STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PRIYANKA B. PATEL	:	DECISION DTA NO. 829830
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period July 1, 2018 through July 31, 2018.	:	

Petitioner, Priyanka B. Patel, filed an exception to the determination of the Administrative Law Judge issued on December 22, 2022. Petitioner appeared by Philip J. Vecchio, P.C. The Division of Taxation appeared by Amanda Hiller, Esq. (Elizabeth Lyons Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on October 26, 2023, in Albany, New York, which date began the six-month period for issuance of this decision.

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

ISSUES

I. Whether the penalty imposed against petitioner pursuant to Tax Law § 481 (1) (b) (i) was proper.

II. Whether the penalty imposed against petitioner pursuant to Tax Law § 481 (1) (b) (i) was in violation of the New York State and United States Constitutions.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that we have not restated the Administrative Law Judge's finding of fact 24 (rulings on proposed findings of fact). As so modified, the facts are set forth below.

1. On June 20, 2018, Investigators Casey Jensen and Heather Mather from the Criminal Investigations Division of the Division of Taxation (Division) conducted an inspection of Hari Krishna Enterprise, Inc. (Hari Krishna), located on East Main Street, St. Johnsville, New York, in Montgomery County. The clerk of the store informed the investigators that he was only an employee and that a woman was the owner, but she was at a different store. The clerk provided Investigator Jensen with a phone number, which was ultimately the number of petitioner, Priyanka B. Patel, but he was not able to reach anyone that day using that number.

2. During the inspection of Hari Krishna, Investigator Jensen found a total of 389.5 pounds of untaxed loose and chewing tobacco and 2,150 untaxed cigars that the store clerk was not able to produce invoices for from a registered distributor. The investigators then seized the untaxed tobacco and cigars.

3. Investigator Jensen prepared a list of the untaxed tobacco and cigars that were seized using Office of Tax Enforcement Property Receipt/Release, form EN-651 (Property Receipt). The case number assigned to this form was 201800456. At the hearing, Investigator Jensen testified that each receipt of evidence has a unique number. The case number is assigned through the Division's program used to organize its investigations. It is created once the investigators are in the office preparing the report.

4. During the investigation, Investigator Jensen attempted to contact petitioner to find a certificate of registration for 2018 and to determine whether there were any invoices for the tobacco found at Hari Krishna.

5. While researching information regarding Hari Krishna, Investigator Jensen found the Application to Register for a Sales Tax Certificate of Authority for that business that was completed on March 31, 2017. The Certificate provided that petitioner was the president of Hari Krishna and that she owned more than 50% of the shares of stock in that entity. Petitioner was also the one to submit the application.

On the application, petitioner listed a Niskayuna, New York, home address. Niskayuna is in Schenectady County, New York.

6. Petitioner does not dispute that she is the president, shareholder and responsible person of Hari Krishna. She also does not dispute that the tobacco and cigars were untaxed or the amounts of each that were seized.

7. On June 22, 2018, the Division went to petitioner's home in Niskayuna, New York. Petitioner lived in an apartment complex. At that time, Investigator Jensen was still attempting to determine whether petitioner had more invoices for the tobacco that was seized at Hari Krishna. Investigator Jensen knocked on petitioner's door and, when there was no answer, he attempted to call her, but was initially unable to connect.

8. While Investigator Jensen was at petitioner's apartment complex, he noticed a rental Enterprise van parked in the parking lot of the complex. He then walked through the parking lot to the van where he could clearly see boxes labeled with known tobacco brands inside of the back storage compartment of the van. When he saw the boxes, he contacted Enterprise and was informed that the vehicle had been rented by petitioner the day before. At that point, Investigator

Jensen applied for and obtained a search warrant in the City Court for the City of Schenectady, New York.

9. As a result of the search, the Division found 1,021.88875 pounds of untaxed tobacco and 9,423 untaxed cigars. Investigator Jensen prepared a list of the untaxed tobacco and cigars that were seized using a Property Receipt form dated June 22, 2018. The case number assigned to this form was 201800456, the same case number that was used for the seizure on June 20, 2018.

10. At the hearing, Investigator Jensen testified that the Property Receipt had the same case number as the one listing the items seized on June 20, 2018, because at that time he was under the belief that it was going to be the same case. He stated that thereafter, the management team reviewed the case and determined that the seizures happened in separate counties and were separate events, with one being an inspection and one being an execution of a search warrant. After that time, a separate case number was generated for the items seized from the Enterprise van on June 22, 2018.

11. Petitioner does not dispute that the tobacco and cigars were untaxed or the amounts of each that were seized from the Enterprise van.

12. Petitioner was arrested at Hari Krishna for both seizures on June 26, 2018. The offense date for the seizure at Hari Krishna was listed as June 20, 2018, and the arraignment court was set in St. Johnsville in Montgomery County, New York. The offense date for the seizure from the Enterprise van was listed as June 22, 2018, and the arraignment court was set as the Niskayuna Town Court in Schenectady County, New York.

13. Investigator Jensen filed two misdemeanor informations in the St. Johnsville Town Court. One was not dated and listed the offense of "Dealer in Possession of More Than Ten

Pounds Untaxed Tobacco." The second was dated June 28, 2018, and listed the offense of "Dealer in Possession of More Than Five Hundred (500) Untaxed Cigars."

14. Investigator Jensen filed a misdemeanor information on June 28, 2018, and a felony complaint on June 26, 2018, in the Niskayuna Town Court. The felony complaint listed the offense of "Attempt to Evade or Defeat Taxes on Four Hundred Forty (440) or More Pounds of Tobacco." The misdemeanor information listed the offense of "Possession or Transportation of More Than Fifty (50) Pounds of Untaxed Tobacco."

15. On January 23, 2019, petitioner entered a plea of guilty to a violation of Penal Law § 240.20 Disorderly Conduct in the St. Johnsville Village Justice Court and paid restitution of $882.69 before being sentenced to a conditional discharge for one year.

16. On February 19, 2019, the Division issued petitioner notice of determination L-049489230 (the First Notice) assessing a penalty in the amount of $15,000.00 for the untaxed tobacco products seized from Hari Krishna on June 20, 2018. The notice provided that the penalty was imposed because, after an inspection of her premises, petitioner was "found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products." The computation summary section of the First Notice states it was for the "tax period ended" on July 31, 2018.

17. At the hearing in this matter, Richard Seeley testified on behalf of the Division. Mr. Seeley is an auditor with the Division who audits white collar crimes and cigarette and/or tobacco cases. In cigarette and tobacco cases he also prepares the bills, performs the calculations, and looks at all reports that were issued or written by the investigators. Mr. Seeley testified that the reason the tax period listed in the First Notice was for the month of July 2018 instead of the audit period of June 1, 2018 through June 30, 2018, was that at the time this

assessment and the subsequent assessment for the seizure in Niskayuna were issued, the program would not allow the two notices to be issued for the same month. Mr. Seeley testified that because of this, he had to do one assessment for the month of June and the other for the month of July in 2018.

18. On October 11, 2019, petitioner pled guilty to disorderly conduct in the Niskayuna Town Court and made restitution by paying the excise tax in the amount of $7,743.81. Petitioner also paid a penalty of $15,000.00. The tax and penalty were paid by a single check in the amount of $22,743.81. This check was sent under cover letter from the District Attorney's Office in Schenectady, New York, for payment in the matter pending in the Town of Niskayuna Justice Court.

19. On December 20, 2019, the Division issued petitioner notice of determination, L-051102692 assessing a penalty in the amount of $15,000.00 for the untaxed tobacco products seized from the Enterprise van on June 22, 2019 (the Second Notice). In the computation summary section of the Second Notice, it states it was for the "tax period ended" June 30, 2018.

20. Mr. Seeley testified that the Second Notice was generated after the matter in the Town of Niskayuna Justice Court had been resolved with the payment made because he does not issue bills until after he receives information back from the court.

21. Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) protesting the First Notice. By BCMS conciliation order number 000309728, dated November 29, 2019, BCMS sustained the First Notice.

22. Petitioner timely filed a petition asserting that the First Notice should be cancelled because petitioner had already paid full restitution and penalties in the amount of $15,000.00 in the same transaction. Petitioner asserted that the Division seized the untaxed tobacco products

from petitioner within 48 hours from the two places and that they were purchased simultaneously. She claimed that this matter was bifurcated for criminal prosecution but should not be bifurcated for administration of the civil penalties imposed under the Tax Law. Petitioner contended that bifurcating the seizures and assessing two assessments constitutes an excessive fine in violation of the United States Constitution.

23. At the hearing, petitioner presented the testimony of Timothy Nugent. Mr. Nugent is an attorney that practices criminal law and represented petitioner in the matters in the Town of St. Johnsville in Montgomery County and in the Town of Niskayuna in Schenectady County. He testified that he had a meeting with the Division, including Investigator Jensen, and with an assistant district attorney, with regard to the seizures and to determine whether petitioner knew about obtaining untaxed products. Mr. Nugent testified that from the meeting he recollected that petitioner made one purchase of untaxed tobacco products where she was required to have a vehicle to transport the product because she had to meet an unidentified person somewhere to obtain it. It was Mr. Nugent's understanding that petitioner only made one purchase of untaxed tobacco products during the time of the seizures.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the requirements of relevant Tax Law provisions concerning untaxed tobacco products, including those contained in Tax Law §§ 471-b and 481 (1) (b) (i). The Administrative Law Judge noted that it was undisputed between the parties that petitioner was in possession and control of untaxed loose and chewing tobacco and cigars and therefore was liable for the penalty imposed by Tax Law § 481 (1) (b) (i) for the First Notice. Next, the Administrative Law Judge rejected petitioner's contention that the Division lacked the authority to impose a second penalty because this would allegedly "bifurcate" what

should be treated as one incident. The Administrative Law Judge found that there were two penalties imposed for two separate instances on two different days in two different locations where petitioner was in possession or control of untaxed tobacco products. The Administrative Law Judge noted that *had* the seizures been made in two separate incidents at the store, the result would be the same and the fact that one seizure took place in a van does not change this result.

The Administrative Law Judge then turned to petitioner's argument that the penalties imposed were excessive and violative of the United States and New York State Constitutions. She noted that the Tax Appeals Tribunal has held that the imposition of a penalty is within the discretion of the Commissioner and that the only limit is the monetary cap set forth in Tax Law § 481 (1) (b) (i), which was not exceeded here. She further reviewed jurisprudence proscribing the government's power under the Eighth Amendment to extract payments as punishment for crimes when that fine is grossly disproportional to the gravity of a defendant's offense. The Administrative Law Judge noted that, but for the $15,000.00 limit on each penalty, petitioner could have been liable for over $50,000.00 for the Hari Krishna seizure and $150,000.00 for the Enterprise van seizure. Moreover, the Administrative Law Judge found that the enforcement costs to the State in this case and the loss of revenue from untaxed tobacco products more than justifies the penalties imposed, which were not, in the Administrative Law Judge's view, grossly disproportional. Accordingly, the Administrative Law Judge denied the petition.

ARGUMENTS ON EXCEPTION

Petitioner adopts by reference arguments made below and asks for a *de novo* review of the record consistent with this Tribunal's statutory authority. She contends that the Division is circumventing the limitation on civil penalties by assessing two penalties, contrary to Tax Law § 481, for one continuous investigation resulting in the arrest of petitioner on the same date, by

the same investigator, for the events that occurred in both locations. Petitioner next claims that the penalties violate the Double Jeopardy prohibition of the United States Constitution because they act as punishment for the same conduct that underlay the criminal prosecutions. Petitioner also claims that sustaining a separate assessment in each of the two counties would violate the Excessive Punishment clauses of the New York and United States Constitutions.

The Division argues that its imposition of a penalty of $15,000.00 on petitioner for untaxed tobacco and cigars found in a regulatory inspection of her store in St. Johnsville on June 20, 2018, the penalty at issue here, was proper. It asserts that the events that occurred on June 22, 2018, related to a separate search and seizure of a van rented by petitioner. The Division claims that the statutory penalty provided pursuant to Tax Law § 481 (1) (b) (i) applies to the possession or control of tobacco products, and that the two assessments were the result of two separate incidents of possession and control. The Division also argues that petitioner failed to demonstrate that the penalty imposed was excessive.

OPINION

Tax Law § 471-b generally provides that a dealer in tobacco products is liable for the tax on all tobacco products in his or her possession at any time if tax has not been paid on such tobacco products. Tax Law § 470 (7) defines a dealer to include a "retail dealer," which is a person other than a wholesale dealer who is engaged in selling cigarettes or tobacco products. "Tobacco products" are defined as "[a]ny cigar, including a little cigar, or tobacco, other than cigarettes, intended for consumption by smoking, chewing, or as snuff" (Tax Law § 470 [2]). Tax Law § 481 (1) (b) (i) provides that the commissioner may impose a penalty of not more than $150.00 for each 50 cigars or pound of tobacco in excess of 250 cigars or 5 pounds of tobacco in

the possession or under the control of a dealer or distributer where the tobacco products tax has not been paid or assumed by the dealer. However, the penalty imposed pursuant to Tax Law § 418 (1) (b) (i) shall not exceed $15,000.00 in the aggregate.

Petitioner does not dispute that she was a dealer, that she was in possession of untaxed tobacco products or was properly assessed the $15,000.00 penalty for the First Notice. Her sole contention is that Tax Law § 481 (1) (b) (i) only permits the Commissioner to calculate and assess a penalty not to exceed $15,000.00 based on the quantity of untaxed tobacco products "in the possession or under the control" of a dealer and that the Commissioner doubled the permissible penalty by assessing two penalties each of $15,000.00 for two separate seizures, one for the seizure of untaxed tobacco products at Hari Krishna and a second assessment as a result of the seizure of untaxed tobacco products from the Enterprise van she rented.

Petitioner contends that what should have been one civil penalty of $15,000.00 was bifurcated into two penalties of $15,000.00, each based on the two seizures two days apart in different locations. As evidence of this alleged bifurcation, she noted there was one investigation, one arrest and one case number, which was later changed to two separate numbers. Petitioner's argument can be reduced to the contention that she possessed all of the untaxed tobacco at the same time even if the investigator did not find it all at once.

While an individual may be simultaneously in possession and control of different items in different locations, the burden is on petitioner to adduce sufficient facts to establish that only one penalty is appropriate for one overall quantity of untaxed tobacco in her possession and control at the same time. The evidence in the record does not support such a finding.

The evidence indicates that petitioner had a volume of untaxed tobacco products at the Hari Krishna store, which were seized; that one day later, an Enterprise van was rented; and that

another day later, additional tobacco products were seized from inside that van. These constitute two seizures and two apparently separate instances of possession and control. Indeed, when asked at oral argument if there was any evidence in the record establishing that petitioner had been in possession and control of all of the seized tobacco at the same time, her counsel conceded there was not, but contended that "common sense" would indicate that she had all the tobacco at the same time. This is insufficient.

Petitioner's interwoven constitutional claims as to how the two penalties violate either or both of the Double Jeopardy Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment to the United States Constitution are similarly unavailing. Petitioner relies on ***United States v Halper*** 490 US 435 (1989), which held that a disproportionately large civil sanction could constitute a second punishment in violation of double jeopardy (***id.*** at 443). The ***Halper*** Court found that a fine had to be rationally related to the loss suffered by the government, and if not, the lack of proportionality would not be considered remedial but rather deterrent or retributive (***id.*** at 449-52). The Court stressed that this was a "rare" case and the government could assess a civil penalty that had a rational relationship to the damages suffered by the government. However, ***Halper*** and its progeny were subsequently disavowed by the Supreme Court.

In ***Hudson v United States***, 522 US 93 (1997), the Supreme Court granted certiorari to address the "wide variety of novel double jeopardy claims spawned in the wake of ***Halper***" (***id.*** at 98). In ***Hudson***, a chairman of a bank was debarred and fined by the Office of the Comptroller of the Currency for violating several banking statutes and was later indicted for the same conduct. In reviewing whether the indictment violated the Double Jeopardy Clause of the Fifth Amendment, the Supreme Court rejected the ***Halper*** Court's "excessive civil penalty"

analysis in finding that the civil fines and debarment previously imposed were not "criminal punishment" in the sense required to trigger the protection of the Double Jeopardy Clause (***id.*** at 105). In doing so, the Court relied on the distinction between civil and criminal penalties set forth in ***United States v Ward***, 448 US 242, 248 (1980) namely: (1) whether the penalty was intended to be civil or criminal; and (2) whether, considering several factors, the defendant could establish by clearest proof that the civil sanction is so punitive on its face as to be transformed to the level of a criminal prosecution.

Here, it is clear that the penalties assessed by the Division were civil in nature and were assessed under civil statutory authority. As for its punitive nature, the statutory cap on the size of the fines imposed limited each fine to $15,000.00, a figure that does not appear to be sufficiently criminal in scope or excessive in size to equate with criminal prosecution. Nor has petitioner brought forth any cases where a fine of similar size was held to trigger the Double Jeopardy Clause.

The ***Hudson*** Court did reiterate that the Eighth Amendment protects against excessive civil fines and petitioner contends that the second $15,000.00 fine violates the Excessive Fines Clause of the United States Constitution. However, petitioner's argument is premised on her contention that there was only one incident of possession and control of untaxed tobacco products and that, accordingly, the penalty should have been limited to $15,000.00, which she alleges is the maximum allowed under Tax Law § 481.

In ***Austin v United States***, 509 US 602 (1993), the Supreme Court considered a drug-related forfeiture and stated that the pertinent question in whether the Excessive Fines Clause analysis applies is "not . . . whether forfeiture . . . is civil or criminal, but rather, whether it is punishment." Having found that civil forfeiture actions were in part punitive, it remanded for

consideration of whether forfeiture of a drug dealer's mobile home and a body shop was excessive. Similarly, a penalty is excessive for purposes of the Excessive Fines Clause of the New York State Constitution if it is "grossly disproportional to the gravity of a defendant's offense" (***County of Nassau v Canavan***, 1 NY3d 134, 140, [2003], quoting ***United States v Bajakajian***, 524 US 321, 334 [1998].

Here, petitioner tacitly concedes that the $15,000.00 fine was not excessive as a penalty for one seizure. Her argument is that it only became excessive when it was charged twice for what she claims was really one investigation for one overall possession of untaxed tobacco products. As noted, the defendant did not sustain her burden of establishing that the tobacco products seized at Hari Krishna and those seized two days later from the Enterprise van were simultaneously in her possession and control as Tax Law 481 (1) (b) (i) proscribes. Given the volume of the untaxed tobacco products seized in the course of petitioner's apparently successful business, these penalties do not rise to the level of excessive (***see e.g. United States v United Mine Workers of America***, 330 US 258 [1947] [finding that a $3.5 million fine against a union was excessive but a $700,000.00 fine was not after considering the defendant's resources and the burden the fine would place on the defendant]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Priyanka B. Patel is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Priyanka B. Patel is denied; and

4. The notice of determination numbered L-049489230, dated February 19, 2019, is sustained.

DATED: Albany, New York
February 29, 2024

/s/ Anthony Giardina
Anthony Giardina
President

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

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner