

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>AHMAD ALAMIRI</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 830444</b>
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Period April 6, 2018.	:	

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Petitioner, Ahmad Alamiri, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period April 6, 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Aliza Chase, Esq., of counsel), brought a motion on August 18, 2023, seeking summary determination in the above-captioned matter pursuant to section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). Petitioner, appearing pro se, did not file a response by September 18, 2023, which date commenced the 90-day period for issuance of this determination.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following determination.

***ISSUE***

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

***FINDINGS OF FACT***

1. On August 18, 2023, the Division of Taxation (Division) brought a motion seeking summary determination in its favor. In support of the motion, the Division included the

affirmation of Aliza Chase, an attorney in the Division's Office of Counsel, dated August 18, 2023, and the affidavit of Naté Juntunen, dated March 27, 2023, with attached exhibits.

2. Naté Juntunen is a Forensic Tax Auditor II with the Division's Criminal Investigations Division. Mr. Juntunen's affidavit details the events surrounding the Division's issuance of the notice of determination under protest.

3. On April 6, 2018, a deputy with the Genesee County Sheriff's office stopped the vehicle driven by petitioner, Ahmad Alamiri, for alleged vehicle and traffic violations. During the stop, petitioner was found to be in possession of 42,000 untaxed cigarettes (210 cartons) contained in packages that did not have New York State tax stamps affixed to them.

4. Following the traffic stop, petitioner waived his Miranda rights and admitted that he had purchased the cigarettes for a friend who, in addition to reimbursing him for same, paid for his gasoline and an additional \$50.00.

5. Petitioner was arrested and charged with one class D felony and one class E felony in violation of Tax Law § 1814 (c) (2) for possession of untaxed cigarettes and § 1803 for willfully attempting to evade or defeat the taxes imposed by article 20 of the Tax Law, respectively.

6. On August 14, 2018, petitioner entered an *Alford* plea to a reduced charge of violating Tax Law § 1814 (b) for possession of untaxed cigarettes, a misdemeanor. As part of the plea agreement, petitioner forfeited his vehicle.

7. On January 17, 2020, the Division issued a notice of determination, notice number L-051165443 (the notice), to petitioner asserting penalty pursuant to Tax Law § 481 (1) (b) (i) in the amount of \$123,000.00 for possession of untaxed cigarettes. The notice asserts the maximum penalty of \$600.00 per carton in excess of five cartons (1,000 cigarettes) (i.e., 205 cartons x \$600.00 = \$123,000.00).

8. Petitioner did not file a response to the Division's motion.

### **CONCLUSIONS OF LAW**

A. 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]). 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 Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [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 v City of New York*, 49 NY2d at 562).

B. Petitioner did not respond to the Division's motion. Accordingly, he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*,

36 NY2d 539 [1975]; *John William Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Division's motion papers. Therefore, those facts are deemed admitted (*Kuehne & Nagel v Baiden*, 36 NY2d at 544; *Whelan v GTE Sylvania*, 182 AD2d at 449).

C. 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.”

D. 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 affixed false, altered or counterfeit cigarette tax stamps, imprints or impressions, or fraction thereof, in the possession or under the control of any person.”

E. In this case, petitioner was issued a notice of determination that asserted penalty pursuant to Tax Law § 481 (1) (b) (i) for the possession of untaxed cigarettes in the amount of \$600.00 per carton. In the underlying criminal matter, petitioner entered an *Alford* plea pursuant to *North Carolina v Alford* (400 US 25 [1970]), for violating Tax Law § 1814 (b) for possession of untaxed cigarettes. An *Alford* plea involves the defendant entering a plea of guilty to avoid the risk of conviction on a more serious charge, even though disputing the evidence of guilt (*id.* at 28-29). In the *Alford* case, the Supreme Court held that it was proper for the trial court to

accept the plea of guilty even though the defendant claimed to be innocent, because the plea represented a voluntary and intelligent choice among the alternative courses of action open to the defendant. The Court considered the plea valid when viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered (*id.* at 37-38). The Court ruled that there must be a strong factual basis for the plea as demonstrated by the State's case, that is, the record must contain strong evidence of actual guilt, and that the defendant chose the plea to avoid harsher penalties if convicted at trial (*id.* at 38). "In New York, such a plea is allowed only when, as in *Alford* itself, it is the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt" (*Silmon v Travis*, 95 NY2d 470, 475 [2000]). In *Silmon*, the court held that an *Alford* plea, ". . . may be used as a predicate for civil and criminal penalties" (*id.*), as is the case here. The Division, through its motion papers, has set forth a prima facie case that the notice was proper in all respects. Specifically, the facts asserted in the Division's motion papers show: (1) during a vehicle and traffic stop petitioner was found to be in possession of 42,000 untaxed cigarettes; (2) petitioner waived his Miranda rights and admitted that he had purchased the cigarettes; and (3) petitioner plead guilty to possession of untaxed cigarettes. Petitioner has not set forth any compelling reason why his *Alford* plea should not be used against him to uphold the civil penalties for possessing untaxed cigarettes.

F. The Division of Taxation's motion for summary determination is granted, the petition of Ahmad Alamiri is denied, and the notice of determination, dated January 17, 2020, is sustained.

DATED: Albany, New York  
December 14, 2023

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE