

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MINYAN ZHU	:	DETERMINATION
	:	DTA NO. 828951
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Tax Period Ending March 22, 2017.	:	

Petitioner, Minyan Zhu, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period ending March 22, 2017.

A Cisco Webex hearing was held before Donna M. Gardiner, Administrative Law Judge, on November 20, 2020 at 10:30 a.m., with all briefs to be submitted by April 5, 2021, which date began the six-month period for the issuance of this determination. Petitioner appeared by Demidchik Law Firm, PLLC (Robert S. Hazzard, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel).

ISSUE

Whether the penalty imposed by the Division of Taxation against petitioner pursuant to Tax Law § 481 (1) (b) (i) should be reduced.

FINDINGS OF FACT

1. On March 22, 2017, as part of an ongoing investigation into large quantities of cigarettes being shipped through the United States Postal Service (USPS), members of the Division of Taxation's (Division's) Criminal Investigations Division (CID) Cigarette Strike Force along with USPS inspectors, Homeland Security and Queens County District Attorney

(DA) investigators were advised by USPS that 11 parcels, believed to contain untaxed cigarettes, were to be delivered to a private postal store located at 192-14 Northern Boulevard in Queens, New York.

2. The USPS delivered 11 marked parcels each known to contain untaxed cigarettes to the independent postal store on that date. At approximately 2:25 p.m., an Asian male was observed arriving at the location in a 2015 white Toyota Sienna with New York license plates. The subject entered the postal store and then loaded three of the known parcels into the vehicle. The subject was followed as he drove away from the location. The vehicle was stopped by investigators from the DA's office at the northwest corner of Borden Avenue and 63rd Street. Petitioner, Minyan Zhu, was detained while a search warrant was obtained for the vehicle.

3. At approximately 8:04 p.m., the search warrant was executed. A total of 183.1 cartons of duty-free, untaxed cigarettes along with \$18,014.00 in United States currency were recovered. The contraband cigarettes were seized as evidence and vouchered at the Division's Metro Tech Office evidence room bearing voucher EN-651 number 67219. The cash was vouchered at the DA's office under its voucher #Q17DA045

4. Petitioner was arrested and charged with possession of untaxed cigarettes pursuant to Tax Law § 1814 (c) (2), a class D felony.

5. On June 26, 2017, petitioner pled guilty to a violation for disorderly conduct under Penal Law § 240.20. Petitioner was sentenced to a conditional discharge and ordered to pay restitution in the amount of \$18,014.00. Thereafter, CID issued petitioner a notice and demand, assessment number L-047492619, dated November 30, 2017, for cigarette penalty equal to the restitution it received. This notice and demand is not a subject of this petition.

6. Additionally, CID issued to petitioner a notice of determination, assessment number L-048710029, dated August 22, 2018, imposing penalties for possession and control of the seized 183.1 cartons of untaxed cigarettes.

7. At the hearing, the Division presented the testimony of Nicoleta Clayton-Rowe, who is a Revenue Crime Investigator 1 with the Division's CID who was involved with the criminal investigation of petitioner that is the subject of this proceeding. The investigation as described in the facts above and the conclusion that petitioner was in possession and control of 183.1 cartons of untaxed cigarettes is conceded by petitioner and is not in dispute.

8. The Division also presented the testimony of Robert Bergeson, who is employed by the Division as a Forensic Tax Auditor 2. He is the team leader for the cigarette strike force audit group and was the audit manager for this case.

9. Mr. Bergeson testified that he reviewed the investigation report completed by CID as well as the assignment and forfeiture agreement executed by petitioner. After his review, he issued two bills to petitioner, the notice and demand and the notice of determination as outlined in findings of fact 5 and 6.

10. Mr. Bergeson explained how the penalty amount asserted in the notice of determination was calculated. He testified that there is an exemption from penalty in Tax Law § 481 for the first five cartons, or one thousand cigarettes, of untaxed cigarettes. Therefore, since petitioner was in possession of 183.1 cartons, the penalty was imposed on 178.1 cartons at the rate of \$600.00 per carton pursuant to Tax Law § 481 (1) (b) (i) (A) for a total amount of \$106,860.00.

11. On cross-examination, Mr. Bergeson was asked to explain why he imposed the maximum penalty amount of \$600.00. He testified that the facts of this case demonstrated what he characterized as bootlegging or smuggling of cigarettes which resulted in the imposition of the

maximum penalty. Mr. Bergeson stated that it was irrelevant to his imposition of the penalty whether petitioner was previously charged with similar offenses.

12. Petitioner did not testify at the hearing.

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]). 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 the tax (*see* Tax Law § 481 [2] [a]).

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. . .”

There is no dispute that petitioner was in possession and control of 183.1 cartons of unstamped cigarettes. The sole issue in this case is whether the penalty imposed pursuant to Tax Law § 481 (1) (b) (i) upon petitioner was excessive.

C. Petitioner argues that the civil penalty imposed must be reduced because it is excessive and, as such, is improper under the excessive fines clause of the Eighth Amendment of the United States Constitution. The Tax Appeals Tribunal (Tribunal) has held that this is an as applied challenge to the constitutionality of Tax Law § 481 (1) (b) (i) (A), over which this agency has jurisdiction (*see Matter of ERW Enters., Inc.*, Tax Appeals Tribunal, May 29, 2019, *revd on*

other grounds sub nom Matter of White v State of New York Tax Appeals Trib., 196 AD3d 927 [3d Dept 2021]).

The excessive fines clause limits the government’s power to extract payments as punishment for some offense (*Austin v United States*, 509 US 602 [1993]). Cash payments are fines for purposes of the excessive fines clause if they constitute punishment for some offense (*United States v Bajakajian*, 524 US 321 [1998]). Where a civil forfeiture serves, “at least in part, deterrent and retributive purposes,” such forfeiture is punitive and subject to the excessive fines clause (*County of Nassau v Canavan*, 1 NY3d 134, 140 [2003]). As noted in *Matter of Bayridge Supermarket, Inc.* (Tax Appeals Tribunal, January 2, 2003), the Tribunal stated that the purpose of an increase in the amount of maximum penalty to \$600.00 per carton under Tax Law § 481 (1) (b) pursuant to chapter 262 of the Laws of 2000 was “to be a more effective deterrent against cigarette smuggling.” Therefore, the penalties at issue are subject to the excessive fines clause.

D. A penalty or fine is excessive for purposes of the excessive fines clause if it is “grossly disproportional to the gravity of a defendant’s offense” (*County of Nassau v Canavan*, 1 NY3d at 140, quoting *United States v Bajakajian*, 524 US at 334). Petitioner has failed to demonstrate that the subject penalties are, in fact, so grossly disproportional as to violate the Eighth Amendment.

Moreover, considering the costs of enforcement of article 20 of the Tax Law, a significant portion of the penalties necessarily serve the remedial purpose of compensating the government for its cost in discovering petitioner’s illegal activity (*see United States v Halper*, 490 US 435, 446 [1989] [“the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas”]). Furthermore, the potential loss to

the State in revenue from the sale of unstamped or illegally stamped cigarettes is well established (see *Department of Taxation & Fin. of N.Y. v Milhelm Attea & Bros., Inc.*, 512 US 61 [1994]).

E. Petitioner also argues that the Commissioner of Taxation and Finance failed to consider mitigating factors before imposing the maximum penalty allowed under the Tax Law. The Tribunal has held that there are no statutory or regulatory guidelines for the exercise of the Commissioner's discretion in imposing the per carton penalty and, thus, it is not necessary for the Division to take into consideration any mitigating factors prior to its imposition of the penalty under Tax Law § 481 (1) (b) (i) (*Matter of Fakhouri*, Tax Appeals Tribunal, July 5, 2007). Even if mitigating factors could be considered, none were established. Petitioner asserts that he is not a repeat offender, he has never been arrested for a similar crime and that he has paid over \$30,000.00 to date in defense of the criminal charges against him. It is noted that petitioner failed to testify at this hearing and, as such, these assertions are mere allegations that were not established at the hearing.

F. The petition of Minyan Zhu is denied and the notice of determination, L-048710029, dated August 22, 2018, is sustained.

DATED: Albany, New York
September 30, 2021

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE