

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ZHEN C. YI	:	DETERMINATION
	:	DTA NO. 822491
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for	:	
Period Ended April 16, 2008.	:	

Petitioner, Zhen C. Yi, 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 April 16, 2008.

A hearing was commenced before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 16, 2009, at 10:30 A.M. All briefs were to be submitted by October 23, 2009, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. 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. On the afternoon of April 16, 2008, the New York Police Department (NYPD), 72nd Precinct Intel Unit, executed a search warrant for the basement at 2907 Fort Hamilton Parkway in

Brooklyn, New York. The executed warrant resulted in the arrest of two individuals, Zhen C. Yi (petitioner) and Chuangeng Pan, who were observed by NYPD officers to be in possession and control of 767 cartons of untaxed cigarettes and assorted counterfeit designer handbags.

2. As a result of the arrest, petitioner was charged with the following offenses:

- (a) Trademark Counterfeiting 1st degree, a class C felony
- (b) Trademark Counterfeiting 2nd degree, a class E felony
- (c) Attempt to Evade Tax, a class E felony
- (d) Possession over 150 cartons, a class D felony

3. The 767 cartons of untaxed cigarettes were seized and vouchered by the NYPD on NYPD property and transported to the NYPD evidence storage facility.

4. On April 17, 2008, senior investigators from the Petroleum, Alcohol and Tobacco Bureau of the Office of Tax Enforcement (OTE) of the Division of Taxation (Division) met with the arresting officer from the NYPD. The investigators were advised of the events surrounding the arrest of petitioner and were provided a copy of the arrest report and property invoice, so the matter could be referred to the Division for the issuance of a civil assessment.

5. The Division issued to petitioner a Notice of Determination dated August 11, 2008, which asserted penalty of \$114,300.00. The notice referred to a "Tax Period Ended" date of April 16, 2008, and advised petitioner as follows:

On 04/16/08, 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.

6. The April 16, 2008 date on the statutory notice results from the fact that petitioner was arrested on that date in connection with the NYPD criminal investigation. The civil penalty imposed pursuant to the Tax Law is \$150.00 per carton in excess of five cartons. Thus, 762 cartons multiplied by \$150.00 per carton resulted in the penalty of \$114,300.00.

7. On October 31, 2008, petitioner pled guilty to the violation of lesser offenses than he was originally charged with: Penal Law § 165.71, trademark counterfeiting in the 3rd degree, and Penal Law § 110, attempt to commit a crime, in satisfaction of all the criminal charges. A certificate of disposition was made a part of the hearing record.

8. Petitioner filed a petition with the Division of Tax Appeals, and a hearing in this matter was held on April 16, 2009, where petitioner testified through an interpreter to explain why he was present at that location on April 16, 2008.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner maintains he should not be subject to this penalty because he does not own the cigarettes and he was merely visiting a friend who had asked him to help unload some boxes, the contents of which he claimed not to know.

10. The Division asserts that petitioner was in possession and control of unstamped or unlawfully stamped cigarettes and was therefore properly assessed the penalty.

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. 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. The Division’s investigator credibly testified that he was contacted by the NYPD the day following the arrest of petitioner and Mr. Pan and was provided the details of the events of the previous day and a report filed by the NYPD on the day of the arrest. Petitioner acknowledged he was at the specified location helping Mr. Pan unload boxes from a vehicle into the basement. In fact, petitioner’s testimony revealed that the NYPD arrived on the scene “at the same time while he was unloading the boxes. . . .” (Tr. 32). In later testimony, petitioner attempted to minimize his involvement by testifying that he was not actually moving boxes and that he did not know his friend was doing something illegal, though he admittedly understood after the fact that the activity was not legal. Petitioner argued the cigarettes were not owned by

him and asserted there was a third party involved who fled from the scene while the arrest was being made and that is the person who should be held responsible.

The report filed by the NYPD, contemporaneous to the arresting event, did not mention a third party co-conspirator, nor did the NYPD indicate that there was a person fleeing the scene of the crime when meeting with the Division's investigator. Although petitioner's testimony in this regard is wholly unsupported by the evidence, even if there had been a third party, Tax Law § 481 creates joint and several liability by assessing a penalty against any person found in possession or having control of the requisite unstamped or illegally stamped cigarettes. Simply, if another party was also responsible for the illegal activity, he would be assessed the penalty in addition to petitioner, not instead of him. Thus, petitioner's testimony regarding the guilt of another person who fled the scene is disregarded.

Petitioner's contradictory statements at the hearing about the events on the day of the arrest followed the Division's presentation at the hearing of its position as to possession and control of the cigarettes. Although petitioner testified through an interpreter in this matter, he appeared to fully understand the facts herein and the consequences of his actions. He offered no further evidence to refute the evidence of possession presented against him. Accordingly, the Division properly assessed the civil penalty against petitioner.

E. The petition of Zhen C. Yi is denied and the Notice of Determination, dated August 11, 2008, is sustained.

DATED: Troy, New York
April 22, 2010

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE