

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
OSMAN AK	:	DETERMINATION DTA NO. 829248
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period May 31, 2017.	:	

Petitioner, Osman Ak, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period May 31, 2017.

A videoconferencing hearing via CISCO Webex was held before Kevin R. Law, Administrative Law Judge, on July 21, 2021, with all briefs to be submitted by December 24, 2021, which date commenced the six-month period for issuance of this determination. Petitioner appeared pro se. 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 May 9, 2017, the New York State Department of Health notified the Division of Taxation's (Division's) Criminal Investigative Division (CID) that Eyup Gas and Convenience Store, Inc. (Eyup), located in Medford, New York, and doing business as US Food Mart, was selling loose and untaxed cigarettes.

2. On May 31, 2017, CID investigators performed a regulatory inspection of Eyup. The inspection uncovered 26.2 cartons of cigarettes bearing Virginia and Oregon tax stamps, 40 loose cigarettes, 11 Virginia tax stamps affixed to cellophane wrappers from which the cigarette packages had been removed, and approximately 963 packages of K2 (synthetic marijuana).

3. Petitioner, Osman Ak, was the owner of Eyup. Petitioner was not present when the inspection commenced; however, he arrived sometime later after CID investigators called him on the telephone. Petitioner was issued appearance tickets charging him with criminal tax fraud in the fifth degree pursuant to Tax Law § 1802, and possession of untaxed cigarettes pursuant to Tax Law § 1814 (f).¹

4. In satisfaction of the charges relating to the untaxed cigarettes referred to in finding of fact 3, petitioner pled guilty to disorderly conduct and was sentenced to an unconditional discharge and agreed to pay \$1,139.70 in restitution.

5. On January 23, 2019, the Division issued petitioner a notice of determination (notice number L-049422956) which asserted penalty of \$12,660.00 and advised petitioner as follows:

“We may impose a penalty of not more than \$600 for each 200 cigarettes (one carton) in excess of 1,000 cigarettes (five cartons) in unstamped or unlawfully stamped packages in the possession or under the control of any person (NYS Tax Law section 481). We assessed the civil penalty rate of \$600.00 per carton (in excess of five cartons) because you possessed or controlled 26.1 cartons of cigarettes on 5/31/17.”

6. At the hearing in this matter, petitioner testified that as a result of his arrest and incarceration related to the K2, he “lost everything.”

¹ The New York State Police seized the K2 and petitioner was eventually imprisoned for the possession and the sale thereof. The record does not indicate the specific charges related to the K2 that petitioner was convicted of, and/or pled guilty to.

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) discovered on May 31, 2017. Petitioner does not contend that the penalty was improperly assessed or that the notice lacks a rational basis, but rather requests that the notice be cancelled as he lost everything, including his business, and was incarcerated.

D. In *Matter of Vinter* (Tax Appeals Tribunal, September 27, 2001, *dismissed on other grounds sub nom Matter of Vinter v Commissioner of Taxation and Fin.*, 305 AD2d 738 [3d Dept 2003]), 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

