

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
YAHYA AHMED : DETERMINATION
for Revision of a Determination or for Refund under : DTA NO. 828353
Article 20 of the Tax Law for the tax period May 19, 2016. :
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Petitioner, Yahya Ahmed, filed a petition for a revision of a determination or for refund under article 20 of the Tax Law for the tax period May 19, 2016.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, in New York, New York, on January 7, 2020 at 11:00 a.m., with all briefs to be submitted by May 18, 2020, which date began the six-month period for the issuance of this determination. Petitioner appeared by Lazzaro Law Firm, PC (Lance Lazzaro, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel),

ISSUES

I. Whether petitioner was in possession or control of unstamped or unlawfully stamped cigarettes so as to be liable for the penalty imposed pursuant to Tax Law § 481 (1) (b) (i).

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

FINDINGS OF FACT

1. On May 19, 2016, petitioner, Yahya Ahmed, was driving when he was stopped by members of the Cigarette Strike Force of the Division of Taxation's (Division's) Criminal Investigations Division for a violation of the Vehicle and Traffic Law.

2. At approximately 12:30 p.m., Supervising Investigator Kevin J. Barbitsch and Suffolk County Detective Chris Mangi conducted the car stop on the corner of 63rd Street and 6th Avenue in front of 6202 6th Avenue in Brooklyn New York, for petitioner's failure to signal before making a left from 55th Street onto 6th Avenue.

3. Detective Mangi asked petitioner if he could conduct a search of the vehicle. Petitioner responded that the car did not belong to him, but he did not prevent a search of the vehicle. Two cardboard boxes were discovered in the trunk. One box appears to contain cartons of Newport cigarettes. Photograph 15 contained in exhibit F reflects the two boxes found. From the picture, there is no way to determine the entire contents of the boxes. Moreover, there is no way to determine whether these cigarettes bore cigarette tax stamps.

4. Petitioner was asked if he had a license to sell cigarettes. Petitioner replied that he did not. Petitioner was arrested at 12:36 p.m. and charged with possession and transportation of more than 30,000 cigarettes, evading cigarette tax, possession to sell unstamped cigarettes and failure to give required signal for turning.

5. There is no dispute that the vehicle driven by petitioner was a rental car. In fact, it is undisputed that petitioner did not rent the vehicle. The rental agreement was discovered and reviewed at the scene by Detective Mangi. However, the rental agreement was not vouchered nor presented into evidence by the Division.

6. The Division presented the testimony of Mr. Barbitsch, who is a Supervising Investigator with the Criminal Investigations Division, to explain the basis for the traffic stop and the resulting arrest of petitioner. Mr. Barbitsch has worked for the Division for at least 18 years and has been involved in hundreds of these types of cases. He testified that at approximately 11:00 a.m. on May 19, 2016, 10 members of the Cigarette Strike Force were conducting surveillance in the vicinity of 54th Street and 9th Avenue in Brooklyn, after a reliable source reported a suspected cigarette trafficker driving a red scooter in the vicinity. At no point is it alleged that petitioner was the suspect driving the scooter. At 11:50 a.m., the reliable source then reported that a male driving a silver Toyota Camry was transporting untaxed cigarettes in the rear of the vehicle. Mr. Barbitsch then recounted the traffic stop as described in finding of fact 2.

7. In order to refresh his memory, Mr. Barbitsch referred to exhibits E and F. Exhibit E is 38 pages in length and is collectively the report of the investigation from the initial tip from the reliable source, receipts from vouchering the evidence, documents relating to the criminal charges and ends with the case adjudication report. Exhibit F is a collection of 22 photographs taken at the scene after the arrest of petitioner. Mr. Barbitsch did not take these photos and he did not know which investigator took them. According to his testimony, the photos were taken at the scene and then another investigator was responsible for transferring the photographic evidence onto a disc. This process takes place at the Division's offices.

8. Upon review of the photographs taken at the scene, and relied upon in witness testimony, the cartons discovered in the trunk were not opened at the time of petitioner's arrest. As indicated in finding of fact 4, petitioner was arrested on the scene at 12:36 p.m. and the photographs are all time stamped between 13:22 and 13:36. Therefore, at the time of petitioner's arrest, it is impossible to determine from the evidence that the cartons of cigarettes were

unstamped. Moreover, on cross-examination, Mr. Barbitsch was asked whether he opened the two boxes in the trunk and he replied that neither he nor Detective Mangi opened the boxes. Mr. Barbitsch testified that it was the reliable source who indicated the boxes contained unstamped cigarettes.

9. Additionally, the report, on page two, states that the vehicle was released to a friend of petitioner, and this statement is corroborated by form EN-651 entitled Office of Tax Enforcement Property Receipt/Release, with voucher number 45413, which lists the car as released to the friend listed on page two of the report. However, in his testimony, Mr. Barbitsch explained that a rental vehicle is not subject to seizure, because it is not owned by the arrested individual, and, therefore, cannot be subject to forfeiture. He explained that the car was vouchered and eventually the rental company receives the car from the district attorney's office.

10. There are eight additional forms EN-651 attached to the investigation report. Form EN-651, with voucher number 45412, is a property receipt for 159 cartons of Virginia (VA) stamped Newports and 20 cartons of VA stamped Marlboros. There was no evidence showing any Marlboro cigarettes and, as set forth above, no pictures of any unstamped or VA stamped cigarettes. The cigarettes were vouchered by Ethan Taylor, an investigator under the supervision of Mr. Barbitsch. Mr. Taylor was not present to testify.

11. Form EN-651 with voucher number 62130 is a property receipt for a bundle of unaudited United States currency (USC). This form is also pictured in photograph 21 of exhibit F and relates to the \$1,200.00 seized from petitioner during his arrest. From a review of the property receipt and the picture, the amount cannot be determined. However, at page 32 of the report, a deposit in the amount of \$1,200.00 was made to an account at Key Bank on May 19, 2016.

12. Form EN-651 with voucher number 63126 is a property receipt for a disc of 24 photos taken of the arrest. Despite vouchering 24 photos, the Division excluded two when entering the photos into evidence as exhibit F. The Division's representative stated at the time he offered the exhibit into evidence that: "I just want to note that out of respect for the individual's medical information that was also photographed, I have taken two photographs out of the 24 photographs that were taken." When asked to address this other person whose personal items were in the vehicle driven by petitioner, the Division's representative stated: "We don't know who Kassim Mohamed is. He was not identified in the vehicle." Form EN-651 with voucher number 45411 is a property receipt for documents related to Kassim, Mohamed. It is presumed that this refers to the medical information photographed in the excluded two photos from exhibit F. Petitioner testified that the medical information referred to prescriptions for Mr. Kassim. The remaining forms EN-651 were property receipts for personal property found in the vehicle during the traffic stop.

13. Included as part of the investigative report were certain documents related to the criminal proceeding. When questioned regarding the grand jury proceeding, Mr. Barbitsch asserted that he was in attendance. However, when questioned further on cross-examination, he explained that although he did not remember the grand jury proceeding with respect to petitioner, he did confirm that he would routinely appear at such proceedings when he was served with a subpoena to do so. Although petitioner was charged with multiple felonies, this case did not proceed to a grand jury. Petitioner pled guilty to a misdemeanor charge of disorderly conduct. Petitioner was not required to pay any fine or any restitution.

14. At no point was petitioner advised of his Miranda rights.

15. After criminal disposition of a cigarette tax case, it is referred to the Division's audit group for any civil assessment. The Division presented the testimony of Robert Bergeron who is the Cigarette Strike Force audit team leader. Mr. Bergeron stated the Division's position on imposing a civil assessment as follows:

“Depending on particular circumstances and if there is money seized or restitution ordered by the court, then the audit group would customarily issue an assessment for the restitution that was ordered. If it was ordered, then we would look at the facts in the case and we would make a determination on whether or not we would issue a carton penalty which is the civil component of the case” (Tr., pp. 115 [lines 22 25] - 116 [lines 2-6]).

16. In this case, the Division issued a notice of determination, assessment number L-046133559, dated March 16, 2017, to petitioner that assessed penalty in the amount of \$104,400.00 for possession of 179 cartons of untaxed cigarettes. As set forth in finding of fact 13, petitioner was not required to pay any fine or any restitution.

17. Petitioner credibly testified that the rental car did not belong to him, but rather, belonged to Mr. Kassim. On the day of his arrest, petitioner testified that his car was not in service and that he asked Mr. Kassim if he could borrow his car to pick up his children and run an errand. Petitioner explained that he did not know the contents of the trunk and that he consented to a search and told the officers that the car did not belong to him.

CONCLUSIONS OF LAW

A. New York State imposes an excise tax of \$4.35 per pack of 20 cigarettes on “all cigarettes possessed in the state by any person for sale” (Tax Law § 471 [1]). Possession of more than 400 cigarettes in unstamped or unlawfully stamped packages by any person other than an agent or distributor is presumptive evidence that such cigarettes are subject to the tax and the burden is on the person in possession to prove otherwise (*see* Tax Law § 481 [2] [a]).

B. In order to discourage the sale of untaxed cigarettes, Tax Law § 481 (1) (b) (i) provides for the imposition of penalty, 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. . .”

For petitioner to be liable for the penalty imposed, the unlawfully stamped cigarettes must have been in his possession or under his control (*see Matter of Kamal*, Tax Appeals Tribunal, February 11, 2010).

C. In this case, the Division has failed to demonstrate the mere existence of unstamped cigarettes. Mr. Barbitsch made the arrest and testified that he did not open the two boxes of cigarettes discovered in the trunk of the rental vehicle that petitioner was driving on the day in question. Moreover, photographs submitted into evidence, with time stamps well over an hour after petitioner’s arrest, demonstrate that the boxes remained unopened and there is virtually no way to determine the contents of both boxes. Mr. Barbitsch testified that neither he nor Detective Mangi opened the boxes. He stated that his knowledge concerning the contents of the boxes in the trunk was from the reliable source. At no point did the Division establish the number of cartons seized or whether the cigarette packs in the cartons were unstamped or unlawfully stamped.

D. Even assuming that unstamped cigarettes were recovered during a search of the vehicle, petitioner has established that he was not in possession or control of the cigarettes. Petitioner credibly testified that it was not his vehicle, he did not rent the vehicle, that he merely borrowed a vehicle from Mr. Kassim because his vehicle was inoperable. This testimony is bolstered by the fact that personal items belonging to Mr. Kassim were found in the car. Mr.

Barbitsch had no personal information from the reliable source regarding petitioner's involvement whatsoever, but rather, received a tip that unstamped cigarettes were located in the silver Toyota Camry that petitioner borrowed.

E. Assuming that petitioner had possession and control over unstamped or unlawfully stamped cigarettes, the imposition of a penalty is not automatic (*see Matter of Kamal; Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001, *dismissed on other grounds sub nom Matter of Vinter v Commissioner of Taxation & Fin.*, 305 AD2d 738 [3d Dept 2003]) Additionally, it is noted that Mr. Bergeron testified that it is the audit division's common practice to issue a civil assessment based upon the money seized or restitution required to be made in the criminal component of the investigation. Clearly, there was no fine or restitution ordered in the criminal matter. Accordingly, it is determined that the assessment is excessive based upon the facts of this case.

F. The petition of Yahya Ahmed is granted and the notice of determination, L-046133559, dated March 16, 2017, is cancelled.

DATED: Albany, New York
November 12, 2020

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE