

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FATHI A. MOHARAM	:	DETERMINATION
	:	DTA NO. 821557
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Period Ended October 26, 2005.	:	

Petitioner, Fathi A. Moharam, 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 26, 2005.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 8, 2008 at 10:30 A.M., with all briefs submitted by April 9, 2008, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by E. David Duncan, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michelle M. Helm, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. On June 2, 2004, during the course of a sting operation conducted by the Office of Tax Enforcement of the Division of Taxation (Division), a confidential informant for the Division was given the telephone number of an individual who purportedly had an interest in purchasing

unstamped cigarettes. Division investigators later determined by review of subpoenaed phone company records that the phone number provided was registered to petitioner, Fathi A. Moharam.

2. Petitioner subsequently contacted the confidential informant on June 15, 2004. During that conversation, petitioner agreed to purchase 540 cartons of unstamped cigarettes from the confidential informant.

3. On June 16, 2004, petitioner purchased 540 cartons of unstamped cigarettes from the confidential informant and an undercover investigator from the Office of Tax Enforcement at a location in Albany, New York. Petitioner paid \$11,340.00 for the cigarettes and loaded them into a white van. The Division's investigators later determined that the van was registered in petitioner's name.

4. On June 19, 2004, petitioner again purchased 540 cartons of unstamped cigarettes from an undercover investigator at a location in Albany. Petitioner paid \$11,340.00 and loaded the cigarettes into the white van.

5. On June 24, 2004 in Albany, petitioner purchased and took possession of 100 cartons of untaxed cigarettes from the undercover investigator and the confidential informant. Petitioner paid \$2,500.00 for the cigarettes, which he believed bore counterfeit New York State excise tax stamps.

6. On July 6, 2004 in Albany, petitioner purchased and took possession of 30 cartons of untaxed cigarettes from the undercover investigator and the confidential informant. As with the June 24 transaction, it was petitioner's understanding that these cigarettes bore counterfeit New York State excise tax stamps.

7. On July 27, 2004, petitioner purchased 300 cartons of unstamped cigarettes from the confidential informant and the undercover investigator at a location in Albany. Petitioner paid \$5,000.00 and loaded the cigarettes into the white van.

8. On July 28, 2004 in Albany, petitioner purchased and took possession of 60 cartons of untaxed cigarettes from the confidential informant and the undercover investigator. Petitioner believed that these cigarettes bore counterfeit New York State excise tax stamps.

9. On August 9, 2004, petitioner purchased 400 cartons of unstamped cigarettes from the confidential informant at a location in Brooklyn, New York. Petitioner paid \$8,000.00 for these cigarettes, which were loaded into petitioner's vehicle.

10. On August 11, 2004 in Albany, petitioner purchased and took possession of 90 cartons of untaxed cigarettes from the undercover investigator and the confidential informant. Petitioner believed that these cigarettes bore counterfeit New York State excise tax stamps.

11. On August 23, 2004, petitioner purchased and took possession of 510 cartons of unstamped cigarettes from the confidential informant at a location in Brooklyn, New York. The purchase price was \$10,200.00.

12. On August 31, 2004, petitioner purchased and took possession of 420 cartons of unstamped cigarettes from the confidential informant and the undercover investigator at a location in Albany. The purchase price was \$8,400.00.

13. Randy Cherubino was in charge of the Division's investigation. Mr. Cherubino, who testified at the hearing, monitored all of the transactions described in Findings of Fact 3 through 12. Mr. Cherubino observed petitioner with the confidential informant and the undercover investigator at the time of the transactions. He observed the undercover investigator, the confidential informant and petitioner loading cigarettes into petitioner's van. He could hear

(although not necessarily understand because some of the conversations were in Arabic) in real time the conversations among petitioner, the confidential informant and the undercover investigator because either the confidential informant or the undercover investigator was wearing a transmitting device. Although he did not actually see money exchanged during the transactions because it was exchanged inside the vehicles, he took possession of the money paid by petitioner for the cigarettes from the confidential informant or the undercover investigator soon after the purchase occurred.

14. On November 3, 2005, petitioner was indicted in Schenectady County Court on, among other charges, a count of attempting to evade the cigarette and tobacco products tax in violation of Tax Law § 1814(a)(2)(i), a class E felony. The indictment alleges that on June 16, 2004 in Albany County petitioner did willfully attempt in any manner to evade or defeat the tax on cigarettes and tobacco products under Article 20 of the Tax Law “by purchasing 540 cartons of unstamped (no New York State tax stamp) cigarettes (108,000 cigarettes).”

15. Petitioner pled guilty to the charge in the indictment on May 26, 2006. The transcript of petitioner’s plea allocution¹ reveals that the judge in that proceeding asked petitioner whether it was true that on the date and location set forth in the indictment he willfully attempted to evade or defeat the taxes imposed by Article 20 of the Tax Law by purchasing 540 cartons of unstamped cigarettes. Petitioner answered “yes.”

¹ In his reply brief petitioner asserts that the transcript of the plea allocution was not admitted into evidence. At hearing, the Division moved for the admission of this document and petitioner’s representative expressly stated that he had no objection to the document. By oversight, the administrative law judge did not formally receive the transcript in evidence. Under these circumstances, it is reasonable to expressly state here that the transcript of the plea allocution, identified as Exhibit H in the record, has been admitted into evidence.

16. On November 13, 2006, the Division issued to petitioner, Fathi A. Moharam, a Notice of Determination which asserted penalty of \$418,500.00. The notice referred to a “Tax Period Ended” date of October 26, 2005 and advised petitioner as follows:

On 10/26/05, you were found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.

Therefore, penalty is imposed under Article 20 of the New York State Tax Law.

17. The October 26, 2005 date on the statutory notice results from the fact that certain arrests were made on that date in connection with the Office of Tax Enforcement’s criminal investigation.

18. Petitioner was in Yemen, his country of origin, from January 2005 until January 2006.

19. Although the cartons of cigarettes purchased by petitioner in the subject transactions total 2,990, the penalty assessed against petitioner was calculated by multiplying 2,790 cartons by \$150.00 per carton, for a total penalty due of \$418,500.00. In calculating the penalty the Division made an error in totaling the number of cartons purchased in the subject transactions.

20. Petitioner was present at the hearing in this matter but did not testify.

CONCLUSIONS OF LAW

A. Tax Law § 471 imposes a tax on all cigarettes possessed in New York State for purposes of sale. Although it is the intent of the law that the ultimate incidence of the cigarette tax will fall upon the consumer, the tax is paid by licensed cigarette agents who purchase cigarette tax stamps from the Division’s designated bank and affix such stamps on individual packages of cigarettes as evidence of payment (*see* 20 NYCRR 74.1[b]). All cigarettes within the state are presumed subject to tax under Tax Law § 471 until the contrary is established (*see* Tax Law § 471[1]).

B. Tax Law § 481(1)(b)(i) provides, 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 . . .

C. Preliminarily, and contrary to petitioner's contention, the law clearly imposes the burden of proof on petitioner to prove that the Division improperly assessed penalty in this matter (*Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001; *Matter of Jiang*, Tax Appeals Tribunal, March 31, 2005; *see also Matter of Leogrande*, Tax Appeals Tribunal, July 18, 1991, *confirmed* 187 AD2d 768, 589 NYS2d 383 [1992], *lv denied* 81 NY2d 704, 595 NYS2d 398 [1993]; 20 NYCRR 3000.15[d][5]).

D. Petitioner has failed to meet his burden, and the subject Notice of Determination must be sustained. Petitioner offered no evidence to refute the testimony of Mr. Cherubino, who credibly described in detail the investigation of petitioner which led to his arrest, guilty plea and, finally, to the penalty assessment at issue. Additionally, petitioner's guilty plea establishes that he purchased cigarettes as described on June 16, 2004.

Petitioner attacked the credibility and probative value of Mr. Cherubino's testimony, characterizing it as hearsay. While it is well established that hearsay may provide the sole basis for an administrative determination (*see Matter of Gray v. Adduci*, 73 NY2d 741, 742, 536 NYS2d 40, 41 [1988]; *Matter of Pride Oil*, Tax Appeals Tribunal, March 14, 1991), it is inaccurate to describe the evidence presented by the Division solely as hearsay. Specifically, Mr. Cherubino observed petitioner with the confidential informant and the undercover investigator at the time of the transactions; he observed petitioner, along with the confidential informant and the undercover investigator, loading cigarettes into petitioner's vehicle; and he secured the monies

paid by petitioner for the cigarettes soon after each transaction. This is direct evidence supporting the Division's assertion that petitioner purchased cigarettes as described herein. Additionally, it is noted that petitioner's guilty plea is not hearsay. Moreover, petitioner did not controvert Mr. Cherubino's hearsay testimony that petitioner owned the white van that was used in the transactions (*see* Finding of Fact 3) and that it was, in fact, petitioner's phone number that was provided to the confidential informant (*see* Finding of Fact 1). Petitioner was obviously free to call witnesses and to present evidence to refute any of the hearsay evidence or, indeed, any of the evidence offered by the Division, but chose not to do so. Further, although present at the hearing, petitioner chose not to testify on his own behalf. Under the circumstances, it is reasonable to take the strongest possible negative inference from petitioner's failure to testify to contradict the Division's case (*see Matter of Drebin*, Tax Appeals Tribunal, March 27, 1997).

E. Furthermore, petitioner is collaterally estopped from contesting the penalty imposed with respect to the purchase of 540 cartons of cigarettes on June 16, 2004. Specifically, petitioner pled guilty to a charge accusing him of attempting to evade the cigarette and tobacco products tax in violation of Tax Law § 1814(a)(2)(i) "by purchasing 540 cartons of unstamped (no New York State tax stamp) cigarettes (108,000 cigarettes)." Petitioner admitted his purchase of 540 cartons of cigarettes on June 16, 2004 in his plea allocution. Such conduct constitutes a violation of Tax Law § 481(1)(b)(i), which, as noted, imposes penalties for the possession or control of unstamped cigarettes. Petitioner's possession or control of 540 cartons of unstamped cigarettes on June 16, 2004 was therefore a factual issue required to be resolved in the criminal proceeding and the doctrine of collateral estoppel is properly applicable with respect to such purchase (*see Matter of Cano*, Tax Appeals Tribunal, December 12, 2002).

F. Petitioner also contended that the petition should be granted and the Notice of Determination cancelled because the notice asserts that he was found to be in possession of unstamped or unlawfully stamped cigarettes on October 26, 2005. Petitioner notes that he was in Yemen on that date (*see* Finding of Fact 18) and therefore could not have been in possession of unstamped or unlawfully stamped cigarettes as asserted in the Notice of Determination. Petitioner further notes, correctly, that the Division's answer affirmatively states that petitioner was in possession or control of unstamped or unlawfully stamped cigarettes on October 26, 2005 and that the Division has made no attempt to amend its answer.

Petitioner's contention is rejected. Although the date on the Notice of Determination is in error, such a defect is insufficient to invalidate the notice absent evidence of harm or prejudice to the petitioner (*Matter of Vinter*). Petitioner has made no such showing in this matter as he has failed to allege, much less prove, that he was not aware that the penalties asserted in the notice arose from the transactions described herein. Indeed, considering that the penalties arose from the same investigation that resulted in criminal charges and a guilty plea, proving such a claim would seem highly unlikely.

G. The petition of Fathi A. Moharam is denied and the penalty asserted in the Notice of Determination, dated November 13, 2006, is sustained.

DATED: Troy, New York
July 24, 2008

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE