

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

HILARION CANO :

for Revision of a Determination or for Refund of :
Cigarette Tax under Article 20 of the Tax Law for the :
Period March 13, 1997. :

In the Matter of the Petition :

of :

TAVERAS SANTOS :

for Revision of a Determination or for Refund of :
Cigarette Tax Under Article 20 of the Tax Law for the :
Period March 13, 1997. :

DECISION
DTA NOS. 817570
AND 817571

Petitioner Hilarion Cano, 3249 93rd Street, 2nd Floor, East Elmhurst, New York 11369-2451, petitioner Taveras Santos, 3150 85th Street, Jackson Heights, New York 11370-1929 and the Division of Taxation each filed exceptions to the determination of the Administrative Law Judge issued on October 4, 2001. Petitioners appeared by James R. Grimaldi, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Clifford Peterson, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in support of its exception and in opposition to the exception filed by petitioners. Oral argument, at the request of the Division of Taxation, was held on July 10, 2002 in Troy, New York.

Petitioners did not appear at the oral argument.

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

ISSUES

I. Whether petitioners were collaterally estopped from arguing that they were persons in possession of or had control of unlawfully stamped cigarettes.

II. If not, whether petitioners were persons in possession of or had control of unlawfully stamped cigarettes.

III. Whether the penalties imposed were excessive.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact “6” which has been deleted as not supported by the record and finding of fact “11” which has been modified. The modified finding of fact and the Administrative Law Judge’s remaining findings of fact are set forth below.

The Petroleum, Alcohol and Tobacco Bureau of the Division of Taxation (“Division”) received an anonymous tip that a counterfeiting operation, involved in the production of bogus cigarette tax stamps, was going to be moved at some unspecified time on Thursday, March 13, 1997 from its location at 131-20 95th Avenue, an address in South Queens not far from the Brooklyn borough line. Byron Mars (“Investigator Mars”), a senior investigator with experience in approximately 200 investigations of counterfeit cigarette tax stamps, was assigned to conduct a stakeout of this location in South Queens. No specific person was the target of the stakeout.

Elsa Guzman and Ramon O. Moronta, the owners of the two-family house under surveillance, had rented the basement apartment to Francisco and Mercedes Ramirez. Elsa

Guzman lived in the other apartment located on the premises staked out by Investigator Mars. She did not know either one of the petitioners on the date at issue.

Arriving at approximately 10:00 A.M. on March 13, 1997, Investigator Mars, who was assisted by various other investigators in the course of the stakeout, did not actually see anyone, in his words, “going to” the premises until about 8:15 P.M. (tr., p. 17). At that time, he observed petitioners arrive on the scene in a GMC Safari truck. This vehicle had been rented by petitioner Cano from National Car Rental. Because the law allows law enforcement to seize vehicles used to commit crimes, according to the investigator, in “over 95 percent of the cases involv[ing] vehicle and cigarettes transportation, the vehicle is rented”(tr., p. 50). In that way, the vehicle would be returned to the rental company as owner and not seized by law enforcement. Petitioner Cano was cagey and nonresponsive in answering questions concerning his rental of the truck:

Attorney Peterson: You rented the van?

Hilarion Cano: Yeah.

Attorney Peterson: Okay. And how far in advance of the evening of March 13th did you rent the van?

Hilarion Cano: How what?

Attorney Peterson: Did you rent the van that same day?

Hilarion Cano: No, I rent the van before that, sir. I don't recall the date, but it was before that.

Attorney Peterson: Okay. And do you recall how much the rental of the van was?

Hilarion Cano: No, I don't remember exactly, it was like 330 something for the week or something.

Attorney Peterson: So you rented it for the week?

Hilarion Cano: I don't recall. I don't have the receipt.

Investigator Mars observed petitioners, the two occupants of the truck, pull up in reverse to the mouth of the driveway for the two-family house which he had staked out. After opening the gate to the driveway, the truck was backed up to the side of the house. The investigator described what he then saw as follows:

[Petitioners] went into the basement of the house from some doors, Bilko doors that were there. They went downstairs, and from a glass window, a small glass window, I observe that they were loading half cases of cigarettes into black garbage bags. (Tr., p. 20.)

Although the investigator was too far away from the Bilko doors to see how the petitioners “first entered” the basement through these doors and was also unable to see anyone else through the small basement window, he believed that another person was in the basement. According to Investigator Mars, the Bilko doors were locked from the inside and someone had to unlock them to permit petitioners to enter. In addition, the investigator in the course of the stakeout, “mainly was focused on the . . . entrance to the basement” and conceded that “people could have gone in and out without anyone noticing” through the front door of the two-family house (tr., p. 54).

After gaining access to the basement of the building under surveillance, petitioners made approximately 10 trips from the basement to the rented truck in the course of the next 15 minutes loading black plastic bags full of half cases¹ of cigarettes, filling the truck to near capacity. Petitioners then left the scene in their rented truck, and a minute or two later, when they were approximately one block away, petitioners were stopped by Division investigators. An inspection of the truck revealed 329 cartons (or 3,290 packs since there are 10 packs to a carton

¹ Half cases contain 30 cartons of cigarettes.

of cigarettes) of assorted cigarettes all bearing counterfeit New York State and City cigarette tax stamps. A property release and receipt form itemized the 329 cartons of cigarettes found in the van as follows:

Quantity	Item
149 cartons	Marlboro cigarettes with counterfeit stamps
85 cartons	Newport cigarettes with counterfeit stamps
6 cartons	Kent cigarettes with counterfeit stamps
18 cartons	Parliament cigarettes with counterfeit stamps
16 cartons	Winston cigarettes with counterfeit stamps
10 cartons	Kool cigarettes with counterfeit stamps
30 cartons	Salem cigarettes with counterfeit stamps
14 cartons	Pall Mall cigarettes with counterfeit stamps
1 carton	Benson & Hedges cigarettes with counterfeit stamps

Petitioners had no purchase documentation for the 329 cartons of cigarettes in their rented van. Nonetheless, petitioner Cano stated, at the time he was stopped by the investigators, that he had “purchased” the cigarettes for \$19.00 a carton, an amount less than the fixed legitimate wholesale price of \$20.40, from an unnamed male in the basement of 131-20 95th Ave.

Petitioners were arrested and taken to the local police precinct.

Division investigators returned to the premises which had been staked out and attempted to gain entrance by way of the Bilko doors and by way of a stairwell door on the first floor landing, approximately 16 feet from the front door. Although the lights were on in the basement apartment as seen through gaps in the stair landing door and two basement windows, nobody answered repeated knocks and requests for entrance. With investigators stationed at the two

exits from the basement, a search warrant was sought and obtained in the early hours of March 14, 1997. The search warrant was executed at approximately 4:30 A.M., and the investigators found materials for a counterfeiting operation, including several gallons of glue, several gallons of stripper, masks, four boxes of Brillo, goggles, brushes and four hand-held irons used to apply stamps to packs of cigarettes, as well as over 96,000 counterfeit New York State and City tax stamps. The investigators counted 645 full sheets of 150 counterfeit cigarette tax stamps or 96,750 counterfeit stamps and 41 partial sheets of counterfeit cigarette tax stamps.² On the date at issue, each stamp was worth 70 cents so that the value of 96,750 stamps was \$67,725.00. In addition, the investigators found over a thousand cartons of cigarettes with counterfeit New York State and City tax stamps. These cartons of cigarettes were itemized on a property receipt and release form as follows:

Quantity	Item
147.0 cartons	Benson & Hedges cigarettes bearing counterfeit stamps
118.0 cartons	Virginia Slims cigarettes bearing counterfeit stamps
151.0 cartons	Salem cigarettes bearing counterfeit stamps
64.0 cartons	Kent cigarettes bearing counterfeit stamps
116.0 cartons	Parliament cigarettes bearing counterfeit stamps
2.0 cartons	Pall mall cigarettes bearing counterfeit stamps
62.2 cartons	Newport cigarettes bearing counterfeit stamps
86.0 cartons	Kool cigarettes bearing counterfeit stamps
160.5 cartons	Marlboro cigarettes bearing counterfeit stamps

² At some later date, the counterfeit stamps were recounted and the number of full sheets was reduced by 16, from 645 to 629, and partial sheets increased by 16 from 41 to 57. Since the full sheets contained 94,350 stamps, and it appears that the partial sheets had 5,274 stamps, the total number of counterfeit stamps found in the basement by the investigators was 99,724 representing a dollar value of \$69,806.80 (70 cents multiplied by 99,724).

132.8 cartons	Winston cigarettes bearing counterfeit stamps
Total: 1,039.5 cartons (or 10,395 packs of cigarettes)	

The counterfeit stamps seized by the investigators were lettered and numbered either “Y7343” or “Y7443”. Counterfeit stamps with either of these two designations were seen by Investigator Mars throughout New York City on a daily basis: “Those stamps were well known, prevalent in the New York City area, and almost daily I was encountering them at that particular time (tr., p. 22).”

We modify finding of fact “11” of the Administrative Law Judge’s determination to read as follows:

The arrests of petitioners would ultimately culminate in plea bargains whereby each petitioner pleaded guilty to Penal Law § 170.20, Criminal possession of a forged instrument in the third degree, which provides as follows:

A person is guilty of criminal possession of a forged instrument in the third degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters³ or possesses a forged instrument.

Criminal possession of a forged instrument in the third degree is a class A misdemeanor.

At the plea allocution on May 23, 1997 in Criminal Court of The City of New York, County of Queens, before Judge S. Parker, each

³ The term “utter” is defined in Black’s Law Dictionary 1387 [5th ed 1979] as follows: To put or send (as a forged check) into circulation; to publish or put forth; to offer. To utter and publish an instrument, as a counterfeit note, is to declare or assert, directly or indirectly, by words or actions, that it is good; uttering it is a declaration that it is good, with an intention or offer to pass it. To utter, as used in a statute against forgery and counterfeiting, means to offer, whether accepted or not, a forged instrument, with the representation, by words or actions, that the same is genuine.

of the petitioners was represented by an attorney. Petitioners conceded that the following charge was “true”:

It is charged that on March 13th, 1997 at 8:30 in the evening at 121-30 95 Avenue in Queens county, that each of you together were in possession of counterfeit New York State tax stamps.

Although Judge Parker was prepared to impose a \$500.00 fine on each of the petitioners, Mr. Cano agreed to pay \$1,000.00 so that no fine would be imposed upon Mr. Santos, which was acceptable to the judge. Consequently, a fine of \$1,000.00 was imposed upon Mr. Cano and no fine upon Mr. Santos.⁴

A separate Notice of Determination dated July 13, 1998 was issued to each of the petitioners. Each notice asserted penalty due of \$147,300.00 under Article 20 of the Tax Law for the tax period ended March 1, 1997 because “during an inspection of your premises, you were found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.”

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Primarily, the Administrative Law Judge addressed the issue of collateral estoppel. The Administrative Law Judge stated that the charge to which petitioners pled guilty was sufficiently vague such that they were not collaterally estopped from arguing in this case that they were, in fact, guilty of possession of only the confiscated cartons of illegally stamped cigarettes contained in the van that they were driving at the time of their arrest. Thus, the Administrative Law Judge addressed the issue of whether petitioners were in possession and control of all of the illegally stamped cigarettes contained in the basement apartment which were seized by authorities.

⁴We modified finding of fact “11” of the Administrative Law Judge’s determination by deleting the last sentence of such fact since the testimony was uncorroborated by the record herein.

The Administrative Law Judge determined that petitioners were not in possession and control of the 1,039.5 cartons of cigarettes found in the basement apartment based upon the fact that Elsa Guzman, the owner-occupant of the two-family house at 131-20 95th Avenue, did not know either of petitioners in March of 1997 and that, from the evidence, it appeared to the Administrative Law Judge that there was another person involved in the counterfeiting operation, and such alleged third party participant was the individual who was in possession of the cartons of cigarettes seized from the basement apartment. Thus, the Administrative Law Judge reduced the penalty imposed to \$100.00 per carton that was found in the van occupied by petitioners, less 10 cartons as set forth pursuant to Tax Law § 481(1)(b), resulting in a revised penalty amount of \$31,900.00.

ARGUMENTS ON EXCEPTION

Both petitioners and the Division filed exceptions to the determination of the Administrative Law Judge.

The Division argues that petitioners are collaterally estopped from challenging the imposition of the subject penalties for the illegally stamped cigarettes found in the basement of the house located at 131-20 95th Avenue since petitioners had a full and fair opportunity to litigate such issue at their criminal trial, but did not do so. Alternatively, the Division states that even if petitioners are allowed to contest whether or not they were in control or possession of the illegally stamped cigarettes at the house, they have failed to demonstrate by clear and convincing evidence that they were not in control or possession of the illegally stamped cigarettes. Therefore, the Division maintains that it properly imposed the penalty herein and the Notices of Determination issued to each petitioner should be sustained.

In opposition, petitioners claim that, despite their guilty pleas, they were not in possession and control of the illegally stamped cigarettes seized from the basement apartment, but rather, only in possession of the approximately 320 cartons of illegally stamped cigarettes that were located in the van at the time of their arrest. Moreover, although the Administrative Law Judge found in their favor and reduced the penalty accordingly, petitioners argue that the Administrative Law Judge should have utilized his discretion in light of petitioners' particular financial situations and further reduced the penalty amount imposed upon them rather than impose the maximum penalty.

OPINION

We begin by addressing the issue of whether petitioners were collaterally estopped from arguing herein that they were not in possession of the illegally stamped cigarettes at the location of 131-20 95th Avenue. For the doctrine of estoppel to apply, petitioners must have had a fair opportunity to litigate the same issues during the prior proceeding (*see, Matter of Kuriansky v. Professional Care*, 158 AD2d 897, 551 NYS2d 695). To determine whether petitioners herein had a fair opportunity to litigate the issue of whether they had possession or control of all the cartons of cigarettes both at the basement apartment and within the van:

the party seeking the benefit of collateral estoppel (here, the State) has the burden of demonstrating the identity of the issues and the necessity of their having been decided, and the party opposing its use (here, Sokol) has the responsive burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action (*State of New York v. Sokol*, 113 F3d 303, 306).

In an effort to resolve this issue, it is necessary to review the transcript from the plea allocution (*see*, Exhibit "T"). It is clear from page 3 of such transcript that petitioners' plea was to criminal possession of a forged instrument. The judge asked petitioners whether, on March 13, 1997,

they each were in possession of counterfeit New York State tax stamps. Both petitioners responded in the affirmative. However, no mention was made of the quantity involved. Also, the judge imposed a fine, and restitution was not an issue (*cf.*, *Matter of Kuriansky v. Professional Care, supra* [wherein provider, Professional Care, which pled guilty to grand larceny and agreed to pay restitution in the amount of \$1,000,000.00, was collaterally estopped from arguing that the damages were less than \$1,000,000.00 in a proceeding seeking forfeiture of monies improperly received as Medicaid reimbursement]). Therefore, we find that whether petitioners were in possession or control of the illegally stamped cigarettes contained in both the van and the basement apartment was a factual issue which was not required to be resolved in the prior criminal proceeding and, as such, petitioners are not collaterally estopped from arguing that factual issue in this forum.

We now turn our attention to whether petitioners were, in fact, in possession or control of the cigarettes seized by authorities not only from the van, but also, from the basement apartment. In his determination, the Administrative Law Judge concluded that petitioners were in possession or control of only the cartons of cigarettes that were actually impounded from the van that they were driving when stopped by authorities. Much of the basis for his conclusion rested on his belief that petitioners were working under the influence of a man named Elvio Monegro. We find petitioners' contention regarding this individual as well as the affidavits submitted in support of their position to be completely baseless and not supported by the evidence in the record.

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 the 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.

After reviewing the hearing transcript of this proceeding in its entirety, it is clear that petitioner Cano was not forthright in his testimony and, in fact, as characterized by the Administrative Law Judge, such testimony was cagey and nonresponsive, not only in answering certain questions about the rental of the van used on the night in question, but with respect to most of the testimony presented by petitioner Cano. For instance, petitioner Cano was asked by the Division's representative to state his salary from the grocery store for the entire year of 1997. The cross examination proceeded as follows:

Q [Division's attorney]. . . . Now, Mr. Cano, it's your testimony that in March of 1997 you worked at a grocery store; is that correct?

A [petitioner Cano]. Yes.

Q. And that your wife owned the store?

A. Yeah.

Q. Okay. How much was your salary that year?

A. In that year, my salary was like \$200.

Q. *For all of 1997?*

A. Yeah (Hearing tr., p. 116 [lines 12-23], emphasis added).

Then, when the same topic was raised on redirect examination by petitioner's representative, petitioner Cano completely contradicted himself as follows:

Q. One other question. During 1997, you made \$200 for the whole year?

A. No, no. I will say a figure like this because every time I needed money I will take it from the cashier, but we just bought the store in that time, we didn't have much money, we tried to build the store which we couldn't and then we sold it and that was it.

Q. So you made more than \$200 during the whole year?

A. Oh, during the whole year, yes, yes, of course (Hearing tr., pp. 136 [lines 16-25]-137 [lines 2-4]).

At other points during his testimony, petitioner Cano could not remember any details of the third person who was arrested along with himself and petitioner Santos emphasizing that he only met the person on the night in question (Hearing tr., pp. 120-121), yet with respect to details involving Elvio Monegro, another individual with whom he met on only the one occasion, he had the ability to recall many details. Additionally, we find the affidavits submitted after the hearing from petitioner Santos and Elsa Guzman to be wholly unpersuasive. It is apparent from our review of the record that the affidavits were tailored to counter certain arguments made by the Division at the hearing. Thus, the submission of both affidavits, post-hearing, undermines the credibility of the contents contained therein. Since we find the testimony of petitioner Cano to lack credibility, coupled with the paucity of evidence submitted in support of petitioners' position, we reverse the determination of the Administrative Law Judge which concluded that petitioners were not in possession and control of the illegally stamped cigarettes contained in the basement apartment. Petitioners clearly have fallen short of meeting the burden of proof on this issue.

A presumption of correctness attaches to a properly issued statutory notice (*Matter of Tapolacci 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). Since petitioners failed 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, we sustain the Notices of Determination herein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted to the extent that petitioners were in possession or control of the illegally stamped cigarettes located both in the van and in the basement apartment, but otherwise is denied;
2. The exception of Hilarion Cano is denied;
3. The exception of Taveras Santos is denied;
4. The determination of the Administrative Law Judge is reversed in accordance with paragraph "1" above, but in all other respects is sustained;
5. The petition of Hilarion Cano is denied;
6. The petition of Taveras Santos is denied; and

7. The Notices of Determination dated July 13, 1998 are sustained.

DATED: Troy, New York
December 12, 2002

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner