

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CHRISTOPHER J. BROWN : DETERMINATION
for Revision of a Determination or for Refund of Cigarette : DTA NO. 819268
Tax under Article 20 of the Tax Law for the Period Ended :
August 27, 2001. :

Petitioner, Christopher J. Brown, 8620 W. Bucktooth Run, Little Valley, New York 14755, 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 August 27, 2001.

A small claims hearing was held before James Hoefler, Presiding Officer, at the offices of the Division of Tax Appeals, 77 Broadway, Buffalo, New York on October 23, 2003 at 9:15 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (John Walther and Larry Graham).

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 51.4 cartons of unstamped cigarettes and, as such, is liable for a penalty in the sum of \$6,900.00 imposed pursuant to Tax Law § 481(1)(b)(i).

FINDINGS OF FACT

1. On August 22, 2001, members of the Southern Tier Regional Drug Task Force (“STRDTF”) conducted a marihuana eradication operation in Cattaraugus County. At approximately 4:00 P.M., aerial surveillance by STRDTF spotted 30 marihuana plants growing on the property of petitioner, Christopher J. Brown, located at 8620 W. Bucktooth Run in the

town of Salamanca, New York. Members of the STRDTF seized the 30 marihuana plants, and at approximately 4:15 P.M. petitioner gave his consent to a search of his personal residence. During the search of petitioner's residence, law enforcement officers found two pounds of marihuana, 51.4 assorted cartons of Newport and Marlboro unstamped cigarettes and cash totaling \$12,772.00.

2. As the result of the August 22, 2001 search, numerous criminal charges were brought against petitioner, including violations of Tax Law § 1814(a), for willfully attempting to evade the cigarette tax imposed by Article 20, and Tax Law § 1814(d), for possession of unstamped cigarettes for the purpose of sale, both misdemeanor charges. Petitioner pled guilty in Cattaraugus County Court to a single felony charge of third degree possession of marihuana in satisfaction of all criminal charges brought against him.

3. The 51.4 cartons of unstamped cigarettes found at petitioner's residence were seized by members of the STRDTF and were subsequently turned over to the Division of Taxation ("Division"). On February 25, 2002, the Division issued a Notice of Determination to petitioner asserting that he was liable for a civil penalty in the sum of \$6,900.00. The penalty was imposed pursuant to Tax Law § 481(1)(b)(i) at the maximum rate of \$150.00 per carton for 46 cartons of unstamped cigarettes. Although 51.4 cartons of unstamped cigarettes were found, Tax Law § 481(1)(b)(i) provides that the penalty of \$150.00 per carton be imposed for every carton in excess of 5 cartons of unstamped or unlawfully stamped cigarettes.

4. Petitioner readily admits that he purchased the 51.4 cartons of unstamped cigarettes found in his residence at various stores located on the Seneca Nation Indian Reservation situated no more than 5 miles from his house. Petitioner is employed in the construction industry as a laborer, and he also splits wood and hauls garbage to generate income. Because his income is higher in the summer months, it was petitioner's practice to purchase cigarettes in bulk when they went on sale at various stores located on the Seneca Nation Indian Reservation. The unstamped cigarettes found in petitioner's residence were for his and his girl friend's personal

consumption and were not for resale. Petitioner possesses a tenth grade education and he was unaware of the provisions of Article 20 of the Tax Law which provide that possession in the State of more than 400 unstamped cigarettes at any one time by a person other than a dealer is presumptive evidence that the cigarettes were subject to tax (Tax Law § 481[2][a]); that he was liable for a use tax on the unstamped cigarettes pursuant to Tax Law § 471-a; or that the Division could impose a penalty of up to \$150.00 per carton, for each carton in excess of five cartons, for his possession or control of unstamped cigarettes.

5. Petitioner accepts full responsibility for his illegal activities with respect to the possession of marihuana and as stated in his petition “my girlfriend was expecting a baby. I didn’t know how I was going to pay for the birth. To get to the point, I tried to make a fast dollar.” Petitioner admits that although he knew it was illegal to possess marihuana, he had no such knowledge of the Tax Law with respect to the imposition of tax and penalty for the possession of unstamped cigarettes. Petitioner notes that the unstamped cigarettes were for personal consumption and that with his limited financial resources the Division’s assertion of the penalty at the maximum rate of \$150.00 per carton is excessive.

CONCLUSIONS OF LAW

A. Tax Law § 481(1)(b)(i) provides, in pertinent part, that “the commissioner 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 penalty imposed by Tax Law § 481(1)(b)(i) can be waived in whole or in part by the commissioner in the commissioner’s discretion (Tax Law § 481[1][b][iii]).

B. In the instant matter it is clear that petitioner was a person in possession or control of the 51.4 cartons of unstamped cigarettes found in his personal residence. There is no dispute that petitioner purchased these unstamped cigarettes at the Seneca Nation Indian Reservation and thereafter personally transported the unstamped cigarettes to his residence. Accordingly, it was

proper for the Division to assert that petitioner was liable for the penalty imposed by Tax Law § 481(1)(b)(i).

C. Although I have concluded that the Division properly assessed a penalty against petitioner, I believe that under the circumstances presented herein it is just and equitable (Tax Law § 2012) to reduce the penalty from the maximum \$150.00 per carton to \$25.00 per carton, thereby reducing the penalty from \$6,900.00 to \$1,150.00. Petitioner did not purchase the 51.4 cartons of unstamped cigarettes with the intent to resell them at a profit but instead purchased them for personal consumption. Petitioner cooperated fully with law enforcement personnel and the Division's investigator. This was petitioner's first violation of Article 20 of the Tax Law and he was unaware of the provisions of the Tax Law concerning possession of unstamped cigarettes, even if the unstamped cigarettes were for personal consumption. Petitioner is further penalized by the fact that the 51.4 cartons of unstamped cigarettes were seized by the Division.

I arrived at a reduced penalty figure of \$1,150.00 taking into consideration Tax Law § 481(2)(a) which provides that "the possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages . . . by any person other than an agent or distributor, as the case may be, at any one time shall be presumptive evidence that such cigarettes . . . are subject to tax as provided by this article." Tax Law § 471-a imposes a use tax on cigarettes on any person who uses (i.e., possesses, stores, retains, imports, etc.) untaxed cigarettes in this state. Said section further requires that a person in possession of untaxed cigarettes must file a use tax return (Form CG-15) "within twenty-four hours after liability for the tax accrues . . . together with a remittance of the tax shown to be due thereon." In the instant matter, petitioner was in possession of a total of 514 packs of untaxed cigarettes and the cigarette tax due on the 514 packs, using the \$1.11 tax rate per pack in effect on August 22, 2001, would total \$570.54. I believe that reducing the penalty to \$1,150.00 represents a reasonable amount given the fact that petitioner would owe at least \$570.54 in tax, plus interest.

D. The petition of Christopher J. Brown is granted to the extent provided in Conclusion of Law "C"; the Division is directed to modify its Notice of Determination dated February 25, 2002 to be consistent with this determination; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
December 31, 2003

/s/ James Hoefer
PRESIDING OFFICER