

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
YEHYA M. ALSAIDI
for Revision of a Determination or for Refund of
Cigarette Tax under Article 20 of the Tax Law for the
Period September 30, 2014 through October 1, 2014.

DETERMINATION
DTA NO. 829395

Petitioner, Yehya M. Alsaidi, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period September 30, 2014 through October 1, 2014.

A videoconference hearing was held before Kevin R. Law, Administrative Law Judge, via Cisco Webex on February 10, 2021, with all briefs to be submitted by June 18, 2021, which date commenced the six-month period for issuance of this determination. Petitioner appeared by the Almonte Law Firm, PC (Alexander Almonte, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Eric Gee, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. On September 30, 2014, investigators in the Division of Taxation’s (Division’s) Criminal Enforcement Division had a garage on Van Nest Avenue in Bronx, New York (Van Nest garage) under surveillance. A confidential informant had informed the Division that the

Van Nest garage was used to store and supply untaxed cigarettes to stores in the area. At approximately 2:00 p.m., on that day, an automobile driven by petitioner, Yehya M. Alsaïdi, pulled into the Van Nest garage and the door was closed. Approximately two hours later, petitioner exited the Van Nest garage and drove to a convenience store in Pelham, New York. Petitioner was observed exiting the automobile carrying a yellow notepad and a large black plastic bag consistent with the shape of multiple cartons of cigarettes. Subsequently, petitioner exited the store without the plastic bag. Later that day, illegally stamped cigarettes were recovered from that store.

2. On that same day, petitioner returned to the Van Nest garage prior to visiting another store in the Bronx. At that store, petitioner was observed delivering another package consistent with the shape of multiple cartons of cigarettes. Upon leaving that store, the Division's investigators conducted a stop of petitioner's vehicle. During the stop, petitioner consented to a search of the vehicle whereupon 147 cartons of untaxed, Virginia stamped and counterfeit stamped cigarettes were seized, along with 1,188 counterfeit cigarette stamps. As a result of the automobile search, petitioner was arrested..

3. The Van Nest garage was held and frozen overnight while the Division's investigators obtained a search warrant. Upon execution of a search warrant, the Division uncovered 504.6 cartons of unstamped, Virginia stamped and counterfeit stamped cigarettes and 44,456 counterfeit cigarette stamps, irons, and other contraband related to illegal cigarette sales.

4. Petitioner was charged with counts of criminal possession of a forged instrument in the first degree, criminal possession of forgery devices, evasion of cigarette tax and criminal possession of a controlled substance in the seventh degree.

5. On April 20, 2017, petitioner pled guilty before the Honorable Robert A. Neary, Justice

of the Supreme Court, Bronx County, to criminal possession of a forged instrument in the first degree (Penal Law § 170.30) and evasion of tax (Tax Law § 1814 [b]). Petitioner was sentenced to one-year probation conditioned on payment of restitution of \$9,790.20

6. Before Judge Neary took the plea, petitioner was sworn in and questioned regarding his competency and general understanding of the charges. The judge specifically asked petitioner if he had received adequate time to speak with his lawyer and whether he was satisfied with his representation. Petitioner responded in the affirmative to these questions. The judge, through a series of questions, asked petitioner if he was aware of his right to a trial, the people's burden to prove his guilt beyond a reasonable doubt in the event of a trial, that it was not necessary for him to testify at a trial, and that he was entitled to question the witnesses against him and present his own witnesses. When asked if he understood that pursuant to his plea he gave up all these rights, petitioner again responded in the affirmative. Petitioner, by responding to the judge's questions, indicated that he was not threatened or forced in any way to plead guilty. The judge asked petitioner if he was pleading guilty because he was, in fact, guilty. Petitioner responded in the affirmative. The questioning then went as follows:

THE COURT: Yehya Alsaïdi, do you plead guilty to the following two counts: Count 1 of indictment 2812 of 15, namely, Criminal Possession of a Forged Instrument in the First Degree, and in doing so, do you admit, sir, that you, on or about September 30th, 2014, in the County of the Bronx, with knowledge that it was forged, and with intent to defraud, deceive, or injure another, you did utter or possess a forged instrument, that being 1,188 tax stamps recovered from the glove box of a certain Toyota Camry that you were operating; do you admit to those facts, sir?

THE DEFENDANT: Yes.

THE COURT: Okay. Under Count 11 of that same indictment, do you admit the following: That on or about September 30, 2014, here in the Bronx, not being an agent licensed by the Tax Commissioner of New York, did possess or transport for the purpose of sale any unstamped or unlawfully stamped packages of cigarettes subject to tax imposed by such Section 471 of the New York State Tax

Law, or did sell or offer for sale unstamped or unlawfully stamped cigarettes in violation of provisions of Article 20 of the New York State Tax Law which were recovered from the trunk of the same Toyota Camry that we discussed earlier; do you admit those facts, sir?

THE DEFENDANT: Yes.

MR. SICLARI: Your Honor, may I inquire?

THE COURT: Sure.

MR. SICLARI: As to Count 11, do you admit that the number of packs of untaxed cigarettes in the Toyota Camry in the trunk was 1,470 packs?

THE DEFENDANT: Yes .

MR. SICLARI: Do you admit that on or about and between September 30th to October 1st, 2014, inside of 960 Van Nest Avenue here in the Bronx, you possessed 5,046 untaxed or unlawfully taxed packs of cigarettes with the intent to sell them and thereby evade the payment of the applicable tax on those cigarettes?

THE DEFENDANT: Yes.

MR. SICLARI: Do you admit that on or about and between September 30th to October 1st, 2014, also inside the 960 Van Nest Avenue in Bronx, County, you possessed 44,456 unfixed forged tax stamps with intent to evade or defeat the applicable taxes due on packs of cigarettes that were intended to be sold in New York State?

THE DEFENDANT: Yes.

7. On February 16, 2018, the Division issued the following notices of determination to petitioner that asserted penalty pursuant to Tax Law § 481 (1) (b) (i):

Notice number	Tax Period	Penalty Asserted
L047736460	September 30, 2014	\$85,200.00
L047736461	October 1, 2014	\$299,760.00
L047736462	September 30, 2014	\$23,760.00
L047736463	October 1, 2014	\$899,120.00

8. Notice number L047736460 asserted the maximum penalty of \$600.00 per carton in excess of five cartons (1,000 cigarettes) uncovered during the search of the automobile petitioner was driving on September 30, 2014 (142 cartons x \$600.00 = \$85,200.00). Likewise, notice

number L047736462 asserted the maximum penalty of \$200.00 for each ten counterfeit tax stamps uncovered during the automobile search (1,118 stamps/10 = 111.8 x \$200 = \$22,360.00).

9. Notice number L047736461 asserted the maximum penalty of \$600.00 per carton in excess of five cartons (1,000 cigarettes) (499.6 cartons x \$600.00 = \$299,760.00) seized from the Van Nest garage during the October 1, 2014 execution of the search warrant. Likewise, notice number L047736464 asserted the maximum penalty of \$200.00 for each ten counterfeit tax stamps (44,456 stamps/10 = 4445.6 x \$200 = \$889,120.00) seized from the Van Nest garage during the October 1, 2014 execution of the search warrant.

10. At the hearing in this matter, petitioner admitted that he delivered untaxed cigarettes to the two stores on September 30, 2014 and that he had picked up cigarettes at the Van Nest garage prior to such date. Petitioner testified that when he was pulled over by the Division's investigators on September 30, 2014, he did not give them permission to search the automobile he was driving. He also testified that an individual named "Sam" had provided the garage door opener to him and that "Sam" may be the owner of the garage. Petitioner claimed that he did not have control or possession of the untaxed cigarettes and counterfeit tax stamps recovered from the Van Nest garage on October 1, 2014, and that he only admitted to possessing them because he was scared he would be sent to jail if he did not admit to possession.

CONCLUSIONS OF LAW

A. Cigarette tax is imposed under Tax Law § 471 (1), which provides as follows:

"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."

B. In order to discourage the sale of untaxed cigarettes, Tax Law § 481 (1) (b) (i) provides for the imposition of penalty, 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 or (B) impose a penalty of not more than two hundred dollars for each ten unaffixed false, altered or counterfeit cigarette tax stamps, imprints or impressions, or fraction thereof, in the possession or under the control of any person.”

C. In this case, petitioner was issued notices of determination that asserted penalty pursuant to Tax Law § 481 (1) (b) (i) for the untaxed cigarettes (in excess of 1,000) and the counterfeit stamps seized from the vehicle he was driving on September 30, 2014 and seized from the Van Nest garage on October 1, 2014. Petitioner argues that notices of determination numbers L047736461 and L047736463 should be cancelled contending that he was not in possession and control of the untaxed cigarettes and counterfeit stamps seized by the Division from the Van Nest garage.

D. The burden of proof is upon petitioner to prove, by clear and convincing evidence, that the Division improperly assessed penalty in this matter (*Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001, *dismissed on other grounds sub nom Matter of Vinter v Commissioner of Taxation and Fin.*, 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]). “To meet the clear and convincing evidence standard of proof, a party must adduce evidence that makes it highly probable that what he or she claims is what actually happened” (*Krol v Eckman*, 256 AD2d 945, 947 [3d Dept 1998], citing Prince, Richardson on Evidence § 3–205, at 104 [Farrell 11th ed]). Petitioner does not dispute that he possessed untaxed cigarettes and counterfeit tax stamps and admits that penalty is due but asserts that the amount that he

possessed is far less than the amounts the Division determined based upon his own testimony from his criminal case. Petitioner's attempt to recant his admissions made during his plea allocution do not rise to the level of clear and convincing evidence. No credence is given to petitioner's testimony in this matter as I find it completely lacking in credibility. Accordingly, the penalties asserted in the notices of determination are sustained.

E. The petition of Yehya M. Alsaïdi is denied and the February 16, 2018 notices of determination are sustained.

DATED: Albany, New York
December 16, 2021

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE