

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SALAH ABDELRAHMAN : DETERMINATION
for Revision of a Determination or for Refund of Cigarette : DTA NO. 817413
Tax under Article 20 of the Tax Law for the Period Ended :
October 1, 1997. :

Petitioner, Salah Abdelrahman, 188 Bay Ridge Road, Brooklyn, New York 11220, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended October 1, 1997.

A small claims hearing was held before James Hoefler, Presiding Officer, at the offices of the Division of Tax Appeals, 5 Penn Plaza, New York, New York on February 6, 2002 at 1:15 P.M. Petitioner appeared by Melvin Greenwald, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Mary Fontaine).

Since neither party herein elected to reserve time for the submission of post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the small claims hearing was held.

ISSUE

Whether petitioner was a person in possession of or had control of 1,041.5 cartons of unstamped or unlawfully stamped cigarettes and, as such, is liable for a penalty in the sum of \$10,300.00 imposed pursuant to Tax Law § 481(1)(b).

FINDINGS OF FACT

1. At 3:30 P.M. on October 28, 1997, investigators from the Division of Taxation's ("Division") Petroleum, Alcohol and Cigarette Tax Bureau conducted a retail inspection of the One Stop Grocery ("the store") located at 188 Bay Ridge Avenue, Brooklyn, New York. During the course of the inspection, the investigators found a total of 1,041.5 cartons of Virginia

stamped and unstamped cigarettes. There was a total of 25.5 cartons of Virginia stamped and unstamped cigarettes being offered for sale to the public in a rack above the sales counter and on shelves behind the counter. The balance of the Virginia stamped and unstamped cigarettes, some 1,016 cartons, were found in various concealed locations in the basement.

2. The investigative report indicates that “present at the time of the inspection was the owner Abdelrahman, Salah. . . .” Since more than 20,000 untaxed cigarettes were discovered, the investigators, at 4:00 P.M., arrested petitioner and read him his Miranda rights. Petitioner was subsequently charged with violating Tax Law § 1814(a)(2) and (e), both class E felony charges. On March 2, 1998, petitioner pled guilty in Kings County Criminal Court to a single violation of Tax Law § 1814(d), a misdemeanor, in full satisfaction of the two felony criminal charges. Kings County Criminal Court imposed upon petitioner a fine of \$1,000.00 and it also appears that an unspecified surcharge was added to this amount.

3. On September 21, 1998, the Division issued a Notice of Determination to petitioner asserting that he was liable for a penalty in the sum of \$10,300.00. The penalty was imposed pursuant to Tax Law § 481(1)(b) at the rate of \$10.00 per carton for 1,030 cartons of unstamped or unlawfully stamped cigarettes. Although 1,041.5 cartons of untaxed cigarettes were found, Tax Law § 481(1)(b) provides that the penalty be imposed for every carton in excess of ten cartons of unstamped or unlawfully stamped cigarettes. Here, it appears that the Division rounded down the total number of cartons of unstamped or unlawfully stamped cigarettes from 1,041.5 to 1,040 and subtracted from this figure the 10 cartons which are exempt from the Tax Law § 481(1)(b) penalty. Although Tax Law § 481(1)(b) provides that the penalty imposed therein is not to exceed \$100.00 per carton of untaxed cigarettes, the Division, due to a clerical or mathematical error, computed the penalty at \$10.00 per carton. Petitioner filed a timely petition contesting the Notice of Determination and this proceeding ensued.

4. The Division’s investigative report reveals that petitioner waived his Miranda rights and further indicates that petitioner stated that “he knows it was wrong and I did it because I was

greedy. . . .” The Division’s witness at the small claims hearing, Supervising Investigator Amaral, was called to the store by the investigators shortly after they discovered the untaxed cigarettes and he specifically recalls petitioner’s admitting that he knew it was wrong to have the cigarettes and that he did it out of greed.

5. Petitioner submitted in evidence various documents which establish that prior to March 1, 1995 he operated the store located at 188 Bay Ridge Avenue, Brooklyn, New York as a sole proprietor doing business as Tarik Food Center. On or about March 1, 1995, petitioner sold the business, including all fixtures, furnishings, machinery, equipment, supplies, inventory and stock in trade presently situated in the store premises, to his cousin, Akram Fallah Abdel Rahman. Simultaneous with the sale of the business, petitioner leased the store and that part of the basement area beneath the store to his cousin for a period of 10 years. Documentary evidence submitted into the record establishes that Akram Fallah Abdel Rahman obtained a license to sell beer from the New York State Liquor Authority and that he also obtained a Certificate of Authority from the Division authorizing him to collect sales and use taxes under Articles 28 and 29 of the New York State Tax Law. Both of these documents reflect Akram Fallah Abdel Rahman’s address as the store located at 188 Bay Ridge Avenue, Brooklyn, New York.

SUMMARY OF PETITIONER’S POSITION

6. Petitioner maintains that on the day of the inspection he and a plumber went to the store to repair a leaky pipe in the residential apartment situated above the store. When the investigators came into the store petitioner’s cousin was purportedly in the back room praying and petitioner was in the front of the store near or at the counter where the cash register was located. According to petitioner, the investigators, once they discovered the untaxed cigarettes, had everyone, including his cousin, vacate the store and that he was then placed under arrest without being given an opportunity to offer an explanation for his presence at the store. Petitioner asserts that he is not the owner or an employee of the store and that he was merely at the store on the date of the inspection in his capacity as a landlord making repairs to the

apartment located above the store. Petitioner does not recall making any statements to the investigators indicating that he knew it was wrong to have the untaxed cigarettes and that he did it out of greed. Petitioner has no idea why the investigative report would attribute these statements to him. Petitioner also avers that he pled guilty in the criminal proceeding to a violation of Tax Law § 1814(d) in full satisfaction of the two felony charges for several reasons, including, the advice of his attorney, the fact that he wanted the matter to end and finally because he was frightened.

7. Alternately, petitioner argues that if it is determined that he is subject to the penalty imposed by Tax Law § 481(1)(b), the assessment of a penalty at \$10.00 per carton for each carton of Virginia stamped or unlawfully stamped cigarettes is excessive and should be reduced.

CONCLUSIONS OF LAW

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

the commissioner of taxation and finance may impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person. . . . The commissioner of taxation and finance, in his discretion, may remit all or part of such penalty.

B. On March 2, 1998, petitioner, in full satisfaction of the two class E felony charges, pled guilty in Kings County Criminal Court to a violation of Tax Law § 1418(d). Tax Law § 1418(d) states as follows:

Any person, other than an agent so authorized by the tax commission, who willfully possesses or transports for the purpose of sale twenty thousand or more cigarettes subject to the tax imposed by section four hundred seventy one of this chapter in any unstamped or unlawfully stamped packages or who willfully sells or offers for sale twenty thousand or more cigarettes in any unstamped or unlawfully stamped packages in violation of article twenty of this chapter shall be guilty of a misdemeanor.

C. In the instant matter petitioner asserts that he was not a person in possession of or had control over the 1,041.5 cartons of untaxed cigarettes found in the store and, as such, he cannot be held liable for the penalty imposed by Tax Law § 481(1)(b). Initially, I note that the doctrine of collateral estoppel would prevent petitioner from raising this defense. In ***Matter of Planit***

(Tax Appeals Tribunal, February 7, 1991), the Tribunal stated:

The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action an issue clearly raised in a prior action and decided against that party or those in privity with that party (*Matter of Choi v. State of New York*, 74 NY2d 933, 550 NYS2d 267, 269; *Ryan v. New York Tel. Co.*, 62 NY2d 494, 478 NYS2d 823, 826). In order to invoke this doctrine there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action and there must have been a full and fair opportunity to contest the prior decision (*Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 NY2d 147, 531 NYS2d 876, 878; *Schwartz v. Public Adm'r of County of Bronx*, 24 NY2d 65, 298 NYS2d 955, 960). The party seeking the benefit of collateral estoppel must meet the burden of showing the identity of the issues in the present litigation and the prior determination (*Kaufman v. Eli Lilly & Co.*, 65 NY2d 449, 492 NYS2d 584, 588).

Having pled guilty in Kings County Criminal Court to a misdemeanor violation of Tax Law § 1814(d) for possessing or transporting for sale untaxed cigarettes or for selling or offering for sale untaxed cigarettes, petitioner cannot now relitigate this same issue here by contending that he was not a person in possession or control of these same untaxed cigarettes for purposes of Tax Law § 481(1)(b) (*see, Matter of Fahy*, Tax Appeals Tribunal, April 5, 1990).

D. Even if petitioner was not collaterally estopped from arguing this issue, the evidence adduced in the instant matter is sufficient to show that he was a person in possession or control of the untaxed cigarettes at issue and, as such, subject to the penalty imposed by Tax Law § 481(1)(b). Petitioner's testimony that he was at the store merely in his capacity as a landlord to repair a leaky pipe in the upstairs apartment was unconvincing and not supported by corroborating evidence. Although petitioner has submitted documentary evidence to show that he sold the store to his cousin in March 1995 and leased the building to said cousin concurrent with the sale, said evidence does not prove that petitioner was not the person in possession or control of the untaxed cigarettes found in the store. It is also noted that neither petitioner's cousin nor the plumber appeared at the hearing to offer supporting testimony, nor were affidavits submitted in lieu of their testimony.

E. Finally, petitioner's argument that the Division's assertion of the Tax Law § 481(1)(b) penalty at \$10.00 per carton is excessive must be rejected. The New York State tax imposed on

cigarettes in 1997 totaled \$.56 a pack. Given that there are 10 packs of cigarettes in a carton, the tax would total \$5.60 and, in my view, it is not unreasonable to assess a penalty of \$10.00 per carton, especially when one considers that Tax Law § 481(1)(b) authorizes “a penalty of not more than one hundred dollars” for each carton of untaxed cigarettes. But for a clerical or mathematical error on the Division’s part petitioner would have been assessed a penalty of \$103,000.00

F. The petition of Salah Abdelrahman is denied and the Division’s Notice of Determination dated September 21, 1998 is sustained in its entirety.

DATED: Troy, New York
May 2, 2002

/s/ James Hoefler
PRESIDING OFFICER