

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**MUHAMMAD KAMAL** : DECISION  
for Revision of a Determination or for Refund of : DTA NO. 821701  
Cigarette Tax under Article 20 of the Tax Law for the :  
Period May 10, 2005. :

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Petitioner, Muhammad Kamal, filed an exception to the determination of the Administrative Law Judge issued on April 9, 2009. Petitioner appeared by Jerry A. Merola, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. 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 a person in possession of or had control of unlawfully stamped cigarettes.

II. Whether the penalty imposed was an abuse of discretion and excessive.

***FINDINGS OF FACT***

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

In the year 2000, petitioner commenced the operation of two Long Island Amoco gasoline stations, with retail kiosks selling cigarettes, candy and soda, not long after his arrival in the United States. One gasoline station was located in Holtsville at 1680 North Ocean Avenue (Holtsville station), and the other in North Bellmore at 2484B Jerusalem Avenue<sup>1</sup> (North Bellmore station). According to petitioner, it was “very easy” for him to “get involved” in the operation of gasoline stations because there is “no money involved.” Rather, the actual owner of the two gasoline stations was a company identified by petitioner as Leon Petroleum, which apparently held a franchise to operate these two Amoco brand gasoline stations on Long Island. Petitioner, by his company known as New York Trading Corp., contracted with Leon Petroleum and became responsible for the operation of the two gasoline stations in exchange for the payment of a monthly rent to Leon Petroleum, which was based upon the volume of gasoline sold. By operating the retail kiosks at the stations, petitioner had an additional source of income, besides some small portion of the income from gasoline sales.

The Division of Taxation (“Division”) entered into evidence two quarterly sales tax returns for New York Trading Corp., which reported sales only for petitioner’s North Bellmore location. Petitioner’s corporation, New York Trading Corp., apparently<sup>2</sup> conducted business as New York Auto Repair at the Holtsville location and presumably filed separate sales tax returns under this

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<sup>1</sup> There is some confusion in the record concerning the street address of the North Bellmore station. Petitioner’s personal residence was also on Jerusalem Avenue, one block from the station. He apparently used on occasion the address of his personal residence on Jerusalem Avenue as a business address for New York Trading Corp. During his testimony, perhaps due to his limited English language ability which made it difficult for him to testify at the hearing, he answered “Yes” to the question whether his “home address” was 2484B Jerusalem Avenue and that his “business address” was 2425 Jerusalem Avenue. As noted in the audit file, the North Bellmore station was located at 2484B Jerusalem Avenue.

<sup>2</sup> A memorandum from Joseph T. Conley, III, a Suffolk County Assistant District Attorney, Tax Crimes Unit, dated November 30, 2005 included in Exhibit F describes the defendant in the “corporate substitution” as New York Trading Corporation D/B/A New York Auto Repair with the Holtsville station’s address of 1680 North Ocean Avenue.

name for this second location. The quarterly sales tax returns for petitioner's North Bellmore location show (1) taxable motor fuel sales of \$457,307.00 and gross sales of candy, cigarettes and soda of \$44,969.00 for the quarter March 1, 2005 through May 31, 2005 and (2) taxable motor fuel sales of \$581,598.00 and gross sales of candy, cigarettes and soda of \$30,048.00 for the quarter June 1, 2005 through August 31, 2005. The record does not similarly disclose the amount of gasoline sales and gross sales of candy, cigarettes and soda at the Holtsville location.

On May 10, 2005, the Petroleum, Alcohol and Tobacco Bureau of the Division of Taxation ("PAT Bureau") conducted an inspection of petitioner's Holtsville station and discovered 90.4 cartons (or 904 packs since there are 10 packs to a carton) of cigarettes with counterfeit New York State cigarette tax stamps. The counterfeit stamps were lettered and numbered either 2824N or X4403 and had not been seen before by any PAT Bureau investigators. The PAT Bureau investigator did not immediately seize these cigarettes with counterfeit New York State cigarette tax stamps. Rather, after surreptitiously conducting a field test and determining that the stamps were counterfeit, the investigator left the Holtsville station without alerting Sajad Jan,<sup>3</sup> the clerk at the station, of her findings. Since she had learned from the clerk that petitioner, the operator of the Holtsville station, also operated the North Bellmore station, the investigator wanted to arrange for an inspection of the North Bellmore station before seizing the cigarettes with counterfeit cigarette tax stamps discovered at the Holtsville station and tipping off petitioner. Consequently, two PAT Bureau inspectors were sent to the North Bellmore station where they found 10.2 cartons (or 102 packs) bearing the same counterfeit New York State

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<sup>3</sup> Petitioner testified that on May 10, 2005, Muhammad Gondal was operating the kiosk at the Holtsville station, and that he was "working on the register" at the North Bellmore station. After answering "Yes, I operated it," in response to his representative's question, "Did you ever operate the Holtsville location," petitioner also responded "No," to his representative's next question, "Did you *personally* ever operate the Holtsville location." (Emphasis added).

cigarette tax stamps (lettered and numbered either 2824N or X4403) that were discovered at the Holtsville station.

The cigarettes seized at the Holtsville station were carefully itemized by the PAT Bureau: 44.4 cartons of Marlboro cigarettes, 22.2 cartons of Newport cigarettes, and 23.8 cartons of Parliament cigarettes. The administrative record does not include a similar itemization by brand of the 10.2 cartons of cigarettes that were seized at the North Bellmore location.

Petitioner, who had been contacted by a PAT Bureau investigator, informed the investigator that he was at home but “would leave immediately to go to the Holtsville location.” Instead, he went to his North Bellmore station<sup>4</sup> and was placed in custody by the PAT Bureau inspectors who had been sent to that location. Petitioner’s cigarette registration was suspended for both locations, and the clerks at the two locations were advised not to sell any cigarettes or tobacco products until the cigarette registration was reinstated.

The arrest of petitioner would ultimately culminate in a plea bargain whereby the corporation, New York Trading Corp., was substituted for petitioner, and the corporation then pleaded guilty to the misdemeanor set forth at Tax Law § 1814(a)(1), which provides as follows:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by article twenty of this chapter [Tax on Cigarettes and Tobacco Products] or the payment thereof shall, in addition to other penalties provided by law, be guilty of a misdemeanor.

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<sup>4</sup> As noted in Footnote 3, petitioner testified that he was working the register at the North Bellmore station on May 10, 2005 which conflicts with the investigator’s report. The reason for this discrepancy may well relate to petitioner’s lack of English language ability. During his testimony at the hearing, it did not seem at times that he was truly comprehending the questions. The confusion concerning the addresses, as detailed in Footnote 1, exemplifies this difficulty.

New York Trading Corp. was fined \$1,356.00, and the matter was conditionally discharged. The four original charges<sup>5</sup> asserted against petitioner, all much more serious, were dismissed.

A Notice of Determination dated April 10, 2006 was issued to petitioner asserting penalty due of \$15,240.00 under Article 20 of the Tax Law for the tax period ended May 10, 2005 because, “On 05/10/05, you were found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.”

At the time of his arrest according to the investigator’s report, petitioner claimed that “a person who worked for him by the name of Wadara purchased the cigarettes from a person by the name of Sarwar for \$37 a carton,” and he offered to cooperate and “would set up a buy and bust.” However the person by the name of Sarwar was not at the location on Waverly Avenue in Holtsville provided by petitioner. Rather a sign at such location indicated “that it [a store owned by Sarwar Ghulam] would be opening in two weeks.” At the hearing, in contrast, petitioner testified that he did not purchase the untaxed cigarettes, and did not know who had purchased them. On recross examination, petitioner added further to the confusion by this exchange:

Attorney Ostwald: And who is Mr. Sarwar?

Mr. Kamal: I don’t know this person.

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<sup>5</sup> As set forth in the Division’s Tax Enforcement Referral Report, petitioner was originally charged as follows:

- NYSPL 170.25: Possession of a forged instrument in the second degree;
- NYSTL 1814(e)(1): Possession of untaxed cigarettes (20,000 plus cigarettes);
- NYSTL 1814(a)(2): Attempt to evade/defeat cigarette tax (20,000 plus cigarettes);
- NYSTL 1814(i): Possession of counterfeit tax stamps.

The administrative record provides no explanation why the four “arraignment offenses,” as noted on the transcript of record for the District Court of Suffolk County, varied as follows:

- NYSPL 170.25: Criminal possession of a forged instrument
- NYSTL 1814: Cigarette tax fail to report/pay
- NYSTL 1814: Willfully possess/transport/sell 20,000 plus unstamped cigarettes
- NYSTL 1814: Willfully possess/transport/sell 20,000 plus unstamped cigarettes [sic-duplicates prior offense]

Attorney Ostwald: So how did you find out that Mr. Wadara purchased cigarettes from Mr. Sarwar?

Mr. Kamal: I don't know.

Attorney Ostwald: So when you said that Mr. Wadara purchased cigarettes from Mr. Sarwar, that was an assumption of yours?

Mr. Kamal: That's totally assumption. There is nothing in reality with this one. I never see Wadara. I never see anyone.

Petitioner also testified that he had no knowledge of counterfeit New York tax stamps at the Holtsville station until he received the phone call from the PAT bureau investigator on May 10, 2005, which is also inconsistent with the investigator's report as detailed above.

Petitioner was a person responsible for the operation of New York Trading Corp. He was president of the corporation, signed consents on its behalf, signed sales tax returns in his capacity of president of the corporation, signed a renewal application for its registration of cigarette retail dealer, and on the corporation's quarterly combined withholding, wage reporting and unemployment insurance return, his remuneration was the highest of the five persons noted thereon: petitioner, Muhammad Kamal, \$5,200.00; Ahmed Taman, \$3,900.00; Muhammad Afzal, \$3,250.00; Mohammad Gondal, \$3,120.00; and Rahim Dad Choudhary, \$1,560.00. Petitioner operated the register at the North Bellmore station where he worked most of the time, while Mohammad Gondal worked primarily at the Holtsville station.

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

In his determination, the Administrative Law Judge noted that Tax Law § 471(1) imposes a tax "on all cigarettes possessed in the state by any person for sale." Further, he noted that Tax Law § 481(1)(b) provided for the imposition of a penalty of not more than \$150.00 for each two hundred cigarettes or fraction thereof, in excess of one thousand cigarettes, that were in unstamped or unlawfully stamped packages in the possession or under the control of any person.

The Administrative Law Judge rejected the Division's argument that petitioner should be collaterally estopped from denying his liability for the penalty at issue with regard to the cigarettes with counterfeit New York tax stamps seized at the Holtsville and North Bellmore stations. The Administrative Law Judge found that it was New York Trading Corp., and not petitioner, that pled guilty to attempting to evade or defeat the cigarette tax or the payment thereof. The Administrative Law Judge also found that the charge to which the corporation pled guilty made no reference to the seizure of cigarettes with counterfeit New York tax stamps at the two stations operated by petitioner. As a result, the Administrative Law Judge concluded that petitioner was not collaterally estopped from contesting the factual issue of whether he was in possession or control of the cartons of cigarettes with counterfeit cigarette stamps seized at the two gasoline stations operated by New York Trading Corp.

The Administrative Law Judge concluded that petitioner was in possession or control of the 10.2 cartons that the investigators found at the North Bellmore station because petitioner admitted that he worked the register there. The Administrative Law Judge acknowledged that the more complicated issue was whether petitioner was in possession or control of the 90.4 cartons of cigarettes bearing counterfeit stamps that the investigators found at the Holtsville station. The Administrative Law Judge found "most telling" that the counterfeit stamps found at both stations were lettered and numbered either 2824N or X4403, stamps never seen before by any PAT Bureau investigators, and this weighed heavily against petitioner since he operated both stations. The Administrative Law Judge held that petitioner's denial of any knowledge of the cigarettes with tax counterfeit stamps at the Holtsville station was not credible. The Administrative Law Judge determined that "a careful review of the record leads to the conclusion that petitioner has not shouldered his burden of proving that he was not in control of

90.4 cartons seized at the Holtsville station” and he concluded that petitioner was in possession or control of the 90.4 cartons seized at the Holtsville station as well as the 10.2 cartons seized at the North Bellmore station, for a total of 100.6 cartons with counterfeit stamps.

The Administrative Law Judge found that the Division had improperly calculated the penalty it asserted against petitioner. The Administrative Law Judge recalculated the penalty as \$14,400.00. The Administrative Law Judge rejected petitioner’s contention that the fine paid by New York Trading Corp. of \$1,356.00 in the criminal proceeding should be credited against the civil penalty asserted in this matter. The Administrative Law Judge also rejected petitioner’s argument that the civil penalty imposed was excessive. The Administrative Law Judge concluded that the penalty was not excessive in light of the governmental need to deter wrongful conduct as well as to provide a source of revenue to meet the various expenses incurred by the State to uncover such conduct. Further, the Administrative Law Judge noted that it is within the prerogative of the Division to take a firm stance against any mitigation of the penalty, and it was not necessary for the Division to have considered any mitigating factors prior to the imposition of the penalty since this is neither mandated by statute nor regulation.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that the Administrative Law Judge erred in concluding that petitioner was in possession of or had control of unlawfully stamped cigarettes because the criminal charges filed against petitioner were dismissed. Petitioner maintains that the record is unclear whether petitioner had control of both gas stations. Further, petitioner asserts that it would be illogical for someone trying to evade the cigarette tax to have illegally stamped cigarettes displayed in plain view or to risk his entire business simply to evade the tax on some packs of cigarettes.

Petitioner maintains that the Commissioner abused his discretion by asserting penalty at the maximum rate. While acknowledging that mitigating circumstances are not required to be considered, petitioner argues that it is not prohibited that they be considered. Petitioner asserts that his lack of prior wrongdoing, as well as the unsubstantiated and dubious public policy arguments made by the Division to the Administrative Law Judge, should prevent the imposition of the maximum penalty.

In opposition, the Division argues that petitioner bears the burden of proof to demonstrate that the Notice of Determination assessing penalty was incorrect. The Division asserts that the Administrative Law Judge correctly determined that petitioner was in possession or control of 100.6 cartons of unlawfully stamped cigarettes. The Division points out that petitioner did not offer any evidence that he did not have ultimate control over the daily operations of both gas stations. Rather, the Division maintains that as President and owner of New York Trading Corp., petitioner is wholly responsible for the premises and inventory of both gas stations, and is subject to the penalty provided by Tax Law § 481(1)(b)(i).

The Division agrees with the Administrative Law Judge that petitioner is not entitled to have the criminal fine that was paid by New York Trading Corp. credited against his civil penalty. Further, the Division argues that the civil penalty imposed is not excessive, given the important policy interest of New York State to control the sale of cigarettes and to ensure that the appropriate tax is collected.

***OPINION***

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

(i) In addition to any other penalty imposed by this article, 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 . . . .

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(iii) The commissioner of [taxation and finance], in his discretion, may remit all or part of such penalty.

For petitioner to be liable for the penalty imposed, the unlawfully stamped cigarettes seized by the Division's PAT investigators must have been in his possession or under his control. It is not necessary that petitioner have actually participated in the purchase of such cigarettes for him to be liable for the penalty imposed.

Petitioner was the president and a responsible person of New York Trading Corp., which operated the two service stations where the counterfeit stamped cigarettes were seized. The cigarettes at issue were stored on the premises controlled by petitioner's corporation and offered for sale by the business he operated. Possession or control itself, with or without intent to sell, is sufficient for the imposition of penalty. The Administrative Law Judge correctly concluded that petitioner was in possession or control of the 10.2 cartons found at the North Bellmore station because petitioner admitted that he worked the register there. Although not physically present when the cigarettes were seized at the Holtsville station, the Administrative Law Judge correctly concluded that petitioner failed to meet his burden of proving that he was not in control of 90.4 cartons seized at the Holtsville station.

Having concluded that petitioner had possession or control of unstamped or unlawfully stamped cigarettes, the Division was authorized to impose a penalty against him, pursuant to Tax Law § 481(1)(b). The imposition of such a penalty was not mandated by law but was a

matter within the discretion of the Commissioner. The only limit on the exercise of such discretion was that the amount of the fine could not exceed \$150.00 for each 200 cigarettes or fraction thereof in excess of 1,000 cigarettes in unstamped or unlawfully stamped packages. The Commissioner imposed the maximum fine allowed by law.

In imposing the penalty, it was not necessary for the Division to consider any mitigating factors, as this is mandated neither by statute nor regulation (*see, Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001, *confirmed Matter of Vinter v. Commissioner of Taxation & Fin.*, 305 AD2d 738 [2003]). It is beyond the jurisdiction of the Tax Appeals Tribunal to impose such a requirement on the Commissioner when the statute does not provide for it. That is properly the subject of legislative reform or regulatory action by the Commissioner.

A presumption of correctness attaches to a properly issued statutory notice (*Matter of Tivolacci v. State Tax Commn.*, 77 AD2d 759 [1980], *Matter of Leogrande*, Tax Appeals Tribunal, July 18, 1991, *affd Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768 [1992], *lv denied* 81 NY2d 704 [1993]). 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, therefore, is not entitled to have the penalty reduced.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Muhammad Kamal is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Muhammad Kamal is granted to the extent that the penalty asserted in the amount of \$15,240.00 is reduced to \$14,400.00, but in all other respects is denied; and

4. The Notice of Determination dated April 10, 2006 is modified in accordance with paragraph "3" above.

DATED:Troy, New York  
February 11, 2010

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

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