

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MENACHEM VINTER	:	DECISION
	:	DTA NO. 816928
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Period April 9, 1997.	:	

Petitioner Menachem Vinter, 34 Martin Court, Great Neck, New York 11024-1620, filed an exception to the determination of the Administrative Law Judge issued on August 3, 2000. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner was a person in possession of or who had control of unlawfully stamped cigarettes and, as such, is liable for the penalty imposed pursuant to Tax Law § 481(1)(b).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On April 9, 1997, investigators from the Division of Taxation (“Division”) conducted a routine inspection of a Getty gasoline station located at 1134 East New York Avenue, Brooklyn, New York. The owner of the business was Meir, Inc., which was wholly owned by petitioner, Menachem Vinter. Mr. Vinter operates the gasoline station, handles all financial matters relating to the station, hires and fires the employees and signs the checks of the business.

At the time of the inspection the Division’s investigators found 168.9 cartons of Marlboro, Newport, Winston, Kools and Parliament cigarettes with counterfeit tax stamps. These cigarettes were subsequently seized. At the time of the inspection, the store manager of the business was present. Mr. Vinter, the owner, was later contacted and was requested by the investigators to come down to the station to surrender for arrest.

On April 9, 1997, the date of the inspection, the Division’s investigators issued to petitioner four summonses for (1) criminal possession of a forged instrument pursuant to Penal Law § 170.30, (2) attempting to evade and defeat cigarette tax pursuant to Tax Law § 1814(a)(2), (3) possession of counterfeit New York State tax stamps pursuant to Tax Law § 1814(i) and (4) possession of unstamped or unlawfully stamped packages of cigarettes pursuant to Tax Law § 1814(e). The investigators also determined that petitioner did not possess a New York State certificate of registration to sell cigarettes as a retail dealer as required by Tax Law § 480-a(1)(a).

On April 1, 1998, in the Supreme Court of the State of New York, County of Kings, petitioner pled guilty to attempting to evade and defeat the cigarette tax, a class B misdemeanor, and was fined \$500.00. All other summonses were dismissed.

On April 23, 1998, the Division issued a Notice of Determination to petitioner asserting that he was liable for a penalty in the sum of \$15,800.00. The penalty was imposed pursuant to Tax Law § 481(1)(b) at the rate of \$100.00 per carton for 158 cartons of unstamped or unlawfully stamped cigarettes. Although 168.9 cartons of unlawfully stamped cigarettes were found, Tax Law § 481(1)(b) provides that the maximum penalty of \$100.00 per carton be imposed for every carton in excess of 10 cartons of unstamped or unlawfully stamped cigarettes. The Notice of Determination indicated that the period at issue was April 1, 1997, rather than the actual date of inspection of April 9, 1997.

Upon approaching petitioner's business location on April 9, 1997, the investigators noticed certain stamps which appeared to be counterfeit on packages of cigarettes stacked and displayed for sale in a locked booth. The investigators receive extensive training on how to identify counterfeit stamps and also receive bulletins which identify counterfeit stamp numbers. At the time of the inspection, the valid stamps on cigarettes were orange in color and the numbers on the stamps were made by dotted lines. The stamps on the cigarettes in the booth were a brighter orange color and the numbers on the stamps were solid lines.

Inside the booth, the investigators found approximately 4 cartons of counterfeit stamped cigarettes on display for sale and an open case with about 20 cartons lying on the floor. Initially, the investigators were denied access to the storage room located behind the booth because it was locked and the attendant did not have the key. After petitioner was contacted, the key to the

storage room was delivered to the business location. In the storage room, the investigators found another 149 cartons of counterfeit stamped cigarettes which had been placed on shelves and mixed among properly stamped cigarettes.

One of the investigators questioned Mr. Vinter in an effort to ascertain the source of the counterfeit stamps. Petitioner stated that he had purchased the cigarettes from an individual named "Omar," who was the delivery person of one of the two wholesalers from which Mr. Vinter bought cigarettes. According to Mr. Vinter, Omar told him he had purchased the counterfeit stamped cigarettes from someone at the John F. Kennedy Airport in Queens, New York. Omar would not give Mr. Vinter the name of the individuals who sold him the counterfeit stamped cigarettes for fear of reprisal. However, Omar informed the investigator that the cartons he sold to petitioner were stolen from regular deliveries that he had made. According to Omar, if a customer ordered 150 cartons, he would deliver 145 cartons to the customer and keep 5 cartons, which he would sell to petitioner at a discount.

Mr. Vinter purchased the counterfeit cigarettes to avoid a 50-cents per carton increase in the cost of cigarettes which was to go into effect soon. Mr. Vinter received this information from the wholesaler. The investigator was not able to connect the purchase of any of the 168.9 cartons of counterfeit stamped cigarettes to either of the two wholesalers from which petitioner regularly purchased cigarettes.

For a period of time immediately preceding the events of April 9, 1997, petitioner's wife was seriously ill and it was necessary for petitioner to be home caring for his three young children. He was therefore not able to be at the business premises on a regular basis. During this period of time, which included the purchase of the counterfeit stamped cigarettes, Mr. Vinter

operated the business from his home. He would be advised by his employees at the business as to which supplies or inventory items were running low, and he would then order the needed supplies or inventory and issue checks for their payment.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge found no dispute that there were counterfeit stamped cigarettes discovered on premises owned by Meir, Inc. which were being offered for sale in violation of the provisions of Article 20 of the Tax Law. Thus, the Administrative Law Judge held that imposition of the penalty provided under Tax Law § 481(1)(b) was warranted. The Administrative Law Judge noted that the issue to be determined was whether petitioner was a person who was in possession of or had control of the counterfeit stamped cigarettes, thereby subjecting him to the penalty.

The Administrative Law Judge found that:

petitioner was the sole owner and officer of the corporation, Meir, Inc., which owned the service station where the counterfeit stamped cigarettes were found. Petitioner operated the service station, did all the hiring and firing and handled all financial transactions including the signing of checks and the making of deposits. During the weeks preceding the seizure of the counterfeit cigarettes, petitioner was home tending to his wife and children and not regularly present at the gasoline station. However, petitioner testified that employees working at the station would telephone and advise him of any supplies or inventory which were running low. From his home, petitioner would order these items from the supplier and issue a check for payment. Although not regularly present at the service station, petitioner continued to operate the business from his home and had full control of the ordering and purchasing of inventory for the station. As to the cigarettes at issue, petitioner claimed during the initial investigation that he purchased them from the delivery person of one of his wholesale suppliers. Petitioner also testified that he purchased the cigarettes to avoid a future price increase. At the

hearing, however, he claimed that he had nothing to do with their purchase. Either way, it appears certain that petitioner was involved in the purchase of the counterfeit stamped cigarettes either directly, or through his employees (Determination, conclusion of law "C").

The Administrative Law Judge also observed that petitioner was the first person that store personnel called during the inspection; petitioner surrendered to the investigators for arrest; and petitioner pled guilty to an attempt to evade payment of the cigarette and tobacco tax imposed by Article 20 of the Tax Law. As a result, the Administrative Law Judge concluded that petitioner failed to establish that he was not in possession of or did not have control of the 168.9 cartons of unlawfully stamped cigarettes found at the service station and was, therefore, properly subject to the penalty imposed by Tax Law § 481(1)(b).

The Administrative Law Judge observed that pursuant to Tax Law § 481(1)(b), the Commissioner has the discretion to impose a penalty of not more than \$100.00 for each 200 cigarettes or fraction thereof in excess of 2,000 cigarettes in unstamped or unlawfully stamped packages. Having found that the penalty of \$15,800.00 was based on petitioner's possession of 168 cartons of counterfeit stamped packages, the Administrative Law Judge concluded that the Division did not take into account the presence of any mitigating factors in imposing the penalty. The Administrative Law Judge noted that there was no evidence that petitioner ever possessed improperly stamped cigarettes on any other occasion. Based on this, the Administrative Law Judge considered the penalty imposed by the Division to be excessive and, instead, imposed a reduced penalty of \$50.00 for each carton in excess of 10 illegally stamped cartons, or \$7,900.00. The Administrative Law Judge stated that this was "adequate to achieve the goals of imposing a

sanction upon petitioner and deterring petitioner and others in petitioner's position from possessing unstamped cigarettes in New York State" (Determination, conclusion of law "E").

The Administrative Law Judge rejected petitioner's arguments that since the Notice of Determination erroneously states that the period at issue was April 1, 1997 rather than April 9, 1997, the notice should be invalidated. The Administrative Law Judge stated that absent evidence of harm or prejudice to the petitioner, defects on the face of the notice do not invalidate the notice. Here, there is no evidence that petitioner was prejudiced by receiving a notice with the date of April 1, 1997 rather than April 9, 1997.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the proceeding herein revolves around an incident which supposedly occurred in a period ending April 1, 1997 and not April 9, 1997. Petitioner asserts that, since there has been no amendment of the pleadings, the pleadings are defective and cannot support the imposition of a penalty against him. Further, petitioner argues that the record does not support a finding that the investigating officer found 168.9 cartons of unstamped or unlawfully stamped cigarettes. In fact, petitioner states that the officer testified both to finding 168.9 cartons and to finding 153 cartons. Petitioner claims that, since the cigarettes were never produced at the hearing, the correct number of cartons cannot be determined and cannot serve as the basis for the imposition of a penalty.

Petitioner claims that the Administrative Law Judge incorrectly concluded that petitioner was in full control of the gas station where the cigarettes were found, although petitioner was absent from the gas station for a period of three weeks prior to the seizure of the cigarettes. Rather, petitioner relied on his manager and employees during his absence. The cigarettes at

issue never reached the point of sale and, when they were found to be unstamped or unlawfully stamped, petitioner notified the wholesaler as required pursuant to Tax Law § 473. Petitioner argues that the record supports only the fact that petitioner was not at the gas station for the period at issue and did not order, receive or pay for the cigarettes at issue.

Petitioner claims that he submitted to arrest only to avoid the arrest of the gas station attendant. Although petitioner pled guilty to attempting to evade payment of the cigarette and tobacco tax, petitioner argues that the Administrative Law Judge ignored the promise made to him by the Criminal Court judge that his guilty plea would not reflect negatively upon him in any proceedings brought against him by the Division. Petitioner also argues that the Administrative Law Judge erred in not giving sufficient weight to the tape and transcript which allegedly contained a conversation between petitioner and Omar in relation to rebutting the testimony of the investigating officer. Comparing his penalty to that imposed by the State Tax Commission in prior cases of similar violations, petitioner argues that the amount of the penalty imposed by the Division and reduced by the Administrative Law Judge is an abuse of discretion and violates his right to equal protection under the Federal and State constitutions.

The Division did not take an exception to the findings of fact and conclusions of law of the Administrative Law Judge. However, the Division argues that the Administrative Law Judge correctly determined that a defect in the date of the Notice of Determination does not invalidate the notice, absent harm or prejudice to petitioner, and no such harm or prejudice was demonstrated herein.

The Division maintains that the Administrative Law Judge correctly determined that petitioner was in control or possession of 168 cartons of unstamped or unlawfully stamped

cigarettes. The Division disputes petitioner's characterization of the record on the number of cartons as misleading or unclear. Further, the Division argues that a presumption of correctness attaches to a properly issued Notice of Determination and that petitioner has failed to meet his burden to rebut that presumption, either as to the number of cartons or the fact of his possession. Petitioner was the sole owner and officer of the corporation which owned the premises where the cigarettes were seized. Petitioner offered no evidence that he did not have ultimate control over the daily operations of the business. Thus, the Division asserts that petitioner cannot avoid his fiduciary corporate duty and is wholly responsible for the inventory of seized cigarettes. The Division maintains that because petitioner pled guilty to the crime of violation of Tax Law § 1814, he is estopped from denying his control over the cigarettes in issue and is liable for the penalty assessed thereon. Despite petitioner's arguments that he had no knowledge that the stamps on the cigarettes were counterfeit, liability is premised on possession, not knowledge or intent.

The Division argues that the penalty imposed against petitioner should not be further reduced as requested by petitioner. The Division urges us to review the imposition of penalty *de novo*, reverse the Administrative Law Judge on the issue of the amount of penalty and impose the amount originally imposed by the Division.

OPINION

Petitioner argues that the undisputed discrepancy in the Notice of Determination as to the date on which the cigarettes at issue were actually seized requires that the matter be dismissed. We reject this unsupported argument and agree with the Administrative Law Judge that although the date on the notice is in error (April 1, 1997 instead of April 9, 1997), this defect is not

sufficient to invalidate the Notice of Determination absent a showing of harm or prejudice to the petitioner (*Matter of Agosto v. Tax Commn.*, 68 NY2d 891, 508 NYS2d 934; *Matter of Pepsico, Inc. v. Bouchard*, 102 AD2d 1000, 477 NYS2d 892; *Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin.*, Sup Ct, Albany County, March 16, 1988, *affd on other grounds* 151 AD2d 822, 542 NYS2d 61; *Matter of A & J Parking Corp.*, Tax Appeals Tribunal, April 9, 1992). No such showing was made by petitioner herein. In fact, no testimony was given by or on behalf of petitioner concerning the date discrepancy whatsoever.

As to the Administrative Law Judge's finding that the number of unstamped or unlawfully stamped cigarettes at issue was 168.9 cartons of cigarettes, we conclude that the Administrative Law Judge was entitled to review the evidence produced and, as the finder of fact, weigh that evidence to arrive at a finding as to the number of cartons seized. It was not necessary to this finding that the actual cigarettes be produced by the Division at the hearing. Here, the Administrative Law Judge found that the number of cartons of unstamped or unlawfully stamped cigarettes seized was 168.9 and we find no reason to disturb that finding.

Tax Law § 481(1)(b) provides, in pertinent part, as follows:

In addition to any other penalty imposed by this article, the commissioner of taxation and finance may impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person. . . . The commissioner of taxation and finance, in his discretion, may remit all or part of such penalty.

Tax Law § 470(3) includes both an individual and a corporation within the definition of a "person." For petitioner to be liable for the penalty imposed, the cigarettes must have been in his possession or his control. Petitioner was the owner and sole officer of Meir, Inc., which owned

the service station where the counterfeit stamped cigarettes were seized. Although not physically present when the cigarettes were seized, and not regularly present at the business premises during that time, the Administrative Law Judge concluded that petitioner remained in charge of the corporation during his physical absence. It is not necessary that petitioner have actually participated in the purchase of such cigarettes for him to be liable for the penalty imposed. The cigarettes were stored on petitioner's premises and offered for sale by the business he owned and controlled. Possession or control itself, with or without intent to sell, is sufficient for the imposition of penalty.

The Administrative Law Judge also noted that petitioner pled guilty to attempting to evade payment of the cigarette and tobacco tax, a charge arising from the same incident underlying the imposition of penalty herein. Despite petitioner's argument that the Criminal Court judge promised petitioner that his guilty plea would not reflect in any way on a proceeding against him by the Division, there is no evidence in the record to support that allegation.

Finally, the Administrative Law Judge was entitled to weigh the probative value of the transcript of the conversation between Omar and petitioner which petitioner claims to have taped. The Administrative Law Judge accorded it little weight, an assessment with which we are in accord. Even if it were considered to be of value, the transcript does not negate the basis for the penalty imposed herein - possession or control of unstamped cigarettes.

Having concluded that petitioner had possession or control of unstamped or unlawfully stamped cigarettes, the Division was authorized to impose a penalty pursuant to Tax Law § 481(1)(b) against him. The imposition of such a penalty was not mandated by law but was a matter within the discretion of the Commissioner. The only limit on the exercise of such

discretion was that the amount of the fine could not exceed \$100.00 for each 200 cigarettes or fraction thereof in excess of 2,000 cigarettes in unstamped or unlawfully stamped packages. The Commissioner imposed the maximum fine allowed by law.

The Administrative Law Judge stated the following:

The difficulty with the sanction imposed by the Division is that it does not take into account the presence of any mitigating factors. In this regard, it should be borne in mind that the statute affords the Commissioner wide latitude in determining the appropriate amount of penalty to impose. It is significant that there is no evidence that petitioner ever possessed improperly stamped cigarettes on any other occasion. Under these circumstances, it is concluded that the penalty imposed by the Division is excessive and that a penalty of \$50.00 for each 200 cigarettes or fraction thereof in excess of 2,000 illegally stamped packages, or \$7,900.00, is adequate to achieve the goals of imposing a sanction upon petitioner and deterring petitioner and others in petitioner's position from possessing unstamped cigarettes in New York State (Determination, conclusion of law "E").

Although acknowledging that the statute affords the Commissioner "wide latitude," the Administrative Law Judge rejected the penalty imposed by the Commissioner and imposed a reduced penalty in its place, finding that this lower penalty was "adequate" to "achieve the goals" he then articulated. The difficulty in this approach is that it simply substitutes the Administrative Law Judge's discretion for that of the Commissioner, without articulating any authority for doing so.

In reviewing discretionary acts by the Commissioner, the function of the Division is to provide a *de novo* review (*see, Matter of 300 East 74th Owners Corp.*, Tax Appeals Tribunal, July 25, 1996; *Matter of OK Petroleum Products Corp.*, Tax Appeals Tribunal, November 1, 1990). As the Administrative Law Judge noted, the Commissioner did not provide any

explanation as to why the maximum fine was imposed. Relying on our decision in *Matter of Allied Grocers Coop.* (Tax Appeals Tribunal, November 30, 1989, *affd Matter of Allied Grocers Coop. v. Tax Appeals Tribunal*, 162 AD2d 791, 557 NYS2d 707), the Administrative Law Judge found no evidence that the Division had considered “the nature, number and degree of the violation” before imposing the penalty at issue. *Allied Grocers* is distinguishable from the present case, however, and we do not believe that the considerations relevant there provide guidance in this matter. In *Allied Grocers*, we considered whether the Commissioner had abused his discretion by refusing to license the taxpayer as a cigarette wholesale dealer or agent. In that case, we noted that Tax Law § 480(2)(b) authorized the Commissioner to refuse to issue a license where it had been ascertained that “the applicant or a controlling person has been convicted of a Tax Law crime within the preceding five years.” We held that the Commissioner’s consideration of the nature, number and degree of such violations by petitioner was an adequate basis for the refusal to license the taxpayer. Significantly, there are no such statutory guidelines for the exercise of the Commissioner’s discretion in imposing a penalty pursuant to Tax Law § 481(1)(b).

In view of this, we conclude that it was not necessary for the Division to have considered factors such as the nature, number and degree of the violation by petitioner prior to the imposition of the penalty at issue since this is mandated neither by statute nor regulation. It is beyond the jurisdiction of the Tax Appeals Tribunal to impose such a requirement on the Commissioner when the statute does not provide for it. That is properly the subject of legislative reform or regulatory action by the Commissioner.

A presumption of correctness attaches to a properly issued statutory notice (*Matter of Tivolacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174, *Matter of Leogrande*, Tax Appeals Tribunal, July 18, 1991, *affd Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398). It is petitioner's burden to demonstrate by clear and convincing evidence that the imposition of the penalty by the Commissioner in the amount so imposed was an abuse of discretion. In this case, petitioner has not met his burden and is, therefore, not entitled to have the penalty reduced.

Petitioner relies on decisions of the former State Tax Commission where the Commissioner's discretion was exercised to reduce the penalty imposed pursuant to Tax Law § 481 (*see, Matter of Singer*, State Tax Commn., May 23, 1980; *Matter of Yunginger*, State Tax Commn., February 22, 1980). The Division of Tax Appeals is not bound by decisions of the former State Tax Commission, although such decisions are entitled to respectful consideration (*Matter of Racal Corp.*, Tax Appeals Tribunal, May 13, 1993). The decisions cited by petitioner are of no assistance to us in the present matter since they contain no explanation of the basis for the reductions in penalty.

In summation, the Commissioner's investigators found 168.9 cartons of cigarettes bearing counterfeit stamps being offered for sale or held in storage at premises containing a business owned and operated by petitioner. Petitioner pled guilty to attempting to evade the tax on such cigarettes. Under these circumstances, we hold that it was not an abuse of discretion to impose the maximum fine allowed by law against petitioner.

Although the Tax Appeals Tribunal usually defers to the Administrative Law Judge's evaluation of the credibility of witnesses and evidence, we are not bound by that determination

(see, *Matter of Wachsman*, Tax Appeals Tribunal, November 30, 1995, *confirmed Matter of Wachsman v. New York State Commissioner of Taxation & Fin.*, 241 AD2d 708, 660 NYS2d 462). In keeping with our policy of *de novo* review of the exercise of discretion by the Commissioner, we are authorized by Tax Law § 2006(7) and the regulation at 20 NYCRR 3000.17(e)(1) to review the record and exercise all the powers which could have been exercised if the Tribunal had made the determination under review. Here, we find no evidence in the record that supports any reduction of the amount of penalty imposed by the Division on petitioner (see, *Matter of Roebing Liqs.*, Tax Appeals Tribunal, November 24, 1999, *affd Matter of Roebing Liqs. v. Commissioner of Taxation & Fin.*, ___ AD2d ___ [Apr. 23, 2001]). Thus, we reverse the determination of the Administrative Law Judge and reinstate the original penalty imposed of \$15,800.00.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Menachem Vinter is denied;
2. The determination of the Administrative Law Judge is reversed to the extent that the original penalty of \$15,800.00 is reinstated, but in all other respects is affirmed;
3. The petition of Menachem Vinter is denied; and

4. The Notice of Determination and the original penalty of \$15,800.00 is sustained.

DATED: Troy, New York
September 27, 2001

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner