

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KASSIM ALI	:	DETERMINATION
	:	DTA NO. 828767
Revision of a Determination or for Refund of Cigarette Tax	:	
under Article 20 of the Tax Law for the Period	:	
November 1, 2016 through November 30, 2016.	:	

Petitioner, Kassim Ali, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period November 1, 2016 through November 30, 2016.

A hearing was held before Barbara J. Russo, Administrative Law Judge, in Albany, New York, on March 5, 2020, at 10:30 a.m., with all briefs to be submitted by October 15, 2020, which date began the six-month period for the issuance of this determination. Petitioner appeared by Samuel N. Iroegbu, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel).

ISSUE

Whether petitioner was a person in possession or who had control of unstamped cigarettes in New York State and, as such, is liable for the penalty imposed pursuant to Tax Law § 481 (1) (b).

FINDINGS OF FACT

1. On October 12, 2016, Investigator Danial Russell, a Revenue Crime Specialist I with the Division of Taxation (Division), received information from a confidential source stating that petitioner, Kassim Ali, was selling untaxed cigarettes in the Capital region.

2. On October 13, 2016, Division's Investigators Russell and Heather Mather performed surveillance at petitioner's residence located in Schenectady, New York. The investigators observed a tan Lexus in the driveway registered to petitioner.

3. On November 9, 2016, Investigator Russell and other investigators from the Division's Criminal Investigation Division (CID) continued surveillance at petitioner's residence. The investigators noted that petitioner's vehicle was parked in the driveway. The investigators observed petitioner exit his residence, enter his vehicle, and then exit the vehicle with a black plastic bag and carry it into his residence. During the surveillance, the investigators observed petitioner on multiple occasions exiting his residence carrying a black plastic bag, entering his vehicle with the bag, and then driving to various stores in the Schenectady, New York, area.

4. At approximately 6:12 p.m. on November 9, 2016, the Division's investigators observed petitioner exit his residence carrying a black plastic garbage bag consistent with the size and shape of a half master case of cigarettes and load it into the back of his vehicle. At this time, Investigator Russell and other Division investigators approached petitioner while in his vehicle. Investigator Russell identified himself and asked petitioner to exit the vehicle. Petitioner exited the vehicle and provided identification. Visible inside the vehicle were two black plastic garbage bags. One of the black plastic bags was the same shape and size of a half

master case of cigarettes and had a tear in the bag. Through the tear in the bag, the investigators could see several cartons of Newport brand cigarettes.

5. Petitioner would not give the investigators consent to search the vehicle.

6. The investigators obtained a search warrant for petitioner's vehicle. Upon executing the search warrant, the investigators found several cartons of untaxed cigarettes in petitioner's vehicle. Specifically, in petitioner's vehicle the investigators found 19 cartons of unstamped Newport cigarettes and 2 cartons of cigarettes with counterfeit stamps affixed to the packages.

7. Investigator Russell testified that he could recognize that the cigarettes in petitioner's vehicle had counterfeit stamps because they were stamped with the same sequence of numbers, stamp #E451920989, whereas every valid New York State stamp has a different sequence of numbers.

8. Petitioner was detained and given his *Miranda* rights. The cigarettes that were found in petitioner's vehicle were photographed and secured by the investigators and vouchered on a property receipt.

9. During the search of petitioner's vehicle, petitioner stated to Investigator Casey Jensen that if the investigators did not search his home, they could have the cigarettes they found in his vehicle.

10. Several other investigators arrived at the scene, including Investigator Anthony Vona. Investigator Russell and others left the scene to obtain a search warrant for petitioner's residence. Investigator Vona and other Division investigators remained at the front of the residence to secure the scene until a search warrant was obtained. Investigator Vona testified that from where he and the other investigators were standing, they could not see the backyard of petitioner's residence.

11. During the time that the investigators were obtaining the search warrant for petitioner's residence, petitioner was detained outside the residence and his wife and children were inside the residence.

12. The investigators obtained a search warrant for petitioner's residence, and at approximately 12:10 a.m. on November 10, 2016 they executed the search warrant at petitioner's residence. During the search of petitioner's residence, cartons of untaxed cigarettes were found in petitioner's basement and kitchen pantry. Specifically, the investigators found one carton of counterfeit stamped Newport cigarettes (stamp #5419E 09892) and .2 cartons of unstamped Marlboro cigarettes in the kitchen pantry, and 2.7 cartons of counterfeit stamped Newport cigarettes (stamp #5419E 09892) and .1 cartons of unstamped Marlboro cigarettes in the basement.

13. During the search of petitioner's residence, the investigators discovered a safe on the second floor. When the investigators asked for the combination to the safe, petitioner stated that he did not have a key. Petitioner was informed that the investigators would seize the safe whether or not he provided a key to open it, and that if he opened the safe for the investigators, they would consider not seizing his personal vehicle. Petitioner then took the investigators outside and produced a key to the safe. Inside the safe, among other items, the investigators found a large amount of U.S. currency. The investigators sealed the currency in an envelope in front of petitioner. The currency was subsequently counted by a KeyBank employee, determined to be \$6,249.00, and deposited into the seized fund account pursuant to CID protocol.

14. Investigator Vona testified that during the search of petitioner's residence, he discovered that the basement window was ajar. Investigator Vona then performed a perimeter search outside the residence and noticed six large black plastic bags, similar to those found in

petitioner's vehicle, in the neighbor's adjoining backyard. The backyards were separated by a low chain-link fence, and Investigator Vona could see the bags through the fence. Investigators questioned the neighbor about the bags and he stated that they were not his, he was unaware of them, and gave the investigators verbal consent to search the bags. Upon further search of the black plastic bags located in the neighbor's backyard, the investigators found unstamped cartons of cigarettes and counterfeit stamped cartons of cigarettes inside these bags. The counterfeit stamps affixed to the packs of cigarettes discovered in the neighbor's backyard were identical to the counterfeit stamps affixed to the packs discovered in petitioner's residence and vehicle. In total, 141.9 cartons of unstamped/counterfeit stamped cigarettes were discovered in the neighbor's backyard.

15. The neighbor provided a written statement to the investigators that the cigarettes found in his backyard were not his, that he had not seen them until shown by the investigators, that he does not smoke, does not know his neighbor, and has never purchased a large quantity of cigarettes. Based on the interview the investigators conducted with the neighbor, as well as the similarity between the bags and counterfeit stamp numbers on the cigarettes found in the neighbor's yard compared to those found in petitioner's vehicle and residence, the investigators determined that the untaxed cigarettes in the neighbor's yard belonged to petitioner and concluded that these cigarettes were moved from petitioner's residence into the neighbor's backyard while the investigators were waiting to obtain a search warrant.

16. The investigators photographed the seized property, including the cigarettes and currency, and vouchered the items on property receipts pursuant to CID protocol.

17. After the search of petitioner's residence was completed, petitioner was arrested and held in Schenectady County Jail until his arraignment the following morning. Investigator

Russell drafted a criminal complaint against petitioner for the possession or transport of 30,000 or more unstamped or unlawfully stamped cigarettes for the purpose of sale, alleging that petitioner willfully possessed 166.9 cartons of untaxed cigarettes.

18. Petitioner subsequently pleaded guilty to disorderly conduct and agreed to forfeit the seized currency in the amount of \$6,249.00 as criminal restitution. The forfeiture agreement states that no one has made any promises about a civil case.

19. The Division's Forensic Tax Auditor 2, Richard Seeley, calculated the amount of civil penalty to be asserted against petitioner based on the information obtained during the criminal investigation and proceedings. The auditor calculated the amount of civil penalty by applying a \$600.00 per carton penalty to 161.9 cartons (166.9 cartons seized minus 5 cartons = 161.9) for a total penalty of \$97,140.00.

20. The Division issued a notice of determination, dated October 3, 2017, asserting a penalty against petitioner pursuant to Tax Law § 481 in the amount of \$97,140.00.

21. Subsequent to the hearing, the Division consented to a reduction in penalty to the amount of \$12,000.00, based on the amount of untaxed cigarettes found in petitioner's vehicle (21 cartons) and residence (4 cartons) for a total of 25 cartons (minus 5 per statute) multiplied by a \$600.00 per carton penalty.

22. Petitioner is not and has never been licensed by the State of New York as a cigarette stamping agent.

SUMMARY OF PETITIONER'S POSITION

23. Petitioner does not dispute that the Division found a total of 25 cartons of untaxed cigarettes in his vehicle and home and that he was in possession of said untaxed cigarettes. Petitioner argues only that the notice of determination was erroneous with regard to the untaxed

cigarettes found in his neighbor's yard, contending that they were not in his possession.

CONCLUSIONS OF LAW

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

“In addition to any other penalty imposed by this article, the commissioner of taxation and finance may impose a penalty of not more than 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. . . .”

Tax Law § 481 (2) provides, in part that:

“[t]he possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages . . . by any person other than an agent or distributor . . . shall be presumptive evidence that such cigarettes . . . are subject to tax”

B. Here, it is undisputed that petitioner was in possession and control of unstamped and unlawfully stamped cigarettes in excess of one thousand cigarettes (5 cartons). Petitioner does not dispute that 25 cartons of unstamped cigarettes were in his vehicle and residence. It is further undisputed that petitioner was not a New York State licensed stamping agent. Petitioner's only argument is that he was not in possession of the unstamped cigarettes found in his neighbor's yard, and that, as such, the notice of determination asserting a penalty on 166.9 cartons of unstamped cigarettes was erroneous.

Although a notice of determination must have a rational basis in order to be sustained, the presumption of correctness raised by the issuance of the notice, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (*see Matter of Leogrande v Tax Appeals Tribunal*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]; *Matter of Atlantic and Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). When the Division issues a notice of determination to a taxpayer, a presumption of correctness attaches to the notice, and the burden of proof is on the taxpayer to demonstrate, by clear and convincing

evidence, that the assessment is erroneous (*see Matter of O'Reilly*, Tax Appeals Tribunal, May 17, 2004; *see also Matter of Leogrande; Matter of Tavolacci v State Tax Commn.*, 77 AD2d 759 [3d Dept 1980]; Tax Law § 689 [e]). Petitioner bears the burden of proof to show that the Division improperly assessed penalties in this matter (*Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001; *Matter of Jiang*, Tax Appeals Tribunal, March 31, 2005; *see also Matter of Leogrande*; 20 NYCRR 3000.15 [d] [5]).

The record shows that the Division had a rational basis in issuing the notice of determination assessing a penalty on the 166.9 cartons of unstamped cigarettes found during the search. There is no question that petitioner was in possession and control of the unstamped cigarettes found in his vehicle and residence totaling 25 cartons, and the Division properly asserted penalties against petitioner for those unstamped cigarettes. As for the cigarettes found in petitioner's neighbor's yard, the Division had a rational basis for including these untaxed cigarettes in its penalty calculation. The cigarettes were discovered when the Division's investigators were conducting the search of petitioner's residence, pursuant to the search warrant, and conducted a perimeter search of the property. The investigators observed that the window in petitioner's basement, leading to the backyard, was opened and found that outside that window, just beyond a low fence in the adjoining neighbor's yard, were black plastic bags identical to those found in petitioner's vehicle. After interviewing the neighbor, who disclaimed any knowledge regarding the bags and gave the investigators permission to search the bags, the investigators found cigarettes with counterfeit stamps identical to those found on the cigarettes in petitioner's vehicle and home. As such, the Division had a rational basis to conclude that these cigarettes were moved from petitioner's residence into the neighbor's backyard while the investigators were waiting to obtain a search warrant and the decision to include these cigarettes

in the penalty amount assessed in the notice was rational. Petitioner offered no evidence other than his self-serving testimony, which was contradicted by the neighbor's statement. Whether petitioner has met his burden of proving that he was not, in fact, in possession or control of the cigarettes found in the neighbor's yard need not be determined, as the Division has consented to a reduction in the amount of penalty assessed to only include a penalty imposed on the unstamped cigarettes found in petitioner's vehicle and residence, to which there is no dispute. The revised amount of penalty is \$12,000.00.

C. The petition of Kassim Ali is granted to the extent described in finding of fact 21 and conclusion of law B, but is in all other respects denied, and the notice of determination, dated October 3, 2017, as modified, is sustained.

DATED: Albany, New York
April 15, 2021

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE