

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BAYRIDGE SUPERMARKET, INC. :
 : DETERMINATION
 : DTA NOS. 817910,
 : 817911 AND 817912
for Revision of Determinations or for Refund of :
Cigarette Tax under Article 20 of the Tax Law for the :
Periods Ended April 1, 1999 and April 15, 1999. :

In the Matter of the Petitions :
of :
NAZAR ALIDANI :
 :
for Revision of Determinations or for Refund of :
Cigarette Tax under Article 20 of the Tax Law for the :
Periods Ended May 14, 1998 and April 15, 1999. :

Petitioner, Bayridge Supermarket, Inc., 188 Bay Ridge Avenue, Brooklyn, New York 11220, filed a petition for revision of determinations or for refund of cigarette tax under Article 20 of the Tax Law for the periods ended April 1, 1999 and April 15, 1999.

Petitioner, Nazar Alidani, 1565 Bath Avenue, Brooklyn, New York 11228, filed petitions for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended May 14, 1998 and for the period ended April 15, 1999, respectively.

A consolidated hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 19, 2001 at 10:30 A.M., with all briefs to be submitted by September 14, 2001, which date began

the six-month period for the issuance of this determination. Petitioners appeared by Melvin L. Greenwald, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michelle M. Helm, Esq., of counsel).

ISSUES

I. Whether petitioner Nazar Alidani was in possession of or had control of unstamped cigarettes which he had transported from Virginia to New York.

II. Whether the penalties imposed against petitioners for the possession or control of unstamped cigarettes were excessive.

III. Whether the notices of determination should be voided on the basis that they did not adequately specify the dates of the incidents at issue.

FINDINGS OF FACT

1. On May 14, 1998, petitioner Nazar Alidani (“petitioner Alidani”) was apprehended in Brooklyn with 607 cartons¹ of cigarettes that lacked New York tax stamps. A day earlier, Mr. Alidani had rented a gold 1998 Toyota Camry, with a Virginia license plate number ZEV-4811, from Alamo Car Rental (“Alamo”) at its Newark airport location. Only Mr. Alidani of 1565 Bath Avenue in Brooklyn was authorized to drive the vehicle, and he paid for the rental with his own credit card.

2. On the morning of May 14, 1998, petitioner Alidani, unaccompanied by anyone else, drove his rental car to Woodbridge, Virginia, the location of a BJ’s Wholesale Club, where the backseat and trunk of the Toyota were loaded up with cigarettes. The cigarettes in the backseat were covered by black plastic trash bags.

¹ The 607 cartons consisted of 521 cartons of Newports, 73 cartons of Marlboros, 12 cartons of Parliaments, and 1 carton of Virginia Slims.

3. Petitioner Alidani was unaware that two investigators from Pennsylvania had observed the loading of cigarettes into his Toyota, and, at least initially, unaware that they were in pursuit of his vehicle as he made his return trip to Brooklyn. In the course of their surveillance, the Pennsylvania investigators contacted their colleagues at the New York Petroleum, Alcohol, Tobacco Bureau since they apparently surmised that petitioner Alidani was heading to New York City.

4. Two New York investigators, including Investigator George D'Amato, who testified at the hearing, and his partner, Investigator Regan ("the investigators"), were directed to intercept petitioner Alidani on the New Jersey Turnpike and take over the surveillance from the Pennsylvania investigators. However, the New York investigators were unable to join up with the Pennsylvania investigators and intercept petitioner Alidani. Rather, after crossing the Verrazano Bridge into Brooklyn from Staten Island, the Pennsylvania investigators "broke off" their pursuit as petitioner Alidani exited from the highway at 92nd Street. Moments earlier, petitioner Alidani had stopped his vehicle on the Verrazano Bridge apparently having become aware that he was being followed. According to Investigator D'Amato, the Pennsylvania investigators informed their New York colleagues by phone that petitioner Alidani "had made a verbal threat to them" (tr., p. 27). Petitioner Alidani then entered the Brooklyn-Queens Expressway after driving "the wrong way down Parrot Place at 90th Street" according to Investigator D'Amato's report. The investigators and New York Police Department vehicles, which had also joined in the pursuit of Mr. Alidani, "broke off" after losing sight of Mr. Alidani.

5. Although Mr. Alidani was no longer under surveillance, the investigators as well as additional colleagues acted upon information they had obtained concerning two locations "linked" to the rental of the Toyota from Alamo, including 774 3rd Avenue (at 26th Street) in

Brooklyn. Upon their arrival at this 3rd Avenue location, the investigators spotted the gold Toyota with the Virginia license plate parked nearby. After several minutes of watching the vehicle while waiting for backup, the investigators observed petitioner Alidani approach the Toyota and insert a key in the driver side door. Investigator D'Amato turned on his vehicle's flashing red lights and siren "to make the person aware that I was a law enforcement officer and I didn't want him to think he was being robbed" (tr., p. 29). When asked by Investigator D'Amato where he was coming from, petitioner Alidani responded, "Virginia," and when asked what he had in the car, he answered, "cigarettes." When asked by the investigator to open the car so he could see that the cigarettes were there, petitioner responded, "Yes, they are in there." In the nine years that Investigator D'Amato has been involved in the enforcement of the cigarette tax, he has had only one other case where the number of untaxed cigarettes exceeded the 607 cartons of unstamped cigarettes seized from petitioner Alidani's rental vehicle on the day in question.

6. Petitioner was arrested and charged with two class E felonies: (1) Possession of untaxed cigarettes under Tax Law § 1814(e), and (2) Attempt to evade/defeat cigarette tax under Tax Law § 1814(a)(2). On July, 30, 1998, petitioner Alidani appeared before the Hon. Jerome Kay in New York Supreme Court (Kings County) and under oath responded affirmatively to the following question posed by the judge:

So, on May 14, 1998, at approximately 6 P.M. at 26th Street and 3rd Avenue in the County of Kings, did you willfully attempt to evade or defeat the tax imposed on [sic] by Article 20 of the New York State Tax Law in that you had a number of cartons of cigarettes, none of which were stamped under the New York State Tax Law.

Before accepting the guilty plea of petitioner Alidani to a reduced misdemeanor charge, the judge verified that Mr. Alidani had fully discussed it with his attorney, that he understood the

consequences of his guilty plea, that no one had forced him to accept the plea, that no one had promised him anything for accepting the plea, and that he was “pleading guilty because you are guilty.” In exchange for his guilty plea to a reduced misdemeanor charge, petitioner Alidani was sentenced to a conditional discharge and a \$1,000.00 fine or 30 days.

7. Approximately six months after his guilty plea, the Division of Taxation (“Division”) issued a Notice of Determination dated January 25, 1999 against petitioner Alidani asserting penalty due of \$59,700.00 under Article 20 of the Tax Law, with reference to a “file due date” of May 14, 1998 and a “tax period ended date” of May 1, 1998, because he was “found to be in possession of unstamped or unlawfully stamped cigarettes”

Sales of Unstamped Cigarettes at Bayridge Supermarket

8. In August or September of 1998, just a few months after his arrest for transporting unstamped cigarettes into New York, petitioner Alidani became the owner of a small grocery store, with the corporate name of Bayridge Supermarket, Inc.,² (“Bayridge Supermarket”) located at 188 Bayridge Avenue in Brooklyn. In October of 1998, an investigator with the New York Petroleum, Alcohol, Tobacco Bureau discovered a false wall in the rear area of the store, behind which over 200 cartons of unstamped cigarettes were hidden. A few months later, anonymous complaints were received, probably from competing retailers, that untaxed cigarettes were being sold at petitioner Alidani’s grocery store. In response, two undercover investigators on separate occasions purchased untaxed cigarettes confirming the illegal activity, and a retail inspection was subsequently conducted on April 1, 1999 by Investigator D’Amato and colleagues. In the course of his inspection, Investigator D’Amato found over three cartons of

² There was no explanation why the business name of the enterprise is also referenced on certain documents in the record as Akram Fallah Abdel Rahman.

unstamped cigarettes in a hollowed out area of a shelf behind the grocery's front counter. The investigator noted that the hidden compartment "was so well hidden that I actually bypassed it twice" (tr., p. 62). When asked by the investigator, petitioner Alidani could not provide a certificate of registration for retail sales of cigarettes and/or tobacco products nor any invoices for the cigarettes. He also did not provide any explanation or information concerning where and how the unstamped cigarettes were obtained.

9. Two weeks later, on April 15, 1999, Investigator D'Amato and a colleague returned to petitioner Alidani's grocery store at 188 Bayridge Avenue to deliver a notice of a three-year suspension of the store's registration for retail sales of cigarettes and/or tobacco products. While at the premises, 14 cartons³ of untaxed cigarettes were discovered in a brown shopping bag in the back of the store. Investigator D'Amato arrested petitioner Alidani, who was charged with two misdemeanors, i.e., possession of untaxed cigarettes and attempt to evade cigarette tax. During processing of his arrest at the police precinct, petitioner Alidani, who was unremorseful, complained to the investigator that the arrest for a small number of cartons was harassment. Petitioner Alidani pleaded guilty to a lesser included offense of disorderly conduct and paid a \$250.00 fine.

10. The Division issued a Notice of Determination dated September 2, 1999 against petitioner Bayridge Supermarket asserting penalty of \$1,000.00 with reference to a "tax period ended date" of April 1, 1999 and a "file due date" of April 15, 1999. This notice included the following explanation: "During an inspection of your premises, you were found to be in violation for failure to possess a valid certificate of registration for retail sales of cigarettes and/or tobacco products."

³ The 14 cartons consisted of 5 cartons of Capris, 5 cartons of Virginia Slims, and 4 cartons of Newports.

11. The Division also issued a Notice of Determination dated September 13, 1999 against petitioner Bayridge Supermarket asserting penalty of \$2,500.00 with reference to a “tax period ended date” of April 1, 1999 and “file due date” of April 1, 1999. This notice included the following explanation: “During an inspection of your premises, you were found to be in violation for failure to possess a valid certificate of registration for retail sales of cigarettes and/or tobacco products.”

12. In addition the Division issued a Notice of Determination dated November 15, 1999 against petitioner Nazar Alidani asserting penalty of \$400.00 with reference to a “tax period ended date” of April 1, 1999 and “file due date” of April 16, 1999. This notice included the following explanation: “During an inspection of your premises, you were found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.”

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioner Alidani contends that he did not have possession and control of the 607 cartons of unstamped cigarettes discovered in his rental car. He asserts that “He did not own them; he derived a very meagre financial benefit from transporting them; he could not sell them or dispose of them at will” (Petitioners’ brief, p. 8). Petitioner Alidani claims he pleaded guilty to a criminal misdemeanor charge of willful attempt to evade or defeat cigarette tax “as a matter of convenience to dispose of a serious [felony] charge” (Petitioners’ brief, p. 8). Petitioners also argue that the notices of determination were defective for the following reasons:

(1) The Notice of Determination dated September 2, 1999 (against Bayridge Supermarket) referred to a period ending April 1, 1999 rather than the proper date of April 15, 1999⁴ and “fials

⁴ April 1, 1999, in fact, is the proper date as noted in Finding of Fact “8” when the investigator found over three cartons of unstamped cigarettes in a hollowed out area of a shelf behind the grocery’s front counter.

[sic] to specifically set forth whether the cigarettes were unstamped or unlawfully stamped, and the specific premises where the contraband was located” (Petitioners’ brief, p. 10);

(2) The Notice of Determination dated September 13, 1999 referred to a period ending April 1, 1999 rather than the proper date of April 15, 1999 and “fails to specifically set forth whether the cigarettes were unstamped or unlawfully stamped, and the specific premises where the contraband was located” (Petitioners’ brief, p. 10);

(3) The Notice of Determination dated January 25, 1999 (against petitioner Alidani) referred to a period ended May 1, 1998 rather than the proper date of May 14, 1998 and “fails to specifically set forth whether the cigarettes were unsamped [sic] or unlawfully stamped, and the specific location where the contraband was located” (Petitioners’ brief, p. 11);

(4) The Notice of Determination dated November 15, 1999 (against petitioner Alidani) referred to a period ended April 1, 1999 rather than the proper date of April 15, 1999 and “fails to specifically set forth whether the cigarettes were unstamped or unlawfully stamped, and the specific premises where the contraband was located” (Petitioners’ brief, p. 11).

Further, petitioner Alidani contends that a penalty of \$100.00 per carton of unstamped cigarettes was “grossly excessive” since “the tax on each pack of cigarettes in 1998 was approximately \$1.67 ⁵ [\$16.70 per carton of cigarettes].” (Petitioners’ brief, p. 14.) In addition,

⁵ The New York cigarette tax has increased over the years as follows:

Effective Date of Tax	Tax per 10 cigarettes	Tax per pack of cigarettes	Tax per carton of cigarettes
March 1, 2000	55.5 cents	\$1.10	\$11.00
June 1, 1993	28.0	.56	5.60
June 1, 1990	19.5	.39	3.90
May 1, 1989	16.5	.33	3.30
April 1, 1983	10.5	.21	2.10

petitioner Alidani maintains the penalty is “disproportionate to [his] involvement and culpability,” that he has been in the United States “merely five years . . . was unemployed [with a wife and two children] . . . and had no prior criminal record” (Petitioners’ brief, p. 13).

14. The Division counters that petitioner Alidani’s prior guilty plea in the criminal matter precludes him from challenging the same issue in the civil matter. In the alternative, petitioner was in possession of illegally stamped cigarettes discovered in his rental car and was also in control of such cigarettes. No other person was permitted to drive the rental car and petitioner drove alone to Virginia and back to New York. Petitioner Alidani was also in possession or control of the unstamped cigarettes discovered on the premises of his grocery store. The Division maintains that petitioner Alidani’s testimony was “incredible” and was insufficient to “even come close to meeting his burden [of proof].” (Division’s brief, pp. 10 and 11.) The Division also argues that the notices of determination were adequate and informative and did not hinder petitioners’ ability to protest the assessments. The penalty imposed was just and proper, according to the Division, based upon the “extreme lengths in order to secure [petitioner Alidani’s] shipment of contraband cigarettes,” the deceptiveness of petitioner Alidani (in using hidden compartments), the large number of cigarettes confiscated, and the continuing pattern of disregard for the law.

Footnote continued:

In addition, Governor Pataki’s budget plan for the State fiscal year 2002-03 includes an increase in the cigarette tax to \$1.50 from the \$1.10 shown in the table. Although the record is not clear on the point, based upon this argument of petitioners, it appears that federal taxes were also unpaid on the 607 cartons of unstamped cigarettes discovered in petitioner Alidani’s rental car since New York cigarette tax in 1998 was only 56 cents per pack not \$1.67 as referenced by petitioners.

CONCLUSIONS OF LAW

A. Tax Law former § 481(1)(b)⁶ provides in relevant part as follows:

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 dollars for each two hundred cigarettes [ten cartons] 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. Petitioner Alidani's contention that he was not in possession or control of the 607 cartons of assorted cigarettes all lacking New York State cigarette tax stamps is rejected. This meritless contention was based upon petitioner Alidani's testimony which has been given little, if any, weight. On direct examination, he testified that "someone" took him to rent the car at Alamo and directed him to drive to Virginia. He also testified that he did not know what was put into the car in Virginia for transport by him back to New York. He testified further that this unidentified person reimbursed the cost of the car rental (which he put on his own credit card) and gave him money to pay tolls, gasoline, as well as an additional \$300.00 for transporting the unknown items to New York from Virginia. On cross-examination, he added that the "someone" he was acting for told him *only* his first name, which was "Hussein." Such vague and unforthcoming testimony was not credible.

C. In contrast, the testimony of Investigator D'Amato was thorough and credible. In addition, the records the experienced investigator created in carrying out his professional duties were persuasive evidence of the events at issue, especially in light of the failure of petitioners to introduce any reliable evidence in contradiction.

⁶ Tax Law § 481(1)(b) was amended on January 1, 2001 to provide for a *minimum* penalty of \$100.00 per carton and *doubled* the maximum penalty to \$200.00 per carton in order to be a more effective deterrent against cigarette smuggling (L 2000, ch 262).

D. As detailed in Finding of Fact “6”, petitioner Alidani pleaded guilty to a willful attempt to evade or defeat the cigarette tax based upon his possession of unstamped cigarettes on May 14, 1998. Consequently, the Division’s contention that he is collaterally estopped from contesting the issue whether he was in possession or control of the 607 cartons found in his rental car has merit (*see, Matter of Defeo*, Tax Appeals Tribunal, April 22, 1999; *Kuriansky v. Professional Care*, 158 AD2d 897, 551 NYS2d 695). Petitioner’s motivation for pleading guilty does not affect the above conclusion that he was collaterally estopped from contesting the issue of his possession or control of the unstamped cigarettes in this matter (*see, Matter of Defeo, supra*).

E. In any event, the Division’s evidence supports the conclusion that petitioner Alidani was in possession and⁷ control of the 607 cartons of unstamped cigarettes discovered in the backseat and trunk of his rental car. Petitioner Alidani rented the car and charged its expense to his own credit card. He drove alone to Virginia and back to New York for the sole purpose of transporting unstamped cigarettes, which were loaded into his rental car in Virginia. He tried to shake off the Pennsylvania investigators who were tracking him back to New York, and he sold and possessed unstamped cigarettes at his grocery store. Furthermore, as noted in Finding of Fact “5”, petitioner Alidani consented to the search of his rental car. Therefore, petitioners’ argument that evidence obtained from the search of the car must be excluded from the record is meritless. Furthermore, even if there was some merit to petitioners’ claim that the rental car was illegally searched, the exclusionary rule would not automatically apply to this civil matter to exclude such evidence (*see, Matter of Diane P.*, 110 AD2d 354, 494 NYS2d 881, *appeal*

⁷ The Division’s contention that petitioner Alidani is liable for the penalty at issue if he was *either* in possession *or* control of the unstamped cigarettes is correct. Nonetheless both his possession *and* control have been established.

dismissed 67 NY2d 918 [wherein the court noted that the exclusionary rule does not automatically apply in a civil matter to exclude evidence illegally obtained, but rather the state's interest in using such evidence in the civil matter must be weighed against the deterrent value of the exclusionary rule]).

F. Pursuant to Tax Law § 481(1)(b), as detailed in Conclusion of Law "A", a penalty may be imposed of not more than \$100.00 for each carton of unstamped packages in the possession or under the control of any person in excess of 10 cartons. Since petitioner was in possession and control of 607 cartons of unstamped cigarettes, a penalty of \$59,700.00, which equates to 597 unstamped cartons in excess of 10 such cartons, was properly calculated. In light of the substantial number of unstamped cigarettes uncovered and the pattern of illegal behavior displayed by petitioner Alidani in evading cigarette tax as well as his continuing lack of remorse, a penalty of \$100.00 per carton may not be deemed excessive (*cf.*, *Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001).

G. Pursuant to Tax Law § 480-a(1)(a), "every retail dealer shall publicly display a certificate of registration from the department in each place of business . . . through which it sells cigarettes or tobacco products at retail." "Retail dealer" is defined expansively at Tax Law § 470(9) as "any person other than a wholesale dealer engaged in selling cigarettes or tobacco products." This definition would cover petitioner Bayridge Supermarket which sold unstamped cigarettes as detailed in the Findings of Fact.

H. Tax Law § 480-a(3)(a) provides as follows:

Any retail dealer who violates the provisions of this section shall, after due notice and an opportunity for a hearing, for a first violation be liable for a civil fine not to exceed one thousand dollars and for a second or subsequent violation within three years following a prior finding of violation be liable for a civil fine not to exceed two thousand five hundred dollars.

As noted in Finding of Fact “8”, on April 1, 1999, Investigator D’Amato found over three cartons of unstamped cigarettes hidden in petitioner Alidani’s grocery store, Bayridge Supermarket, which did not have a certificate of registration for retail sales of cigarettes and/or tobacco products publicly displayed. Consequently, the Division properly asserted, by its Notice of Determination dated September 2, 1999, a penalty of \$1,000.00 under Tax Law § 480-a(3)(a) against Bayridge Supermarket, the corporate petitioner. As noted in Finding of Fact “9”, two weeks later, on April 15, 1999, Investigator D’Amato discovered additional cartons of untaxed cigarettes on the grocery store’s premises. This discovery justifies the imposition of an additional penalty of \$2,500.00 under Tax Law § 480-a(3)(a), as asserted by the Division’s Notice of Determination dated September 13, 1999, against the corporate petitioner. On neither date, was the Division required to obtain a search warrant before conducting its reasonable and proper administrative inspection of the grocery store (*see, People v. McIver*, 125 AD2d 263, 508 NYS2d 436). Consequently, petitioners’ argument that the Division is relying on evidence obtained from illegal searches is without merit.

I. As noted in Finding of Fact “9”, on April 15, 1999, Investigator D’Amato and a colleague discovered 14 cartons of unstamped cigarettes on the premises of petitioner Alidani’s grocery store. Pursuant to Tax Law §481(1)(b), a penalty of \$400.00 was properly imposed against petitioner Alidani for the four cartons of unstamped packages discovered in his grocery store which were in excess of the 10 cartons of unstamped packages permitted under this provision. In light of petitioner’s continuing pattern of disregard for the cigarette tax and his lack of remorse, the penalty imposed may not be deemed excessive (*cf., Matter of Vinter, supra*).

J. The minor errors in the dates on the statutory notices issued against petitioners do not serve to invalidate the notices in light of no evidence of harm or prejudice to petitioners as a result of these defects (*Matter of Agosto v. Tax Commn.*, 68 NY2d 891, 508 NYS2d 934; *Matter of Pepsico, Inc. v. Bouchard*, 102 AD2d 1000, 477 NYS2d 892; *Matter of A & J Parking Corp.*, Tax Appeals Tribunal, April 9, 1992). Petitioner Alidani was well aware that the basis for the primary penalty at issue of \$59,700.00 resulted from his transporting from Virginia into New York unstamped cigarettes, and he was aware that the other three penalties at issue, \$400.00 against him personally, and \$1,000.00 and \$2,500.00 against his corporate entity resulted from the two visits in April of 1999 made by Inspector D'Amato to his grocery store, when unstamped cigarettes were discovered on the premises. Petitioners' references to pleading requirements under the Civil Practice Law and Rules (CPLR) is inapposite. The CPLR governs civil procedure in the New York Courts, and not the actions of the Division in administering the Tax Law, including its assertion of tax and penalties due against taxpayers by the issuance of statutory notices as specified by the Tax Law (*see*, CPLR 101).

K. The petition of Bayridge Supermarket, Inc. and the petitions of Nazar Alidani are denied, and the Notice of Determination dated September 2, 1999 and the Notice of Determination dated September 13, 1999 each issued against Bayridge Supermarket, Inc., and the Notice of Determination dated January 25, 1999 and the Notice of Determination dated November 15, 1999 each issued against Nazar Alidani are all sustained.

DATED: Troy, New York
February 21, 2002

/s/ Frank Barrie
ADMINISTRATIVE LAW JUDGE