

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
MICHELLE L. VANDEE
for Revision of a Determination or for Refund of
Cigarette Tax under Article 20 of the Tax Law for the
Period June 29, 2016.

DETERMINATION
DTA NO. 828646

Petitioner, Michelle L. VanDee, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period June 29, 2016.

A hearing was held before Jessica DiFiore, Administrative Law Judge, in Rochester, New York, on November 13, 2019, at 10:00 a.m., with briefs to be submitted by February 26, 2020, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Elizabeth Lyons, Esq. and Osborne Jack, 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 penalty imposed against petitioner pursuant to Tax Law § 481 (1) (b) (i) is excessive.

FINDINGS OF FACT

1. On June 29, 2016, petitioner was driving when she was stopped by Genesee County sheriff's deputies for a violation of the Vehicle & Traffic Law.

2. While the sheriff's deputies were conducting the stop, petitioner's passenger told one of them that she had 14 cartons of cigarettes in the cargo area of the vehicle. When asked about her passenger's statement, petitioner admitted to having more than 14 cartons in the vehicle, and voluntarily opened the rear hatch of the vehicle, exposing more cigarettes. The deputies conducted a search of the vehicle and found 93 cartons of untaxed cigarettes and 1 roll of untaxed chewing tobacco in the rear cargo. They then contacted Investigator Linde (Linde) from the Criminal Investigation Division of the Department of Taxation and Finance.

3. Linde advised petitioner of her *Miranda* rights. Petitioner then waived her *Miranda* rights and gave Linde written consent to search the vehicle. During his search of the vehicle, Linde found 72 cartons of Seneca cigarettes, 13 cartons of King Mountain cigarettes, 8 cartons of Signal cigarettes and 1 roll of Grizzly chewing tobacco inside the rear cargo. Petitioner also gave Linde a receipt for the purchase of 58 cartons of Seneca cigarettes, 13 cartons of King Mountain cigarettes, and 8 cartons of Signal cigarettes. The remaining 14 cartons of Seneca cigarettes and the roll of chewing tobacco were purchased by petitioner's passenger.

4. Petitioner also consented to and signed a voluntary statement prepared by Linde. In the statement, petitioner admitted that she purchased Indian brand cigarettes, she did not pay tax on the cigarettes she purchased, and that she purchased Indian brand cigarettes approximately 20 times in the last 4 years. Petitioner stated that she collected money before purchasing the cigarettes and would distribute them when she returned home. She also admitted she did not

have a license to distribute or possess untaxed cigarettes, and she understood what she was doing was illegal. She concluded by stating that she purchased 79 cartons of untaxed cigarettes.

5. The unpaid cigarette tax for the 79 cartons totaled \$3,436.50.

6. Among other charges, petitioner was charged with willfully possessing or transporting 10,000 or more unstamped cigarettes for the purpose of sale in violation of Tax Law § 1814 (c) (1).

7. Petitioner appeared in the Pembroke Town Court on December 12, 2017 and pled guilty to disorderly conduct. She also paid restitution in the amount of \$3,436.50.

8. On January 4, 2018, the Division issued petitioner notice and demand L-047580841, showing a penalty and payment made in the amount of \$3,436.50. Despite the fact the notice shows that this is a penalty, it is not. The \$3,436.50 represents the total tax lost, and therefore, owed, on the untaxed cartons of cigarettes petitioner purchased. Thierno Diallo, an auditor in the Criminal Investigations Division, testified that because this assessment was issued after petitioner paid the restitution, he could not issue the assessment showing it as a tax due and paid.

9. On January 5, 2018, the Division issued petitioner notice of determination L-047582090 (notice), which asserted a penalty of \$44,400.00 because petitioner was found to be in possession of unstamped or unlawfully stamped cigarettes and/or tobacco products. Petitioner was assessed the maximum penalty of \$600.00 per carton for 74 of the 79 cartons she purchased. A penalty was not assessed on the five additional cartons because it is prohibited by Tax Law § 481 (1) (b) (i) (A).

10. Petitioner filed a petition on March 26, 2018, stating that she did not understand the amount in the notice and that she already paid \$3,436.50 in restitution for the cigarettes she had. Petitioner also stated that she “called about the amount the [sic] person said they don’t charge

everyone.” She also stated that she was not told about a civil fine and she cannot pay the amount assessed.

11. Petitioner testified at the hearing that she thought she would only be liable for the sales tax on the cartons she purchased. Petitioner was never told that she would be incurring a civil penalty if she pled guilty to the tax due. She believes a penalty of \$600.00 per carton is extreme.

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]). This tax is imposed on all cigarettes sold on an Indian reservation to non-Indians (*id.*). An affixed cigarette tax stamp serves as proof that such tax was paid (*id.*). 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. A penalty of up to \$600.00 per carton may be imposed for every two hundred cigarettes (i.e., a carton), or fraction thereof, in excess of one thousand cigarettes (five cartons) “in unstamped or unlawfully stamped packages in the possession or under the control of any person” (Tax Law § 481 [1] [b] [i] [A]). For petitioner to be liable for the penalty imposed, the unlawfully stamped cigarettes must have been in her possession or under her control (*see Matter of Kamal*, Tax Appeals Tribunal, February 11, 2010).

C. Here, it is undisputed that petitioner was in possession and control of untaxed and, therefore, unstamped cigarettes (*see* Tax Law § 471 [1]). Petitioner told the sheriff’s deputy that she had cigarettes in her vehicle. Additionally, she signed a voluntary statement admitting she

purchased 79 cartons of cigarettes, did not pay tax on such cartons, and that she knew her actions were illegal (*see* finding of fact 4). Petitioner also admitted that she collected money before purchasing the cigarettes and was going to distribute them when she returned home (*see id.*). Accordingly, petitioner is liable for the penalty imposed by Tax Law § 481 (1) (b) (i) (A). Even if she did not admit to buying them so she could resell them when she returned home, “[p]ossession or control itself, with or without intent to sell, is sufficient for the imposition of penalty” (*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]).

D. Petitioner asserts that the penalty imposed by the Division is excessive. The imposition of a penalty is not automatic (*see Matter of Kamal; Matter of Vinter*). It is within the discretion of the Commissioner (*see id.*). The only limit on the Commissioner’s use of such discretion is that the amount of the fine cannot exceed \$600.00 for each 200 cigarettes or fraction thereof in excess of 1,000 cigarettes in unstamped or unlawfully stamped packages (*see* Tax Law § 481 [1] [b] [i] [A]). Here, the Commissioner imposed the maximum fine allowed by law.

E. In imposing the penalty, the Division is not required to consider mitigating factors (*see id.; Matter of Vinter*). Additionally, the Division of Tax Appeals does not have jurisdiction to require the Commissioner to consider mitigating factors when the statute does not provide for it (*see id.*).

F. A presumption of correctness attaches to a properly issued statutory notice (*see id.*). It is petitioner’s burden to establish by clear and convincing evidence that the imposition of the penalty imposed by the Commissioner was an abuse of discretion (*see Matter of Vinter*). In this

case, petitioner has not met her burden. Therefore, she is not entitled to have the penalty reduced.

G. The petition of Michelle L. VanDee is denied and notice of determination L-047582090, dated January 5, 2018, is sustained.

DATED: Albany, New York
August 20, 2020

/s/ Jessica Difiore
ADMINISTRATIVE LAW JUDGE