

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ASHOK KUMAR D/B/A K. WHOLESALES : DETERMINATION
for Review of a Notice of Proposed Refusal to Register as : DTA NO. 822129
a Wholesale Dealer of Cigarettes and as a Wholesale
Dealer of Tobacco Products under Articles 20 and 20-A :
of the Tax Law Dated November 27, 2007. :
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Petitioner, Ashok Kumar d/b/a K. Wholesales, filed a petition to review a Notice of Proposed Refusal to Register as a Wholesale Dealer of Cigarettes and as a Wholesale Dealer of Tobacco Products under Articles 20 and 20-A of the Tax Law, dated November 27, 2007. Said petition was received by the Division of Tax Appeals on February 19, 2008 and a hearing was scheduled for March 4, 2008. At petitioner's request, a two-week adjournment was granted.

Pursuant to Tax Law § 480(5)(b), an expedited hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 18, 2008 at 2:00 P.M., with all briefs to be submitted by April 28, 2008. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michele Helm, Esq., of counsel).

ISSUE

Whether the Division of Taxation has established an adequate basis for its proposed refusal to register petitioner as a wholesale dealer of cigarettes and as a wholesale dealer of tobacco products under Articles 20 and 20-A of the Tax Law.

FINDINGS OF FACT

1. From 2002 to 2006, petitioner, Ashok Kumar, managed a business in New Rochelle, New York, called Sonny Wholesales, Inc. (Sonny), an enterprise which had been owned by an individual named Sanjay Singla and later transferred to another individual, Prem Singla. Petitioner was the sole employee, and his duties included sales, delivery and payment for product. However, he was not an officer and held no ownership interest in Sonny until 2006.

2. Sonny's president and sole shareholder, Prem Singla, transferred a six percent interest in the company to petitioner in recognition of his efforts on behalf of the business and as an incentive to retain his management services. The transfer was intended as an incentive without consideration, and was reported by Prem Singla to the Division of Taxation on form DTF-95, Business Tax Account Update, dated July 31, 2006. The information on the DTF-95 was provided under the section designated for reporting changes in the information about persons required to be listed on "application forms" as owners, officers or responsible persons, not under the section designated for reporting the sale of a business. For unknown reasons, the effective date of the changes was set forth as January 1, 2006.

The DTF-95 was signed and filed by Prem Singla, Sonny's president. The information on the form notified the Division that petitioner was being added as a 6% owner and corporate vice president. It also informed the Division that Prem Singla's status was revised to reflect an ownership interest of 94%.

3. Sonny held licenses as a wholesale dealer of cigarettes and a wholesale dealer of tobacco products which were subsequently canceled by the Division of Taxation in September 2006, effective January 1, 2006, on the basis that there was no notification of a change in

ownership. The Division of Taxation determined the effective date of the cancellation using the effective date of the transfer stated in the DTF-95.

4. Sanjay Singla and Prem Singla reapplied for licenses as wholesalers of cigarettes and tobacco products on behalf of Sonny Wholesales, Inc., but the Division's proposed denial of the applications was affirmed by an administrative law judge in the Division of Tax Appeals in *Matter of Sonny Wholesales, Inc.* (ALJ Determination, May 25, 2007) on the basis that "Sonny's licenses were cancelled by operation of law upon the basis of the report that 100 percent of the ownership of Sonny had been transferred from Sanjay Singla to Prem Singla and Ashok Kumar, effective January 1, 2006, while the Division had not been notified of this transfer as required"

5. Following an exhaustive investigation and sting operation conducted by New York State tax enforcement investigators between May 4, 2005 and March 8, 2006, petitioner was arrested on March 9, 2006. The Westchester County District Attorney's Office filed a felony complaint against petitioner for the offense of attempting to evade or defeat cigarette tax pursuant to Tax Law § 1814(a)(2)(ii). However petitioner was fully exonerated when, on October 16, 2006, the case against him was dismissed and the records of the matter sealed in the City Court of New Rochelle, New York.

6. On July 6, 2007, petitioner filed an Application for a License as a Wholesale Dealer of Tobacco Products and an Application for a License as a Wholesale Cigarette Dealer, listing his tradename as K. Wholesales with an address of 146 North Avenue, New Rochelle, New York. In addition, petitioner filed with the Division's Registration and Bond Unit a Personal Questionnaire, form CG-100-P, in which he declared that no business in which he was a "controlling person," as defined later in the questionnaire, ever applied for or held a license or

permit to traffic in cigarettes or tobacco products. The applications and questionnaire were all dated July 2, 2007.

7. After the applications were filed by petitioner, the Division sent several letters to him by which it requested further documentation and clarification. The first letter, dated July 23, 2007, requested several pieces of information concerning petitioner's lease agreement, his personal financial information, including personal loans, and a general inquiry about his interest in purchasing another business. The Division requested an answer within 30 days.

8. Petitioner responded by letter, dated July 27, 2007, addressing each of the Division's concerns and requests and providing additional documentation.

9. The Division acknowledged receipt of petitioner's response by letter, dated September 10, 2007, and requested that petitioner provide further information with regard to his lessor, a personal loan from Prem Singla, and documentation of specific deposits to his personal account and that of K. Wholesales which were in excess of the amount of the personal loan. Again, the Division allowed petitioner 30 days to forward the requested information.

10. By letter, dated September 17, 2007, petitioner responded to the Division's September 10 request for information, attaching an amended form CG-100-L, Cigarette Agent/Wholesaler-Lessor Identification, additional information and documentation with regard to his loans, deposits and salary. Further, he reported a new employer identification number received from the Internal Revenue Service. In closing, petitioner provided his telephone number if the Division had additional questions.

Petitioner submitted evidence that he had reported the loans on his statement of personal financial condition as of January 25, 2007 and submitted it with his application and attached a

statement from Prem Singla and the bank statement and cancelled check accounting for its transfer and deposit. An additional \$40,000.00 was accounted for as a gift.

11. By letter, dated October 2, 2007, the Division requested a notarized copy of petitioner's lease, clarification of whether Sonny Wholesales also operated out of the same location and whether he had purchased another business or its assets to start K. Wholesales. In addition, it asked how petitioner was accounting for the money paid to him by Sonny Wholesales. The Division closed the letter by asking that the information be forwarded within 30 days.

12. By letter, dated October 19, 2007, petitioner forwarded the notarized lease and explained that the payment of \$30,000.00 to him was income from Sonny Wholesales and would be accounted for on a form 1099. He also explained that Sonny's lease for the same premises would terminate once he received his licenses to act as an agent for cigarette and tobacco products. Other than his plans to purchase inventory from Sonny once he was licensed, petitioner indicated he was not purchasing another business to begin K. Wholesales and only K. Wholesales would operate from the location described in the lease.

13. Petitioner, d/b/a K. Wholesales, has never conducted business as a wholesaler of cigarettes or tobacco products and understood that he needed the approval of the Division to do so.

14. On November 27, 2007, the Division issued to petitioner a Notice of Proposed Refusal to Register as a Wholesale Dealer of Cigarettes and as a Wholesale Dealer of Tobacco Products Under Articles 20 and 20-A of the New York State Tax Law. The proposed denial was based on the following three reasons, set forth as follows:

1. Pursuant to Tax Law § 480(2)(e) under Tax Law § 480(3)(a)(ii) for failure to comply with the provisions of Article 20.

Pursuant to Tax Law § 480(1)(i) and 20 NYCRR 72.1, a wholesale dealer's license is not assignable, and such a license will be deemed to have been assigned upon the transfer of more than 25% of the shares of stock of a wholesale dealer having 4 or fewer shareholders. Such assignment is an invalidating action and results in an immediate cancellation of the license. The wholesale dealer of cigarettes and wholesale dealer of tobacco products licenses of Sonny Wholesales, Inc. were cancelled by operation of law upon the basis of the report that 100% of Sonny's had been transferred from Sanjay Singla to Prem Singla and Ashok Kumar, effective January 1, 2006, while the Division had not been notified of this transfer as required until August 3, 2006, thus constituting a nonpermitted assignment of the licenses with resulting cancellation thereof. Ashok Kumar was directly involved in the transfer of ownership of Sonny's Wholesales, Inc. to Prem Singla and himself, and he failed to report the same. Thus, Ashok Kumar has failed to comply with the provisions of Article 20.

2. Pursuant to Tax Law § 480(2)(e) under Tax Law § 480(3)(a)(iii) for knowingly aiding and abetting another person in violating any of the provisions of Article 20.

Ashok Kumar's actions with regard to the transfers of ownership of Sonny Wholesales, Inc. also fall under this category. The transfers of ownership and investment in Sonny Wholesales, Inc. were made to assist Ashok Kumar in his business venture of wholesaler of cigarettes and tobacco products. Ashok Kumar was knowingly involved in the transfers of ownership of Sonny Wholesales, Inc. and he failed to report those transfers.

3. Pursuant to Tax Law § 480(2)(e) under Tax Law § 480(3)(b)(i) for fraud or deceit in his operations as a wholesale dealer.

Numerous places in the license application material reflect the fact that Ashok Kumar controlled and managed Sonny Wholesales, Inc. While operating Sonny Wholesales, Inc., Ashok Kumar knowingly purchased untaxed tobacco products from an undercover agent. These purchases of untaxed tobacco products are acts of fraud and deceit.

15. With respect to the third ground for the proposed refusal to register, the Division relied on its investigation of petitioner between May 4, 2005 and March 2006. During this period, petitioner purchased cigars on several occasions from the Division's Office of Tax Enforcement employees who were acting undercover as representatives of Tornado Tobacco Distributors of

136 18th Street, Brooklyn, New York, in actively soliciting sales from petitioner, visiting his business location in New Rochelle as well as communicating by telephone.

16. The Division produced testimony and documentation that allegedly demonstrated that petitioner had knowingly purchased untaxed tobacco products, including six investigative reports which were unsworn, unsigned statements of various Division employees which had been incorporated into electronic mail sent by Senior Investigator John Connolly to various Division employees. The reports allegedly document communications with petitioner on six different dates wherein aspects of purchases of untaxed cigars were discussed. Five of the six communications were stated to have been electronically recorded, but the Division did not submit them or transcripts of the conversations into evidence.

17. On his application for a License as a Wholesale Dealer of Tobacco Products, petitioner answered question 16 in the negative. This question asked, “has the cigarette or tobacco products wholesale dealer’s license or the appointment as a tobacco products distributor of the applicant . . . been cancelled, suspended or denied within the preceding five years?”

18. On the application for a License as a Wholesale Cigarette Dealer, Question 10(a) asked if petitioner had ever applied for a license or permit under the cigarette laws of New York, the United States, any other state or country, and part (c) asked if such license or permit had been denied, revoked, cancelled, suspended or otherwise involuntarily terminated. Petitioner responded to both questions in the negative.

Question 11 asked if there were any outstanding loans to or from petitioner and he answered in the negative, even though his statement of financial condition indicated a loan payable in the sum of \$90,000.00.

In Question 13 of the same application, petitioner said he did not have an interest in any business where cigarettes or tobacco products are manufactured, stocked or sold.

19. In his personal questionnaire, questions 11 and 12, petitioner claimed that he had no interest in any business where cigarettes are manufactured, transported or sold and had never applied for a license personally or as a controlling person of an applicant.

20. Petitioner submitted the affidavit of Prem Singla, sworn to March 14, 2008, which stated that a 100% ownership interest had been transferred to her in late July 2006. She then transferred a six percent interest to petitioner in recognition of his hard work and as an incentive to continue his efforts, leaving her with a 94% interest in Sonny, which was reflected on the DTF-95. She also averred in her affidavit that petitioner had no influence on the transfers of any interests in Sonny.

21. Petitioner always demanded a receipt with the tax separately stated when purchasing cigars from the Division employees at Tornado, a fact corroborated by Investigator Fedele. Further, from his experience in the trade, petitioner knew that the price offered to him by the Division in its sting operation through Tornado was not unreasonable and varied little from other wholesalers.

22. Based upon the Division's undercover operations, on March 10, 2006, petitioner was arrested at his business by officers of the Westchester County District Attorney's office and charged with violating Tax Law § 1814(a)(2)(ii), attempting to evade tobacco tax due to his purchase of cigars. As mentioned above, the case was dismissed on October 16, 2006, 17 months after the inception of the investigation, and the records of the matter sealed.

SUMMARY OF THE PARTIES' POSITIONS

23. The Division's position is grounded in theories arising out of petitioner's involvement with Sonny's Wholesales, Inc. In the first instance, the Division contends that petitioner was a party to the transfer of 100% of the shares of stock of Sonny, receiving 6% of the shares of stock from Sanjay Singla. The Division reasons that since the transfer was without prior notice, it was in violation of Article 20 of the Tax Law and justified cancellation of Sonny's licenses. The Division contends that petitioner's direct involvement with that transfer and the violation of Tax Law § 480(1)(i) provide the basis for the Division's proposed refusal to license him.

In the second instance, petitioner's involvement with the transfer of shares in Sonny to Prem Singla and himself was construed to be aiding and abetting another person in violating Tax Law § 480(1)(i). The Division argues that the transfer was made knowingly to assist petitioner in his new business venture as a wholesaler of cigarettes and tobacco products without reporting the transfer to the Division.

Finally, in the third instance, the Division contends that, while managing Sonny Wholesales, Inc., petitioner knowingly purchased untaxed tobacco products from undercover agents of the Division's Tax Enforcement Office. The Division contends that petitioner was informed on several occasions that the cigars were untaxed and that he "did not have a problem" with that. In the alternative, the Division argues that petitioner should have known that the prices were too low to include tax.

24. In its brief, the Division modified its third ground for proposing to refuse to register petitioner, adding that petitioner committed fraud or deceit in the procurement of a license. Specifically, the Division alleges that several of petitioner's answers on his applications were fraudulent or deceitful.

Specifically, the Division argues that petitioner's answer to question 16 of the wholesale dealer of tobacco products application was false because it believes petitioner was a controlling person of Sonny, which had its license cancelled within the preceding five years.

The Division contends that petitioner's status was indistinguishable from Sonny because it believes he was a controlling person in Sonny Wholesales. Since Sonny's license was cancelled the Division believes that his answers to question 10 and 13 were untruthful.

25. Petitioner contends that he applied for the licenses as a Wholesale Dealer of Cigarettes and as a Wholesale Dealer of Tobacco Products Under Articles 20 and 20-A in good faith and fully cooperated with the Division's questions in a timely manner, yet was never asked anything about the facts underlying the grounds for refusing to register him before receiving the Division's proposal to refuse his registration.

26. Petitioner continues to argue that he was not a transferee of shares in Sonny from Sanjay Singla and did not aid and abet the transfer to Prem Singla. He contends he merely received a very small equity interest of 6% of the stock in Sonny as an incentive to continue in his management role.

27. Petitioner argues that he did not knowingly purchase untaxed cigars and denied he was ever told the cigars were untaxed. Since cigars do not receive actual stamps to indicate tax paid like other tobacco products, the cigars' appearance did not indicate to him if tax had been paid.

CONCLUSIONS OF LAW

A. The Division of Taxation set forth three grounds in its notice for the proposed refusal to register petitioner as a wholesaler dealer of cigarettes and as a wholesaler dealer of tobacco products under Articles 20 and 20-A of the Tax Law.

The first basis articulated by the Division rests upon its finding that petitioner was “directly involved in the transfer of ownership of Sonny Wholesales, Inc. to Prem Singla and himself” and his failure to report the transfer to the Division. Tax Law § 480(1)(i) provides that a license is not assignable, and if petitioner wanted to purchase the business, he was required to file a copy of the sales contract and related documents. The rationale being that licenses granted to wholesalers are personal to the persons to whom they are granted. (20 NYCRR 72.1[a][2].) The Division reasons that since it was not notified of the transfer to petitioner and Prem Singla, effective January 1, 2006, until August 3, 2006, when Sonny filed the DTF-95, there was a prohibited assignment of the license (Tax Law § 480[1][i]) which cancelled Sonny’s license by operation of law pursuant to Tax Law § 480(3)(a)(ii). Having already concluded that petitioner was directly involved with the prohibited transfer of Sonny’s license, the Division of Taxation proposed to refuse to register him in his own right doing business as K. Wholesales based upon Tax Law § 480(2)(e), which provides, in part, as follows:

2. Refusal to license. The commissioner . . . may refuse to license an applicant . . . where. . . the commissioner ascertains that:

* * *

(e) Any controlling person of such applicant has committed any of the acts specified in subdivision three of this section within the preceding five years

There are several problems with the Division’s reasoning. First, it relied upon the form DTF-95, Business Account Update, for all of its information regarding petitioner’s involvement with the transfer of ownership of Sonny Wholesales, Inc. The form was prepared and filed with the Division by Prem Singla, the president of Sonny. As represented by the entries on the form, notice was being given to the Division that petitioner was being *added* as a 6% owner and vice president of the corporation, while Prem Singla’s status was *revised* to reflect a new ownership interest of 94%. This is significant because it demonstrated that Prem Singla had a preexisting

status with the corporation and comports with her affidavit and the credible testimony of petitioner which explained that she had received 100% of the shares of stock in Sonny from Sanjay Singla prior to transferring a 6% interest to petitioner. Therefore, it cannot be determined that petitioner was involved, directly or indirectly, in the transfer of 100% ownership of Sonny to Prem Singla and, therefore, had nothing to do with the prohibited assignment of Sonny's license and its subsequent cancellation by operation of law.¹ Given this conclusion, it follows that the Division's proposed refusal to register petitioner, doing business as K. Wholesales, was in error to the extent it relied on his violation of Tax Law § 480(1)(i).

B. The Division's second basis for proposing to refuse licensing petitioner rests upon its belief that he aided and abetted another person in violating Tax Law § 480(1)(i). (*See* Tax Law § 480[2][e]; [3][a][iii].) The Division's letter, dated November 27, 2007, stated that the "transfers of ownership and investment in Sonny Wholesales, Inc. were made to assist Ashok Kumar in his business venture . . .", thus proving his involvement in the transfers of ownership of Sonny and his violation of Tax Law § 480(1)(i).

There are only three sources of information on which the Division can rely as a basis for this claim. The first is the aforementioned form DTF-95, the second is correspondence between the Division and petitioner during the pendency of his application and the third is the applications for licenses and supporting documentation. As mentioned above, the DTF-95 prepared and filed by Prem Singla indicated that she already held an ownership interest in Sonny

¹To the extent this conclusion differs from the findings of fact in *Matter of Sonny Wholesales, Inc.* (Division of Tax Appeals, May 25, 2007) (the determination and transcript therefor placed in evidence by the Division), it is stressed that petitioner was not a license applicant in that matter and neither the transcript nor determination considered or anticipated petitioner's role for purposes of an individual application for licenses. Hence, any argument against petitioner based on that determination must be closely scrutinized since he was not the focus of the Division's case therein.

and that the form was reporting a subsequent revision and the addition of petitioner as the holder of a six percent ownership interest. Her affidavit and petitioner's credible testimony corroborate this interpretation and the Division has offered no proof to contradict it.

The Division appears to challenge the transfers of money from Prem Singla and her husband to petitioner as disclosed in his Personal Questionnaire, bank statements, loan agreements, personal statement of net worth and K. Wholesales balance sheet. However, as explained by petitioner in his letters to the Division, there was a loan made by the Singla family to him in the sum of \$90,000.00 and a sum of \$30,000.00 paid to him by Sonny Wholesales, Inc., which was claimed by the company as wage expense and by petitioner as income or salary. There was an inadvertent failure to account for the loan on his Application for License as a Wholesale Cigarette Dealer, question 11(a), which specifically asked if any person had a loan outstanding to the applicant, i.e., petitioner. However, in addition to his explanatory letter of September 17, 2007, petitioner submitted evidence that he had reported it on his Statement of Personal Financial Condition as of June 25, 2007 and submitted it with his application and also provided a statement from Prem Singla and the bank statement and cancelled check accounting for its transfer and deposit. An additional \$40,000.00 was accounted for as a gift to him.

The applications were filed in good faith, and although the answer to the question with respect to loans outstanding to him was incorrectly answered, it was correctly represented on his contemporaneously filed statement of personal financial condition, and he immediately explained the situation when it was brought to his attention (something that only happened because he filed truthful financial statements).

In sum, the Division has failed to demonstrate that petitioner had been knowingly involved in the stock transfers of Sonny Wholesales or that he aided and abetted another person in

violating Article 20 with regard to said transfers. The loans were adequately explained as intra-family loans and gifts and corroborated with the affidavit and letters from Prem Singla.

C. The Division's third basis for proposing to refuse to register petitioner asserts that as a controlling person of the applicant he committed fraud or deceit in his operations as a wholesale dealer or in procuring its license within the preceding five years. (Tax Law § 480[2][e]; [3][b][i].) The Division contends that petitioner has conceded his control over and management of Sonny Wholesales, Inc., and that, while in this capacity, he purchased untaxed tobacco products from undercover agents, which are acts of fraud and deceit.

After consideration of all the evidence, it is concluded that it has not been established that petitioner purchased untaxed tobacco products, namely cigars. The criminal charge of attempt to evade or defeat cigarette tax against petitioner was dismissed and the records sealed. He credibly testified that he was never told that the cigars were untaxed and that he believed, based upon his experience in purchasing cigars at wholesale for many years, that the price at which they were offered to him was within a reasonable range. In addition, he credibly testified, and the Division's investigator confirmed, that he requested receipts for his purchases of cigars, including a statement of tax - - a very unusual request for someone being accused of seeking to evade tax. Petitioner noted and the Division's investigator agreed that cigars do not have tax stamps affixed, and one cannot differentiate between taxed and untaxed cigars by a visual inspection.

The Division's unsworn investigative reports contained in the electronic mail of Investigator Connolly, by themselves, are of little probative value with respect to the issue of whether he knowingly purchased untaxed cigars. Five of the six communications stated that they were electronically recorded, but the Division did not submit the recordings or transcripts into

evidence. Further, it is impossible to tell if the reports were fully reproduced in the electronic mail of Investigator Connolly, who did not testify or otherwise explain his transmission of the reports in any fashion.

Investigator Fedele's testimony cannot be accorded equal weight with that of petitioner given its reliance on hearsay, lack of personal knowledge and an inability to demonstrate that petitioner's characterization of the facts was false. In addition, in the absence of any explanation of why the charges against petitioner were dismissed and the records sealed, the Division's failure to gain a conviction against petitioner after a 17-month investigation and prosecution casts serious doubt on its claim that petitioner had committed fraud or deceit as contemplated by Tax Law § 480(3)(b)(i).

D. As mentioned above, the Division has expanded its third basis for proposing to refuse to license petitioner by adding that petitioner committed fraud or deceit in the procurement of a license by submitting incorrect answers to questions on his applications and supporting documentation herein. Specifically, the Division contends that petitioner's answer in the negative to question 16 on the application for a license as a wholesale dealer of tobacco products, questions 10 and 13 of the application for a license as a wholesale cigarette dealer and question 12 of the personal questionnaire were untruthful because of his involvement with Sonny and his role as a controlling person of Sonny. In addition, the Division notes that petitioner untruthfully answered question 11 on the application for a license as a wholesale dealer of tobacco products in denying any outstanding loans to him.

The facts do not support the Division's contention that petitioner committed fraud or deceit in his attempt to procure a license. Petitioner did receive a 6 % interest in Sonny from Prem Singla, who had become the sole owner and shareholder at a previous time. There was no

explanation of the prior transfer other than Prem Singla's affidavit which attested to the fact that it did occur, the credible testimony of petitioner who also attested to this fact and the form DTF-95, dated July 31, 2006, which reported to the Division that petitioner had been added to the corporation as a 6% shareholder with the title of vice president, inferring that Prem Singla had the shares to transfer.

Just as the Division asserted that a license is cancelled by "operation of law" when there is an unauthorized transfer of ownership without notice to it, there was a cancellation of the license held by Sonny when Sanjay Singla transferred 100% of the ownership to Prem Singla. Therefore, the entity in which petitioner was gifted a 6% interest did not have a license and all of his answers with regard to involvement with a company that may have lost its license were accurate. Further, there is no evidence in the record that substantiates any application by Sonny subsequent to its license cancellation which indicated that petitioner was involved in any way. Given these facts, this was petitioner's apparent common sense understanding and interpretation when he answered question 12 of the Wholesale Cigarette Dealer's License application in the negative, which asked if he had an interest in a business that stocked, manufactured or sold cigarettes or tobacco products. By the time petitioner was answering the questions in July 2007, Sonny had been out of business for over ten months.

Finally, the allegations with respect to the failure to accurately answer the question concerning loans outstanding must be considered inconsequential error. The loan from Prem Singla was contained in his statement of financial condition which was submitted with his personal questionnaire. When questioned about it further in the correspondence, he sent copies of the note, bank statements and a cancelled check. There was no intent to deceive or act in a

fraudulent manner. The funding was satisfactorily explained by intra-family gifts and loans and salary.

For these reasons, it is concluded that the entries on petitioner's applications herein did not support the Division's third stated basis for its proposed refusal to register.

E. In each of its three bases for proposing to deny petitioner's applications for licenses, the Division cited Tax Law § 480(2)(e), which speaks solely to the commission of certain acts by "any controlling person of such applicant." The term "controlling person" as used in this section is defined in Tax Law § 480(6)(a) and (b) as an officer, director or partner of an applicant or as a shareholder, directly or indirectly owning more than 10% of the shares of stock of the applicant (25% in the case of an applicant with 4 or fewer shareholders). (*See also* 20 NYCRR 72.2[a][2].) Since petitioner, the applicant herein, was an individual and not a corporation, the subsection is not applicable to him by definition in his current application as an individual.

In repeatedly referring to petitioner as a "controlling person," it was not readily discernible whether the Division was arguing that petitioner and Sonny have a single identity, interest or represent a continuing enterprise. However, it never articulated such an argument and there is little, if any, evidence in this record to support such theories.

It is noteworthy that several of the subsections of Tax Law § 480(2) specifically differentiate between "applicants" and "controlling persons" (Tax Law § 480[2][a], [b], [c], [f]), underscoring an intent to treat each differently for purposes of ascertaining if a license should be refused or granted. The legislative differentiation does not lend itself to an interpretation that the terms could be used interchangeably.

To the extent that the application for a license as a wholesale cigarette dealer and the personal questionnaire modify the statutory definition of "controlling person" such definition

contained in those two forms is in error. The application and personal questionnaire are creations of the Division used to examine applicants for licenses issued under Article 20 and they must conform to the statutory and regulatory language to promulgate the meaning and intent of the legislature. “An administrative practice contrary to or inconsistent with the statute is without legal effect and will be disregarded by the courts.” (*In re Billings’ Estate*, 70 NYS2d 191 [1947].)

F. The petition of Ashok Kumar is granted, and the Division of Taxation is directed to register petitioner as a wholesale dealer of cigarettes and as a wholesale dealer of tobacco products under Articles 20 and 20-A of the New York State Tax Law.

DATED: Troy, New York
May 9, 2008

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE