

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SADDAM MASHAAL ALSEMI	:	DETERMINATION DTA NO. 828270
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period April 8, 2016.	:	

Petitioner, Saddam Mashaal Alselmi, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period April 8, 2016.

A formal hearing was held before Kevin R. Law, Administrative Law Judge, in New York, New York, on April 17, 2019, with all briefs to be submitted by September 20, 2019, which date commenced the six-month period for issuance of this determination. Petitioner appeared by appeared by The Antonious Law Firm (Jacqueline S. Kafedjian, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian D. Evans, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. On September 16, 2015, the Division of Taxation’s (Division’s) Criminal Enforcement Division performed a regulatory inspection of Holly Deli and Grocery, Inc. (the deli), located at 2520 Linden Boulevard, Brooklyn, New York. The inspection uncovered 28.5 cartons of untaxed cigarettes. As a result, the deli’s certificate of registration to sell cigarettes was

immediately revoked by the Division. Petitioner, Saddam Mashaal Alselmi, was an employee of the deli; although he was not present when the inspection commenced, he arrived sometime after and told the Division's investigator's that he was the manager. The Division's report of investigations states as follows:

“The inspection revealed a total of 28.5 cartons of various brands . . . Virginia and Georgia stamped cigarettes. Of which 5.0 cartons were in a magnetic trap directly to the right of the register the remaining 23.5 cartons was [sic] in a moving shelf next to the turn table window behind the register.

The store's 2015 C of R was suspended and a Notice of Suspension Letter was issued to the Al Selmi [sic] . . .

Al Selmi [sic] was in charge of the store, he paid vendors. Al Selmi [sic] stated that he has been working at the store for two years. In lieu of arrest this writer issued Al Selmi [sic] a summons # 4417504913 for NYSTL 1814(b) Possession for sale untaxed cigarettes with a court date of 12/10/15 returnable to NY Criminal Court located at 346 Broadway, Manhattan.

At time of inspection Al Selmi [sic] was unable to produce an invoice for cigarettes, but produced an invoice for tobacco from American trading [sic] Corp. The business has a current beer & wine license from SLA. . .

Two additional employees were present identified as Hassan Mahmood Al Manzilli [sic] . . .and Antonio Lora. . .

This writer explained to all present at the business that the owner/manager needs to call NYS DTF regarding his C of R which is currently suspended and that the business cannot sell cigarettes, cigars or tobacco products without it.”

There is no indication that either Mr. Almanzilli or Mr. Lora were issued summons. The criminal charges on the summons issued to petitioner were eventually dismissed.

2. Petitioner testified that he did not realize he was selling untaxed cigarettes prior to the September 16, 2015 regulatory inspection and was assured by the store's owner, Saef Ali, that nothing would happen to him personally if he continued selling untaxed cigarettes. Petitioner stated that he was told that all legal ramifications would fall to the store.

3. As a result of the regulatory inspection, the Division placed the deli and an apartment

located above the deli under surveillance. While under surveillance, the Division's investigators observed what appeared to be cigarettes being delivered to the deli and the apartment on various occasions. Between March 17, 2016 and April 8, 2016, undercover investigators purchased cigarettes bearing Virginia tax stamps from the deli. The purchase price of each of these packs of cigarettes was \$6.50. On April 1 and 8, 2016, petitioner was photographed selling untaxed cigarettes during the undercover cigarette buys. According to the Division's investigator who testified at the hearing in the matter, the average retail price of a pack of cigarettes in New York City during 2016 was approximately \$13.00.

4. The Division introduced various photographs that its investigators took during their surveillance of the deli and the apartment. The photographs generally depict individuals entering and/or exiting the apartment carrying bags and or boxes that the Division believed to be cigarettes based upon the size and shape of the packages. It was the Division's investigator's belief that cigarettes were being stored at the apartment, which was referred to as a "stash." Petitioner is not in any of the photographs taken during the surveillance of the apartment. Mr. Almanzilli, however, appears in several of the photographs.

5. Based upon the surveillance and the undercover cigarette purchases, the Division's investigators obtained search warrants for the deli and for the apartment.

6. On April 8, 2016, the Division executed the search warrants for searches of the apartment and the deli. The search warrant of the apartment yielded 149 cartons of cigarettes bearing Virginia tax stamps and 2 cartons of cigarettes bearing counterfeit New York tax stamps. No one was in the apartment at the time the warrant was executed. The search warrant of the deli uncovered 68.4 cartons of cigarettes. Specifically, 5.8 cartons of cigarettes bearing only New York State tax stamps were found in a black bag behind the register counter; 4.6 cartons of

cigarettes bearing Virginia tax stamps were found in a trap adjacent to the cash register; 1 pack of cigarettes bearing a Virginia tax stamp was found in the cash register; 25.8 cartons of cigarettes bearing Virginia tax stamps and 1 pack of cigarettes with only a New York tax stamp was found in a wall trap next to a turn window near the register counter; and 32 cartons of cigarettes bearing Virginia tax stamps were located in a wall trap between the deli counter and the register counter. When the search warrants were executed, Mr. Almanzilli was in possession of the keys to the deli and the apartment as well as the storage containers in the apartment where the Division's investigators located the untaxed cigarettes uncovered during the search. As a result of the search, the locks to the apartment were damaged. After the search was concluded, the Division's investigators secured it with locks and put the keys on the key ring taken from Mr. Almanzilli that had the store keys on it.

7. During the execution of the search warrant, petitioner told one of the Division's investigators that he was the deli's manager and that he sold the cigarettes for \$6.50 a pack. When the Division's investigator's questioned Mr. Almanzilli, he stated he was an employee and petitioner was the deli's manager.

8. Both petitioner and Mr. Almanzilli were arrested as a result of the untaxed cigarettes seized pursuant to the search warrants. Prior to being brought to the police station, petitioner requested that the Division's investigators give the key ring to Sammy Ali. According to petitioner, Sammy Ali was a friend of the deli's owner, Saef Ali.

9. On the day of petitioner's arrest, a criminal complaint was filed in Kings County that charged him with crimes pursuant to Tax Law §§ 1814 (a) (i); (c) (1); (b) and New York City Administrative Code §§ 11-4012 (a) (1); (b) and (c) (1) relating to the untaxed cigarettes seized during execution of the search warrant at the deli. Mr. Almanzilli was charged with the same

offense as petitioner for the cigarettes seized at the deli and was also charged with a variety of offenses for the cigarettes seized at the apartment,

10. On July 6, 2016, petitioner pled guilty to a disorderly conduct charge and agreed to restitution of \$2,200.00 to be paid to the Division in full satisfaction of the criminal charges filed against him. During the plea hearing, the Assistant District Attorney stated that the plea agreement did not encompass any civil penalties asserted by the Division. Petitioner's defense counsel stated that petitioner understood that to be the case.

11. On September 28, 2016, the Division issued petitioner a notice of determination (notice number L-045485549) which asserted penalty of \$38,040.00 and advised petitioner as follows:

“On 04/08/16, 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.”

12. At the hearing in this matter, petitioner testified that he was never manager of the deli, but merely a cashier. Instead, petitioner testified that Mr. Almanzilli was the deli's manager and lived in the apartment. Petitioner acknowledged that as a result of the September 16, 2015 regulatory inspection, he knew that untaxed cigarettes were being sold, but was assured by the deli's owner that there would no adverse ramifications to him as he was only a cashier.

Petitioner stated that, on April 8, 2016, while he was aware of, and had control of, the cigarettes in an around the register, he had no access to, or knowledge of, the 32 cartons of cigarettes located in the wall trap between the deli counter and the register counter or the 5.8 cartons found in a black bag. Petitioner testified that after his arrest on April 8, 2016, he quit his job at the deli and lost everything. He testified that his wife and child went to stay with her father, and he was forced to stay with a friend who he identified as “Sammy.” When questioned as to Sammy's last

name, petitioner was unwilling or unable to provide a name.

CONCLUSIONS OF LAW

A. Cigarette tax is imposed under Tax Law § 471 (1), which provides as follows:

“There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale . . . [s]uch tax on cigarettes shall be at the rate of four dollars and thirty-five cents for each twenty cigarettes or fraction thereof . . . [s]uch tax is intended to be imposed upon only one sale of the same package of cigarettes. It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof.”

B. In order to discourage the sale of untaxed cigarettes, Tax Law § 481 (1) (b) (i) provides for the imposition of penalty, in relevant part, as follows:

“In addition to any other penalty imposed by this article, the commissioner may (A) impose a penalty of not more than six hundred 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. . .”

C. In this case, petitioner was issued a notice of determination that asserted penalty pursuant to Tax Law § 481 (1) (b) (i), for the untaxed cigarettes (in excess of 1,000) seized in Holly Deli on April 8, 2016. Petitioner contends that the notice should be cancelled as he had neither possession nor control of the cigarettes because he was simply a cashier at the store and not a manager or in charge of the store. In the alternative, petitioner contends that if his status as a cashier made him in possession and/or control of the cigarettes, the penalty should be based on only those cigarettes at or near the register and not the cigarettes that were located between the register counter and the deli counter because he neither had the keys to access the cigarettes or knowledge thereof.

D. The burden of proof is upon petitioner to prove, by clear and convincing evidence, that the Division improperly assessed penalty in this matter (*Matter of Vinter*, Tax Appeals Tribunal,

September 27, 2001, *dismissed on other grounds sub nom Matter of Vinter v Commissioner or Taxation and Fin.*, 305 AD2d 738 [3d Dept 2003]; *Jay's Distributors, Inc. v Boone*, 148 AD3d 1237 [3d Dept 2017] *lv denied* 29 NY3d 918 [2017] *rearg denied* 30 NY3d 1039 [2017]).

Careful review of the record and evaluation of the witness testimony adduced at hearing leads to the conclusion that petitioner has not clearly and convincingly met his burden of establishing that the notice of determination should be cancelled or modified. “To meet the clear and convincing evidence standard of proof, a party must adduce evidence that makes it highly probable that what he or she claims is what actually happened” (*Krol v Eckman*, 256 AD2d 945, 947 [3d Dept 1998] *citing* Prince, Richardson on Evidence § 3–205, at 104 [Farrell 11th ed]). Here, there is conflicting testimony as to whether petitioner was manager of the deli or simply an employee. While petitioner alleges he was merely a cashier, the Division’s investigative reports and the testimony of one of the Division’s investigators directly contradict his claim. On the day the search warrant of the deli was executed both petitioner and Mr. Almanzilli stated petitioner was the deli’s manager. Likewise, during the regulatory inspection that occurred the preceding September, petitioner identified himself as manager upon entering the store and taking responsibility for the certificate of registration to sell cigarettes. These actions certainly suggest that petitioner was actively involved in the operation and management of the deli. Although petitioner denies ever making such statements, his testimony standing alone is not enough to meet his burden. Although petitioner contends that Mr. Almanzilli was the manager, as evidenced by his possession of the store keys, this claim is contradicted by his request that the store keys be given to Sammy Ali. If petitioner was not the manager or in charge of the store, he would not have had the authority to dictate who received the keys. Finally, petitioner contends that the Division acknowledged that he was not the deli’s manager as evidenced in the

investigative report wherein the investigator recounts telling the deli employees that “. . . the owner/manager needs to call NYSDTF regarding his C of R . . .” This argument is rejected as there is no explicit finding by the investigator that petitioner was not a manager of the deli; the investigator was clearly instructing the deli employees that the deli could not sell cigarettes until it had a valid certificate of registration.

E. Finally, petitioner contends that it was an abuse of discretion for the Division to impose the maximum penalty of \$600.00 per pack of cigarettes in this case as he was merely an employee and sold untaxed cigarettes to keep his job. Petitioner’s argument is rejected. In *Matter of Vinter*, the Tax Appeals Tribunal (Tribunal) reversed a determination by an Administrative Law Judge which reduced, by 50 percent, the penalty imposed by the Division pursuant to Tax Law § 481 (1) (b) (i). Noting that there are no statutory guidelines for the exercise of the commissioner’s discretion in imposing a penalty pursuant to Tax Law § 481 (1) (b) (i), the Tribunal stated that it was not necessary for the Division to have considered factors such as the nature, number and degree of the violation prior to imposing the penalty since it is not so mandated by statute or regulation and “it is beyond the jurisdiction of the Tax Appeals Tribunal to impose such a requirement on the Commissioner when the statute does not provide for it” (*Id.*). Even if it were determined that petitioner was a mere employee as he has alleged, he was observed on at least two occasions selling these cigarettes and, by his own admission knew that it was illegal to do. Having sold such cigarettes as a “cashier,” petitioner was certainly in possession or control of the same whether he personally profited or not. The penalty under Tax Law § 481 (1) (b) (i) of \$600.00 per carton is simply not excessive considering the governmental need to deter such wrongful conduct as well as to provide a source of revenue to meet the various expenses incurred by the State to uncover such conduct. Accordingly, the

penalty is sustained.

F. The petition of Saddam Mashaal Alselmi is denied and the September 28, 2016 notice of determination is sustained.

DATED: Albany, New York
March 19, 2020

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE