determined that petitioner's testimony was insufficient to meet his burden of proof. We are mindful of our general practice to respect the discretion of an administrative law judge in matters of credibility and weight assigned to testimony and see no reason here to alter the Administrative Law Judge's determination in this regard (*see Matter of Rizzo*, Tax Appeals Tribunal, May 13, 1993; *Matter of Spallina*, Tax Appeals Tribunal, February 27, 1992; *see also Stevens v Axelrod*, 162 AD2d 1025 [4th Dept 1990]).

Even if petitioner did carry his burden and was able to show that he lacked control of the unstamped cigarettes, control of unstamped cigarettes is not an element necessary for imposition of the penalty where the alternative basis, possession, is found. Petitioner does not dispute the fact that he knowingly sold unstamped cigarettes, but rather contests how many unstamped cigarettes were in his possession at the time of the execution of the search warrant, and accordingly, the amount of penalty the Division may impose. In furtherance of this argument, petitioner posits that he cannot be in possession of cigarettes of which he had no knowledge, which would include the 32 cartons of cigarettes between the deli and register counters and the 5.8 cartons found in a bag on the floor of the store. Given petitioner's knowing involvement in the deli's sale of unstamped cigarettes, however, we are unpersuaded by his claim that he was unaware that cigarettes were stored in those locations. Accordingly, this argument must fail.

Lastly, we address petitioner's argument that he was denied his right to confront witnesses against him (US Const, 6th Amend.; *see also* SAPA § 306 [3]; 20 NYCRR 3000.15 [d] [1]). Specifically, petitioner alleges that he was denied his right to confront the investigators quoted in the Division's investigation report regarding what he characterized as double hearsay identifying him as manager of the store. We first note that, for purposes of the 6th Amendment,

a determination to impose a civil penalty is not the equivalent of a criminal proceeding, and protections applicable to criminal sanctions, such as the right of confrontation, do not apply in the present context (*see Rowlee v Commr of Internal Revenue*, 80 TC 1111, 1116 [1983]; *Helvering v Mitchell*, 303 US 391, 402-404 [1938]). In any event, petitioner does not deny that prior to the hearing in this matter, he had access to the Division's investigation report and the Division's hearing memorandum naming the witnesses it planned to call to give testimony. Petitioner thus had the opportunity to subpoena the investigators named in the investigation report to testify at the hearing. As to petitioner's complaint about the hearsay nature of the investigation report, it is well-established that hearsay evidence is admissible in administrative hearings and may constitute substantial evidence supporting the determination (*Matter of Flanagan v New York State Tax Commn.*, 154 AD2d 758 [3d Dept 1989]; *Matter of Mira Oil Co. v Chu*, 114 AD2d 619 [3d Dept 1985], *appeal dismissed* 67 NY2d 756 [1986], *lv denied* 68 NY2d 602 [1986]). While the technical rules of evidence do not apply in an administrative hearing, it is within the discretion of the administrative law judge to apportion whatever weight is necessary to hearsay (20 NYCRR 3000.15 [d] [1]; *see also Matter of Rizzo; Matter of Spallina*). In any case, petitioner's argument that the Administrative Law Judge improperly relied on hearsay evidence is rendered moot as petitioner's liability for the penalty for possession of unstamped cigarettes does not depend on his status as the manager of the store, but rather his possession or control of unstamped cigarettes in violation of Tax Law § 481 (1) (b) (i).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Saddam Mashaal Alselmi is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Saddam Mashaal Alselmi is denied; and
4. The notice of determination, dated September 28, 2016, is sustained.

DATED: Albany, New York
March 24, 2021

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner