

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FUAD AZZUBAIDI : DETERMINATION
 : DTA NO. 821784
for Revision of a Determination or for Refund of :
Cigarette Tax under Article 20 of the Tax Law for :
Period Ended October 26, 2005. :

Petitioner, Fuad Azzubaidi, 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 commenced before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 12, 2008 at 10:30 A.M., and held to completion at the same location on July 2, 2008 at 9:30 A.M. All briefs were to be submitted by September 12, 2008, which date began 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. (Michele W. Milavec, 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. The Office of Tax Enforcement of the Division of Taxation (Division) conducted an undercover sting operation in the Albany, Schenectady and Troy area in which the Division's

investigator, Supervising Investigator Chad Stevens, and a confidential informant for the Division handled transactions with store owners and business people who wanted to deal in untaxed, unstamped or unlawfully stamped cigarettes.

As part of the criminal investigation, counterfeit excise tax stamps were created specifically for the undercover sting operation. The counterfeit tax stamps were manufactured by Meyercord, Inc., the manufacturer of valid New York State cigarette tax stamps. The counterfeit tax stamps were obtained from Meyercord, Inc., at the commencement of the sting operation. In all seven transactions at issue herein, counterfeit tax stamps were used.

2. On March 29, 2005, during the course of a sting operation conducted by the Office of Tax Enforcement, the owner of a deli located in Albany, New York, gave to a confidential informant of the Division the telephone number of an individual who purportedly had an interest in purchasing unstamped or unlawfully stamped cigarettes. The confidential informant called the telephone number and spoke to an individual identified as Fuad Azzubaidi. During the conversation on March 29, 2005, petitioner, Fuad Azzubaidi, placed an order with the confidential informant for 300 cartons of cigarettes with counterfeit tax stamps. Petitioner requested that the cartons of cigarettes be delivered to him at 149 2nd Avenue in Albany, New York.

3. On April 7, 2005, petitioner purchased and took possession of 300 cartons of untaxed cigarettes from the confidential informant and Supervising Investigator Stevens acting undercover at petitioner's store, Jane's Variety Supermarket II, located at 149 2nd Avenue in Albany, New York. The cartons were unloaded into the residence above the store. Petitioner paid \$8,100.00.

4. On April 20, 2005, petitioner purchased and took possession of 100 cartons of untaxed cigarettes from the confidential informant and Supervising Investigator Stevens acting undercover at petitioner's store, Jane's Variety Supermarket II. Petitioner paid \$2,800.00 for the cigarettes.

5. On May 3, 2005, petitioner purchased and took possession of 200 cartons of untaxed cigarettes from the confidential informant and Supervising Investigator Stevens acting undercover at petitioner's store, Jane's Variety Supermarket II. Petitioner paid \$5,400.00 for the cigarettes.

6. On May 18, 2005, petitioner purchased and took possession of 313 cartons of untaxed cigarettes from the confidential informant and Supervising Investigator Stevens acting undercover at petitioner's store, Jane's Variety Supermarket II. Petitioner paid \$8,451.00 for the cigarettes.

7. On June 1, 2005, petitioner purchased and took possession of 100 cartons of untaxed cigarettes from the confidential informant and Supervising Investigator Stevens acting undercover at petitioner's store, Jane's Variety Supermarket II. Petitioner paid \$2,700.00 for the cigarettes.

8. On August 24, 2005, petitioner purchased and took possession of 100 cartons of untaxed cigarettes from the confidential informant and Supervising Investigator Stevens acting undercover at petitioner's store, Jane's Variety Supermarket II. Petitioner paid \$2,800.00 for the cigarettes.

9. On September 28, 2005, petitioner purchased and took possession of 160 cartons of untaxed cigarettes from Supervising Investigator Stevens acting undercover at the Liedkie storage facility on Curry Road, Rotterdam, New York, which was an undercover location set up

by the Office of Tax Enforcement as part of its operation. Petitioner paid \$4,000.00 for the cigarettes, which he was told bore counterfeit New York State excise tax stamps. Petitioner loaded the cigarettes into his green Dodge Caravan van.

10. Chad Stevens is a Supervising Investigator with the Petroleum, Alcohol and Tobacco Bureau of the Office of Tax Enforcement. Supervising Investigator Stevens acted as the undercover investigator and was present at each of the seven transactions involving purchases of untaxed cigarettes by petitioner during the period between April and October 2005. As the undercover officer in the operation, Investigator Stevens would drive the van carrying the untaxed cigarettes and would park directly in front of the front door of Jane's Variety Supermarket II to maintain visual contact with the confidential informant at all times during the transaction. He observed the confidential informant receive money from petitioner which he then obtained from the confidential informant and verified the amount after each transaction. Petitioner did not obtain a purchase receipt for any of the transactions at issue and the confidential informant was not registered as a wholesale dealer of cigarettes. On each of the seven occasions described, petitioner was told that the cartons of cigarettes bore a counterfeit New York State excise tax stamp.

11. Supervising Investigator Stevens created undercover reports after each transaction detailing the operation, which he sent to Investigator Randy Cherubino, who was lead investigator for the operation. Investigator Cherubino used the undercover reports to generate the reports in the Division's case tracking system. During the course of the sting operation, Office of Tax Enforcement investigators performed routine inspections of petitioner's store location and saw cigarettes bearing counterfeit tax stamps which had been sold by the confidential informant to petitioner. The Office of Tax Enforcement investigators were able to identify the cigarettes

with the counterfeit stamps in petitioner's store by the number on the stamps. The counterfeit tax stamps used by the Office of Tax Enforcement in the undercover sting operation contained all numbers with no letters and were created specifically for use in the sting operation.

12. On October 26, 2005, petitioner was indicted in Schenectady County Court on, among other charges, 6 counts of attempting to evade the cigarette and tobacco products tax in violation of Tax Law § 1814(a)(2)(i), a class E felony; 4 counts of attempted possession of over 150 cartons of unstamped or unlawfully stamped cigarettes in violation of section 110 of the Penal Law and Tax Law § 1814(e)(2), a class E felony; a count of possession of over 150 cartons of unstamped or unlawfully stamped cigarettes in violation of Tax Law § 1814(e)(2), a class D felony; 5 counts of attempted criminal possession of a forged instrument in the first degree in violation of Penal Law §§ 110 and 170.30, a class D felony, and criminal possession of a forged instrument in the first degree in violation of Penal Law § 170.30, a class C felony.

13. Petitioner pled guilty to the charge of violating sections 110 and 170.30 of the Penal Law in that he knowingly and unlawfully attempted to possess cigarettes bearing a counterfeit (forged) New York State tax stamp. The transcript of petitioner's plea allocution reveals that the judge in that proceeding asked petitioner whether it was true that on or about October 26, 2005, with the intent to defraud, deceive or injure another, he attempted to possess cigarettes bearing a counterfeit New York State tax stamp, said stamp being an issue or stamps or other valuable instrument issued by a government or governmental instrumentality, all contrary to the provisions of the statute. Petitioner answered in the affirmative.

14. On November 13, 2006, the Division issued to petitioner, Fuad Azzubaidi, a Notice of Determination which asserted penalty of \$271,950.00. The notice referred to a "Tax Period Ended" date of October 26, 2005 and advised petitioner as follows:

On October 26, 2005 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.

15. The October 26, 2005 date on the statutory notice results from the fact that petitioner was arrested on that date in connection with the Office of Tax Enforcement criminal investigation. The amount of the penalty assessed includes purchases of cartons of cigarettes made by petitioner on the date of his arrest.

16. Petitioner purchased a total of 1,273 cartons of untaxed cigarettes during the period between April and September 2005. It is the policy of the Office of Tax Enforcement to not count cigarettes purchased on the date of arrest in calculating the amount of the penalty assessed for possession of untaxed cigarettes. The Division acknowledges that the amount of penalty assessed should be recomputed by multiplying the total cartons of untaxed cigarettes purchased of 1,273 by \$150.00 per carton, for a revised total penalty assessed of \$190,950.00.

17. Petitioner was present at the hearing in this matter on both hearing dates 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 . . .

Tax Law § 470(13) provides for the definition of “[u]nstamped or unlawfully stamped packages of cigarettes” as follows:

A package of cigarettes which bears no tax stamp, or which bears a tax stamp of another state or taxing jurisdiction is considered to be an unstamped package of cigarettes. A package of cigarettes bearing a counterfeit New York state or a counterfeit joint state and New York city tax stamp is an unlawfully stamped package of cigarettes.

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. Stevens, who credibly described in detail the investigation of petitioner which led to his arrest, guilty plea and, finally, to the penalty assessment at issue.

Petitioner attacked the credibility and probative value of Mr. Stevens’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. Stevens observed petitioner with the confidential informant at the time of the seven transactions; he observed petitioner accepting the untaxed cigarettes into petitioner's store; 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. Moreover, petitioner did not controvert Mr. Stevens's testimony that petitioner received the untaxed cigarettes, paid for the untaxed cigarettes and that it was, in fact, petitioner's phone number that was provided to the confidential informant. 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 on both hearing dates, 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. The penalty assessed in the Notice of Determination is reduced to \$190,950.00 to reflect the Office of Tax Enforcement's policy to not count the cigarettes purchased on the date of arrest in calculating the amount of the penalty assessed for possession of untaxed cigarettes (*see* Finding of Fact 16 and Tax Law § 481[1][b][i]).

F. The petition of Fuad Azzubaidi is granted to the extent indicated in Conclusion of Law E and the Division of Taxation is directed to modify the Notice of Determination

accordingly; in all other respects the petition is denied and the Notice of Determination, dated November 13, 2006, as modified, is sustained.

DATED: Troy, New York
March 5, 2009

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE