

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SHOULONG ZHENG	:	DECISION
for Revision of a Determination or for Refund of Cigarette	:	DTA NO. 829172
Tax under Article 20 of the Tax Law for the Period	:	
June 28, 2017.	:	

Petitioner, Shoulong Zheng, filed an exception to the determination of the Administrative Law Judge issued on February 28, 2021. Petitioner appeared by the Law Offices of Robert N. Lerner (Robert N. Lerner, Esq., of counsel) on brief and pro se at oral argument. The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel).

Petitioner filed a brief in support of the exception.¹ The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was heard by teleconference on June 23, 2022.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner was in possession or control of unstamped or unlawfully stamped cigarettes to be liable for the penalty imposed pursuant to Tax Law § 481 (1) (b) (i).

¹ The Division argues that petitioner's brief was late-filed and should not be considered. The Secretary to the Tax Appeals Tribunal granted petitioner extensions of time until June 1, 2021 to file his brief, which he filed on June 2, 2021. This Tribunal may, in its discretion, accept late-filed, non-jurisdictional documents (*Matter of DeMartino*, Tax Appeals Tribunal, December 16, 2016). We have exercised our discretion here and have accepted petitioner's brief in support of his exception.

II. Whether the Division of Taxation properly assessed penalty against petitioner pursuant to Tax Law § 481 (1) (b) (i).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 1, 14 and 15 to reflect the record more fully. As so modified, the Administrative Law Judge's findings of fact appear below.

1. The Division of Taxation (Division) brought a motion, dated October 21, 2020, seeking summary determination in its favor in the present matter pursuant to the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). The subject of the Division's motion is petitioner's protest of a notice of determination L-047504171 (notice), dated December 8, 2017, issued to petitioner, and assessing penalties for the period ended June 28, 2017, in the amount of \$572,580.00. The penalties are premised upon the Division's assertion that petitioner was in possession of 959.3 cartons of unstamped or unlawfully stamped cigarettes in violation of Tax Law article 20.

2. Petitioner filed a request for conciliation conference (Conciliation Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the foregoing notice. A conciliation conference was held July 9, 2018, and on October 19, 2018, BCMS issued a conciliation order (CMS No. 000301784) sustaining the notice. Petitioner continued his challenge by filing a petition with the Division of Tax Appeals. The petition is dated as signed on January 10, 2019, was mailed by United State Postal Service (USPS) priority 2-day mail on January 11, 2019, and is date-stamped as received by the Division of Tax Appeals on January 14, 2019. There is no dispute that the petition was timely filed.

3. In support of its motion, the Division submitted the following documents: (i) an affirmation, dated October 21, 2020, of Brian Evans, Esq.; and (ii) an affidavit, dated October 14, 2020, of Robert Bergeson, a Forensic Tax Auditor II employed by the Division, accompanied by attached exhibits, including Division's investigation file and its audit file in support of the calculation and basis for issuance of the subject notice. Mr. Bergeson has been employed by the Division for 19 years and has held his current position as a Cigarette Strike Force Team Leader for the past six years.

4. As set forth in numerous reports of investigation statements and attached supporting documents included in and comprising the Division's investigation file, this matter commenced in early February of 2017, when the Division received information from a reliable source concerning an advertisement on the "We Chat" mobile phone application, offering "Chinese, Korean and Japanese Cigarettes" for sale. The information included photographs of cigarette packs and cartons, and a telephone number.

5. In response to this information, the Division initiated a Criminal Investigations Division (CID) field operation, conducting an investigation in conjunction with other governmental agencies including Homeland Security and the Kings County District Attorney's Office. Surveillance was focused on an apartment building located on 8th Avenue in Brooklyn, New York, and on a gray Acura MDX automobile, and included the use of an undercover agent making ongoing purchases of cartons of cigarettes from an unknown male. Department of Motor Vehicle (DMV) records revealed the name of the hitherto unknown male and confirmed that he was the registered owner of the Acura automobile, with his address listed as Apartment

2 F in the same 8th Avenue apartment building in Brooklyn, New York, that was the focus of the Division's surveillance.

6. The undercover agent made ongoing purchases of cartons of cigarettes through telephone calls to the above-referenced number, speaking with the same person on each such call. Purchases on May 5, 2017, and June 5, 2017, were made by the undercover agent. The purchase in each such instance consisted of two cartons of Marlboro cigarettes bearing Virginia cigarette stamps.²

7. On June 13, 2017, a member of the Division's CID, together with an agent from Homeland Security, met and attempted to conduct a "knock and talk" at the 8th Avenue premises. The three-story building at that address includes commercial establishments on the ground floor, with residential apartments located on the upper floors. The entrance to the upper floors was gated, and locked when the agents arrived. A male approached the gated entrance, and identified himself as petitioner, Shoulong Zheng. He informed the agents that the second floor of the building consists of two apartments, and that he lives in the apartment in the front of the building, identified as Apartment 2 F. He did not allow the agents access into the residence.

8. On June 14, 2017, an additional purchase of contraband cigarettes was made by the undercover agent. As before, the contraband in this instance consisted of two cartons of Marlboro cigarettes bearing Virginia cigarette tax stamps.

9. Based upon the ongoing purchases described herein, and upon background information searches conducted by the CID, the main subject of the investigation was confirmed

² The cigarettes in question bore Virginia tax stamps, and did not bear New York State tax stamps. Certain other cigarettes seized in connection with the execution of search warrants likewise bore Virginia tax stamps or no tax stamps at all (*see* finding of fact 11). All packages of cigarettes in New York State, other than those possessed by, or in transport on behalf of, licensed New York State stamping agents or distributors must bear affixed New York State tax stamps (*see* Tax Law § 471). Packages of cigarettes that bear a tax stamp of another state are considered to be unstamped (Tax Law § 470 [13]). Hence, all of the packages in question in this matter were unstamped. Such cigarettes are sometimes referred to herein as contraband cigarettes.

to be petitioner, Shoulong Zheng. More specifically, the undercover agent compared petitioner's DMV photograph and a photo of petitioner taken during the May 5, 2017, purchase of contraband cigarettes, and identified petitioner as the person with whom he had been dealing since the inception of the investigation. Petitioner was also identified as the other person leaving the same apartment on 8th Avenue on June 14, 2017, in possession of the contraband cigarettes that were sold to the undercover agent on the same date. The actual transfer of the contraband cigarettes to the undercover agent on that date was made by a person fitting the description of the owner of the Acura automobile. Further, the owner of the Acura automobile was driving that vehicle when petitioner was observed offloading contraband cigarettes from the vehicle into the same apartment on 8th Avenue. The owner of the Acura automobile was identified in the Division's documents as a "co-conspirator." He is not a party to this proceeding, and his name has been redacted from the documents provided herein.

10. On June 27, 2017, two warrants were issued by Kings County Supreme Court Justice Evelyn Laporte authorizing the search of the premises at the same apartment on 8th Avenue, and of the Acura automobile, and of persons present therein, and the seizure of any property found in the premises or automobile, or on such persons, related to the alleged commission of several crimes involving the possession, control or sale of contraband (i.e., unstamped or unlawfully stamped) cigarettes, as specified in each of the search warrants.

11. On June 28, 2017, CID-Cigarette Strike Force agents, together with officers of the New York City Sheriff's Department and agents from Homeland Security, executed the foregoing search warrants, as follows:

a) Petitioner was observed exiting the apartment premises carrying a black plastic bag in the shape and size of approximately two cartons of cigarettes, entering the Acura automobile, and

driving away from the premises. Petitioner met with the undercover agent, where he exchanged the bag for cash and then drove off. The bag contained two cartons of cigarettes with Virginia tax stamps affixed. CID agents followed and stopped the vehicle, petitioner was apprehended, and was transported to the apartment premises.

b) Agents and officers from the above-described agencies arrived at the apartment premises and entered the building using keys found on petitioner's person. Upon entering the building and heading upstairs, the agents observed the co-conspirator leave Apartment 2 F and head up the steps toward the third floor. He was detained and placed under arrest.

c) Using the same keys, the agents entered Apartment 2 F, to execute the search warrant at those premises. At approximately the same time, the vehicle search warrant was executed.

d) The search of the vehicle resulted in the recovery of eight cartons of unstamped or illegally stamped cigarettes, as well as \$116.00 U.S. currency (USC) located in the center console of the vehicle. That USC was compared to a photocopy of the USC given to the undercover agent earlier that day in connection with his purchase of two cartons of cigarettes (*see* finding of fact 11 [a]), and the serial numbers matched. Additional property recovered from the vehicle included two iPhones, and several miscellaneous documents, as well as a driver's license.

e) The search of the apartment resulted in the recovery of 959.3 cartons of unstamped or illegally stamped cigarettes and additional items of property. Specifically, in the kitchen and dining area, a total of 331 cartons of contraband cigarettes were recovered, consisting of 0.9 carton located in a white shopping bag hanging on a wall in the kitchen area, 7.4 cartons located on a shelf under the microwave in the kitchen area, and 323 cartons located in a closet in the dining area. In one of two bedrooms, a total of 628 cartons of contraband cigarettes were recovered. Additionally, \$6,841.00 in USC was recovered from various locations in the

apartment, and from the front pockets of petitioner and of the co-conspirator, as well as one Dell Inspiron One monitor, a Dell AC adapter, two white iPhones, business cards, two black and white composition notebooks, a yellow envelope, and several miscellaneous bank records.

f) In addition to the USC noted above, the search of petitioner's person recovered one key chain (presumably holding the key used to access the building and the apartment), and a bank check. In addition to the USC noted above, the search of the co-conspirator's person recovered one white iPhone.

12. Review of the documents attached reveals that all of the foregoing property recovered was properly vouchered into custody, as recorded on multiple forms EN-651 (Office of Tax Enforcement Property Receipt/Release), each of which bears a voucher number and identifies the particular property included thereon.

13. Petitioner was arrested and charged with several crimes under Tax Law article 37, including attempt to evade or defeat taxes imposed on 10,000 or more cigarettes (Tax Law § 1814 [a] [1]), a class E felony; possession or transport for sale any unstamped or unlawfully stamped cigarettes (Tax Law § 1814 [b]), a class A misdemeanor; possession or transport of 10,000 or more cigarettes for the purpose of sale (Tax Law § 1814 [c] [1]), a class E felony; possession or transport of 30,000 or more cigarettes for the purpose of sale (Tax Law § 1814 [c] [2]), a class D felony. Several like charges were also lodged against petitioner under the New York City Administrative Code §§ 11-4012 (a) (1), (b), (c) (1).

14. Documents concerning the criminal proceeding were included as part of the Division's investigative report. Although petitioner was charged with multiple felonies, this case did not proceed to a grand jury. Rather, petitioner pled guilty to the class A misdemeanor charge of possession of untaxed cigarettes with intent to sell (Tax Law § 1814 [b]), in full

satisfaction of the charges filed against him. In the transcript of his guilty plea, petitioner admitted to possessing cartons of unstamped cigarettes in the vicinity of the address of the apartment at the time of the execution of the search warrant. As part of his October 10, 2017, plea agreement, petitioner agreed to pay to the Division the amount of \$11,309.00 (comprised of his forfeiture of cash found on his person and seized from him at the time of the execution of the search warrants on June 28, 2017, plus an additional payment of \$5,000.00 made at the time of his guilty plea). Paragraph 6 of the stipulation and assignment executed at the time of his plea agreement indicates that this payment was accepted as the New York State excise tax on “the cigarettes previously seized” pursuant to the search warrants executed on June 28, 2017.³

15. In paragraph 5 of the stipulation and assignment, petitioner agrees to forfeit “all my right, title, and interest in the following property, which was previously seized pursuant to [the] search warrant” The property is identified in the next sentence as the seized U.S. currency. In paragraph 7 of the stipulation and assignment, petitioner admits that he was the sole and exclusive owner of “this seized property” and in paragraph 8 petitioner concedes that “all of this seized property” was the proceeds, substituted proceeds, or instrumentalities of felony crime. Petitioner also agrees in the stipulation and assignment that the \$11,309.00 amount paid as excise tax does not include civil penalties and interest owed to the Division for the cigarettes recovered from the Acura automobile or from the 8th Avenue apartment.

16. After criminal disposition of a cigarette tax case, the investigation file is referred to the Division’s audit group for any civil assessment. The affidavit of Robert Bergeron, who is

³ The Division initially computed excise tax in the amount of \$41,309.00, calculated based on the number of packs of cigarettes seized (9,593) multiplied by the applicable excise tax rate of \$4.35 per pack of cigarettes in accordance with Tax Law § 471 (1). However, the plea agreement bears out that the \$11,309.00 amount denominated as excise tax was accepted and agreed to as such by the Division.

the Cigarette Strike Force audit team leader, set forth the Division's calculation of the \$572,580.00 penalty at issue is follows:

number of cartons of cigarettes seized upon execution of search warrants....	959.3
less: number of cartons of cigarettes exempted from penalty.....	(5.0)
number of cartons subject to penalty under Tax Law § 481 (1) (b) (i) (A)....	954.3
penalty imposed per carton or fraction thereof.....	\$600.00
penalty amount assessed.....	\$572,580.00

17. Petitioner alleged, in his petition, that he did not have dominion and control over the cigarettes seized and that his tenancy rights to the apartment unit did not establish such dominion and control. Petitioner also alleged that there are constitutional issues involving the arbitrary and capricious designation of penalties. Petitioner did not respond to the Division's motion for summary determination.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the standards for the granting of a summary determination motion and Tax Law provisions authorizing the imposition of penalties for possession or control of unstamped cigarettes. The Administrative Law Judge then found that the petition's allegation that petitioner did not have dominion or control over the seized contraband cigarettes was unsubstantiated and therefore insufficient to raise an issue of fact requiring a hearing. By petitioner's failure to respond to the Division's motion, the Administrative Law Judge determined that petitioner is deemed to have conceded that no questions of fact requiring a hearing exist. The Administrative Law Judge further determined that the evidence submitted in support of the motion showed that petitioner was in possession or control of the cigarettes in question and was therefore properly subject to the penalty at issue. The Administrative Law Judge rejected petitioner's constitutional claim that the imposition of

penalties in the present matter was arbitrary and capricious. The Administrative Law Judge thus granted the Division's motion, denied the petition, and sustained the notice of determination.

ARGUMENTS ON EXCEPTION

Petitioner contends that there is insufficient evidence in the record to establish that he had dominion and control over the contraband cigarettes seized from the apartment. Petitioner argues that legal access to or presence in the apartment is merely one factor in determining dominion and control of contraband found therein. Petitioner also contends that there is insufficient evidence to establish whether the seized cigarettes were in plain view or in proximity to petitioner within the apartment, another factor in determining dominion and control. Petitioner further asserts that the Administrative Law Judge's finding that petitioner admitted to ownership of the contraband cigarettes in the plea agreement was erroneous and that neither the plea stipulation nor the plea transcript support such a finding.

Petitioner also contends that the scheme by which penalties are imposed under Tax Law § 481 (1) (b) is arbitrary and capricious because the greater the inventory a seller of illegal cigarettes has, the greater the penalty. Hence, according to petitioner, the more successful seller will face a lower penalty because such a seller's inventory will have been sold.

The Division contends that the Administrative Law Judge properly determined that petitioner conceded that no material issues of fact exist herein by his failure to respond to the motion. The Division further contends that the evidence submitted with its motion is sufficient to meet its burden of proof and that petitioner's unsubstantiated allegations made in its petition are insufficient to raise an issue of fact requiring a hearing.

The Division also argues that, because of his guilty plea, petitioner is collaterally estopped from contesting that he did not possess or control the contraband cigarettes seized from the apartment on June 28, 2017.

OPINION

Article 20 of the Tax Law imposes an excise tax of \$4.35 per pack of 20 cigarettes on “all cigarettes possessed in the state by any person for sale” (Tax Law § 471 [1]). The tax is “advanced and paid” by licensed cigarette agents who purchase and affix stamps to each package to show payment (Tax Law § 471 [2]; *see also* 20 NYCRR 74.1 [b] [1], 74.2 [a]). The tax is then incorporated into the price of the cigarettes as they are resold to dealers and, ultimately, to consumers (*see* Tax Law § 471 [2], 20 NYCRR 74.1 [b] [2] [i]).

Possession of more than 400 cigarettes (i.e., 20 packages or two cartons) in unstamped or unlawfully stamped packages by any person other than an agent or distributor is presumptive evidence that such cigarettes are subject to the tax and the burden is on the person in possession to prove otherwise (Tax Law § 481 [2] [a]). Petitioner is not an agent or distributor under article 20.

Among the penalties enacted to ensure compliance with article 20, Tax Law § 481 (1) (b) (i) (A) provides for a penalty of not more than \$600.00 for each two hundred cigarettes (i.e., one carton), or fraction thereof, in excess of one thousand cigarettes (five cartons) in unstamped or unlawfully stamped packages “in the possession or under the control of any person.” The notice of determination asserted such a penalty against petitioner at an amount equal to the maximum \$600.00 per carton for 954.3 cartons seized pursuant to the search warrant (*see* finding of fact 16).

The Tax Law also provides for criminal penalties related to the avoidance or evasion of

the taxes imposed on cigarettes. As noted, petitioner pled guilty to one such provision, Tax Law § 1814 (b), which criminally penalizes any person (other than a licensed agent) “who possesses or transports for the purpose of sale” unstamped or unlawfully stamped cigarettes taxable under Tax Law § 471, or “who sells or offers for sale” unstamped or unlawfully stamped cigarettes in violation of article 20 of the Tax Law.

The determination granted the Division’s motion for summary determination. Such a motion is properly granted “if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented” (20 NYCRR 3000.9 [b] [1]). A summary determination motion is subject to the same provisions as a summary judgment motion under CPLR 3212 (20 NYCRR 3000.9 [c]).

The standards for granting a motion for summary judgment are well established. “Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). “[T]he proponent of a summary judgment motion must make a prima facie showing of absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Indeed, “[a] summary judgment motion should not be granted merely because the party against whom judgment is sought failed to submit papers in opposition to the motion” (*Liberty Taxi Mgt., Inc. v Gincheran*, 32 AD3d 276, 278 footnote [1st Dept 2006]).

Assuming the movant makes a prima facie case, the opponent “must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on

which he rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1992]). In a motion for summary judgment, the facts must be viewed “in the light most favorable” to the non-moving party (*Otiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 [2011]).

Petitioner did not respond to the Division’s motion and has thus offered no evidence to contest the facts asserted in the Division’s motion papers. Accordingly, those facts are deemed admitted (*Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]).

Specifically, the facts asserted in the Division’s motion papers show that petitioner pled guilty to possession or control of contraband cigarettes with intent to sell at the time of the execution of the search warrant and in the vicinity of the apartment (finding of fact 14). Petitioner also admitted to ownership of the seized cash and that such cash was obtained through criminal activity (finding of fact 15). That the criminal activity in question was the possession and sale of contraband cigarettes is established by petitioner’s agreement to pay \$11,309.00 to the Division as the excise tax on the seized contraband cigarettes as part of his plea deal (finding of fact 14). Consistent with petitioner’s admissions, the Division’s motion papers show that petitioner possessed a key to the apartment and that he held himself out as a resident of, and had regular access to, the apartment (findings of fact 7, 11 [b], [c]). Petitioner thus had control of the premises. The motion papers also show that petitioner previously brought contraband cigarettes into the apartment (finding of fact 9) and removed contraband cigarettes from the apartment to sell to undercover agents (finding of fact 11 [a]). Moreover, the facts show that petitioner sold contraband cigarettes to undercover agents on multiple occasions (findings of fact 9 and 11 [a]).

Taken together, facts asserted in the Division's motion papers show that petitioner was engaged in the sale of contraband cigarettes on an ongoing basis; that he used the apartment (premises that he controlled) as the base from which he made his sales; and that he was aware, accordingly, that contraband cigarettes were present in the apartment. This is prima facie evidence that petitioner possessed or controlled, within the meaning of Tax Law § 481 (1) (b), the 959.3 cartons of unstamped or illegally stamped cigarettes seized from the apartment on June 28, 2017.

Relying on the fact that neither the transcript of his guilty plea nor the related stipulation and assignment states the number of cigarettes that he possessed on the date in question, petitioner argues that the Division's evidence falls short of a prima facie case of possession or control of all 959.3 cartons seized from the apartment. Specifically, petitioner contends that "mere access" to the apartment or "even legal, possessory rights" to the apartment are insufficient to infer possession or control of all of the contraband found therein. Our conclusion, however, is based on more than petitioner's access to or right to use the apartment. As noted above, we have also considered his participation in the sale of contraband cigarettes on multiple occasions, his use of the apartment as his base to conduct those sales, his acknowledged ownership of money derived from such sales that was found on the premises, as well as his guilty plea.

Petitioner further contends that the record does not show his proximity to the seized cigarettes or whether the seized cigarettes were in plain view. Petitioner argues that these factors must be considered in determining whether petitioner was in possession and control of all the contraband cigarettes seized from the apartment. Petitioner asserts that these factors are particularly significant here because petitioner's co-conspirator was also involved in the sale of

contraband cigarettes and had access to the apartment. We disagree. As discussed, we find that the facts asserted in the Division's motion papers establish a prima facie case for petitioner's possession and control of the contraband cigarettes. If there is evidence suggesting that petitioner was not in possession or control of the cigarettes seized from the apartment, it was incumbent upon petitioner to submit such evidence in opposition to the Division's motion and to thereby show a material and triable issue of fact. Petitioner submitted no such evidence.

Petitioner's argument that Tax Law § 481 (1) (b) is arbitrary and capricious appears to attack the facial validity of that statute. We lack authority to consider such an argument (*Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003). To the extent that petitioner makes an as-applied argument, the Administrative Law Judge correctly determined that the Division may impose the maximum penalty permitted by the statute, as it did here, and is not required to consider mitigating factors (*see Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001, *dismissed on other grounds* 305 AD2d 738 [3d Dept 2003]).

We have not considered the Division's argument regarding collateral estoppel, as the Division first raised this issue in its opposition brief on exception (*see Matter of Klein's Bailey Foods, Inc.*, Tax Appeals Tribunal, August 4, 1988 [by its failure to file an exception, "the Division waived its right to require the Tribunal to review any portion of the Administrative Law Judge's determination"]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Shoulong Zheng is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Shoulong Zheng is denied; and
4. The notice of determination, dated December 8, 2017, is sustained.

DATED: Albany, New York
August 25, 2022

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner