

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ZEWU ZHU	:	DETERMINATION
	:	DTA NO. 828334
for Revision of Determinations or for Refund of Cigarette Tax	:	
under Article 20 of the Tax Law for the Period February 26,	:	
2016.	:	

Petitioner, Zewu Zhu, filed a petition for revision of determinations or for refund of cigarette tax under article 20 of the Tax Law for the period February 26, 2016.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, on October 2, 2019 and continued to completion on October 3, 2019, in New York, New York, with all briefs to be submitted by November 2, 2020, which date began the six-month period for issuance of this determination. Petitioner appeared by Robert S. Lerner, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Brian D. Evans, Esq., of counsel).

ISSUES

I. Whether petitioner was a person in possession of or had control of unstamped or unlawfully stamped cigarettes and counterfeit tax stamps so as to be liable for the penalties imposed pursuant to Tax Law § 481 (1) (b) (i).

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

FINDINGS OF FACT

1. The Cigarette Strike Force of the Division of Taxation (Division) Criminal Investigations Division (CID) received information from the Manhattan District Attorney's (Manhattan DA's) office that 99 Cent Up store¹ located at 4603 Fort Hamilton Parkway, Brooklyn, New York (store), was involved in the sale of untaxed cigarettes. Based upon this information, the Cigarette Strike Force conducted a two-month investigation of the store. Members of the Cigarette Strike Force assigned to this investigation included CID investigators, a Manhattan DA investigator and a Suffolk County Police Department (PD) detective.

2. On the morning of January 7, 2016, six members of the Cigarette Strike Force set up surveillance on the store. CID Investigator Clayton-Rowe, acting in an undercover capacity, entered the store to ascertain whether cigarettes were in plain view and observed that a certificate of registration to sell cigarettes and tobacco products was not displayed in the store. Subsequently, the CID performed a search of the Division's database and confirmed that the store was never issued a certificate of registration.²

3. The record includes a copy of the store's form DTF-17, Application to Register for a Sales Tax Certificate of Authority, filed on June 18, 2014, on which Mingqing Zhu, the corporation's responsible person, indicated that the business did not intend to sell cigarettes or other tobacco products at retail. The store's awning sign listed items for sale for "99¢ UP" including "GIFT ITEMS," "HOUSE WARE," "HARDWARE," "HEALTHY BEAUTY," "SCHOOL SUPPLY," and "TOY & ETC."

¹ Surveillance photographs in the record show the store's name as Grocery Inc. 99¢ UP on its awning sign. While in the thirteen CID reports of investigation, the store's name is listed as either Grocery Inc. 99c [sic] Up store or 99 Cent Store.

² The record includes a certificate of authentication from the Division that indicates the store located at 4603 Fort Hamilton Parkway, Brooklyn, New York, did not have a license or registration as a Retail Dealer of Cigarettes and Tobacco Products issued to it in 2016.

4. On January 13, 2016, eight members of the Cigarette Strike Force conducted a controlled undercover buy at the store. On that date, CID Investigator Renato Lulaj acting in an undercover capacity, entered the store and purchased a pack of Virginia (VA) tax stamped Marlboro Lights cigarettes for \$8.00. During the same surveillance and uncover operation, the Manhattan DA Investigator observed numerous individuals exiting the store with packs and cartons of cigarettes.

5. On January 26, 2016, six members of the Cigarette Strike Force conducted a controlled buy at the store. Investigator Lulaj, acting in an undercover capacity, entered the store and purchased two packs of VA tax stamped Marlboro Lights cigarettes.

6. On February 2, 2016, seven members of the Cigarette Strike Force, a New York City deputy sheriff, and three Homeland Security Investigations (HSI) special agents conducted a controlled undercover buy at the store.³ Investigator Lulaj, acting in an undercover capacity and wearing a surveillance camera, entered the store and purchased one carton of VA tax stamped Marlboro Lights cigarettes for \$60.00 from the Asian male working behind the counter. ROI #04 states that Investigator Lulaj observed that the Asian male working behind the counter was the same Asian male who sold one pack of VA tax stamped cigarettes to Investigator Lulaj during the January 13, 2016 undercover buy.⁴

7. On February 17, 2016, six members of the Cigarette Strike Force, a New York City deputy sheriff, and two HSI special agents conducted a controlled undercover buy at the store.

³ Report of Investigation (ROI) #04 incorrectly listed the date of the controlled buy as February 3, 2016, the date the ROI was prepared by CID Investigator Kelli Cheek. The Division's form EN-651, Office of Tax Enforcement Property Receipt/Release (EN-651 property receipt) listed the date of the undercover buy as February 2, 2016 and the receipt for one vouchered item, one carton of VA tax stamped Marlboro Lights cigarettes, on the same date.

⁴ The ROI #04 synopsis incorrectly listed the date of the January 13, 2016 undercover buy as January 19, 2016, the date ROI #02, pertaining to the January 13, 2016 undercover buy, was prepared.

Investigator Lulaj, acting in an undercover capacity, entered the store and purchased one carton of VA tax stamped Marlboro Lights cigarettes for \$60.00. ROI #07 states that Investigator Lulaj observed that the Asian male working behind the counter was the same Asian male from the previous undercover buy.

8. At the hearing, the Division presented the testimony of CID Investigator Kelli Cheek, a member of the Cigarette Strike Force that conducted the two-month the investigation of the store. Investigator Cheek explained that she worked with her former partner Investigator Lulaj⁵ on this investigation, assigned case number 201600160. She further explained that during the investigation of the store, then-Supervising Investigator Michaelis⁶ assigned the case to her.

9. At the hearing, Investigator Cheek provided testimony regarding the conduct of the investigation reflected in the thirteen reports of investigation,⁷ the eleven EN-351 property receipts, the three Key Bank cash deposit receipts for the Division's checking/Money Market account, and the surveillance photographs submitted into the record. She identified petitioner, Zewu Zhu, as the Asian male 1 in ROI numbers 1 through 4 and 6 through 8, and the surveillance photos listed as 4 through 8 in the Division's exhibit M.

10. While conducting surveillance on the store, CID investigators Lulaj and Cheek observed petitioner opening and closing the store. Specifically, during their surveillance operations, the investigators observed petitioner using keys to open the store on February 8, 2016, and petitioner closing the store on February 19, 2016.

⁵ At the time of the hearing, Investigator Lulaj was no longer employed by the Division.

⁶ At the time of the hearing, Supervising Investigator Michaelis was no longer employed by the Division.

⁷ A review of the reports of investigation indicates that Investigator Lulaj wrote the first three reports (ROI numbers 01 through 03) and Investigator Cheek wrote the remaining ten reports (ROI numbers 04 through 13).

11. While conducting surveillance operations on February 8, 2016 and February 19, 2016, CID investigators observed various individuals exiting the store with black bags containing what appeared to be one or two cartons of cigarettes.

12. On February 25, 2016, five members of the Cigarette Strike Force conducted a surveillance operation in the vicinity of the store. At approximately 6:18 p.m., the Suffolk County PD detective observed a male exit the store with two cartons of Marlboro brand cigarettes in plain view.

13. On February 26, 2016, 13 members of the Cigarette Strike Force along with two HSI special agents executed a search warrant at the store. Upon entering the store, Investigator Cheek observed petitioner behind the counter. In the basement located at the back of the store, the Suffolk County PD detective observed a female identified as Sai Zhen Liang counting numerous cartons of cigarettes. Ms. Liang was detained and brought up to the main floor. The search of the store resulted in the seizure of 287.3 cartons of untaxed cigarettes (267.3 legitimately VA tax stamped cartons and 20 counterfeit VA tax stamped cartons),⁸ 210 counterfeit VA tax stamps,⁹ \$2,833.00 in U.S. currency (USC), 2 cellular phones, and the security camera recorder. With respect to the \$2,833.00 in USC seized, \$1,848.00 was found in a drawer behind the counter; \$701.00 was found on petitioner (above his wallet); and \$284.00 was found on Ms. Liang (above her pocket). All evidence, including the cigarettes, the counterfeit stamps and personal property, was vouchered and entered into evidence on seven EN-

⁸ Specifically, a total of 282 cartons of various brands of VA tax stamped cigarettes (262 cartons of various brands of legitimately VA tax stamped cigarettes and 20 cartons of Parliament brand counterfeit VA tax stamped cigarettes) were found in the basement; a total of 1.3 cartons of various brands of VA tax stamped cigarettes were found in a black plastic bag hanging on a nail behind the counter; and 4 cartons of VA tax stamped Marlboro brand cigarettes were found in aisle 3 on top of a box located on the floor.

⁹ The 210 counterfeit VA tax stamps, each bearing VA stamp # 87338, were found in a magazine on a shelf under the front counter.

351 property receipts at the Division's New York City Metro Regional Office on February 26, 2016.

14. On February 26, 2016, petitioner and Ms. Liang were 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] [i]), a class E felony; possession or transport for sale of 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; and counterfeiting of or possession of counterfeit stamps (Tax Law § 1814 [g]), a class E felony. On the same date, Investigator Cheek filed a criminal complaint against petitioner and Ms. Liang in the Criminal Court of the City of New York, County of Kings.

15. On May 5, 2016, petitioner entered a guilty plea in the Criminal Court of the City of New York, County of Kings: Part AP-1F to the crime of disorderly conduct under Penal Law § 240.20, in full satisfaction of the criminal charges against him. As a condition of the plea agreement, petitioner executed a Stipulation and Agreement, in which he agreed to pay restitution to the New York State Department of Taxation and Finance in the amount of \$7,381.28¹⁰ that represented "the New York State Cigarette Excise Tax due on the cigarettes previously seized pursuant to the search warrant executed on February 26, 2016."

16. After the criminal disposition in this case, the investigation file was referred to the Division's Cigarette Strike Force audit group for issuance of any civil assessments. The audit in

¹⁰ Petitioner forfeited \$2,549.00 and remitted an additional \$4,832.28 to the New York State Department of Taxation and Finance for the New York State excise tax penalties.

this matter was assigned to Jinzhi Lu¹¹ by Cigarette Strike Force audit team leader Robert Bergeson, who supervised Mr. Lu during the audit.

17. At the hearing, Mr. Bergeson testified about his supervision, review and approval of Mr. Lu's audit calculations that resulted in the issuance of two civil penalty assessments on September 13, 2016 pursuant to Tax Law § 481 (1) (b) (i) as follows:

a) notice of determination (L-045448401) assessed penalty in the amount of \$169,380.00 based upon petitioner's possession of unstamped or unlawfully stamped cigarettes on February 26, 2016. The penalty imposed pursuant to Tax Law § 481 (1) (b) (i) (A) was calculated as follows:

number of cartons of cigarettes seized on February 26, 2016	287.3
less: number of cartons exempted from penalty	(5.0)
number of cartons subject to penalty	282.3
multiplied by: penalty imposed per carton or fraction thereof	\$600.00
penalty amount imposed	\$169,380.00

b) notice of determination (L-045448393) assessed a penalty in the amount of \$4,200.00 for petitioner's possession of 210 counterfeit stamps on February 26, 2016. The penalty imposed pursuant to Tax Law § 481 (1) (b) (i) (B) was calculated as follows:

number of counterfeit stamps seized on February 26, 2016	210.0
divided by: stamps per carton	10
for each 10 unaffixed counterfeit stamps	21.0
multiplied by: penalty imposed for each 10 stamps	\$200.00
penalty amount imposed	\$4,200.00

18. In addition to the issuance of the two notices of determination, the Division issued a notice and demand for payment of tax due (L-045328196), dated August 8, 2016, in the amount of \$7,381.28 for cigarette tax penalty equal to the restitution received.

¹¹ Mr. Lu was no longer employed by the Division at the time of the hearing.

19. Petitioner testified at the hearing that he got the job at the store through an unidentified agency and began working as the store's cashier in July or August 2015 but could not recall the exact date because it was a long time ago. He claimed that he usually worked at the store Monday through Friday between the hours of 9:00 a.m. and 5:00 p.m., but would sometimes work overtime for one or two hours and occasionally on Saturdays, and was paid on a monthly basis, approximately \$1,300.00 in cash each month. In addition to working at the store, petitioner testified that, between the hours of 5:00 p.m. and 9:00 p.m. he also worked part-time delivering food for East Coast Seafood Restaurant located at 7th Avenue and 51st Street, making approximately \$50.00 to \$60.00 daily in cash tips only.

20. Petitioner testified that the store had one cash register, and that on the days he worked at the store, he was the only cashier. He further testified that he always worked with a co-worker, Ms. Liang, who worked in the basement arranging the goods and refilling the counter. Petitioner admitted that he would open the store with keys. He claimed that the boss of the store told him to sell cigarettes but that he did not know the actual name of his boss. He testified his wallet was in his pants pocket on the day the search warrant was executed at the store and he was arrested. Petitioner further testified that he stopped working at the store in February 2016 because he was caught selling cigarettes illegally. Petitioner stated that he had his attorney present with him during the criminal proceeding on May 5, 2016, when he pled guilty to disorderly conduct.

21. Petitioner testified that he did not have any equity interest in the store. He also testified that his wife, Hui Chen, never worked in the store.

22. Petitioner submitted into evidence the New York State Department of State (DOS) Division of Corporations entity information for 99 Up Grocery Inc. that contained database

information current through March 9, 2017. This printout indicates that 99 Up Grocery Inc. had an initial DOS filing date of March 5, 2012, and was an active domestic business corporation whose chief executive officer was Hui Chen (CEO Chen). The record is silent as to what relationship, if any, CEO Chen may have with petitioner.

23. Petitioner submitted into evidence a copy of the deed for 4603 Fort Hamilton Parkway, Brooklyn, New York, dated July 31, 2012. A review of this deed indicates that petitioner did not have any ownership interest in the premises located at 4603 Fort Hamilton Parkway, Brooklyn, New York.

24. Petitioner alleged, in his petition, that he did not own the building in which the alleged illegal cigarettes and counterfeit stamps were found, nor has he ever been the owner of the store. Rather, petitioner asserted that he was simply a sales clerk at the store and did not have dominion and control over the cigarettes and counterfeit tax stamps seized. Petitioner also alleged that there are constitutional issues involving the arbitrary and capricious penalties.

CONCLUSIONS OF LAW

A. New York State 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]). Only a New York State licensed stamping agent may possess or sell unstamped cigarettes, other than in a few limited circumstances not present here (*see* 20 NYCRR 74.3 [a]; 76.1 [b] [2]). Tax Law § 470 (13) states that

“[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.”

Possession of more than 400 cigarettes in unstamped or unlawfully stamped packages by any person other than an agent or distributor is presumptive evidence that such cigarettes are subject to tax and the burden is on the person in possession to prove otherwise (*see* Tax Law § 481 [2] [a]). Furthermore, a certificate from the Commissioner of Taxation and Finance to the effect that a retail dealer is not currently or validly registered as required by article 20 shall be prima facie evidence that such retail dealer is not currently or validly registered to sell cigarettes and/or tobacco products in this State (*see* Tax Law § 481 [3]).

B. Tax Law § 481 (1) (b) (i) provides, in relevant part, as follows:

“[i]n 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 or (B) impose a penalty of not more than two hundred dollars for each ten unaffixed false, altered or counterfeit cigarette tax stamps, imprints or impressions, or fraction thereof, in the possession or under the control of any person.”

For petitioner to be liable for the penalties imposed, the unstamped or unlawfully stamped cigarettes and the counterfeit tax stamps must have been in his possession or under his control (*see Matter of Kamal*, Tax Appeals Tribunal, February 11, 2010).

C. The record clearly shows that petitioner possessed the unstamped and unlawfully stamped cigarettes, and the counterfeit tax stamps in question. Petitioner had keys to the store and used them to open and close the store. On three separate occasions, prior to the search of the store that resulted in the seizure of the unstamped and unlawfully stamped cigarettes, and the counterfeit tax stamps, petitioner sold unstamped cigarettes to Investigator Lulaj, who was acting in an undercover capacity. On February 26, 2016, the date the search was executed at the store, petitioner was the cashier behind the counter. At no time did petitioner testify that he was not in possession of the unstamped and unlawfully stamped cigarettes, and the counterfeit tax stamps.

Rather, petitioner contends that he was just a cashier who worked the cash register and that his boss, whose name he did not know, told him to sell cigarettes. Petitioner's contention that, as a cashier, he should be insulated from the penalties imposed by Tax Law § 481 (1) (b) (i) is misplaced. The Tax Appeals Tribunal in *Matter of Kamal* found petitioner to be a person in possession of unstamped cigarettes found in the store because he admitted to working the cash register in the store. Here, petitioner admitted that he worked the cash register, and sold cigarettes to the public. Moreover, on three separate occasions, he sold unstamped cigarettes to Investigator Lulaj, who was acting in an undercover capacity. Therefore, it is concluded that petitioner was in possession or control of the 287.3 cartons of unstamped or unlawfully stamped cigarettes and the 210 counterfeit tax stamps (*see Matter of Kamal*). Furthermore, "possession or control itself, with or without intent to sell, is sufficient for the imposition of penalty" (*see Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001, *dismissed on other grounds sub nom Matter of Vinter v Commissioner of Taxation & Fin.*, 305 AD2d 738 [3d Dept 2003]).

D. Petitioner, in his petition, also asserted that the penalties imposed by the Division raise constitutional issues involving the arbitrary and capricious penalties. While not further elucidated, this assertion appears to raise a challenge to the facial validity of the statute under which the penalties are assessed (Tax Law § 481 [1] [b] [i] [A]; [B]). The jurisdiction of the Division of Tax Appeals, as prescribed in its enabling legislation, does not encompass facial constitutional challenges (*see Matter of Fourth Day Enterprises, Inc.*, Tax Appeals Tribunal, October 27, 1988). Petitioner, in his reply brief, asserted that the penalties imposed by the Division are excessive and "not commensurate with the activities" of petitioner, who "was simply a cashier discharging the duties required of him." The imposition of a penalty is not automatic (*see Matter of Kamal; Matter of Vinter*). It is within the discretion of the

Commissioner (*see id.*). The only limit on the Commissioner's use of such discretion is that the amount of the fines cannot exceed \$600.00 for each 200 cigarettes or fraction thereof in excess of 1,000 cigarettes in unstamped or unlawfully stamped packages and \$200.00 for each ten unaffixed counterfeit tax stamps or fraction thereof (*see* Tax Law § 481 [1] [b] [i] [A]; [B]). Here, the Commissioner imposed the maximum amount of penalties allowed by law. In imposing the penalties, the Commissioner is not required to consider mitigating factors (*see id.*; *Matter of Vinter*), and the Division of Tax Appeals does not have jurisdiction to require the Commissioner to consider mitigating factors when the statute does not (*see id.*).

E. A presumption of correctness attaches to a properly issued statutory notice (*see id.*). It is petitioner's burden to establish by clear and convincing evidence that the imposition of the penalties imposed by the Commissioner was an abuse of discretion (*see Matter of Vinter*). In this case, petitioner has not met his burden. Therefore, he is not entitled to have the penalties reduced.

F. The petition of Zewu Zhu is denied and notices of determination L-045448401 and L-045448393, dated September 13, 2016, are sustained.

DATED: Albany, New York
April 29, 2021

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE