STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PRIYANKA B. PATEL	:	DETERMINATION DTA NO. 829830
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period July 1, 2018 through July 31, 2018.	:	

Petitioner, Priyanka B. Patel, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period July 1, 2018 through July 31, 2018.

A hearing was held on March 2, 2022, with all briefs to be submitted by June 23, 2022, which date began the six-month period for issuance of this determination. Petitioner appeared by Phillip Vecchio, Esq., CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel). After reviewing the entire record in this matter, Jessica DiFiore, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the penalty imposed against petitioner pursuant to Tax Law § 481 (1) (b) (i) was proper.

II. Whether the penalty imposed against petitioner pursuant to Tax Law § 481(1) (b) (i) was excessive in violation of the New York State and United States Constitutions.

FINDINGS OF FACT

1. On June 20, 2018, Investigators Casey Jensen and Heather Mather from the Criminal Investigations Division of the Division of Taxation (Division) conducted an inspection of Hari Krishna Enterprise Inc. (Hari Krishna), located at 18 East Main Street, St. Johnsville, New York, in Montgomery County. The clerk of the store informed the investigators that he was only an employee and that a woman was the owner, but she was at a different store. The clerk provided Investigator Jensen with a phone number, which was ultimately the number of petitioner, Priyanka B. Patel, but he was not able to reach anyone that day using that number.

2. During the inspection of Hari Krishna, Investigator Jensen found a total of 389.5 pounds of untaxed loose and chewing tobacco and 2,150 untaxed cigars that the store clerk was not able to produce invoices for from a registered distributor. The investigators then seized the untaxed tobacco and cigars.

3. Investigator Jensen prepared a list of the untaxed tobacco and cigars that were seized using Office of Tax Enforcement Property Receipt/Release, form EN-651 (Property Receipt). The case number assigned to this form was 201800456. At the hearing, Investigator Jensen testified that each receipt of evidence has a unique number. The case number is assigned through the Division's program used to organize its investigations. It is created once the investigators are in the office preparing the report.

4. During the investigation, Investigator Jensen attempted to contact petitioner to find a certificate of registration for 2018 and to determine whether there were any invoices for the tobacco found at Hari Krishna.

5. While researching information regarding Hari Krishna, Investigator Jensen found the Application to Register for a Sales Tax Certificate of Authority for that business that was

completed on March 31, 2017. The Certificate provided that petitioner was the president of Hari Krishna and that she owned more than 50% of the shares of stock in that entity. Petitioner was also the one to submit the application.

On the application, petitioner listed her address as "105 Hillcrest Vlg E Apt A1, Niskayuna, NY 123093813." Petitioner's address is in Schenectady County, New York.

6. Petitioner does not dispute that she is the president, shareholder and responsible person of Hari Krishna. She also does not dispute that the tobacco and cigars were untaxed or the amounts of each that were seized.

7. On June 22, 2018, the Division went to petitioner's home in Niskayuna, New York. Petitioner lived in an apartment complex. At that time, Investigator Jensen was still attempting to determine whether petitioner had more invoices for the tobacco that was seized at Hari Krishna. Investigator Jensen knocked on petitioner's door and, when there was no answer, he attempted to call her, but was initially unable to connect.

8. While Investigator Jensen was at petitioner's apartment complex, he noticed a rental Enterprise van parked in the parking lot of the complex. He then walked through the parking lot to the van where he could clearly see boxes labeled with known tobacco brands inside of the back storage compartment of the van. When he saw the boxes, he contacted Enterprise and was informed that the vehicle had been rented by petitioner the day before. At that point, Investigator Jensen applied for and obtained a search warrant in the City Court for the City of Schenectady, New York.

9. As a result of the search, the Division found 1,021.88875 pounds of untaxed tobacco and 9,423 untaxed cigars. Investigator Jensen prepared a list of the untaxed tobacco and cigars that were seized using a Property Receipt form dated June 22, 2018. The case number assigned

to this form was 201800456, the same case number that was used for the seizure on June 20, 2018.

10. At the hearing, Investigator Jensen testified that the Property Receipt had the same case number as the one listing the items seized on June 20, 2018, because at that time he was under the belief that it was going to be the same case. He stated that thereafter, the management team reviewed the case and determined that the seizures happened in separate counties and were separate events, with one being an inspection and one being an execution of a search warrant. After that time, a separate case number was generated for the items seized from the Enterprise van on June 22, 2018.

11. Petitioner does not dispute that the tobacco and cigars were untaxed or the amounts of each that were seized from the Enterprise van.

12. Petitioner was arrested at Hari Krishna for both seizures on June 26, 2018. The offense date for the seizure at Hari Krishna was listed as June 20, 2018, and the arraignment court was set in St. Johnsville in Montgomery County, New York. The offense date for the seizure from the Enterprise van was listed as June 22, 2018, and the arraignment court was set as the Niskayuna Town Court in Schenectady County, New York.

13. Investigator Jensen filed two misdemeanor informations in the St. Johnsville Town Court. One was not dated and listed the offense of "Dealer in Possession of More Than Ten Pounds Untaxed Tobacco." The second was dated June 28, 2018, and listed the offense of "Dealer in Possession of More Than Five Hundred (500) Untaxed Cigars."

14. Investigator Jensen filed a misdemeanor information on June 28, 2018, and a felony complaint on June 26, 2018, in the Niskayuna Town Court. The felony complaint listed the offense of "Attempt to Evade or Defeat Taxes on Four Hundred Forty (440) or More Pounds of

Tobacco." The misdemeanor information listed the offense of "Possession or Transportation of More Than Fifty (50) Pounds of Untaxed Tobacco."

15. On January 23, 2019, petitioner entered a plea of guilty to a violation of Penal Law § 240.20 Disorderly Conduct in the St. Johnsville Village Justice Court and paid restitution of $882.69 before being sentenced to a conditional discharge for one year.

16. On February 19, 2019, the Division issued petitioner notice of determination L-049489230 (the First Notice) assessing a penalty in the amount of $15,000.00 for the untaxed tobacco products seized from Hari Krishna on June 20, 2018. The notice provided that the penalty was imposed because after an inspection of her premises, petitioner was "found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products." In the computation summary section of the First Notice, it states it was for the "tax period ended" on July 31, 2018.

17. At the hearing in this matter, Richard Seeley testified on behalf of the Division. Mr. Seeley is an auditor with the Division who audits white collar crimes and cigarette and/or tobacco cases. In cigarette and/or tobacco cases he also prepares the bills, performs the calculations, and looks at all reports that were issued or written by the investigators. Mr. Seeley testified that the reason the tax period listed in the First Notice was for the month of July 2018 instead of the audit period of June 1, 2018 through June 30, 2018, was that at the time this assessment and the subsequent assessment for the seizure in Niskayuna were issued, the program would not allow the two notices to be issued for the same month. Mr. Seeley testified that because of this, he had to do one assessment for the month of June and the other for the month of July in 2018.

18. On October 11, 2019, petitioner pled guilty to disorderly conduct in the Niskayuna Town Court and made restitution by paying the excise tax in the amount of $7,743.81. Petitioner also paid a penalty of $15,000.00. The tax and penalty were paid by a single check in the amount of $22,743.81. This check was sent under cover letter from the District Attorney's Office in Schenectady, New York, for payment in the matter pending in the Town of Niskayuna Justice Court.

19. On December 20, 2019, the Division issued petitioner notice of determination L-051102692 assessing a penalty in the amount of $15,000.00 for the untaxed tobacco products seized from the Enterprise van on June 22, 2019 (the Second Notice). In the computation summary section of the Second Notice, it states it was for the "tax period ended" June 30, 2018.

20. Mr. Seeley testified that the Second Notice was generated after the matter in the Town of Niskayuna Justice Court has been resolved with the payment made because he does not issue bills until after he receives information back from the court.

21. Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) protesting the First Notice. By BCMS conciliation order number 000309728, dated November 29, 2019, BCMS sustained the First Notice.

22. Petitioner timely filed a petition asserting that the First Notice should be cancelled because petitioner has already paid full restitution and penalties in the amount of $15,000.00 in the same transaction. Petitioner asserts that the Division seized the untaxed tobacco products from petitioner within 48 hours from the two places and that they were purchased simultaneously. She claims that this matter was bifurcated for criminal prosecution but should not be bifurcated for administration of the civil penalties imposed under the Tax Law. Petitioner

contends that bifurcating the seizures and assessing two assessments constitutes an excessive fine in violation of the United States Constitution.

23. At the hearing, petitioner presented the testimony of Timothy Nugent. Mr. Nugent is an attorney that practices criminal law and represented petitioner in the matters in the Town of St. Johnsville in Montgomery County and in the Town of Niskayuna in Schenectady County. He testified that he had a meeting with the Division, including Investigator Jensen, and with an assistant district attorney, with regards to the seizures and to determine whether petitioner knew about obtaining untaxed products. Mr. Nugent testified that from the meeting he recollected that petitioner made one purchase of untaxed tobacco products where she was required to have a vehicle to transport the product because she had to meet an unidentified person somewhere to obtain it. It was Mr. Nugent's understanding that petitioner only made one purchase of untaxed tobacco products during the time of the seizures.

24. Pursuant to 20 NYCRR 3000.15 (d) (6), petitioner submitted 15 proposed findings of fact. In accordance with State Administrative Procedure Act § 307 (1), proposed findings of fact 1, 2, 4, 5, 7 through 10, 12 through 15 are supported by the record, and have been consolidated, condensed, combined, renumbered, and substantially incorporated herein. Proposed findings of fact 3 and 11 have been modified to more accurately reflect the record and/or accepted in part and rejected in part as conclusory, irrelevant and/or not supported by the record; to the extent accepted they have been consolidated, condensed, combined, renumbered, and substantially incorporated herein, as modified. Proposed finding of fact 6 is rejected as conclusory, irrelevant and/or not supported by the record.

SUMMARY OF THE PARTIES' POSITIONS

25. Petitioner argues that the events in St. Johnsville and Niskayuna were related. She asserts that the Division conducted one continuous investigation of petitioner, resulting in arrests on the same date, by the same investigator, at the same place, at the same time, for the events that occurred in both locations. She argues that while the Division is permitted to file criminal complaints in both Montgomery County and Schenectady County, the Tax Law does not allow it to circumvent the limitation on civil penalties by assessing $15,000.00 in one county and an additional $15,000.00 in another. She asserts that as the Division has already collected the maximum penalties in Niskayuna, the assessment in the Town of St. Johnsville must be struck down as sustaining a separate assessment would contradict the requirements of Tax Law § 481 (1) (b) (i) (B) that cap the penalty maximum at $15,000.00 and violate the protection against excessive punishments provided by the New York State Constitution. Petitioner also claims that sustaining a separate assessment in each of the two counties would violate the protection clause of the United States Constitution against excessive punishments. Petitioner argues that petitioner made a single purchase of untaxed tobacco products and, therefore, should only be assessed one penalty as a result.

26. The Division argues that its imposition of a penalty of $15,000.00 on petitioner for untaxed tobacco and cigars found in her store on June 20, 2018, was proper. It asserts that the events that occurred on June 20, 2018, related to a regulatory inspection of a store in St. Johnsville, while the events that occurred on June 22, 2018, related to a search and seizure of a van rented by petitioner. The Division claims that the statutory penalty provided pursuant to Tax Law § 481 (1) (b) applies to the possession or control of tobacco products, and that the two

assessments were the result of two separate incidents of possession and control. The Division also argues that petitioner failed to demonstrate that the penalty imposed was an excessive fine.

CONCLUSIONS OF LAW

A. Excluding exceptions not relevant here, there is a presumption that all tobacco products possessed within New York State for sale are subject to tax until the contrary is established (***see*** Tax Law § 471-b [1]). The burden of proof that any tobacco products are not taxable is upon the person in possession thereof (***id.***). Every dealer is liable for the tax on all tobacco products in his or her possession at any time if tax has not been paid on such tobacco products (Tax Law § 471-b [3]). If a dealer fails to produce an invoice from a distributor or licensed wholesale dealer for any tobacco products in his possession to the commissioner of taxation and finance or his authorized representative, it is presumptive evidence that the tax has not been paid and that such dealer is liable for the tax thereon (***id.***). A "dealer," includes a "retail dealer," which is a person other than a wholesale dealer who is engaged in selling cigarettes or tobacco products (***see*** Tax Law § 470). "Tobacco products" are defined as "[a]ny cigar, including a little cigar, or tobacco, other than cigarettes, intended for consumption by smoking, chewing, or as snuff" (***see*** Tax Law § 470).

Here, petitioner does not dispute that she was a dealer or that she was in possession of untaxed tobacco products as defined by Tax Law § 470. The issue presented is whether the Division imposed an excessive fine by imposing a $15,000.00 penalty for the tobacco products seized at Hari Krishna after also imposing a $15,000.00 penalty for the tobacco products seized from the Enterprise van at petitioner's residence.

B. Tax Law § 481 (1) (b) (i) provides that the commissioner may impose a penalty of not more than $150.00 for each 50 cigars or pound of tobacco in excess of 250 cigars or 5 pounds of

tobacco in the possession or under the control of a dealer or distributer where the tobacco products tax has not been paid or assumed by the dealer. However, the penalty imposed pursuant to Tax Law § 418 (1) (b) (i) shall not exceed $15,000.00 in the aggregate. Here, petitioner was issued two assessments of $15,000.00, one assessment for the seizure of untaxed tobacco products at Hari Krishna and a second assessment as a result of the seizure of untaxed tobacco products from the Enterprise van she rented. Petitioner does not dispute the calculations of what would be due if these were two separate instances. She only argues that this should be considered one seizure with a limit of $15,000.00.

C. It is undisputed that petitioner was in possession and control of untaxed loose and chewing tobacco and cigars. Accordingly, petitioner is liable for the penalty imposed by Tax Law § 481 (1) (b) (i) for the First Notice (***see Matter of Vinter***, Tax Appeals Tribunal, September 27, 2001, ***lv dismissed and denied Matter of Vinter v Commissioner of Taxation & Fin.***, 305 AD2d 738 [3d Dept 2003]). Petitioner asserts the Commissioner of Taxation and Finance lacked the authority to impose a second penalty for what should be treated as one incident and, by "bifurcating" the penalties, the Division attempted to eviscerate the statutory limit on imposing penalties set by Tax Law § 481 (1) (b) (i). This argument is rejected.

Tax Law § 481 (1) (b) (i) provides for a penalty for untaxed tobacco products "in the possession or under the control of any tobacco products dealer . . ." that shall not exceed $15,000.00. The First and Second Notices were issued for two distinct incidents, at two distinct locations, on two different days, where petitioner was in possession or control of untaxed tobacco products. The notice at issue herein, the First Notice, was issued for untaxed tobacco products found at petitioner's store as the result of an inspection of the premises where she was a "retail dealer" of tobacco products. The Second Notice was issued as the result of a search of

and seizure from an Enterprise van petitioner rented. The search and seizure of the contents of the van happened two days later, as the result of a Division investigator identifying plainly visible boxes labeled with known tobacco brands inside of the back storage compartment. The only thing linking these two seizures is that the same person was responsible for both. Had the investigators returned to Hari Krishna on June 22, 2018, instead of going to petitioner's apartment complex, petitioner would have again been found to be in possession of untaxed tobacco products and assessed a penalty pursuant to Tax Law § 481 (1) (b) (i). Finding the additional untaxed tobacco in the van instead of the store does not warrant a different result. Although the statute limits the penalty amount for each seizure, it does not limit the penalty amount for each retail dealer (***see*** Tax Law § 481 [1] [b] [i]). Assessing petitioner two $15,000.00 penalties, one for each of the seizures, was proper.

D. Petitioner also asserts that the penalty imposed by the Division is excessive and violates the protection in the New York State and United States Constitutions against excessive punishments. The imposition of a penalty is not automatic (***see Matter of Kamal***, Tax Appeals Tribunal, February 11, 2010; ***Matter of Vinter***). It is within the discretion of the Commissioner (***see id.***). 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" (***Matter of Vinter***).

The only limit on the Commissioner's use of such discretion, is that the amount of the fine cannot exceed $150.00 for each 50 cigars or pound of tobacco in excess of 250 cigars or 5 pounds of tobacco (***see*** Tax Law § 481 [1] [b] [i] [B]). Here, the Commissioner imposed the maximum fine allowed by law. As there are no regulations providing for mitigating factors, and the undersigned has already determined that issuing two separate assessments was proper, such imposition was not excessive.

The Tax Appeals Tribunal has held the claim that civil penalties imposed are excessive within the meaning of the Eighth Amendment of the United Stated Constitution to be an applied challenge to the constitutionality of Tax Law § 481 (1) (b) (i), over which this agency has jurisdiction (***see Matter of ERW Enters., Inc.***, Tax Appeals Tribunal, May 29, 2019***, revd on other ground 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, 609-10 [1993]). A penalty 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 134, 140, quoting ***United States v Bajakajian***, 524 US 321, 334 [1998]. Petitioner has failed to demonstrate that the subject penalties are so grossly disproportionate as to violate the Eighth Amendment. But for the $15,000.00 limit for either offense, petitioner could have been liable for over $50,000.00 in penalties for the seizure at Hari Krishna, and over $150,000.00 in penalties for the seizure from the Enterprise van. Additionally, 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 Stated 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"]. Further, the potential loss to the State in revenue from the sale of untaxed tobacco products is well-established (***see Dept of Taxation & Fin of N. Y. v Milhelm Attea & Bros., Inc.***, 512 US 61, 65 [1994]). Accordingly, the penalties imposed in the First Notice are not grossly disproportional to petitioner's offense and thus are not excessive under the Eighth Amendment.

E. The petition of Priyanka B. Patel is denied and notice of determination L-049489230 dated February 19, 2019, is sustained.

DATED: Albany, New York
December 22, 2022

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE