

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MANUEL SANTOS	:	SMALL CLAIMS DETERMINATION DTA NO. 820499
for Revision of a Determination or for Refund of Tax on Cigarettes and Tobacco Products under Article 20 of the Tax Law for the Period Ended February 20, 2004.	:	

Petitioner, Manuel Santos, 17 High Street, Rye, New York 10580, filed a petition for revision of a determination or for refund of tax on cigarettes and tobacco products under Article 20 of the Tax Law for the period ended February 20, 2004.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York, on November 14, 2006 at 1:15 P.M. Petitioner appeared by McGovern, Connelly & Davidson (William H. McKenna, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Paula Tunkel and Gary M. Keiser).

The final post-hearing brief in this matter was due by March 30, 2007, and it is this date that triggers the three-month period for the issuance of this determination.

ISSUE

Whether petitioner was an unregistered and unlicensed tobacco products dealer or distributor in possession of 4,036 cigars upon which the tobacco products tax was not paid or assumed by a registered dealer or distributor and, as such, was liable for a penalty in the sum of \$11,583.00 imposed pursuant to Tax Law § 481(1)(b)(I).

FINDINGS OF FACT

1. On Wednesday, February 18, 2004, investigators from the Division of Taxation (“Division”) conducted a regulatory inspection of a deli located in Yonkers, New York

concerning its compliance with the provisions of Article 20 of the Tax Law, which imposes tax on cigarettes and tobacco products. A report generated by the investigators with respect to the inspection of the deli states that they “were provided with handwritten receipts which did not list a company name, address, phone number, nor did they list any NYS Excise taxes paid.

Investigators were informed that a Hispanic male by the name of ‘Manny’ makes cigar deliveries to the above retail store on Tuesdays and Fridays. . . .”

2. On Friday, February 20, 2004, Division investigators observed petitioner, Manuel Santos, enter, and then exit a moment later, the deli that had been the subject of the regulatory inspection two days earlier. The investigators contacted a clerk in the deli and were told that petitioner had attempted to deliver cigars to the deli and that delivery was refused. The investigators followed petitioner, operating a black Subaru station wagon, for approximately two blocks, before confronting him. As the investigators approached petitioner’s car they observed numerous boxes of cigars in plain view. Petitioner provided the investigators with numerous invoices from Worldwide Wholesale Trading, Inc. (“Worldwide”), showing the purchase of cigars; however, the investigators were unwilling to accept the invoices since the purchaser’s name shown on the invoices was one “Angel Ortiz” and not petitioner’s. Petitioner, who has a very limited ability to speak and understand the English language, told the investigators that he delivers cigars to about 30 to 35 customers. When shown a copy of the handwritten receipt that the investigators had obtained from the deli two days earlier, he denied providing any of his customers with this type of handwritten receipt.

3. Since petitioner was not a licensed or registered dealer or distributor of tobacco products and did not have in his possession acceptable invoices or delivery tickets, the 4,036 cigars found in his car were seized by the investigators. Petitioner was also issued five summonses for misdemeanor violations of Tax Law § 1814. Specifically, petitioner was charged with attempt to evade or defeat tobacco products tax, unlicensed wholesaler of tobacco products,

unregistered distributor of tobacco products, failure to produce tobacco product business records and possession for sale of more than 2,500 cigars. On November 15, 2004, petitioner pled guilty in Yonkers City Court to a charge of disorderly conduct in full satisfaction of all five misdemeanor criminal charges alleged in the summonses and was sentenced to a fine of \$250.00, plus a \$95.00 surcharge.

4. On March 29, 2004, the Division issued a Notice of Determination to petitioner asserting that as an unregistered and unlicensed tobacco products dealer or distributor in possession of 4,036 untaxed cigars, he was liable for a civil penalty in the sum of \$11,583.00. The penalty was imposed pursuant to Tax Law § 481(1)(b)(I), which statute, as relevant to this proceeding, exempts from penalty the first 50 cigars and then imposes a penalty of \$1.50 on each of the next 250 cigars and thereafter a penalty of \$3.00 on every untaxed cigar after the first 300.

5. By notice dated February 5, 1998, the Division advised Worldwide that its application to be appointed as a distributor to import, manufacture and sell tobacco products (excluding cigarettes) was granted. Worldwide's office and warehouse facility was located at 1104 Webster Avenue, Bronx, New York, and it appears from the record that Worldwide was in compliance with the provisions of Article 20 and Article 20-A.

6. In March 2003, both petitioner and Angel Ortiz became associated with Worldwide as "self-employed routemen." Petitioner and Mr. Ortiz worked together for a short period of time servicing clients of Worldwide located on Route 79. Mr. Ortiz terminated his relationship with Worldwide soon after it had begun, and the task of servicing Worldwide's Route 79 customers fell solely to petitioner.

7. Petitioner's relationship with Worldwide was memorialized in a generic typewritten one-page agreement where the routeman's name and address were handwritten in. This one-page agreement provided that petitioner would receive commissions "on the sale of company products" and that when using his vehicle "for the purpose of transporting or delivering

merchandise on behalf of Worldwide . . .” petitioner agreed to hold Worldwide harmless in the event of an accident.

8. Worldwide took sales orders by telephone from its customers, and as a self-employed routeman, petitioner, supplying his own transportation, was required to pick up the orders at Worldwide’s Bronx facility, deliver the product to the customer and collect payment. Petitioner was compensated at the rate of \$1.00 for every box of cigars he delivered.

9. Apparently due to a clerical oversight, the invoices generated by Worldwide for the cigars petitioner obtained from Worldwide continued to show Angel Ortiz as the routeman/salesman, notwithstanding the fact that Mr. Ortiz had left the employ of Worldwide sometime in 2003. Worldwide made the necessary modifications to its computer system and provided petitioner with corrected duplicate invoices showing his name in lieu of Angel Ortiz. Petitioner submitted in evidence 10 corrected invoices he received from Worldwide for the period January 23, 2004 to February 19, 2004. These invoices show that for the approximate one-month period prior to the February 20, 2004 date that the Division confronted petitioner, he had picked up a total of 551 boxes of cigars (approximately 27,500 cigars) from Worldwide. The invoices contain the registration number assigned to Worldwide by the Division with respect to its appointment as a registered distributor of tobacco products and also stated that the “tobacco products tax assumed by seller.”

10. For the 2003 calendar year, Worldwide issued to petitioner a Federal Form 1099-MISC, Miscellaneous Income, indicating that it had paid \$3,100.00 of nonemployee compensation to petitioner. A review of petitioner’s 2003 New York State personal income tax return reveals that the \$3,100.00 was reported as business income on said return.

11. On February 23, 2004, three days after petitioner was issued the five summonses by the Division, Worldwide’s president issued the following letter with respect to petitioner’s employment status with the company:

This letter is to inform you that Mr. Manuel A. Santos . . . who presently resides at 17 High Street, Apt. #3, Rye, New York 10580 – is a self-employed person. Under the category of “Route-man” [he] represents

Worldwide Wholesale Trading Inc. in the sale of Cigarettes and Tobacco Products.

Worldwide Wholesale Trading Inc. provides Mr. Santos copies of our licenses in the event that he would have to identify himself to the authorities. Mr. Santos and the vehicle that he uses to carry out daily his operations have been reported to the New York State Department of Finance in conformance with the State regulations.

Our supplier of Cigarette and Tobacco Products is Klein Wholesale Distributors in Pennsylvania. Should you need to contact us regarding this matter please feel free to do so at anytime during the course of the day.

SUMMARY OF THE PARTIES’ POSITIONS

12. In his initial brief, petitioner argues that he was an employee of Worldwide and not an independent contractor. Petitioner further asserts that Worldwide, as a registered distributor of tobacco products, had paid the required tax on the 4,036 cigars which were found in his possession on February 20, 2004.

13. In its brief, the Division states that it:

is willing to concede Mr. Santos may be an employee of Worldwide, however, that information is not relevant as to whether the tobacco product tax has been paid. The Audit Division is willing to concede the invoices submitted with Manuel Santos’ name on them indicate a transaction has taken place and not that the tax has been paid. The information contained on the invoices indicate that the sales tax has been collected and passed through to the customer, not the tobacco products tax.

14. Petitioner’s reply brief points out that Worldwide’s preprinted sales invoices given to its customers contain the statement “all New York State tobacco product taxes, where applicable, have been included in the prices shown above” and, as previously noted in Finding of Fact “9”,

that the computer generated invoices given to petitioner bears the printed statement “tobacco products tax assumed by seller.”

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 seventy-five dollars for each fifty cigars . . . , or fraction thereof, in excess of fifty cigars . . . in the possession or under the control of any tobacco products dealer or distributor appointed by the commissioner, and a penalty of not more than one hundred fifty dollars for each fifty cigars . . . , or fraction thereof, in excess of two hundred fifty cigars . . . in the possession or under the control of any such dealer or distributor, with respect to which the tobacco products tax has not been paid or assumed by a distributor or a tobacco products dealer. . . .

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. Tax Law § 474(3) provides that:

Every dealer or distributor or employee thereof, or other person acting on behalf of a dealer or distributor, who shall possess or transport more than fifty cigars . . . upon the public highways, roads or streets of the state, shall be required to have in his actual possession invoices or delivery tickets for such tobacco products. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the tobacco products transported, and the name and address of the person who has or shall assume the payment of the tax and the wholesale price or the tax paid or payable. The absence of such invoices or delivery tickets shall be prima facie evidence that the tax imposed by this article on tobacco products has not been paid and is due and owing.

Tax Law § 481(2)(a) also provides that “The possession within this state of . . . more than two hundred fifty cigars . . . by any person other than an agent or distributor, as the case may be,

at any one time shall be presumptive evidence that such . . . tobacco products are subject to tax as provided by this article.”

C. In the instant matter, petitioner has adduced sufficient evidence to show that the 4,036 cigars found in his possession on February 20, 2004 were cigars he had received from Worldwide, an entity appointed by the Division as a registered distributor to import, manufacture and sell tobacco products, excluding cigarettes. Thus, the issue to decide herein is whether petitioner had in his possession invoices or delivery tickets for the tobacco products as contemplated in Tax Law § 474(3).

D. While it is understandable that the Division’s investigators would not accept the invoices or delivery tickets presented to them by petitioner on February 20, 2004 because they bore Angel Ortiz’s name, this discrepancy has been satisfactorily explained by petitioner. In fact, the Division concedes as much in its brief and now asserts that the invoices or delivery tickets presented by petitioner reflect only “that the sales tax has been collected and passed through to the customer, not the tobacco products tax.” A careful review of Worldwide’s sales invoices and the computer generated delivery tickets issued in petitioner’s name support that Worldwide has assumed liability for the tobacco products tax on the 4,036 cigars found in petitioner’s possession on February 20, 2004. Accordingly, petitioner is found to be in compliance with the provisions of Tax Law § 474(3), and since Worldwide is a registered distributor which has assumed liability for the tobacco products tax, it is concluded that the tobacco products tax has been paid on the 4,036 cigars at issue in this proceeding and petitioner is therefore not liable for the penalty asserted due herein.

E. The petition of Manuel Santos is granted and the Division's Notice of Determination dated March 29, 2004 is canceled in its entirety.

DATED: Troy, New York
June 28, 2007

/s/ James Hoefer
PRESIDING OFFICER