

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>CLARENCE WAITE</b>	:	DECISION
	:	DTA NO. 818401
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law	:	
for the Period March 29, 2000.	:	

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Petitioner Clarence Waite, 383 Warburton Avenue, Apartment 3-G, Yonkers, New York 10701, filed an exception to the determination of the Administrative Law Judge issued on July 11, 2002. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michelle M. Helm, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a brief in opposition to petitioner's exception. Oral argument, at petitioner's request, was denied.

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

***ISSUE***

Whether petitioner is liable for the penalty imposed by the Division of Taxation for failure to be registered as a dealer of cigarettes and tobacco products for the year 2000.

***FINDINGS OF FACT***

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

Petitioner, Clarence Waite, is the owner of the Faith Grocery Store (“Faith Grocery”), a small grocery store located at 91 McLean Avenue, Yonkers, New York. Faith Grocery sells beer, candy, cigarettes and grocery items.

On March 29, 2000, an investigator from the Alcohol, Cigarette and Tobacco Products Bureau of the Division of Taxation (“Division”) conducted a retail inspection of Faith Grocery. The investigator concluded that petitioner was selling cigarettes without a valid New York State Certificate of Registration. This conclusion is stated on the Tax Enforcement Referral Report filed by the investigator. An accompanying Cigarettes, Alcohol and Tobacco Regulatory Report indicates that on the date of the inspection, there were two cartons of cigarettes “on hand” at Faith Grocery. This latter report also identifies 565 Retail Inc. as petitioner’s supplier of cigarettes and tobacco products, and indicates petitioner’s purchase of three cartons of cigarettes under an invoice dated February 9, 2000, as well as the purchase of one box of cigars under an invoice dated February 19, 2000. The report lists the tax stamp numbers for the cigarettes.

On August 11, 2000, the Division issued to petitioner a Notice of Determination assessing a penalty in the amount of \$2,500.00 pursuant to Tax Law § 480-a(3)(a). This notice included the following statement in explanation:

During an inspection of your premises, on 03/29/00, you were found to be in violation for failure to possess a valid New York State certificate of registration for retail sales of cigarette and/or tobacco products.

Therefore, a civil fine is imposed under Article 20 of the New York State Tax Law.

On May 1, 2000, approximately one month after the above-described inspection, petitioner mailed a completed Form DTF-716 (“Application for Registration of Retail Dealers and Vending Machines for Sales of Cigarettes or Tobacco Products”) seeking to renew his license as a

cigarette and tobacco products retail seller for the year 2000. It is undisputed that petitioner possessed a valid license for the year 1999. It is also undisputed that petitioner did not renew such license upon its expiration on December 31, 1999, allegedly because he lacked the funds to do so.

Petitioner was previously issued a Notice of Determination on February 3, 1998 under which a fine in the amount of \$1,000.00 was assessed for the same violation as is stated in this matter, to wit, selling cigarettes without a valid Certificate of Registration. Petitioner does not dispute the lack of a valid license for 1998, but alleges that he simply forgot to renew such license upon its expiration at the end of 1997. It appears that the assessment for the 1998 violation was paid.

The annual registration fee for a New York State Certificate of Registration is \$100.00.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted that pursuant to Tax Law § 480-a(1)(a), retail dealers of cigarettes and tobacco products are required to register with the Division and publicly display a certificate of registration in each place of business in New York State. For failure to comply with this mandate, Tax Law § 480-a(3)(a) provides a civil fine not to exceed \$1,000.00 for a first violation. A second or subsequent violation within three years results in a civil fine not to exceed \$2,500.00.

The Administrative Law Judge found that petitioner had a valid certificate of registration as a retail seller for the year 1999. However, he did not have a valid certificate of registration for the year 2000 at the time of the inspection on March 29, 2000. The Administrative Law Judge rejected petitioner's arguments that he did not actually sell any cigarettes to the investigating

agent and that the investigator did not actually witness anyone purchasing any cigarettes from petitioner.

Based on the fact that there were two cartons of cigarettes on hand at petitioner's premises on March 29, 2000 and based upon petitioner's testimony that there were approximately 10 to 15 packs of cigarettes displayed in the plexiglass rack at the store, the Administrative Law Judge concluded that petitioner had, and was offering, cigarettes for sale. The Administrative Law Judge found that petitioner purchased three cartons of cigarettes from his supplier on February 9, 2000, which negated petitioner's testimony that he had purchased no cigarettes after the expiration of his license.

The Administrative Law Judge concluded that petitioner was in violation of Tax Law § 480-a on March 29, 2000 and, thus, was subject to the assessment of a civil fine. The Administrative Law Judge also found that this was petitioner's second violation within three years, as petitioner was assessed a fine of \$1,000.00 on February 3, 1998 for failing to have a valid certificate of registration for 1998. Consequently, the Administrative Law Judge upheld the imposition of the \$2,500.00 fine pursuant to Tax Law § 480-a(3)(a).

#### ***ARGUMENTS ON EXCEPTION***

Petitioner argues that the Administrative Law Judge incorrectly determined that petitioner was selling cigarettes in his store when, in fact, such cigarettes had simply remained on hand at the expiration of his retailer dealer's registration for 1999. Petitioner maintains that he was accused of selling cigarettes but not of having cigarettes for sale without a proper registration certificate.

In opposition, the Division argues that on March 29, 2000 petitioner did not possess a valid New York State Certificate of Registration and this was not contested by petitioner. By petitioner's own admission, he had cigarettes on display on a rack in his store and the Administrative Law Judge correctly determined that this constituted offering such cigarettes for sale.

### ***OPINION***

Tax Law § 480-a(1)(a) provides that:

On and after January first, nineteen hundred ninety-one, every retail dealer shall publicly display a certificate of registration from the department in each place of business in this state through which it sells cigarettes or tobacco products at retail. A retail dealer who has no regular place of business shall publicly display such certificate on each of its carts, stands, trucks or other merchandising devices through which it sells cigarettes or tobacco products in this state.

A "retail dealer" is defined in Tax Law § 470(9) as "[A]ny person other than a wholesale dealer engaged in selling cigarettes or tobacco products."

Tax Law former § 480-a(3) provides, in applicable part, that:

In addition to any other penalty imposed by this chapter: (a) Any retail dealer who violates the provisions of this section shall, after due notice and an opportunity for a hearing, for a first violation be liable for a civil fine not to exceed one thousand dollars and for a second or subsequent violation within three years following a prior finding of violation be liable for a civil fine not to exceed two thousand five hundred dollars;<sup>1</sup>

Petitioner had registered as a retail dealer at least in 1997 and 1999. He was previously fined by the Division for not renewing his registration in 1998. Petitioner clearly met the

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<sup>1</sup> Section 480-a(3) was amended by Chapter 262 of the Laws of 2000 (effective November 14, 2000) to provide that the civil fine for a first violation of the provisions of section 480 shall be not less than \$500.00 nor more than \$2,000.00 and the civil fine for a second or subsequent violation of that section shall be not less than \$1,000.00 nor more than \$3,500.00.

definition of a “retail dealer” from 1997 forward and there is no evidence that the nature of his business had changed in the year 2000.

Petitioner argues that he is not subject to a fine because he was not engaging in an actual sale transaction at the time that the Division’s investigator was in his store. Petitioner misinterprets the issue. The crux of the matter herein is whether or not petitioner was required to be registered as a retail dealer of cigarettes or tobacco products during the year 2000. As petitioner was offering cigarettes for sale by displaying several packs of them on a rack in his store when the Division’s investigator visited that store on March 20, 2000, we conclude that petitioner was a retail dealer engaged in selling cigarettes and was required to have a valid certificate of registration on display as provided by Tax Law § 480-a(1)(a).

Petitioner has presented the same arguments on exception that were considered and rejected by the Administrative Law Judge. Petitioner has offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge’s determination is incorrect. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Clarence Waite is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Clarence Waite is denied; and

4. The notice of determination dated August 11, 2000 is sustained.

DATED: Troy, New York  
April 17, 2003

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/s/Donald C. DeWitt

Donald C. DeWitt  
President

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/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner