

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**MARC ZACCARIA** : DECISION  
for Revision of a Determination or for Refund of : DTA NO. 819994  
Cigarette Tax under Article 20 of the Tax Law for :  
the Period November 6, 2003. :

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Petitioner, Marc Zaccaria, filed an exception to the determination of the Administrative Law Judge issued on June 22, 2006. Petitioner appeared by Ruchelman & Cruikshank, PC (Allen B. Cruikshank, Jr., Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michelle M. Helm, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at the request of petitioner, was held on June 20, 2007 in Troy, New York.

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

***ISSUE***

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

***FINDINGS OF FACT***

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

On November 6, 2003, at approximately 1:55 P.M., while patrolling in a marked United States Border Patrol vehicle on New York State Route 37 on the Akwesasne Mohawk Territory in Northern New York State, Border Patrol Agent Gilbert Gonzales observed petitioner, Marc Zaccaria, driving a 2000 black Lincoln automobile bearing Connecticut license plates. This section of Route 37 is known to law enforcement personnel as a “smuggling pipeline” between the East Coast and the Akwesasne Reservation. Border Patrol Agent Gonzales followed petitioner in his vehicle to the nearby village of Fort Covington, New York. After petitioner parked and exited his car near the Village Mart Store in Fort Covington, Border Patrol Agent Gonzales approached petitioner. The border patrol agent first asked petitioner his citizenship status (he answered that he was a United States citizen) and then asked petitioner if he could look in the trunk of his vehicle. Petitioner responded that the car was not his and that he did not know what was in the trunk. He also expressly consented to the agent’s looking in the trunk.

Upon opening the trunk with the key, the border patrol agent observed several hundred cartons of Marlboro brand cigarettes. The cigarettes were tightly packed such that few, if any, more cigarettes could be packed in the truck and they were packed in such a way as to maximize the number of cartons that could be placed in the trunk.

Investigators William J. Soldato and Barbara A. Paye of the Division of Taxation’s (“Division”) Petroleum, Alcohol & Tobacco Bureau arrived on the scene in Fort Covington shortly after Border Patrol Agent Gonzales opened the trunk of the vehicle and observed the cartons of cigarettes tightly packed in the trunk of the 2000 black Lincoln.

The cartons were later counted by Division investigators, including Investigator Soldato, and it was determined that there were 300.1 cartons of cigarettes in the vehicle at the time the

border patrol agent opened the trunk. None of the packages of cigarettes in the trunk bore tax stamps.

Petitioner was taken into custody by investigators Soldato and Paye. While in custody, petitioner stated that the vehicle in question was owned by his employer and that he was in the area to do an estimate for a carpet installation for a local business. Petitioner stated that he had been at the location of the local business for about two hours on November 6th completing the estimate. Petitioner did not know the name of the business or the name of the owner of the business and did not have any paperwork or invoices from the estimate. Petitioner told the investigators that his employer had a copy of the estimate in a separate car, but that his employer had already left to return to Connecticut. Petitioner also told the investigators that he had stayed in a local hotel the night before (November 5, 2003), but he could not remember the name of the hotel or where it was located.

The vehicle in question, the 2000 black Lincoln, was registered to Leonard J. Durango, 204 Broad Street, Danielson, Connecticut. The address given on the registration is identical to petitioner's home address.

Petitioner was charged with felony possession of untaxed cigarettes in violation of Tax Law § 1814(e)(2). Such charge remained pending as of the conclusion of the hearing in this matter.

On February 23, 2004, the Division of Taxation issued to petitioner, Marc Zaccaria, a Notice of Determination which asserted penalty of \$44,265.00 due. The notice advised petitioner that, "on 11/06/03, you were found to be in possession of unstamped or unlawfully stamped

cigarettes, and/or untaxed tobacco products. Therefore, penalty is imposed under Article 20 of the New York State Tax Law.

The penalty assessed against petitioner was calculated by taking the 300.1 cartons of cigarettes, subtracting 5 cartons allowable for personal use, and multiplying the remaining 295.1 cartons by \$150.00 per carton, for a total penalty due of \$44,265.00.

The arrest report of investigators Soldato and Paye indicates that an inventory of the Lincoln vehicle found 100.1 cartons of cigarettes. The report of Border Patrol Agent Gonzales and a New York State Police Vehicle Impoundment and Inventory Record both refer to 301 cartons of cigarettes in the vehicle. Investigator Soldato testified at the hearing that he counted 300.1 cartons of cigarettes in the trunk of the vehicle following its seizure.

Petitioner submitted the affidavit of Isidro William Joseph Kelly dated November 25, 2003. Mr. Kelly's affidavit indicated that he is a Long Island, New York resident and that on November 3, 2003 he purchased approximately 300 cartons of cigarettes from an unidentified Indian reservation located on Long Island; that he placed such cigarettes in his work truck and drove to meet petitioner, a co-worker, in upper New York State to appraise a job on November 6, 2003; that he transferred the cigarettes into the Lincoln because he had to pick up supplies for a different job; that petitioner did not know that the cigarettes were in the trunk of the Lincoln; that he informed petitioner that he would call him to exchange vehicles at a location nearer to the building supply company; that he intended to return to Long Island with the Lincoln and the cartons of cigarettes, but that the exchange of vehicles never took place.

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

The Administrative Law Judge concluded that petitioner was in possession of and had control of unstamped cigarettes. Thus, the Administrative Law Judge determined that petitioner was properly liable for the penalty imposed pursuant to Tax Law § 481(1)(b)(i).

The Administrative Law Judge pointed out that the affidavit submitted in support of petitioner's position was weak and petitioner's answers to questions at the time of the stop were implausible. In his determination, the Administrative Law Judge emphasized the fact that petitioner chose not to testify in this proceeding. The Administrative Law Judge noted that petitioner was also the subject of a criminal proceeding involving the same transaction. The criminal matter had not been finally determined at the time of the hearing in this matter and this tax proceeding was continued by the Administrative Law Judge, at one point, to accommodate the criminal matter. Yet, when the subsequent date for hearing arose and the criminal matter was still pending, the Administrative Law Judge called the hearing to order and petitioner still refused to testify, which petitioner argued largely contributed to his failure to sustain his burden of proof in this matter.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner reasserts his claim that he was in an untenable position of choosing to incriminate himself by proceeding in this forum prior to the conclusion of the criminal matter. Although recognizing that asserting his Fifth Amendment right to self-incrimination does not apply in this administrative proceeding, petitioner claims that he was prejudiced by being forced to proceed at the Administrative Law Judge level prior to the

resolution of his criminal case. Petitioner states that there would have been no detriment suffered by the Division in granting his request for an adjournment in this case.

In opposition, the Division states that it did not oppose the adjournment request and it argues that petitioner's testimony in this case would not change the result reached by the Administrative Law Judge. The Division states that petitioner was in possession of and had control of the cigarettes when he was stopped by Border Patrol. The Division disagrees with petitioner's claim that the standard for determining liability is based on petitioner *knowingly* having possession of or control over the cigarettes. The Division states that the statute is clear and having possession is enough to find a basis for liability in this case.

#### ***OPINION***

A formal hearing in this matter was held on March 15, 2005. At that time, petitioner requested a continuation in order to present his case after his criminal matter was completed, since the criminal matter and this administrative matter involved the same issue. Petitioner was granted a continuation until November 16, 2005 to provide enough time for the disposition of the criminal matter. However, as of that date, the criminal matter was still pending. Despite that, the Assistant Chief Administrative Law Judge was reluctant to grant any further adjournments and, thus, denied petitioner's final adjournment request to postpone the November 16, 2005 continuation date for the conclusion of this proceeding. Thus, the Administrative Law Judge called the hearing to order on November 16, 2005 and petitioner refused to put on a case to support his arguments.

We find that the denial of another adjournment request, in light of the circumstances, was in error. In fact, the criminal case was finally determined on February 28, 2006 and we can find

no detriment that would have occurred in providing the taxpayer with an abeyance of his administrative hearing in this instance. Thus, we remand this case to the Administrative Law Judge to afford petitioner the opportunity to present his case in the absence of pending criminal proceedings.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this case be remanded to the Administrative Law Judge for further proceedings consistent with our decision herein.

DATED: Troy, New York  
December 20, 2007

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
President

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

/s/ Robert J. McDermott  
Robert J. McDermott  
Commissioner