

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MAHER A. FAKHOURI : DECISION
for Revision of a Determination or for Refund of Cigarette : DTA NO. 820906
Tax under Article 20 of the Tax Law for the Period Ended :
August 29, 2003. :

Petitioner Maher A. Fakhouri, 111 Spackenkill Road, Poughkeepsie, New York 12603, filed an exception to the determination of the Administrative Law Judge issued on November 20, 2006. Petitioner appeared by William F. Berardi, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michele W. Milavec, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter in lieu of a formal brief in opposition. Petitioner filed a reply letter. Petitioner's request for oral argument was denied.

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

_____ ***ISSUES***

I. Whether petitioner was in possession or control of unstamped cigarettes and, if so, whether summary determination should be granted in favor of the Division of Taxation because there are no facts in dispute and the facts mandate a determination in favor of the Division.

II. Whether the penalty imposed against petitioner for the possession or control of unstamped cigarettes was excessive.

FINDINGS OF FACT

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

On August 27, 2003, the Division of Taxation (“Division”) received information from the United States Postal Service stating that petitioner, Maher A. Fakhouri, had received numerous shipments marked “cigarettes.” The shipments originated outside the United States and were received at petitioner’s post office box.

On August 29, 2003, Division investigators confronted petitioner at his residence. Thereafter, petitioner and his attorney gave 190 cartons of untaxed cigarettes to the investigators. Subsequently, petitioner signed a property receipt which identified the cigarettes which had been seized. The cigarettes were marked “US tax exempt for use outside US.”

Petitioner admitted to the Division’s investigators that he ordered the cigarettes over the Internet. Thereafter, petitioner was charged with one class D felony and one class E felony for violation of Tax Law § 1814 for possession of unstamped untaxed cigarettes and willfully attempting to evade or defeat the taxes imposed by Article 20 of the Tax Law.

As part of the forgoing criminal proceedings, petitioner executed an affidavit which stated, in pertinent part, that on August 15, 2003, he purchased cigarettes from an Internet company and that on August 29, 2003, he was arrested and charged with the two crimes of possession for sale of cigarettes and attempt to evade or defeat cigarette tax. Petitioner asserted that he made a mistake by believing the advice given to him by an Internet site with regard to purchasing and possessing cigarettes. According to petitioner, he did not have any intention to sell the cigarettes and did not know anyone who would purchase the cigarettes from him. Petitioner explained that he found an Internet web site which sold cigarettes for less money and planned on giving the cigarettes to his family and friends as Christmas gifts. In his affidavit, petitioner also noted that he was a recent graduate of a law school and was scheduled to take the New York State Bar Exam. Petitioner expressed concern that an arrest and conviction would prevent him from

practicing law. Petitioner concluded that after realizing that the purchase and possession of the cigarettes was illegal, he fully complied with law enforcement personnel and, after being promised that he could plead to a violation, he allowed law enforcement personnel to search his house and confiscate all of the cigarettes.

On May 24, 2004, petitioner entered a plea of guilty to a violation of Tax Law § 1814(a)(1) which is an attempt to evade or defeat tax imposed by Article 20 of the Tax Law, a misdemeanor.

The Division issued a Notice of Determination (Assessment number L-024283900), dated July 23, 2004, to petitioner which asserted that a penalty was due in the amount of \$27,750.00. The Notice explained that on August 29, 2003, petitioner was found to be in possession of unstamped or unlawfully stamped cigarettes or untaxed tobacco products. As a result, a penalty was imposed under Article 20 of the Tax Law. The notice was premised upon the Division's finding petitioner in possession of 190 cartons of untaxed cigarettes. In order to calculate the amount of the penalty, the Division exempted the first five cartons and then multiplied the remaining 185 cartons by a penalty of \$150.00 per carton.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that there were no facts in dispute and, thus, he decided that this case was properly before him on the motion for summary determination. The Administrative Law Judge noted that petitioner surrendered 190 cartons of untaxed cigarettes to the Division's investigators. Petitioner obtained the unstamped, untaxed cigarettes on the Internet and was arrested and charged with two crimes of possession for sale of cigarettes and attempt to evade or defeat cigarette tax. Petitioner entered a plea of guilty to an attempt to evade or defeat tax imposed by Article 20 of the Tax Law which is a misdemeanor.

Thus, given the undisputed facts, the Administrative Law Judge sustained the Notice of Determination issued to petitioner in the amount of \$27,750.00 that represented penalty

calculated at \$150.00 per carton for 185 cartons of cigarettes (exempting the first five cartons from penalty).

ARGUMENTS ON EXCEPTION

Petitioner claims as he did below that he “was clearly duped by an illegal internet supplier for a single purchase for gifts to family and friends . . .” (Petitioner’s exception, p. 1). Furthermore, petitioner takes issue with the fact that this investigation began from information received by the Division from the United States Postal Service, which information petitioner still has not been able to obtain from the Division. Petitioner argues that he should be given a credit for the \$8,550.00 market value of the cigarettes that he forfeited to the investigators and, after such credit, a penalty of the amount of remaining tax avoided should be imposed rather than the outstanding penalty as set forth in the Notice. Petitioner asserts that the Commissioner should certainly exercise his discretion in this matter since petitioner was a victim of a large sophisticated internet operation.

The Division states that petitioner’s arguments fail to defeat its motion for summary determination and should be rejected. Furthermore, the Division argues that the Administrative Law Judge correctly found that the facts asserted by petitioner do not establish that the maximum amount of penalty imposed was an abuse of discretion by the Commissioner. Thus, the Division requests that the determination be sustained.

OPINION

At the outset, we note that petitioner does not dispute the fact that he was in possession and control of the 190 cartons of unstamped cigarettes. Rather, petitioner’s main argument involves the penalty imposed by the Commissioner herein and puts forth his case for some mitigating factors to be considered in an effort to compromise the penalty imposed by the Notice. Thus, petitioner seeks to have the case remanded back to an Administrative Law Judge for a hearing in order to demonstrate that the Commissioner should use his discretion in this case to reduce the penalty imposed. We reject this proposition.

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

the commissioner [of taxation and finance] may impose a penalty of not more than one hundred fifty dollars for each two hundred cigarettes, or fraction thereof, in excess of one thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person. . . .

The foregoing section further provides that:

The commissioner in the commissioner's discretion, may remit all or part of such penalty. Such penalty shall be paid to the department and disposed of as hereinafter provided with respect to moneys derived from the tax (Tax Law § 481[1][b][iii]).

Petitioner states that he was the victim in this case and was taken advantage of by a sophisticated business operating via the Internet. Thus, he urges that the maximum penalty allowed is excessive. However, we have held in *Matter of Vinter* (Tax Appeals Tribunal, September 27, 2001, *confirmed Matter of Vinter v. Commissioner of Taxation & Fin.*, 305 AD2d 738, 757 NYS2d 911) that there are no statutory guidelines for the exercise of the Commissioner's discretion in imposing a penalty pursuant to Tax Law § 481(1)(b). Therefore, it is not necessary for the Division to have considered any mitigating factors prior to the imposition of the penalty at issue since this is neither mandated by statute nor regulations (*Matter of Vinter, supra* [wherein we held that consideration of factors such as the nature, number and degree of the violation by the petitioner was not required prior to the imposition of penalty]). Thus, a remand to the Administrative Law Judge in this case is inappropriate.

As stated by the Administrative Law Judge in his determination, a presumption of correctness attaches to a properly issued statutory notice (*Matter of Tavolacci 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.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Maher A. Fakhouri is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Maher A. Fakhouri is denied; and
4. The Notice of Determination dated July 23, 2004 is sustained.

DATED: Troy, New York
July 5, 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