

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**BI LAN JIANG** : DETERMINATION  
for Revision of a Determination or for Refund of : DTA NO. 819340  
Cigarette Tax under Article 20 of the Tax Law for the :  
Period February 23, 2001. :

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Petitioner, Bi Lan Jiang, 148 Madison Street, Apartment 9E, New York, New York 10002, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period February 23, 2001.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on October 8, 2003 at 10:00 A.M., with all briefs to be submitted by January 30, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se* at the hearing on October 8, 2003 and by Stephen K. Seung, Esq., on the post-hearing brief. The Division of Taxation appeared by Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel).

***ISSUE***

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

***FINDINGS OF FACT***

1. During the afternoon of February 23, 2001, Investigator Angela Murray, of the Division of Taxation (“Division”), received a telephone call from Detective Jung, of the New York City Police Department (“NYPD”) stating that the NYPD had followed an individual carrying a bag of cigarettes to an apartment where a large quantity of untaxed cigarettes were found. Thereafter, Investigator Murray and her immediate supervisor, Senior Investigator Mars, went to the building where the apartment was located. When they arrived at the apartment building, they were met by a detective who directed them to an apartment on the second floor. As Investigator Murray walked up the stairs, she noticed boxes of cigarettes located on the second floor. The investigators proceeded to the front of the apartment and observed a young male, whom they were told was approximately 16 years old, wearing handcuffs. Petitioner was inside the apartment and the investigators spoke to her from the door. From their vantage point, the investigators observed half cases of cigarettes throughout the apartment.

2. Investigators Murray and Mars went back downstairs and called their supervisor, Investigator Amaral, in order to advise him of what was found. The investigators estimated that there were approximately 500 cartons of cigarettes outside of the apartment. In accordance with Mr. Amaral’s instructions, the investigators returned to the apartment and asked petitioner for permission to enter. Petitioner gave the investigators permission to enter and, thereafter, additional boxes of cigarettes were discovered in locations such as under the bed and in the closet. In response to an inquiry from Investigator Mars, petitioner stated that the cigarettes within and outside the apartment belonged to her and that they were being warehoused in the apartment for her business. Petitioner also provided the investigators with the name and location of the business. The questions from the investigators to petitioner were translated by a NYPD

detective in order to avoid any misunderstanding regarding what was being asked and the meaning of the response.

3. The investigators then made a second call to Investigator Amaral to inform him of what they had learned and to determine if petitioner committed any previous offenses. When Supervising Investigator Amaral checked the Division's record keeping system, he learned that about a year prior to the seizure at issue here, investigators went to petitioner's business and found cigarettes with stamps from Virginia, unstamped cigarettes and alcohol. At the time, the business was being operated by petitioner's husband. Consequently, he was given a summons for the violations and was also told that he was not permitted to have cigarettes with out-of-state stamps.

4. Following the second telephone call, the Division decided to seize the cigarettes and an evidence custodian was called to the location. Thereafter, the cigarettes were counted and brought to Two World Trade Center. In total, 1,131.1 cartons of cigarettes were seized. Petitioner was taken into custody by the NYPD.

5. Several days after the seizure, Investigator Murray received a telephone call from petitioner's attorney asking when petitioner could have her cigarettes returned. Petitioner was informed that in order to have the cigarettes returned, she would have to give the Division invoices proving that they were purchased from a legitimate wholesaler. Thereafter, petitioner's representative called again to request that the cigarettes be returned and he was given the same answer. Several days later, Investigator Murray received a facsimile from petitioner's attorney with a copy of several invoices. In order to investigate the invoices, the Division went to the legitimate wholesalers in the area, where petitioner said that the cigarettes were bought, and showed the invoices to the wholesalers. The wholesalers provided a sworn affidavit stating that

some of the invoices were accurate. The invoices that did not state the name and address of the business were not regarded as valid. Of the several invoices which were provided, the Division ascertained that two were legitimate.

6. Following their investigation, Investigator Murray called petitioner's representative to set up a meeting. Subsequently, a meeting was held at Two World Trade Center wherein petitioner was told that only two of the invoices came from legitimate wholesalers and that the legitimate invoices did not account for the large volume of cigarettes which were seized. Near the end of the meeting, petitioner and her attorney were advised that a portion of the cigarettes would not be returned because they did not have an authorized stamp on them. In particular, petitioner was not entitled to the Virginia stamped cigarettes, the Connecticut stamped cigarettes or the in-bond or duty-free cigarettes. When this was explained to petitioner and her representative, petitioner stated that the cigarettes were being held there by her son for someone known as the "fat man." In response, the Division asked how to get in touch with this person. Petitioner replied that she did not know and that the Division would need to schedule an appointment with her husband and son to find out more about this person.

7. Petitioner's husband, accompanied by petitioner's representative, brought additional invoices to a subsequent meeting at the Division's offices. However, petitioner's husband did not have any additional information on the individual known as the fat man. The Division investigated the new invoices and determined that, in total, the invoices supported the return of 592.4 cartons of cigarettes and, on August 10, 2001, the 592.4 cartons were returned.

8. In a memorandum dated January 28, 2002, the Petroleum, Alcohol and Tobacco Bureau of the NYPD referred this matter to the Division for the assessment of tax, fines and penalties as well as any additional action deemed appropriate.

9. The Division issued a Notice of Determination, dated May 20, 2002, which asserted that a penalty was due in the amount of \$80,055.00. In order to determine the amount of the penalty, the Division subtracted five cartons, which were deemed for personal use, from the cartons of cigarettes which were considered contraband (538.7) and multiplied the remainder (533.7) by a penalty of \$150.00 per carton of contraband cigarettes. Petitioner was assessed because, at the time of the seizure, she stated that the cigarettes belonged to her.

***SUMMARY OF THE PARTIES' POSITIONS***

10. At the hearing, petitioner testified that she knew that cigarettes with New York stamps were in her apartment but she did not know that cigarettes with Virginia and Connecticut stamps were there. Rather, in the process of helping an individual known as the fat man, her son brought cigarettes to her apartment. Petitioner stated that her son did not mention bringing the cigarettes to the house and that, at the time, she did not know anything about them. According to petitioner, when she learned that her son was arrested by the police, she went home. Petitioner further explained that the NYPD asked her to go to the police station to answer questions and that, when she got there, they asked her to say that the cigarettes belonged to her. Petitioner submits that she refused to sign a statement saying that the cigarettes belonged to her. However, the police told her that they would release her if she signed the statement and that, upon hearing this, she panicked and signed the statement. In support of her argument, petitioner explained that she did not go home every night. Petitioner also argued that the penalty was excessive.

11. In a brief, petitioner's representative argues that the entry and search of petitioner's apartment were without permission and illegal. According to petitioner's representative, petitioner was not present at the time of the search and therefore, she could not have given permission to enter the apartment. It is further argued that even if petitioner were present, she

did not speak English and could not have understood the request for permission to enter. Similarly, petitioner's representative maintains that petitioner could not have given permission for an entry. Additionally, petitioner's son was a minor and not in a position to give consent. In this regard, petitioner's representative submits that, even according to the testimony presented by the Division, the investigators only asked for and received permission to enter the apartment, but did not ask for or receive permission to search the apartment.

Petitioner further argues that a new hearing is warranted in order to uncover what really happened on February 23, 2001. It is submitted that a new hearing would allow petitioner to be represented by counsel and to cross-examine the Division's witnesses.

12. In response to the foregoing, the Division asserts that the burden of proof is on petitioner to demonstrate that she was not in possession or control of untaxed cigarettes. The Division maintains that it would have been impossible for petitioner to not know that there were Connecticut and Virginia stamped cigarettes in the apartment. The Division notes that petitioner acknowledged on repeated occasion that the cigarettes were hers. The Division submits that it was authorized to impose a penalty on petitioner and that the only statutory limit on the exercise of that discretion concerns the amount of the penalty. The Division further contends that it was within the discretion of the Commissioner, through his representatives, to impose the maximum penalty allowed by law.

### ***CONCLUSIONS OF LAW***

A. During the period in issue, Tax Law § 481(1)(b) provided, in pertinent 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 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 . . . .

B. It is undisputed that contraband cigarettes were found on the premises of petitioner's apartment. However, the issue remains as to whether petitioner is liable for a penalty as a person in possession of or who had control of unlawfully stamped cigarettes, thereby subjecting her to the imposition of the penalty.

C. Initially, petitioner's representative argues that petitioner did not consent to the search and that the search was illegal. Petitioner's representative further maintains that Investigator Murray's testimony regarding a conversation between Investigator Mars and petitioner was hearsay and may not be considered.

These arguments are clearly without merit. The credible testimony of Investigator Murray clearly establishes that petitioner consented to the search of her apartment. Contrary to petitioner's assertion, this testimony was not hearsay because it was not offered for the truth of a fact asserted in an out of court statement (*see*, Richardson, Evidence § 200 [Prince 10<sup>th</sup> ed]). Rather, the testimony concerned what the witness personally heard.<sup>1</sup>

D. Petitioner's representative next argues that even if it were true that petitioner was present at the time of the search, petitioner did not speak English and could not have understood the request for permission to enter and search the apartment. This argument also lacks merit because the record is clear that the questions from the investigators to petitioner were translated by a NYPD detective in order to avoid any misunderstanding regarding what was being asked and what the response was. Under the circumstances, the record clearly establishes that

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<sup>1</sup> It is noted that even if the testimony were hearsay, it would have been admissible. Hearsay is not only admissible in an administrative hearing, in some circumstances it may serve as a basis for an administrative determination (State Administrative Procedure Act § 306[1]; *EJG Corp. v. New York State Liquor Authority*, 213 AD2d 924, 624 NYS2d 68).

petitioner knowingly and voluntarily consented to the entry (*see, Matter of Bayridge Supermarket, Inc.*, Tax Appeals Tribunal, January 2, 2003).

E. Petitioner submits that the search of the apartment was illegal because the investigators were only given permission to enter the apartment. This argument is also specious. From outside of the apartment, the investigators were able to observe that there were half cases of cigarettes throughout the apartment. Further, the investigators were lawfully in the apartment by virtue of petitioner's consent. Even if petitioner did not expressly consent to a search, the large volume of cigarettes located outside of the apartment and the observation of additional half cases of cigarettes in the apartment provided probable cause to believe that regulated activity was taking place in the apartment. This, in turn, gave the Division the authority, pursuant to Tax Law § 474 to lawfully enter the apartment and seize the inventory (*People v. Grande*, 45 NY2d 717, 408 NYS2d 469; *see also, People v. Sciacca*, 45 NY2d 122, 408 NYS2d 22, 26; *People v. Rizzo*, 40 NY2d 425, 386 NYS2d 878; *Matter of Bayridge Supermarket, Inc.*, Tax Appeals Tribunal, January 2, 2003).

F. Petitioner's contention that a new hearing is warranted is also rejected. Petitioner voluntarily chose to appear at the hearing without counsel and must abide by the consequences of that decision. It would not be conducive to an orderly administrative process to permit parties multiple opportunities to present their case. Further, no showing has been made that a new hearing with a representative would lead to a different result.

G. Petitioner's claim that the penalty was too great is also rejected. The attempt to utilize erroneous invoices to have the contraband cigarettes returned evidences a lack of contrition. It is also significant that a large number of contraband cigarettes were found in petitioner's possession and that petitioner's store was involved in the sale of contraband



cigarettes in the past. Under the circumstances, the penalties imposed were appropriate (*see, Matter of Bayridge Supermarket, Inc.*, Tax Appeals Tribunal, January 2, 2003).

H. In the instant matter, the evidence adduced by petitioner is insufficient to establish that she was not in possession of or had control of the cartons of unlawfully stamped cigarettes found in and near her apartment. Petitioner's defense that her son brought the cigarettes to her apartment without her knowledge is inadequate as a matter of law. Under the statute, a penalty is imposed for possession or control of contraband cigarettes and not their ownership. Further, petitioner's assertion lacks credibility. From the inception of this matter, petitioner repeatedly asserted that the cigarettes belonged to her and focused upon having them returned. It was not until it became clear that the Division regarded a portion of the cigarettes as contraband and that a penalty would be imposed that petitioner contended that the cigarettes belonged to someone else.

I. The petition of Bi Lan Jiang is denied and the penalty asserted in the Notice of Determination, dated May 20, 2002, is sustained.

DATED: Troy, New York  
June 17, 2004

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE