

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

BAYRIDGE SUPERMARKET, INC. :

for Revision of Determinations or for Refund of :
Cigarette Tax under Article 20 of the Tax Law for the :
Periods Ended April 1, 1999 and April 15, 1999. :

DECISION
DTA NOS. 817910,
817911 AND 817912

In the Matter of the Petitions :

of :

NAZAR ALIDANI :

for Revision of Determinations or for Refund of :
Cigarette Tax under Article 20 of the Tax Law for the :
Periods Ended May 14, 1998 and April 15, 1999. :

Petitioner Bayridge Supermarket, Inc., 188 Bay Ridge Avenue, Brooklyn, New York 11220 and petitioner Nazar Alidani, 1565 Bath Avenue, Brooklyn, New York 11228, filed an exception to the determination of the Administrative Law Judge issued on February 21, 2002. Petitioners appeared by Melvin L. Greenwald, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michelle M. Helm, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Oral argument was not requested.

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

ISSUES

I. Whether petitioner Nazar Alidani was in possession of or had control of unstamped cigarettes which he transported from Virginia to New York.

II. Whether the penalties imposed against petitioners for the possession or control of unstamped cigarettes were excessive.

III. Whether the notices of determination should be voided on the basis that they did not adequately specify the dates of the incidents at issue.

FINDINGS OF FACT

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

On May 14, 1998, petitioner Nazar Alidani (“petitioner Alidani”) was apprehended in Brooklyn with 607 cartons¹ of cigarettes that lacked New York tax stamps. A day earlier, Mr. Alidani had rented a gold 1998 Toyota Camry, with a Virginia license plate number ZEV-4811, from Alamo Car Rental (“Alamo”) at its Newark airport location. Only Mr. Alidani of 1565 Bath Avenue in Brooklyn was authorized to drive the vehicle, and he paid for the rental with his own credit card.

On the morning of May 14, 1998, petitioner Alidani, unaccompanied by anyone else, drove his rental car to Woodbridge, Virginia, the location of a BJ’s Wholesale Club, where the backseat and trunk of the Toyota were loaded up with cigarettes. The cigarettes in the backseat were covered by black plastic trash bags.

¹ The 607 cartons consisted of 521 cartons of Newports, 73 cartons of Marlboros, 12 cartons of Parliaments, and 1 carton of Virginia Slims.

Petitioner Alidani was unaware that two investigators from Pennsylvania had observed the loading of cigarettes into his Toyota, and, at least initially, unaware that they were in pursuit of his vehicle as he made his return trip to Brooklyn. In the course of their surveillance, the Pennsylvania investigators contacted their colleagues at the New York Petroleum, Alcohol, Tobacco Bureau since they apparently surmised that petitioner Alidani was heading to New York City.

Two New York investigators, including Investigator George D'Amato, who testified at the hearing, and his partner, Investigator Regan ("the investigators"), were directed to intercept petitioner Alidani on the New Jersey Turnpike and take over the surveillance from the Pennsylvania investigators. However, the New York investigators were unable to join up with the Pennsylvania investigators and intercept petitioner Alidani. Rather, after crossing the Verrazano Bridge into Brooklyn from Staten Island, the Pennsylvania investigators "broke off" their pursuit as petitioner Alidani exited from the highway at 92nd Street. Moments earlier, petitioner Alidani had stopped his vehicle on the Verrazano Bridge apparently having become aware that he was being followed. According to Investigator D'Amato, the Pennsylvania investigators informed their New York colleagues by phone that petitioner Alidani "had made a verbal threat to them" (tr., p. 27). Petitioner Alidani then entered the Brooklyn-Queens Expressway after driving "the wrong way down Parrot Place at 90th Street" according to Investigator D'Amato's report. The investigators and New York Police Department vehicles, which had also joined in the pursuit of Mr. Alidani, "broke off" after losing sight of Mr. Alidani.

Although Mr. Alidani was no longer under surveillance, the investigators as well as additional colleagues acted upon information they had obtained concerning two locations

“linked” to the rental of the Toyota from Alamo, including 774 3rd Avenue (at 26th Street) in Brooklyn. Upon their arrival at this 3rd Avenue location, the investigators spotted the gold Toyota with the Virginia license plate parked nearby. After several minutes of watching the vehicle while waiting for backup, the investigators observed petitioner Alidani approach the Toyota and insert a key in the driver side door. Investigator D’Amato turned on his vehicle’s flashing red lights and siren “to make the person aware that I was a law enforcement officer and I didn’t want him to think he was being robbed” (tr., p. 29). When asked by Investigator D’Amato where he was coming from, petitioner Alidani responded, “Virginia,” and when asked what he had in the car, he answered, “cigarettes.” When asked by the investigator to open the car so he could see that the cigarettes were there, petitioner responded, “Yes, they are in there.” In the nine years that Investigator D’Amato has been involved in the enforcement of the cigarette tax, he has had only one other case where the number of untaxed cigarettes exceeded the 607 cartons of unstamped cigarettes seized from petitioner Alidani’s rental vehicle on the day in question.

Petitioner was arrested and charged with two class E felonies: (1) Possession of untaxed cigarettes under Tax Law § 1814(e), and (2) Attempt to evade/defeat cigarette tax under Tax Law § 1814(a)(2). On July, 30, 1998, petitioner Alidani appeared before the Hon. Jerome Kay in New York Supreme Court (Kings County) and under oath responded affirmatively to the following question posed by the judge:

So, on May 14, 1998, at approximately 6 P.M. at 26th Street and 3rd Avenue in the County of Kings, did you willfully attempt to evade or defeat the tax imposed on [sic] by Article 20 of the New York State Tax Law in that you had a number of cartons of cigarettes, none of which were stamped under the New York State Tax Law.

Before accepting the guilty plea of petitioner Alidani to a reduced misdemeanor charge, the judge verified that Mr. Alidani had fully discussed it with his attorney, that he understood the consequences of his guilty plea, that no one had forced him to accept the plea, that no one had promised him anything for accepting the plea, and that he was “pleading guilty because you are guilty.” In exchange for his guilty plea to a reduced misdemeanor charge, petitioner Alidani was sentenced to a conditional discharge and a \$1,000.00 fine or 30 days.

Approximately six months after his guilty plea, the Division of Taxation (“Division”) issued a Notice of Determination dated January 25, 1999 against petitioner Alidani asserting penalty due of \$59,700.00 under Article 20 of the Tax Law, with reference to a “file due date” of May 14, 1998 and a “tax period ended date” of May 1, 1998, because he was “found to be in possession of unstamped or unlawfully stamped cigarettes”

Sales of Unstamped Cigarettes at Bayridge Supermarket

In August or September of 1998, just a few months after his arrest for transporting unstamped cigarettes into New York, petitioner Alidani became the owner of a small grocery store, with the corporate name of Bayridge Supermarket, Inc.,² (“Bayridge Supermarket”) located at 188 Bay Ridge Avenue in Brooklyn. In October of 1998, an investigator with the New York Petroleum, Alcohol, Tobacco Bureau discovered a false wall in the rear area of the store, behind which over 200 cartons of unstamped cigarettes were hidden. A few months later, anonymous complaints were received, probably from competing retailers, that untaxed cigarettes were being sold at petitioner Alidani’s grocery store. In response, two undercover investigators on separate occasions purchased untaxed cigarettes confirming the illegal activity, and a retail

² There was no explanation why the business name of the enterprise is also referenced on certain documents in the record as Akram Fallah Abdel Rahman.

inspection was subsequently conducted on April 1, 1999 by Investigator D'Amato and his colleagues. In the course of his inspection, Investigator D'Amato found over three cartons of unstamped cigarettes in a hollowed out area of a shelf behind the grocery's front counter. The investigator noted that the hidden compartment "was so well hidden that I actually bypassed it twice" (tr., p. 62). When asked by the investigator, petitioner Alidani could not provide a certificate of registration for retail sales of cigarettes and/or tobacco products nor any invoices for the cigarettes. He also did not provide any explanation or information concerning where and how the unstamped cigarettes were obtained.

Two weeks later, on April 15, 1999, Investigator D'Amato and a colleague returned to petitioner Alidani's grocery store at 188 Bay Ridge Avenue to deliver a notice of a three-year suspension of the store's registration for retail sales of cigarettes and/or tobacco products. While at the premises, 14 cartons³ of untaxed cigarettes were discovered in a brown shopping bag in the back of the store. Investigator D'Amato arrested petitioner Alidani, who was charged with two misdemeanors, i.e., possession of untaxed cigarettes and attempt to evade cigarette tax. During processing of his arrest at the police precinct, petitioner Alidani, who was unremorseful, complained to the investigator that the arrest for a small number of cartons was harassment. Petitioner Alidani pleaded guilty to a lesser included offense of disorderly conduct and paid a \$250.00 fine.

The Division issued a Notice of Determination dated September 2, 1999 against petitioner Bayridge Supermarket asserting penalty of \$1,000.00 with reference to a "tax period ended date" of April 1, 1999 and a "file due date" of April 15, 1999. This notice included the following

³ The 14 cartons consisted of 5 cartons of Capris, 5 cartons of Virginia Slims, and 4 cartons of Newports.

explanation: “During an inspection of your premises, you were found to be in violation for failure to possess a valid certificate of registration for retail sales of cigarettes and/or tobacco products.”

The Division also issued a Notice of Determination dated September 13, 1999 against petitioner Bayridge Supermarket asserting penalty of \$2,500.00 with reference to a “tax period ended date” of April 1, 1999 and “file due date” of April 1, 1999. This notice included the following explanation: “During an inspection of your premises, you were found to be in violation for failure to possess a valid certificate of registration for retail sales of cigarettes and/or tobacco products.”

In addition, the Division issued a Notice of Determination dated November 15, 1999 against petitioner Nazar Alidani asserting penalty of \$400.00 with reference to a “tax period ended date” of April 1, 1999 and “file due date” of April 16, 1999. This notice included the following explanation: “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

At the outset, the Administrative Law Judge noted that, in addition to any other penalty imposed by Article 20 of the Tax Law, the Commissioner of Taxation and Finance may impose a penalty of not more than \$100.00 for each 200 unstamped or unlawfully stamped cigarettes (10 cartons) or fraction thereof in excess of 2,000 cigarettes in the possession or under the control of

any person. The Commissioner of Taxation and Finance has the discretion to remit all or part of such penalty (Tax Law former § 481[1][b]).⁴

Addressing petitioner Alidani's contention that he was not in possession or control of the 607 cartons of assorted cigarettes all of which lacked New York State cigarette tax stamps, the Administrative Law Judge was unpersuaded. The Administrative Law Judge noted that this contention was based solely upon petitioner Alidani's testimony. On direct examination, he testified that someone took him to rent the car at Alamo and directed him to drive to Virginia. He also testified that he did not know what was put into the car in Virginia for him to transport back to New York. He testified further that this unidentified person reimbursed the cost of the car rental (which he put on his own credit card) and gave him money to pay tolls and gasoline as well as an additional \$300.00 for transporting the unknown items to New York from Virginia. On cross-examination, he added that the stranger he was acting for told him *only* his first name which was Hussein. The Administrative Law Judge did not view Mr. Alidani's testimony as credible. Accordingly, the Administrative Law Judge rejected Mr. Alidani's arguments that were based on that testimony.

In contrast, the Administrative Law Judge found the testimony of Investigator D'Amato to be thorough and credible. In addition, the records that the investigator created in carrying out his duties were persuasive evidence of the events at issue, especially in light of petitioners' failure to introduce any reliable evidence to rebut it.

⁴Tax Law § 481(1)(b) was amended on January 1, 2001 to provide for a *minimum* penalty of \$100.00 per carton and *doubled* the maximum penalty to \$200.00 per carton in order to be a more effective deterrent against cigarette smuggling (L 2000, ch 262).

The Administrative Law Judge pointed out that petitioner Alidani pled guilty to a willful attempt to evade or defeat the cigarette tax based upon his possession of unstamped cigarettes on May 14, 1998. Consequently, the Administrative Law Judge agreed with the Division's contention that he is collaterally estopped from contesting the issue of whether he was in possession or control of the 607 cartons found in his rental car (*see, Kuriansky v. Professional Care*, 158 AD2d 897, 551 NYS2d 695; *Matter of DeFeo*, Tax Appeals Tribunal, April 22, 1999). The Administrative Law Judge noted that petitioner Alidani's motivation for pleading guilty did not affect the conclusion that he is collaterally estopped from contesting the issue of his possession or control of the unstamped cigarettes in this matter.

In any event, the Administrative Law Judge found that the Division's evidence independently supports the conclusion that petitioner Alidani was in possession and⁵ control of the 607 cartons of unstamped cigarettes discovered in the backseat and trunk of his rental car. The Administrative Law Judge cited the facts that petitioner Alidani rented the car and charged its expense to his own credit card, tried to elude the Pennsylvania investigators who were tracking him back to New York, and that he sold and possessed unstamped cigarettes at his grocery store. Furthermore, petitioner Alidani consented to the search of his rental car establishing the contents therein. The Administrative Law Judge found that Mr. Alidani drove alone to Virginia and back to New York for the sole purpose of transporting unstamped cigarettes which were loaded into his rental car in Virginia. Therefore, the Administrative Law Judge found that petitioners' argument that evidence obtained from the search of the car must be excluded from the record here to be without merit.

⁵The Division's contention that petitioner Alidani is liable for the penalty at issue if he was *either* in possession *or* control of the unstamped cigarettes is correct.

Pursuant to Tax Law § 481(1)(b), a penalty may be imposed of not more than \$100.00 for each carton of unstamped packages in the possession or under the control of any person in excess of 10 cartons. The Administrative Law Judge found that since petitioner was in possession and control of 607 cartons of unstamped cigarettes, a penalty of \$59,700.00, which equates to 597 unstamped cartons in excess of 10 such cartons, was properly calculated.

The Administrative Law Judge next addressed the imposition of additional fines pursuant to Tax Law § 480-a(3)(a). The Administrative Law Judge noted that on April 1, 1999, Investigator D'Amato found over three cartons of unstamped cigarettes hidden in petitioner Alidani's grocery store, Bayridge Supermarket, which did not have a certificate of registration for retail sales of cigarettes and/or tobacco products publicly displayed. Consequently, the Administrative Law Judge found that the Division properly asserted, by its Notice of Determination dated September 2, 1999, a penalty of \$1,000.00 under Tax Law § 480-a(3)(a) against Bayridge Supermarket, the corporate petitioner. Two weeks later, on April 15, 1999, Investigator D'Amato discovered additional cartons of untaxed cigarettes on the grocery store's premises. The Administrative Law Judge found that this discovery justified the imposition of an additional penalty of \$2,500.00 under Tax Law § 480-a(3)(a), as asserted by the Notice of Determination dated September 13, 1999, against the corporate petitioner. The Administrative Law Judge also found that the Division was not required to obtain a search warrant before conducting its reasonable and proper administrative inspections of the grocery store (*see, People v. McIver*, 125 AD2d 263, 508 NYS2d 436). Consequently, the Administrative Law Judge rejected as without merit petitioners' argument that the Division is relying on evidence obtained from illegal searches.

Furthermore, the Administrative Law Judge stated that on April 15, 1999, Investigator D'Amato and a colleague discovered 14 cartons of unstamped cigarettes on the premises of petitioner Alidani's grocery store. Pursuant to Tax Law § 481(1)(b), the Administrative Law Judge found that a penalty of \$400.00 was properly imposed against petitioner Alidani for the four cartons of unstamped packages discovered in his grocery store, which were in excess of the 10 cartons of unstamped packages permitted under this provision. In light of petitioner's continuing pattern of disregard for the cigarette tax, the Administrative Law Judge sustained the penalty imposed (*see, Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001).

The Administrative Law Judge also found that the minor errors in the dates on the statutory notices issued against petitioners did not serve to invalidate the notices in light of the absence of any evidence of harm or prejudice to petitioners as a result of these defects. The Administrative Law Judge noted that petitioner Alidani was aware that the basis for the primary penalty at issue of \$59,700.00 resulted from his transporting unstamped cigarettes from Virginia into New York, and he was aware that the other three penalties at issue, \$400.00 against him personally, and \$1,000.00 and \$2,500.00 against his corporate entity resulted from the two visits in April of 1999 made by Inspector D'Amato to his grocery store, when unstamped cigarettes were discovered on the premises. The Administrative Law Judge found petitioners' references to the pleading requirements under the Civil Practice Law and Rules (hereinafter "CPLR") as inapposite. The CPLR governs civil procedure in the New York Courts, and not the actions of the Division in its assertion of tax and penalties due against taxpayers by the issuance of statutory notices as specified by the Tax Law.

The Administrative Law Judge denied the petition of Bayridge Supermarket and the petitions of Nazar Alidani, and sustained the notices of determination dated September 2, 1999 and September 13, 1999 each issued against Bayridge Supermarket and also sustained the notices of determination dated January 25, 1999 and November 15, 1999 each issued against Nazar Alidani.

ARGUMENTS ON EXCEPTION

Petitioner Alidani argues on exception, as he did below, that he did not have possession and control of the 607 cartons of unstamped cigarettes discovered in his rental car. Mr. Alidani also takes exception to the fact that the Administrative Law Judge rejected his testimony as not credible.

In addition, petitioner urges that the search of his business premises by the Division's investigators was without a warrant or reasonable or probable cause.

Further, petitioner Alidani claims that a penalty of \$100.00 per carton for unstamped cigarettes was grossly excessive under the circumstances.

The Division counters that petitioner Alidani's plea allocution and guilty plea in the criminal matter estops him from challenging the same factual issues here. Even if that were not the case, the Division urges that petitioner was apprehended in possession and control of illegally stamped cigarettes discovered in his rental car. Further, the Division states that petitioner Alidani was also in possession or control of the unstamped cigarettes discovered on the premises of his grocery store on more than one occasion. The Division agrees with the Administrative Law Judge that Mr. Alidani's testimony lacked credibility and was insufficient to satisfy his burden of proof. The Division also argues that the notices of determination were

adequate to give notice to petitioners of the basis for the amounts asserted and did not hinder petitioners' ability to protest the assessments.

The Division also maintains that the penalty imposed was proper based upon the effort expended by petitioner Alidani to secure contraband cigarettes, the deception by petitioner Alidani (in using hidden compartments), the large number of cigarettes confiscated, and the continuing pattern of disregard for the law. The Division urges that we affirm the determination of the Administrative Law Judge.

OPINION

We note that at that criminal proceeding disposing of the May 14, 1998 charges, petitioner Alidani admitted to possessing the 607 cartons of unstamped cigarettes for the purpose of attempting to evade cigarette tax. We conclude that Mr. Alidani is bound by that admission, and we agree with the Administrative Law Judge that petitioner Alidani is collaterally estopped from contesting the issue of his possession or control of the 607 cartons of unstamped cigarettes. We also note, however, that the evidence in this record shows that Mr. Alidani went to New Jersey, rented a vehicle with his own credit card and during the rental he had the right to exclusive use and possession of the vehicle, i.e., he was the only authorized driver. During this rental, Pennsylvania authorities observed cigarettes being loaded into the car. When New York investigators arrived at petitioner Alidani's 3rd Avenue address in Brooklyn, petitioner Alidani was asked what was in the car. Petitioner Alidani stated that he had cigarettes in the car. We conclude that this evidence is sufficient by itself to independently establish petitioner Alidani's knowledge, possession and control of both the vehicle and the cigarettes contained therein.

Next, we address petitioners' claim that the unlawfully stamped cigarettes found at his place of business and in his car were discovered without benefit of a warrant, probable cause or reasonable cause. The record shows that petitioner Alidani consented to the search of his rental vehicle on May 14, 1998. As to the search of his business premises on April 1, 1999, Mr. Alidani invited Mr. D'Amato to finish his search of the premises "so I can go about my business" (Tr., p. 64). We find this to be sufficient consent under the circumstances. However, even if petitioner Alidani had not consented to the search of his business, we would still find his argument without merit. Where a dealer in selling cigarettes is open and notorious, whether licensed or merely holding himself out to the public as licensed, the Tax Commissioner has the power to inspect the records and inventory of such dealer (*People v. Rizzo*, 40 NY2d 425, 386 NYS2d 878). The Court of Appeals in *Rizzo*, affirmed the Appellate Division's reversal of the defendant's conviction, because the investigator's search of Rizzo's garage was only based upon a mere *suspicion* that he was in possession of untaxed cigarettes. That is not the case here. In this case, two tax compliance agents had purchased untaxed cigarettes in petitioner Alidani's store on two separate occasions prior to the searches of April 1 and 15, 1999 (Tr., pp. 60-69). This was sufficient to give Investigator D'Amato probable cause for the searches of April 1 and 15, 1999 of petitioners' records and inventory pursuant to the Commissioner's authority under Tax Law § 474(4) (*People v. Rizzo, supra*). "[I]f the agency has probable cause to believe that the regulated activity is taking place they may lawfully enter the premises and examine records and inventory pursuant to their statutory power" (*People v. Rizzo, supra*, 386 NYS2d, at 881, *citing Peebles v. United States*, 341 F2d 60, *cert denied* 380 US 988, 14 L Ed 2d 280).

With regard to the cigarettes brought into New York from Virginia in 1998, petitioner Alidani ultimately pled guilty to a reduced charge of wilfully attempting to evade or defeat the tax imposed by Article 20 of the Tax Law, a Class B Misdemeanor, in satisfaction of two Class E Felonies.⁶ Based on his plea bargain, he was sentenced to a fine of only \$1,000.00 and given a Conditional Discharge. This slap on the wrist by the Court obviously had minimal deterrent value, since petitioner was again possessing and selling untaxed cigarettes just a few months later.

The Administrative Law Judge did not find petitioner Alidani's testimony to be credible. We concur. Based upon petitioner Alidani's conduct in repeatedly acting in contravention of the Tax Law, we find that the penalties imposed are appropriate.

We affirm the determination of the Administrative Law Judge. Petitioners have offered no basis to justify our modifying the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Bayridge Supermarket, Inc. and Nazar Alidani, as officer, is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petitions of Bayridge Supermarket, Inc. and Nazar Alidani, as officer, are denied;

⁶The charge of unlawfully possessing or transporting 20,000 or more unstamped cigarettes for the purpose of sale (Tax Law § 1814[e]) and attempted evasion of the cigarette tax on such cigarettes (Tax Law § 1814[a][2]).

4. The Notices of Determination dated September 2, 1999 and dated September 13, 1999 issued to Bayridge Supermarket, Inc., and the Notices of Determination dated January 25, 1999 and dated November 15, 1999, issued to Nazar Alidani, are sustained.

DATED: Troy, New York
January 2, 2003

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner