

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MUHAMMAD KAMAL	:	DETERMINATION DTA NO. 821701
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period May 10, 2005.	:	

Petitioner, Muhammad Kamal, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period May 10, 2005.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 10, 2008 at 10:30 A.M., with all briefs to be submitted by October 27, 2008, which date began the six-month period for the issuance of this determination.

Petitioner appeared by Isaac Sternheim, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether petitioner was a person in possession of or had control of unlawfully stamped cigarettes.

II. Whether the penalty imposed was an abuse of discretion and excessive.

FINDINGS OF FACT

1. In the year 2000, petitioner commenced the operation of two Long Island Amoco gasoline stations, with retail kiosks selling cigarettes, candy and soda, not long after his arrival in

the United States. One gasoline station was located in Holtsville at 1680 North Ocean Avenue (Holtsville station), and the other in North Bellmore at 2484B Jerusalem Avenue¹ (North Bellmore station). According to petitioner, it was “very easy” for him to “get involved” in the operation of gasoline stations because there is “no money involved.” Rather, the actual owner of the two gasoline stations was a company identified by petitioner as Leon Petroleum, which apparently held a franchise to operate these two Amoco brand gasoline stations on Long Island. Petitioner, by his company known as New York Trading Corp., contracted with Leon Petroleum and became responsible for the operation of the two gasoline stations in exchange for the payment of a monthly rent to Leon Petroleum, which was based upon the volume of gasoline sold. By operating the retail kiosks at the stations, petitioner had an additional source of income, besides some small portion of the income from gasoline sales.

2. The Division of Taxation (Division) entered into evidence two quarterly sales tax returns for New York Trading Corp. which reported sales only for petitioner’s North Bellmore location. Petitioner’s corporation, New York Trading Corp., apparently² conducted business as New York Auto Repair at the Holtsville location and presumably filed separate sales tax returns under this name for this second location. The quarterly sales tax returns for petitioner’s North Bellmore location show (1) taxable motor fuel sales of \$457,307.00 and gross sales of candy,

¹ There is some confusion in the record concerning the street address of the North Bellmore station. Petitioner’s personal residence was also on Jerusalem Avenue, one block from the station. He apparently used on occasion the address of his personal residence on Jerusalem Avenue as a business address for New York Trading Corp. During his testimony, perhaps due to his limited English language ability which made it difficult for him to testify at the hearing, he answered “Yes” to the question whether his “home address” was 2484B Jerusalem Avenue and that his “business address” was 2425 Jerusalem Avenue. As noted in the audit file, the North Bellmore station was located at 2484B Jerusalem Avenue.

² A memorandum from Joseph T. Conley, III, a Suffolk County Assistant District Attorney, Tax Crimes Unit, dated November 30, 2005 included in Exhibit F describes the defendant in the “corporate substitution” as New York Trading Corporation D/B/A New York Auto Repair with the Holtsville station’s address of 1680 North Ocean Avenue.

cigarettes and soda of \$44,969.00 for the quarter March 1, 2005 through May 31, 2005 and (2) taxable motor fuel sales of \$581,598.00 and gross sales of candy, cigarettes and soda of \$30,048.00 for the quarter June 1, 2005 through August 31, 2005. The record does not similarly disclose the amount of gasoline sales and gross sales of candy, cigarettes and soda at the Holtsville location.

3. On May 10, 2005, the Petroleum, Alcohol and Tobacco Bureau of the Division of Taxation (PAT Bureau) conducted an inspection of petitioner's Holtsville station and discovered 90.4 cartons (or 904 packs since there are 10 packs to a carton) of cigarettes with counterfeit New York State cigarette tax stamps. The counterfeit stamps were lettered and numbered either 2824N or X4403 and had not been seen before by any PAT Bureau investigators. The PAT Bureau investigator did not immediately seize these cigarettes with counterfeit New York State cigarette tax stamps. Rather, after surreptitiously conducting a field test and determining that the stamps were counterfeit, the investigator left the Holtsville station without alerting Sajad Jan,³ the clerk at the station, of her findings. Since she had learned from the clerk that petitioner, the operator of the Holtsville station, also operated the North Bellmore station, the investigator wanted to arrange for an inspection of the North Bellmore station before seizing the cigarettes with counterfeit cigarette tax stamps discovered at the Holtsville station and tipping off petitioner. Consequently, two PAT Bureau inspectors were sent to the North Bellmore station where they found 10.2 cartons (or 102 packs) bearing the same counterfeit New York State

³ Petitioner testified that on May 10, 2005, Muhammad Gondal was operating the kiosk at the Holtsville station, and that he was "working on the register" at the North Bellmore station. After answering "Yes, I operated it," in response to his representative's question, "Did you ever operate the Holtsville location," petitioner also responded "No," to his representative's next question, "Did you *personally* ever operate the Holtsville location." (Emphasis added.)

cigarette tax stamps (lettered and numbered either 2824N or X4403) that were discovered at the Holtsville station.

4. The cigarettes seized at the Holtsville station were carefully itemized by the PAT Bureau: 44.4 cartons of Marlboro cigarettes, 22.2 cartons of Newport cigarettes, and 23.8 cartons of Parliament cigarettes. The administrative record does not include a similar itemization by brand of the 10.2 cartons of cigarettes which were seized at the North Bellmore location.

5. Petitioner, who had been contacted by a PAT Bureau investigator, informed the investigator that he was at home but “would leave immediately to go to the Holtsville location.” Instead, he went to his North Bellmore station⁴ and was placed in custody by the PAT Bureau inspectors who had been sent to that location. Petitioner’s cigarette registration was suspended for both locations, and the clerks at the two locations were advised not to sell any cigarettes or tobacco products until the cigarette registration was reinstated.

6. The arrest of petitioner would ultimately culminate in a plea bargain whereby the corporation, New York Trading Corp., was substituted for petitioner, and the corporation then pleaded guilty to the misdemeanor set forth at Tax Law § 1814(a)(1), which provides as follows:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by article twenty of this chapter [Tax on Cigarettes and Tobacco Products] or the payment thereof shall, in addition to other penalties provided by law, be guilty of a misdemeanor.

⁴ As noted in Footnote 3, petitioner testified that he was working the register at the North Bellmore station on May 10, 2005 which conflicts with the investigator’s report. The reason for this discrepancy may well relate to petitioner’s lack of English language ability. During his testimony at the hearing, it did not seem at times that he was truly comprehending the questions. The confusion concerning the addresses, as detailed in Footnote 1, exemplifies this difficulty.

New York Trading Corp. was fined \$1,356.00, and the matter was conditionally discharged. The four original charges⁵ asserted against petitioner, all much more serious, were dismissed.

7. A Notice of Determination dated April 10, 2006 was issued to petitioner asserting penalty due of \$15,240.00 under Article 20 of the Tax Law for the tax period ended May 10, 2005 because, “On 05/10/05, you were found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.”

8. At the time of his arrest according to the investigator’s report, petitioner claimed that “a person who worked for him by the name of Wadara purchased the cigarettes from a person by the name of Sarwar for \$37 a carton,” and he offered to cooperate and “would set up a buy and bust.” However the person by the name of Sarwar was not at the location on Waverly Avenue in Holtsville provided by petitioner. Rather a sign at such location indicated “that it [a store owned by Sarwar Ghulam] would be opening in two weeks.” At the hearing, in contrast, petitioner testified that he did not purchase the untaxed cigarettes, and did not know who had purchased them. On recross examination, petitioner added further to the confusion by this exchange:

Attorney Ostwald: And who is Mr. Sarwar?

Mr. Kamal: I don’t know this person.

⁵ As set forth in the Division’s Tax Enforcement Referral Report, petitioner was originally charged as follows:

- NYSPL 170.25: Possession of a forged instrument in the second degree;
- NYSTL 1814(e)(1): Possession of untaxed cigarettes (20,000 plus cigarettes);
- NYSTL 1814(a)(2): Attempt to evade/defeat cigarette tax (20,000 plus cigarettes);
- NYSTL 1814(i): Possession of counterfeit tax stamps.

The administrative record provides no explanation why the four “arraignment offenses,” as noted on the transcript of record for the District Court of Suffolk County, varied as follows:

- NYSPL 170.25: Criminal possession of a forged instrument
- NYSTL 1814: Cigarette tax fail to report/pay
- NYSTL 1814: Willfully possess/transport/sell 20,000 plus unstamped cigarettes
- NYSTL 1814: Willfully possess/transport/sell 20,000 plus unstamped cigarettes [sic-duplicates prior offense]

Attorney Ostwald: So how did you find out that Mr. Wadara purchased cigarettes from Mr. Sarwar?

Mr. Kamal: I don't know.

Attorney Ostwald: So when you said that Mr. Wadara purchased cigarettes from Mr. Sarwar, that was an assumption of yours?

Mr. Kamal: That's totally assumption. There is nothing in reality with this one. I never see Wadara. I never see anyone.

Petitioner also testified that he had no knowledge of counterfeit New York tax stamps at the Holtsville station until he received the phone call from the PAT bureau investigator on May 10, 2005, which is also inconsistent with the investigator's report as detailed above.

9. Petitioner was a person responsible for the operation of New York Trading Corp. He was president of the corporation, signed consents on its behalf, signed sales tax returns in his capacity of president of the corporation, signed a renewal application for its registration of cigarette retail dealer, and on the corporation's quarterly combined withholding, wage reporting and unemployment insurance return, his remuneration was the highest of the five persons noted thereon: petitioner, Muhammad Kamal, \$5,200.00; Ahmed Taman, \$3,900.00; Muhammad Afzal, \$3,250.00; Mohammad Gondal, \$3,120.00; and Rahim Dad Choudhary, \$1,560.00. Petitioner operated the register at the North Bellmore station where he worked most of the time, while Mohammad Gondal worked primarily at the Holtsville station.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner admits that he was "the owner" of the Amoco stations "where the untaxed cigarettes were found" (tr., p. 21). However, he argues that he was not "personally" involved in the sale of cigarettes with counterfeit tax stamps. Therefore, the civil penalty should not be applied against him, or, in the alternative, should be substantially reduced. According to petitioner, the Division of Taxation abused its discretion in asserting the maximum civil penalty against him. Further, petitioner contends that, in the alternative, the fine paid by New

York Trading Corp. of \$1,356.00 in the criminal proceeding should be credited against the civil penalty asserted in this matter.

11. According to the Division, petitioner is “collaterally estopped from contesting the penalty imposed with respect to the possession and control of 90.4 cartons of unlawfully stamped cigarettes at the Holtsville location” (Division’s brief, p. 3). The Division emphasizes that “petitioner pled guilty to a charge of attempting to evade the cigarette and tobacco products tax,” and as a result petitioner cannot deny that he had “the possession or control of unstamped cigarettes,” which justifies the imposition of the penalty at issue (Division’s brief, p. 3). The Division maintains that the penalty imposed was not excessive, and that petitioner did not sustain his “burden to demonstrate by clear and convincing evidence that the imposition of the penalty by the Commissioner in the amount so imposed was an abuse of discretion” (Division’s brief, p. 4).

CONCLUSIONS OF LAW

A. Cigarette tax is imposed under Tax Law § 471(1) which, during the period at issue, provided as follows:

There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale Such tax on cigarettes shall be at the rate of seventy-five cents⁶ for each ten cigarettes [or \$1.50 per pack since there are 20

⁶The New York cigarette tax has increased substantially over the years as follows:

Effective Date of Tax	Tax per pack of cigarettes	Tax per carton of cigarettes
June 3, 2008	\$2.75	\$27.50
April 1, 2002	1.50	15.00
March 1, 2000	1.10	11.00
June 1, 1993	.56	5.60
June 1, 1990	.39	3.90

cigarettes per pack or \$15.00 per carton of cigarettes since there are ten packs per carton] or fraction thereof . . . Such tax is intended to be imposed upon only one sale of the same package of cigarettes. It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof.

B. In order to discourage the sale of untaxed cigarettes, Tax Law § 481(1)(b) provides for the imposition of penalty, in relevant part, as follows:

(i) 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 dollars⁷ 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

* * *

(iii) The commissioner of taxation and finance, in his discretion, may remit all or part of such penalty.

C. It is first noted that the Division’s argument that petitioner should be collaterally estopped from denying his liability for the penalty at issue with regard to the 90.4 cartons of cigarettes with counterfeit New York tax stamps seized at the Holtsville station and 10.2 cartons of cigarettes with counterfeit New York tax stamps seized at the North Bellmore station is rejected. As noted in Finding of Fact 6, New York Trading Corp., *not petitioner*, pleaded guilty

May 1, 1989	.33	3.30
April 1, 1983	.21	2.10

⁷ The Division in its letter brief cited an earlier version of this provision which limited the penalty to \$100.00 for each two hundred cigarettes or fraction thereof in excess of 2000 cigarettes. As noted above, the penalty during the period at issue had the higher limit of \$150.00 for each 200 cigarettes or fraction thereof in excess of 1000 cigarettes (*see* L 2000, ch 262). Furthermore, pursuant to Tax Law § 481(1)(b)(ii), in lieu of the penalty imposed by section 481(1)(b)(i) noted above, the penalty is “not less than one hundred dollars but not more than *two hundred dollars* for each two hundred cigarettes, or fraction thereof, in excess of twenty thousand cigarettes [100 cartons] in unstamped or unlawfully stamped packages, knowingly in the possession or knowingly under the control of any person” [emphasis added].

to the misdemeanor of attempting to evade or defeat the cigarette tax or the payment thereof. Further the misdemeanor charge to which the corporation pleaded guilty was vague and lacked specificity, with no reference to the seizure of cigarettes with counterfeit New York tax stamps at the two stations operated by petitioner (*see Matter of Cano*, Tax Appeals Tribunal, December 12, 2002 [Tribunal found no collateral estopped when factual issue in the administrative hearing “was not required to be resolved in the prior criminal proceeding”]). Consequently, petitioner is not collaterally estopped from contesting the factual issue whether he was in possession or control of the cartons of cigarettes with counterfeit cigarette stamps seized at the two gasoline stations operated by New York Trading Corp.

D. The more complicated issue is whether petitioner was in possession or control of the 90.4 cartons of cigarettes bearing counterfeit stamps that the investigators found at the Holtsville station. With reference to the 10.2 cartons of cigarettes bearing counterfeit stamps that the investigators found at the North Bellmore station, petitioner, as noted in Finding of Fact 4, admitted that he worked the register at the North Bellmore station and it is concluded that he was in possession or control of the 10.2 cartons at that location. In addition, a careful review of the record leads to the conclusion that petitioner has not shouldered his burden of proving that he was not in control of 90.4 cartons seized at the Holtsville station as well (*see Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001 [wherein Tribunal noted that it is petitioner’s burden to demonstrate by clear and convincing evidence that the penalty at issue was improperly imposed], *petition dismissed*, 305 AD2d 738, 757 NYS2d 911 [3rd Dept 2003]). Most telling is the fact, as noted in Finding of Fact 3, that the counterfeit stamps were lettered and numbered either 2824N or X4403, stamps never seen before by any PAT Bureau investigators. The cartons of cigarettes seized at *both locations* had these same unique letters and numbers, and this weighs

heavily against petitioner since, as he conceded, he operated both stations. Consequently, petitioner's denial of any knowledge of the cigarettes with tax counterfeit stamps at the Holtsville station is not credible given this critical fact that the cigarettes seized at the North Bellmore station had counterfeit stamps *with the same unique lettering and numbering* as the cigarettes seized at the Holtsville station. As a result, it is concluded that petitioner was in possession or control of the 90.4 cartons seized at the Holtsville station and the 10.2 carton seized at the North Bellmore station, for a total of 100.6 cartons with counterfeit stamps. Pursuant to Tax Law § 481(1)(b)(i), a penalty of not more than \$150.00 for each 200 cigarettes (one carton) or fraction thereof in excess of 1,000 cigarettes (50 packs or 5 cartons) may therefore be imposed against petitioner.

E. As noted in Finding of Fact 7, the Division issued a Notice of Determination dated April 10, 2006 asserting penalty due of \$15,240.00. However, this amount of penalty asserted against petitioner is incorrectly based upon 101.6 ($\$150 \times 101.6 = \$15,240$) cartons since penalty is properly imposed on cigarettes "in excess of one thousand cigarettes [which equates to 5 cartons or 50 packs of cigarettes]" (*see* Tax Law § 481[1][b][i]). Recalculating the penalty based upon 96⁸ cartons (100.6 cartons, the total cartons seized, less 5 cartons equals 95.6 cartons), results in a penalty of \$14,400.00.

F. Furthermore, petitioner's contention that the fine paid by New York Trading Corp. of \$1,356.00 in the criminal proceeding should be credited against the civil penalty asserted in this matter is rejected. The penalty under Tax Law § 481(1)(b)(i) is a *civil* penalty distinct from the penalty imposed in the *criminal* matter (*see Hudson v. United States*, 522 US 93 [1997]). In

⁸ The allowable penalty is \$150.00 for each 200 cigarettes or *fraction thereof* which justifies rounding up to 96 cartons from 95.6 cartons.

addition, given the important policy interest of New York State to control the sale of cigarettes, with the terrible and expensive health consequences⁹ for their users, the need to ensure that appropriate tax is collected on cigarette sales weighs heavily against petitioner's claim that the civil penalty imposed here was excessive. The penalty at issue of \$150.00 per carton is 5.45 times the tax per carton of \$27.50, the amount of cigarette tax now required to be collected on the sale of a carton of cigarettes (*see* Tax Law § 471). Given the temptation to profit from the sale of untaxed cigarettes since the cigarette tax has become a substantial percentage of the total sales price of cigarettes, the penalty under Tax Law § 481(1)(b)(i) of \$150.00 per carton is simply not excessive in light of the governmental need to deter such wrongful conduct as well as to provide a source of revenue to meet the various expenses incurred by the State to uncover such conduct. In the matter at hand, it required the work of *three or four investigators* plus their supervisors to uncover the wrongful sale of cigarettes with counterfeit tax stamps at petitioner's two gasoline stations. Moreover, it is within the prerogative of the Division of Taxation to take a firm stance against any mitigation of the penalty, as recognized by the Tax Appeals Tribunal: "It is not necessary for the Division to have considered any mitigating factors prior to the imposition of the penalty [under Tax Law § 481(1)(b)] since this is neither mandated by statute nor regulation" (*Matter of Fakhouri*, Tax Appeals Tribunal, July 5, 2007).

⁹ Pursuant to the State Administrative Procedure Act § 306(4), the administrative law judge took official notice of facts of common and general knowledge, well established and settled, concerning the health consequences of using cigarettes as indicated in the 2004 Surgeon General's Report- The Health Consequences of Smoking. This report noted that smoking harms nearly every organ of the body, causing many diseases and reducing the health of smokers in general. Further, it notes that the list of diseases caused by smoking has been expanded to include abdominal aortic aneurysm, acute myeloid leukemia, cataract, cervical cancer, kidney cancer, pancreatic cancer, pneumonia, periodontitis, and stomach cancer. These are in addition to diseases previously known to be caused by smoking, including bladder, esophageal, laryngeal, lung, oral, and throat cancers, chronic lung diseases, coronary heart and cardiovascular diseases, as well as reproductive effects and sudden infant death syndrome.

G. The petition of Muhammad Kamal is granted to the extent that the penalty asserted against him of \$15,240.00 is reduced to \$14,400.00, but in all other respects is denied.

DATED: Troy, New York
April 9, 2009

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE