

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SHOULONG ZHENG : DETERMINATION
for Revision of a Determination or for Refund of Cigarette : DTA NO.829172
Tax under Article 20 of the Tax Law for the Period :
June 28, 2017. :

Petitioner, Shoulong Zheng, filed a petition for a revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period June 28, 2017.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Brian Evans, Esq., of counsel), brought a motion, dated October 21, 2020, seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a) (vi) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing by the Law Offices of Robert N. Lerner (Robert N. Lerner, Esq., of counsel), did not respond to the motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

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 assessed penalty against petitioner pursuant to Tax Law § 481 (1) (b) (i).

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) concerns a pending challenge to a notice of determination L-047504171 (Notice), dated December 8, 2017, issued to petitioner, Shoulong Zheng, and assessing a penalty for the period ended June 28, 2017, in the amount of \$572,580.00. The penalty is premised upon the Division's assertion that petitioner was in possession of 959.3 cartons of unstamped or unlawfully stamped cigarettes in violation of Tax Law article 20.

2. Petitioner filed a request for conciliation conference (Conciliation Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the foregoing notice. A conciliation conference was held July 9, 2018, and on October 19, 2018, BCMS issued a conciliation order (CMS No. 000301784) sustaining the notice. Petitioner continued his challenge by filing a petition with the Division of Tax Appeals. The petition is dated as signed on January 10, 2019, was mailed by United State Postal Service (USPS) priority 2-day mail on January 11, 2019, and is date-stamped as received by the Division of Tax Appeals on January 14, 2019. There is no dispute that the petition was timely filed.

3. In support of its motion, the Division submitted the following documents: (i) an affirmation, dated October 21, 2020, of Brian Evans, Esq.; and (ii) an affidavit, dated October 14, 2020, of Robert Bergeson, a Forensic Tax Auditor II employed by the Division, accompanied by attached exhibits, including Division's Investigation File and its Audit File, in support of the calculation and basis for issuance of the subject notice. Mr. Bergeson has been employed by the

Division for 19 years and has held his current position as a Cigarette Strike Force Team Leader for the past six years.

4. As set forth in numerous Report of Investigation (ROI) statements and attached supporting documents, included in and comprising the Division's investigation file, this matter commenced in early February of 2017, when the Division received information from a reliable source concerning an advertisement on the "We Chat" mobile phone application (APP), offering "Chinese, Korean and Japanese Cigarettes" for sale. The information included photographs of cigarette packs and cartons, and a telephone number.

5. In response to this information, the Division initiated a Criminal Investigations Division (CID) field operation, conducting an investigation in conjunction with other governmental agencies including Homeland Security and the Kings County District Attorney's Office. Surveillance was focused on an apartment building located at 4918 8th Avenue in Brooklyn, New York, and on a gray Acura MDX automobile, and included the use of an undercover agent making ongoing purchases of cartons of cigarettes from an unknown Asian male. Department of Motor Vehicle (DMV) records revealed the name of the unknown Asian male and confirmed that he was the registered owner of the Acura automobile, with his address listed as 4918 8th avenue, Apartment 2 F, in Brooklyn, New York.

6. The undercover agent made ongoing purchases of cartons of cigarettes through telephone calls to the above-referenced number, speaking with the same person on each such call. Purchases on May 5, 2017, and June 5, 2017, were made by the undercover agent. The

purchase in each such instance consisted of two cartons of Marlboro cigarettes bearing Virginia cigarette stamps.¹

7. On June 13, 2017, a member of the Division's CID, together with an agent from Homeland Security, met and attempted to conduct a "knock and talk" at the 4918 8th Avenue premises. The three-story building at that address includes commercial establishments on the ground floor, with residential apartments located on the upper floors. The entrance to the upper floors is gated, and was locked when the agents arrived. An Asian male approached the gated entrance, and identified himself as petitioner, Shoulong Zheng. He informed the agents that the second floor of the building consists of two apartments, and that he lives in the apartment in the front of the building, identified as Apartment 2 F. He did not allow the agents access into the residence.

8. On June 14, 2017, an additional purchase of contraband cigarettes was made by the undercover agent. As before, the contraband in this instance consisted of two cartons of Marlboro cigarettes bearing Virginia cigarette tax stamps.

9. Based upon the ongoing purchases described herein, and upon background information searches conducted by the CID, the main subject of the investigation was confirmed to be petitioner, Shoulong Zheng. More specifically, the undercover agent compared petitioner's DMV photograph and a photo of petitioner taken during the May 5, 2017 purchase of contraband cigarettes, and identified petitioner as the person with whom he has been dealing since the inception of the investigation. Petitioner was also identified as the other person leaving the

¹ The cigarettes in question bore Virginia tax stamps, and did not bear New York State tax stamps. Certain other cigarettes seized in connection with the execution of search warrants likewise bore Virginia tax stamps or no tax stamps at all (*see* finding of fact 11). All packages of cigarettes in New York State, other than those possessed by, or in transport on behalf of, licensed New York State stamping agents or distributors must bear affixed New York State tax stamps (*see* Tax Law § 471). Since the packages in question in this matter were either unstamped or illegally stamped, they are sometimes generically referred to herein as contraband cigarettes.

apartment at 4918 8th Avenue on June 14, 2017 in possession of the contraband cigarettes that were sold to the undercover agent on the same date. The actual transfer of the contraband cigarettes to the undercover agent on that date was made by a person fitting the description of the owner of the Acura automobile. Further, the owner of the Acura automobile was driving that vehicle when petitioner was observed offloading contraband cigarettes from the vehicle into the apartment at 4918 8th Avenue. The owner of the Acura automobile was identified in the Division's documents as a "co-conspirator." He is not a party to this proceeding, and his name has been redacted from the documents provided herein.

10. On June 27, 2017, two warrants were issued by Kings County Supreme Court Justice Evelyn Laporte authorizing the search of the premises at 4918 8th Avenue, Apartment 2 F, and of the Acura automobile, and of persons present therein, and the seizure of any property found in the premises or automobile, or on such persons, related to the alleged commission of several crimes involving the possession, control or sale of contraband (i.e., unstamped or unlawfully stamped) cigarettes, as specified in each of the search warrants.

11. On June 28, 2017, CID-Cigarette Strike Force agents, together with officers of the New York City Sheriff's Department and agents from Homeland Security, executed the foregoing search warrants, as follows:

a) petitioner was observed exiting the apartment premises carrying a black plastic bag in the shape and size of approximately two cartons of cigarettes, entering the Acura automobile, and driving away from the premises. Petitioner met with the undercover agent, where he exchanged the bag for cash and then drove off. The bag contained two cartons of cigarettes with Virginia tax stamps affixed. CID agents followed and stopped the vehicle, petitioner was apprehended, and was transported to the apartment premises.

b) Agents and officers from the above-described agencies arrived at the apartment premises, and entered the building using keys found on petitioner's person. Upon entering the building and heading upstairs, the agents observed the co-conspirator leave Apartment 2 F and head up the steps toward the third floor. He was detained and placed under arrest.

c) Using the same keys, the agents entered Apartment 2 F, to execute the search warrant at those premises. At approximately the same time, the vehicle search warrant was executed.

d) The search of the vehicle resulted in the recovery of eight cartons of unstamped or illegally stamped cigarettes, as well as \$116.00 U.S. currency (USC) located in the center console of the vehicle. That USC was compared to a photocopy of the USC given to the undercover agent earlier that day in connection with his purchase of two cartons of cigarettes (*see* finding of fact 11 [a]), and the serial numbers matched. Additional property recovered from the vehicle included two iPhones, and several miscellaneous documents, as well as a driver's license.

e) The search of the apartment resulted in the recovery of 959.3 cartons of unstamped or illegally stamped cigarettes, and additional items of property. Specifically, in the kitchen and dining area, a total of 331 cartons of contraband cigarettes were recovered, consisting of 0.9 carton located in a white shopping bag hanging on a wall in the kitchen area, 7.4 cartons located on a shelf under the microwave in the kitchen area, and 323 cartons located in a closet in the dining area. In one of two bedrooms, a total of 628 cartons of contraband cigarettes were recovered. Additionally \$6,841.00 in USC was recovered from various locations in the apartment, and from the front pockets of petitioner and of the co-conspirator, as well as one Dell Inspiron One monitor, a Dell AC adapter, two white iPhones, business cards, two black and white composition notebooks, a yellow envelope and several miscellaneous bank records.

f) In addition to the USC noted above, the search of petitioner's person recovered one key chain (presumably holding the key used to access the building and the apartment), and a bank check. In addition to the USC noted above, the search of the co-conspirator's person recovered one white iPhone.

12. Review of the documents attached reveals that all of the foregoing property recovered was properly vouchered into custody, as recorded on multiple forms EN-651 (Office of Tax Enforcement Property Receipt/Release), each of which bears a voucher number and identifies the particular property included thereon.

13. Petitioner was arrested and charged with several crimes under Tax Law article 37, including attempt to evade or defeat taxes imposed on 10,000 or more cigarettes (Tax Law § 1814 [a] [1]), a class E felony; possession or transport for sale any unstamped or unlawfully stamped cigarettes (Tax Law § 1814 [b]), a class A Misdemeanor; possession or transport of 10,000 or more cigarettes for the purpose of sale (Tax Law § 1814 [c] [1]), a class E felony; possession or transport of 30,000 or more cigarettes for the purpose of sale (Tax Law § 1814 [c] [2]), a class D felony. Several like charges were also lodged against petitioner under the New York City Administrative Code §§ 11-4012 (a) (1); (b); (c) (1).

14. Included as part of the Division's investigative report were documents concerning the criminal proceeding. Although petitioner was charged with multiple felonies, this case did not proceed to a grand jury. Rather, petitioner pled guilty to the class A misdemeanor charge of possession of untaxed cigarettes (Tax Law § 1814 [b]), in full satisfaction of the foregoing charges filed against him. As part of his October 10, 2017 plea agreement, petitioner agreed to pay to the Division the amount of \$11,309.00 (comprised of his forfeiture of cash found on his person and seized from him at the time of the execution of the search warrants on June 28, 2017,

plus an additional payment of \$5,000.00 made at the time of his guilty plea). This payment was accepted as the New York State excise tax on the cigarettes previously seized pursuant to the search warrants executed on June 28, 2017.²

15 In his plea agreement, petitioner admitted that he was the sole and exclusive owner of the property seized upon execution of the search warrants, that all of the property was the proceeds, substituted proceeds, or instrumentalities of felony crime, and that the \$11,309.00 amount paid as excise tax does not include civil penalties and interest owed to the Division for the cigarettes recovered from the Acura automobile or from 4918 8th Avenue apartment 2 F.

16. After criminal disposition of a cigarette tax case, the investigation file is referred to the Division's audit group for any civil assessment. The affidavit of Robert Bergeron, who is the Cigarette Strike Force audit team leader, set forth the Division's calculation of the \$572,580.00 penalty at issue is follows:

number of cartons of cigarettes seized upon execution of search warrants....	959.3
less: number of cartons of cigarettes exempted from penalty.....	(5.0)
number of cartons subject to penalty under Tax Law § 481 (1) (b) (i) (A)....	954.3
penalty imposed per carton or fraction thereof.....	\$600.00
penalty amount assessed.....	\$572,580.00

17. Petitioner alleged, in his petition, that he did not have dominion and control over the cigarettes seized, and that his tenancy rights to the apartment unit do not establish such dominion and control. Petitioner also alleged that there are constitutional issues involving the arbitrary and capricious designation of penalties. As noted, petitioner did not respond to the Division's motion for summary determination.

2. The Division initially computed excise tax in the amount of \$41,309.00 (calculated on the basis of the number of packs of cigarettes seized [9593] multiplied by the applicable excise tax rate of \$4.35 per pack of cigarettes [Tax Law § 471 (1)]). However, the plea agreement bears out that the \$11,309.00 amount denominated as excise tax was accepted and agreed to as such by the Division.

CONCLUSIONS OF LAW

A. In this matter, the Division brings a motion for summary determination under section 3000.5, 9 (a) (vi), and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). Because the petition in this matter was filed within 90 days after issuance of the conciliation order (*see* finding of fact 2), the Division of Tax Appeals has jurisdiction over the petition and, accordingly, over the subject motion. A motion for summary determination “shall 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” (20 NYCRR 3000.9 [b] [1]).

B. Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’”

(*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).

Unsubstantiated allegations are insufficient to raise an issue of fact in response to a motion for summary determination (*id*). Petitioner did not respond to the motion in this case, and is therefore deemed to have conceded that no questions of fact requiring a hearing exists (*see Keuhne & Nagel v Baiden*, 36 NY2d 537 [1975]; *John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]).

C. 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]).

D. 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 unstamped or unlawfully stamped cigarettes must have been in his possession or under his control (*see Matter of Kamal*, Tax Appeals Tribunal, February 11, 2010).

E. Petitioner alleged in his petition that he did not have dominion and control over the seized cigarettes, and that his tenancy rights in the apartment where the contraband cigarettes were discovered and seized does not establish dominion and control. As noted, unsubstantiated allegations are insufficient to raise an issue of fact requiring a hearing thereon (*see* conclusion of

law B). Here, petitioner did not respond to the motion for summary determination, and thus is deemed to have conceded that no material issue of fact exists. Moreover, in his plea agreement, petitioner specifically admitted that he was the sole and exclusive owner of the property seized upon execution of the search warrants (*see* finding of fact 16). Petitioner is properly bound in this matter by his admission in the criminal matter (*see Matter of Alidani*, Tax Appeals Tribunal, January 2, 2003). The property seized during the execution of the search warrants specifically included the 959.3 cartons of unstamped cigarettes upon which the penalty at issue is premised (*see* finding of fact 11 [e]). Therefore, petitioner was clearly a person in possession and control of the cigarettes in question, and the Division properly concluded that petitioner was subject to the penalty at issue. Furthermore, “possession or control itself, with or without intent to sell, is sufficient for the imposition of penalty” (*see 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]).

F. Petitioner has also asserted that the penalty imposed by the Division raises constitutional issues involving “arbitrary and capricious designation of penalties.” While not further elucidated, this assertion appears to raise a challenge to the facial validity of the statute under which the penalty is assessed (Tax Law § 481 [1] [b] [i]) [A]). The jurisdiction of the Division of Tax Appeals, as prescribed in its enabling legislation, does not encompass facial constitutional challenges (*see Matter of Fourth Day Enterprises, Inc.*, Tax Appeals Tribunal, October 27, 1988). To the extent petitioner’s assertion is grounded on a claim that imposing the maximum amount of penalty under the facts and circumstances of this case is an abuse of discretion, and may be said to raise an “as applied” constitutional issue, it is noted that the imposition of a penalty is not automatic (*see Matter of Kamal; Matter of Vinter*). Rather,

imposition of the penalty is within the discretion of the Commissioner of Taxation (*id*). The only limit on the Commissioner's discretion is that the amount of the penalty 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 amount of penalty allowed by law. In imposing the penalty, the Commissioner is not required to consider mitigating factors (*see id; Matter of Vinter*), and the Division of Tax Appeals does not have jurisdiction to require the Commissioner to consider mitigating factors when the statute does not.

G. The Division's motion for summary determination is granted, the petition of Shoulong Zheng is hereby denied. and the notice of determination, L-0047504171, dated December 8, 2017, is sustained.

DATED: Albany, New York
February 18, 2021.

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE