

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EAGLE DIVERSIFIED, INC.	:	DETERMINATION
		DTA NO. 817292
for Review of a Denial of a License, Permit or Registration :		
under Articles 20 and 20-A of the Tax Law.		

Petitioner, Eagle Diversified, Inc., 50 Mill Street, Dunmore, Pennsylvania 18512, filed a petition for review of a denial of a license, permit or registration under Articles 20 and 20-A of the Tax Law.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 23, 1999 at 9:15 A.M. Simultaneous briefs were submitted on October 8, 1999. Petitioner appeared by Daniel H. Murray, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly refused to register Eagle Diversified, Inc. as a cigarette stamping agent, wholesale dealer of cigarettes and distributor and wholesaler of tobacco products.

FINDINGS OF FACT

1. Eagle Diversified, Inc. (“Eagle”) was incorporated in the Commonwealth of Pennsylvania on April 7, 1998. On April 22, 1998, it filed with the New York State Department of State for a certificate of authority to do business in the State.

2. By a contract of sale dated April 21, 1998, Eagle agreed to purchase real property located at 593 Jerusalem Avenue, Uniondale, New York. Eagle also entered into a contract to purchase the assets of Andy’s Tobacco & Candy Wholesale, Inc., a New York company.

3. On June 1, 1998, the Division of Taxation (“Division”) received from Eagle an Application for License as a Cigarette Agent (form CG-80.3), an Application for License as a Wholesale Dealer of Cigarettes (form CG-80.5) and an Application for a License as a Wholesale Dealer of Tobacco Products and for Appointment as a Distributor of Tobacco Products (form MT-202). Each of these documents was dated May 22, 1998 and each indicated that Renato P. Mariani was the president and the sole shareholder of Eagle. After requests for additional information and documentation, fully completed applications were formally submitted on July 24, 1998.

Along with its applications, Eagle submitted the contract of sale for its purchase of the Uniondale, New York property, correspondence from four cigarette manufacturers stating that they would supply Eagle with product when it was duly licensed, a balance sheet as of June 30, 1998 with an independent auditor’s report and two New York Cigarette Credit Bonds from Mountbatten Surety Co., Inc. dated July 13, 1998, one in the amount of \$10,000.00 and the other in the amount of \$850,000.00.

4. On November 9, 1998, the Division issued a Notice of Proposed Refusal to Register as a Cigarette Stamping Agent, Wholesale Dealer of Cigarettes and a Distributor and Wholesaler of

Tobacco Products under Articles 20 and 20-A of the New York State Tax Law to Eagle. The basis of the proposed refusal was stated as follows:

Renato P. Mariani, the sole shareholder of the applicant corporation, is under indictment for crimes which include but are not limited to the falsifying of business records to conceal violations of the law and other acts which reflect negatively on his character and suitability to be licensed under Articles 20 and 20-A of the Tax Law.

5. A 140-count indictment filed October 7, 1997 before the United States District Court for the Middle District of Pennsylvania (Docket No. CR-97-225) is currently pending against Renato P. Mariani and five other individuals. The indictment relates to political fund raising activities involving officers and employees of Empire Sanitary Landfill, Inc. ("Empire"), a company wherein Mr. Mariani was the president, treasurer and a 25-percent shareholder. Mr. Mariani and the other shareholders sold their interests in Empire in December 1996, but the indictment relates to activities which occurred prior thereto.

Renato P. Mariani is charged with conspiracy to defraud the United States (Count 1), knowingly causing other persons to create and submit false statements to an agency of the United States (Counts 2 through 11), knowingly and willfully consenting to the making of illegal campaign contributions (Counts 12 and 13) and knowingly and willfully making improper conduit campaign contributions (Counts 14 through 134). Mr. Mariani is not named in the last six counts of the indictment.

In summary, the indictment alleges that Mr. Mariani and other officers, shareholders and employees of Empire engaged in a scheme to make contributions to political campaign funds in excess of the maximums permitted by law and that they concealed those illegal contributions by having employees of Empire act as conduits for the contributions. The indictment further

charges that false entries were made on the records of Empire to conceal the reimbursements made to Empire employees for the conduit contributions.

6. Renato P. Mariani entered a plea of not guilty to all counts of the indictment. As of the date of the hearing held in this matter, no trial had been held and no other disposition of the charges against Mr. Mariani had been made.

SUMMARY OF THE PARTIES' POSITIONS

7. Petitioner contends that the Division, contrary to the language of the applicable statutes and regulations, improperly denied Eagle's application for licenses on the basis of a pending indictment against Renato P. Mariani, its sole shareholder, which indictment was unrelated to any activities under Article 20 of the Tax Law which imposes a tax on cigarettes and tobacco products. Eagle argues that Tax Law § 480(2) allows the Division to refuse to license an applicant only if such applicant was "convicted of a crime provided for in this chapter [the Tax Law]." Eagle maintains that while there is a pending indictment against Mr. Mariani, none of its counts alleges a violation of the Tax Law. In addition, Mr. Mariani has been *convicted* of no crimes. Eagle contends that the indictment is not proof of any wrongdoing and may not be used by the Division to imply guilt.

8. The Division relies upon the language contained in Tax Law § 480(1)(j) which provides that "[t]he commissioner may for cause refuse to issue, or may suspend or revoke a wholesaler's license . . . after an opportunity for hearing has been afforded." The Division contends that the fact that this provision was not repealed when significant amendments were made to Article 20 of the Tax Law by chapter 629 of the Laws of 1996, demonstrates that the standards for refusal to license set forth in Tax Law § 480(2) are not exclusive, but rather are illustrative of the factors to be considered in evaluating an applicant.

The Division further contends that the registration and licensing provisions of Article 20 are similar to those found in Article 12-A which imposes a tax on motor fuels and requires registration and licensing of persons engaged in the importation, distribution and sale of motor fuels. The Division maintains that even though Article 12-A has no provision similar to Tax Law § 480(1)(j) which specifically permits the Division to refuse to license for cause, the courts have nonetheless allowed for the examination into the character of persons acting as motor fuel distributors.

Finally, the Division states that the facts alleged in the indictment against Mr. Mariani stand as a preponderance of the evidence since petitioner is relying solely on legal argument rather than evidence in the form of testimony or sworn affidavits that the allegations set forth in the indictment did not, in fact, occur.

CONCLUSIONS OF LAW

A. In *Matter of Diamond Terminal Corporation* (Tax Appeals Tribunal, September 22, 1988, *confirmed* 158 AD2d 38, *lv denied* 76 NY2d 711), a case involving an applicant for a license to operate a motor fuel terminal, the Tribunal stated:

The power to refuse a license must be exercised in conformity with the express or implied purposes of the licensing law (*Matter of Bologno v. O'Connell*, 7 NY2d 155, 159). The limits of the licensing authority's discretion are determined by reference to the applicable statute. The licensing authority may deny a license only upon those grounds found in the statute, and its determination must be supported by the evidence. The burden is then upon the party seeking the license to show that he has a clear legal right to it (*see, Matter of Maytum v. Nelson*, 53 AD2d 221, 227, and cases cited therein).

B. The applicable statute in the present matter is Tax Law § 480(2) which provides as follows:

Refusal to license. The commissioner of taxation and finance may refuse to license an applicant where such applicant files an application under this section and in considering such application the commissioner ascertains that:

(a) Any tax imposed under this chapter or under any related statute as defined in section eighteen hundred of this chapter has been finally determined to be due from such applicant or controlling person and such tax has not been paid in full,

(b) Such applicant or any controlling person has been convicted of a crime provided for in this chapter within the preceding five years,

(c) Such applicant or any controlling person was the controlling person in another wholesale dealer at the time that:

(i) Any tax imposed under this chapter or any related statute as defined in section eighteen hundred of this chapter was finally determined to be due from such other wholesale dealer and such tax has not been paid in full,

(ii) Such other wholesale dealer was convicted of a crime provided for in this chapter within the preceding five years, or

(iii) The license of such other wholesale dealer was cancelled or suspended pursuant to this section within the preceding five years,

(d) The license of such applicant has been cancelled or suspended pursuant to this section within the preceding five years,

(e) Any controlling person of such applicant has committed any of the acts specified in subdivision three of this section within the preceding five years, or

(f) Such applicant or any controlling person has been finally determined to have violated any of the provisions of this article or article twenty-A of this chapter, or any rule or regulation adopted pursuant to this article or article twenty-A of this chapter.

Since the commission of acts specified in subdivision three of Tax Law § 480, which relate to grounds for cancellation or suspension of a license, are also grounds for refusal to license (*see*, Tax Law § 480[2][e]), its contents must also be examined.

(a) Acts of licensee. The license of any wholesale dealer may be cancelled or suspended by the tax commission upon:

(i) Its failure to file or maintain in full force and effect a bond or other security when required or when the amount thereof is increased,

(ii) Its failure to comply with any of the provisions of this article or article twenty-A of this chapter or any rule or regulation adopted pursuant to this article or article twenty-A of this chapter by the department or the tax commission,

(iii) Its knowingly aiding or abetting another person in violating any of the provisions of this article or article twenty-A of this chapter or any rule or regulation adopted pursuant to this article or article twenty-A of this chapter by the department or the tax commission.

(b) Acts of licensee or controlling person. A license may be cancelled or suspended if the tax commission determines that a licensee or any controlling person:

(i) Commits fraud or deceit in his or its operations as a wholesale dealer or has committed fraud or deceit in procuring his or its license,

(ii) Has been convicted in a court of competent jurisdiction, either within or without the state, of a felony, bearing on the licensee's duties and obligations under this chapter,

(iii) Has impersonated any person represented to be a wholesale dealer under this article but not in fact licensed under this section, or

(iv) Has knowingly aided and abetted the sale of cigarettes or tobacco products by a person which such licensee or controlling person knows (A) has not been licensed by the commissioner of taxation and finance and (B) is a wholesale dealer pursuant to the terms of subdivision eight of section four hundred seventy of this chapter.

C. This record contains no evidence that Eagle or its sole shareholder and president, Renato P. Mariani, has been found guilty of any of the acts set forth in subdivisions two or three of Tax Law § 480. It is the pending indictment against Mr. Mariani which is the sole basis for the Division's refusal to license Eagle.

In its brief, the Division points to Tax Law § 480(1)(j) which states that “[t]he commissioner may for cause refuse to issue, or may suspend or revoke a wholesaler’s license . . . after an opportunity for hearing has been afforded.” If one is to accept the Division’s argument, it is not necessary to carefully analyze the grounds for refusal to license as set forth in the statute, since the Commissioner may “for cause” refuse to license an applicant. The essential question becomes what constitutes “cause,” if not the grounds set forth in the statute.

In an Opinion of Counsel dated October 9, 1998 (which formed a basis for denial of Eagle’s application for a license), the Division notes that a pending prosecution should not be given the preclusive effect of a conviction, but contends that it is a significant indication of facts regarding a defendant. The Opinion, citing *Collins v. Brown* (129 AD2d 902, 514 NYS2d 538) and *Colon v. City of New York* (60 NY2d 78, 468 NYS2d 453), states that a grand jury indictment establishes a presumption of probable cause which a criminal defendant, as a party in a civil case, must overcome. While this is true, neither of these cases are on point with respect to the present matter since each involved a cause of action for malicious prosecution and consideration of whether there was probable cause to indict. Moreover, the Division’s contention that the indictment stands as a preponderance of the evidence which, therefore, requires petitioner to provide testimony or sworn affidavits that the allegations set forth in the indictment did not occur is totally without basis. Mr. Mariani entered a plea of not guilty to all counts. There has been no valid authority presented by the Division to show that anything more is needed.

Similarly, the Division’s reliance on *John J. King, Inc. v. O’Connell* (280 AD 852, 113 NYS2d 329) is misplaced. The Division contends that this case stands for the proposition that the State Liquor Authority may consider a pending indictment against an applicant. Actually, the

Appellate Division of the Supreme Court held that in a proceeding to review a determination of the State Liquor Authority which disapproved an application for renewal of a liquor license, the court was limited solely to determining whether denial by the Authority was arbitrary or capricious. In choosing not to annul the determination of the Authority, the Court looked at the entire record. While the record did disclose the pending indictment, that was just one of several factors considered by the Authority. Although the Court found that the Authority exercised its discretion in a reasonable manner, it cannot be concluded that a pending indictment, standing alone, is a proper basis for denial of a license.

In fact, the former State Tax Commission, in considering the application of a corporation for a license to act as a wholesale dealer of cigarettes pursuant to Article 20 of the Tax Law, held that the arrest, *without conviction*, of one of the corporate principals for possession of untaxed cigarettes, was an insufficient basis for denying the corporation's application for a license (*Matter of ESA Groceries, Inc.*, State Tax Commission, July 26, 1984 [TSB-H-84(19)M]).

D. It must be noted that Eagle is incorrect in its assertion that the Division can refuse to license an applicant only upon conviction of a crime provided for under Article 20 of the Tax Law. In support of that position, Eagle cites *Matter of Santiago Distributors, Inc.* (State Tax Commission, May 21, 1982 [TSB-H-82(7)M]), where the former State Tax Commission held that the criminal conviction of petitioner's president for assault, approximately 11 years prior to petitioner's application for a license as a wholesale cigarette dealer, does not demonstrate petitioner's unfitness to conduct business as a wholesale cigarette dealer nor would the conviction constitute cause for revocation of petitioner's license. While it is not so stated in the decision, it may well be that the former State Tax Commission chose not to deny the license in *Santiago* because the conviction occurred more than five years prior to the application. Tax Law

§ 480(2)(b) states that the Division can refuse to license if an applicant or controlling person has been convicted of a crime provided for “in this chapter within the preceding five years.”

The term “this chapter” is defined in Tax Law § 1 as the “Tax Law.” Therefore, commission of *any* crime provided for in the Tax Law is sufficient grounds for denial of a license.

In addition, Tax Law § 480(3)(b)(ii) provides that the Division can refuse to license if the applicant or a controlling person “[h]as been convicted in a court of competent jurisdiction, either within or without the state, of a felony, bearing on the licensee’s duties and obligations under this chapter. . . .” Accordingly, other crimes unrelated to the Tax Law but bearing on a licensee’s duties and obligations can be considered by the Division in determining whether to license an applicant. But, as noted in the statute, a *conviction* is required.

E. The Division argues that Tax Law § 480(1)(j) and the regulations promulgated thereunder are clear evidence of a legislative intent to address extensive tax evasion and to protect the State’s revenue. In the Opinion of Counsel dated October 9, 1998, cited above, the Division, in support of this argument, pointed to 20 NYCRR former 331.5 (b)(6) and 20 NYCRR former 332.2(b)(6).¹ These regulations both state that the Department may refuse to license or relicense an applicant if it has cause to believe that such licensing would jeopardize the revenue due under Articles 20 or 20-A of the Tax Law. However, the Opinion of Counsel, in quoting these regulations, left out very important examples contained therein. This language, which is set forth in both 20 NYCRR 71.5(b)(6) and 20 NYCRR 72.2(b)(6), provides as follows:

The department may refuse to license or relicense the applicant if it has cause to believe that such licensing would jeopardize the revenue due

¹ Effective May 20, 1998, 20 NYCRR 331.5 was replaced by 20 NYCRR 71.5 and 20 NYCRR 332.2 was replaced by 20 NYCRR 72.2.

under article 20 of the Tax Law, or the cigarette marketing standards contained in article 20-A of such law. For example, the department may request and evaluate any information concerning an applicant's nature and scope of operations, reliability, overall financial status, liquidity or history of financial solvency and stability. Should the department determine that the applicant is not financially sound, lacks a legitimate profit motive or is seeking ostensible status as an agent primarily for purposes of circumventing the Cigarette Marketing Standards Act, it may refuse to license or relicense the applicant. The department may, in its discretion, license an applicant upon such terms and conditions as it may deem necessary for the protection of such revenue and standards.

Eagle posted New York Cigarette Credit Bonds totaling \$860,000.00 (*see*, Finding of Fact "3").

There is no evidence in this record whatsoever which would indicate that Eagle is financially insolvent or unstable so as to cause concern to the Division that its tax revenue would be in jeopardy.

F. In summary, the Division improperly denied Eagle's application for a license as a cigarette stamping agent, wholesale dealer of cigarettes and distributor and wholesaler of tobacco products solely on the basis of the indictment, without conviction, of its president and sole shareholder, Renato P. Mariani.

G. Accordingly, the Notice of Proposed Refusal to Register as a Cigarette Stamping Agent, Wholesale Dealer of Cigarettes and a Distributor and Wholesaler of Tobacco Products under Articles 20 and 20-A of the Tax Law issued on November 9, 1998 is vacated and the Division of Taxation is hereby directed to immediately issue licenses to Eagle Diversified, Inc.

DATED: Troy, New York
December 23, 1999

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE