

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AHMED ALHAJAJ	:	DETERMINATION
for Revision of a Determination or for Refund	:	DTA NO. 830330
of Tobacco Products Tax under Article 20 of the	:	
Tax Law for the Period September 1, 2013 through	:	
December 31, 2014.	:	

Petitioner, Ahmed Alhajaj, filed a petition for revision of a determination or for refund of tobacco products tax under article 20 of the Tax Law for the period September 1, 2013 through December 31, 2014.

An expedited hearing was held in Albany, New York on October 4, 2021, with all briefs to be submitted by March 21, 2022. Petitioner appeared by Mackay, Caswell & Callahan, P.C. (Joseph Callahan, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael J. Hall, of counsel). After reviewing the entire record in this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation properly determined petitioner's tobacco products tax liability for the audit period.

II. Whether the Division of Taxation has met its burden of proof that a fraud penalty pursuant to Tax Law § 481 (1) (a) (iv) is properly imposed herein.

FINDINGS OF FACT

1. Petitioner, Ahmed Alhajaj, is an individual who resides in Utica, New York, and sells convenience store items to other retailers and the public.

2. On October 24, 2011, an Oneida County business certificate was issued to Green Mountain Tobacco, Inc. (Green Mountain). Green Mountain is owned by petitioner. A certificate of authority to collect sales tax was issued to Green Mountain on May 18, 2012. Green Mountain never obtained a license to sell tobacco products in New York State.

3. In 2014, the Criminal Investigations Division (CID) of the Division of Taxation (Division) began an investigation into wholesale tobacco products sales in New York State by petitioner and Green Mountain.¹ The Division entered a 1,720-page audit file into the record. The audit file reflects that the investigation was prompted by reports that petitioner was selling tobacco products to retailers in the Syracuse, New York, area. The Division issued subpoenas to several entities, including a company in Pennsylvania known as Alhamrah Corporation (Alhamrah). In response to the subpoena, Alhamrah provided the Division numerous invoices with a date range of September 2013 through December 2014 (period at issue) and a copy of Green Mountain's sales tax certificate of authority. The Alhamrah invoices in question are in the audit file and indicate substantial purchases of tobacco products by petitioner and Green Mountain.

4. The audit file notes that on May 14, 2015, petitioner was arrested at Tony's Quick Bite, Inc., (Tony's Quick Bite) a business location in Syracuse, New York, and was charged with possession of untaxed cigarettes and cigars. Tony's Quick Bite is owned by petitioner and his

¹ The audit in the matter was targeted at both petitioner and Green Mountain because CID concluded that the two appeared to operate together and interchangeably at times. As noted herein, the relevant statutory notice was only issued against petitioner in his individual capacity.

spouse. According to the audit file, petitioner paid the amount of tax due. According to the Division's witness, David Pohle, Revenue Crimes Specialist III with CID, the May 14, 2015 charges against petitioner were dismissed because a necessary witness would not appear in court.

5. Mr. Pohle testified that CID arrested an individual named Khalid Hussein during a traffic stop in Buffalo, New York, in 2014. Mr. Hussein was found to be in possession of untaxed tobacco products. Mr. Hussein was also found to be in possession of Alhamrah invoices for the purchase of tobacco products by petitioner and Green Mountain. An order of judgment and restitution against Mr. Hussein was docketed in Buffalo City Court on September 10, 2015, whereby Mr. Hussein pleaded guilty to a criminal tax fraud in violation of Tax Law § 1802 and paid restitution to the Division. Mr. Hussein was apparently involved with a company known as K&A Market. It appears that at least some of the invoices CID obtained from Alhamrah relating to petitioner and Green Mountain included a phone number for K&A Market on them.² Mr. Pohle testified that he was unaware of the existence of any connection whatsoever between petitioner and Green Mountain and either K&A Market or Mr. Hussein.

6. In furtherance of the investigation, CID investigators visited Alhamrah in Pennsylvania and interviewed its manager. During the interview, the CID investigators showed the manager of Alhamrah a picture of petitioner; the manager of Alhamrah identified petitioner as the individual who opened the petitioner and Green Mountain account with Alhamrah and made purchases from Alhamrah. The manager also confirmed that another individual known as "Doc" was a person who picked up products from Alhamrah for petitioner and Green Mountain.

7. The individual known as "Doc" was identified as James Lampkin. In September 2016, Mr. Lampkin gave a statement to the CID investigators in which he indicated that he drove to

² The Division points out that some of the Alhamrah invoices also have what appears to be a phone number for Tony's Quick Bite listed on them.

Alhamrah in Pennsylvania and picked up tangible property which included products that were put in boxes marked “tobacco.” In his 2016 statement, Mr. Lampkin indicated that he never opened the boxes.

8. As part of their investigation, the CID investigators requested information from the Financial Crimes Enforcement Network (FINCEN), a bureau of the United States Treasury that collects and analyzes data regarding financial transactions in order to combat domestic and international crimes. FINCEN provided the CID investigators copies of transcripts of forms 8300 which were filed by Alhamrah indicating certain financial transaction between petitioner and Green Mountain and Alhamrah. The subject form 8300s were filled out and filed by Alhamrah and indicated several financial transactions during the period at issue wherein Alhamrah represented that petitioner and Green Mountain had paid Alhamrah thousands of dollars for products. The form 8300s do not indicate what products petitioner and Green Mountain bought.

9. On April 1, 2016, the CID investigators interviewed petitioner and he admitted that he had not filed his New York State personal income tax returns for 2011 through 2014. Petitioner later filed the State tax returns.³

10. Neither petitioner nor Green Mountain filed tobacco tax returns for the period at issue.

11. On April 8, 2016, petitioner was arrested on one count of attempt to evade and defeat tobacco products tax, one count of criminal tax fraud in the second degree and one count of criminal tax fraud in the third degree. Petitioner pled not guilty to the charges. The criminal charges were later dismissed because a witness from Alhamrah would not testify at the trial.

³ In its brief, the Division asserts that petitioner never included any income from his own tobacco or Green Mountain’s business operations on his returns; however, the Division fails to provide a compelling citation in support of the assertion.

12. After the April 8, 2016 charges against petitioner had been dismissed, the Division issued notice of determination L-049549023 (notice), dated May 19, 2019, against petitioner asserting tobacco products tax due of \$560,668.00, penalty under Tax Law § 481 (1) (a) (iv) of \$1,121,336.00 and interest.

13. The amount of the tax asserted in the notice was calculated directly based upon the amount of tobacco products sold to petitioner and Green Mountain listed on the invoices obtained from Alhamrah from the subpoena issued. The Division represented that it took the amount of tobacco products sold directly from each relevant Alhamrah invoice and multiplied such by the applicable tax rate to arrive at the total amount of tobacco tax due.

14. At the hearing, the Division presented the testimony of Daniel Jarvis, a tax auditor with the Division. Mr. Jarvis testified as to the calculation of the tax assessed on the notice and certain aspects of the Division's audit findings. Mr. Jarvis did not conduct the audit of petitioner himself.

15. As noted above, the Division also presented the testimony of Mr. Pohle. Mr. Pohle testified that he did not conduct the audit of petitioner either, and the Division's auditor responsible for the audit had already retired. Mr. Pohle testified as to certain aspects of how he believed the audit was conducted.

16. Petitioner offered the testimony of Khaled Obeid. Mr. Obeid testified that he operated a business in the Syracuse, New York area, he was familiar with petitioner and purchased various items from petitioner for resale, but never saw petitioner sell tobacco products nor did he believe petitioner sold such products.

17. Petitioner offered the testimony of Rashad Alfahed. Mr. Alfahed operated a business in the Utica, New York area, was familiar with petitioner and purchased various items from

petitioner for resale, but never saw petitioner sell tobacco products nor did he believe petitioner sold such products.

18. Petitioner offered the testimony of Malak Mobarez. Mr. Mobarez operated a business in the Syracuse, New York area, was familiar with petitioner and purchased various items from petitioner for resale, but never saw petitioner sell tobacco products nor did he believe petitioner sold such products.

19. Petitioner offered the testimony of Mr. Lampkin. Mr. Lampkin testified that he had previously made a statement to the CID investigators regarding the case; however, Mr. Lampkin testified that to the best of his recollection he never actually saw petitioner purchase tobacco products but rather other sundry items even though the boxes that they had been packaged in may have had the words “tobacco” printed on them. Mr. Lampkin testified that his memory of petitioner’s business was hazy and urgent family matters had taken a priority for him, so he was not sure of petitioner’s business operations during the periods at issue.

20. Petitioner testified at the hearing. Petitioner testified that he owned Green Mountain and applied for a cigarette tax license from New York State for Green Mountain but had been denied twice. Petitioner testified that he purchased many products from Alhamrah but never purchased tobacco products from the company or any other entity. He testified that he never sold tobacco products himself or through Green Mountain. Petitioner testified that he never dropped the word “tobacco” from Green Mountain’s name because he desired to reapply for a cigarette tax license in the hope that his application would be approved. Petitioner testified that he did not remember the exact dates, but he only operated Green Mountain for less than a year probably during 2012 or 2013.⁴

⁴ The Division correctly notes that elsewhere in the transcript it appears that petitioner testified that he ceased Green Mountain’s business operations at the end of 2010. However, given that Green Mountain did not

SUMMARY OF THE PARTIES' POSITIONS

21. The Division asserts that petitioner has not met his burden of proof to show the assessment was incorrect or the amount of tax assessed was unreasonable.

22. Petitioner asserts that the Division's conclusions are based upon hearsay evidence, and such are too unreliable.

CONCLUSIONS OF LAW

A. Tax Law § 471-b (1) imposes a tax at the rate of 75% of the wholesale price on tobacco products,⁵ possessed in New York by any person for sale or used in the state by any person. "It shall be presumed that all tobacco products within the state are subject to tax until the contrary is established, and the burden of proof that any tobacco products are not taxable hereunder shall be upon the person in possession thereof" (Tax Law § 471-b [1]).

Furthermore, Tax Law § 471-b (3) provides that:

"Every dealer shall be liable for the tax on all tobacco products in his possession at any time, upon which tax has not been paid or assumed by a distributor appointed by the commissioner of taxation and finance, and the failure of any dealer to produce and exhibit to the commissioner of taxation and finance or his authorized representative upon demand, an invoice by a distributor or licensed wholesale dealer for any tobacco products in his possession shall be presumptive evidence that the tax thereon has not been paid, and that such dealer is liable for the tax thereon unless evidence of such invoice, payment or assumption shall later be produced."

obtain a certificate of authority to do business until 2011, and petitioner's testimony elsewhere regarding Green Mountain's operations, the assertion that Green Mountain only operated during part of 2012 or 2013 seems more accurate. Petitioner's reference to 2010 appears to be a transcript error, misunderstanding or misstatement by petitioner during the hearing.

⁵ Different rates apply to certain items such as snuff and little cigars.

Tax Law § 473-a requires that every distributor of tobacco product must file a monthly return showing the quantity and price of all tobacco products imported or caused to be imported, and all tobacco products sold, shipped or delivered into New York State during the prior month.

In the case at hand, neither petitioner nor Green Mountain filed any monthly returns for tobacco sales or deliveries. However, petitioner testified that neither he nor Green Mountain sold or purchased tobacco products. The Division's CID investigators had a suspicion petitioner or Green Mountain purchased and sold tobacco products because of a tip. The CID investigators subpoenaed records from a tobacco wholesaler and such records indicated substantial sales of tobacco products to petitioner and Green Mountain. CID investigators charged petitioner with tobacco possession related crimes on two separate occasions; however, both times the charges against petitioner were completely dismissed.⁶ At the hearing, the Division provided the testimony of Mr. Pohle and Mr. Jarvis since the original CID investigator who prepared the audit had retired. Neither witness testified that they had knowledge that petitioner did in fact have possession of tobacco products. In its brief, when the Division offered its proposed finding of fact that petitioner was found in possession of tobacco products, the Division offered no citation to the record in support of the desired fact (*see* 20 NYCRR 3000.15 [d] [6]). The audit file at best makes cursory references to CID investigators catching petitioner with tobacco products. Although there are invoices from Alhamrah, a business in Pennsylvania, indicating petitioner and Green Mountain purchased tobacco products from it, it is noted that said business apparently would not allow anyone from it to testify in court under oath regarding the matter. Furthermore, something questionable seems underway when what appears to be a completely unrelated person and company, Mr. Hussein and K&A Market, are in fact arrested,

⁶ The Division asserts this is because a necessary witness would not testify. Regardless of that assertion it does not negate the fact that both times the separate tobacco possession related charges were dismissed.

charged and convicted for the possession of tobacco products and at the arrest they were also found to be in possession of Alhamrah purchase invoices with petitioner and Green Mountain's name listed on them.

Petitioner had several witnesses that purchased goods from him testify that to their knowledge petitioner did not sell or offer to sell tobacco products. Petitioner himself testified that neither he nor Green Mountain purchased tobacco products.

The Division correctly advances that its notice of determination is presumed correct (*see Matter of O'Reilly*, Tax Appeals Tribunal, May 17, 2014; *see also Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]; *Matter of Tavolacci v State Tax Commn.*, 77 AD2d 759 [3d Dept 1980]). However, a very significant component of the Division's notice of determination is that petitioner actually possessed and/or sold tobacco products. In this regard, petitioner has met his burden of proof rebutting the presumption of correctness the notice carries. Accordingly, for this reason the notice is canceled.

B. The Tax Appeals Tribunal has held that before the Division may utilize an indirect audit method, as was done in this case, for a tobacco tax case, the Division must first make an explicit request for the taxpayer's books and records and make a thorough review of such records (*see Matter of Jay's Distributors, Inc.*, Tax Appeals Tribunal, April 15, 2015). In this case it does not appear, nor does the Division advance, that any such request was ever made. Accordingly, additionally for this reason the notice is canceled.

C. Finally, the Division advances that that a fraud penalty should be assessed against petitioner. The above conclusions cancelling the tax asserted render this argument moot ; however, for a complete record the undersigned will address the issue.

The notice of determination issued to petitioner asserted fraud penalty pursuant to Tax Law § 481 (1). Such penalty is properly imposed where “the failure to pay any tax within the time required by or pursuant to this article is due to fraud.” The standard for the imposition of the fraud penalty is as follows:

“The issue of whether a taxpayer wilfully failed to file returns and timely pay tax was with the intent to evade payment of tax presents a question of fact to be determined upon consideration of the entire record (*see Matter of Drebin v. Tax Appeals Tribunal*, 249 AD2d 716 [1988]). The burden of demonstrating this falls upon the Division (*see Matter of Sona Appliances*, Tax Appeals Tribunal, March 16, 2000). Fraud is not defined in [the] Tax Law However, a finding of fraud requires the Division to show ‘clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing’ (*see Matter of Sona Appliances*). In order to establish fraudulent intent, petitioners must have acted deliberately, knowingly and with the specific intent to violate the Tax Law (*see Matter of Cousins Serv. Sta.*, Tax Appeals Tribunal, August 11, 1988).

The [Tax Law] penalty provisions are modeled after Federal penalty provisions and, thus, Federal statutes and case law may properly provide guidance in ascertaining whether the requisite intent for fraud has been established (*see Matter of Uncle Jim’s Donut & Dairy Store*, Tax Appeals Tribunal, October 5, 1989). Since direct proof of a taxpayer’s intent is rarely available, fraud may be proved by circumstantial evidence, including the taxpayer’s course of conduct (*Intersimone v. Commissioner*, T.C. Memo 1987-290, 53 TCM 1073 [1987]; *Korecky v. Commissioner*, 781 F2d 1566 [1986], 86-1 USTC ¶ 9232). Relevant factors held to be significant include consistent and substantial understatement of tax, the amount of the deficiency itself, the existence of a pattern of repeated deficiencies and the taxpayer’s entire course of conduct (*see Merritt v. Commissioner*, 301 F2d 484 [1962], 62-1 USTC ¶ 9408; *Bradbury v. Commissioner*, T.C. Memo 1996-182, 71 TCM 2775 [1996]; *Webb v. Commissioner*, 394 F2d 366 [1968], 68-1 USTC ¶ 9341; *see also Matter of AAA Sign Co.*, Tax Appeals Tribunal, June 22, 1989).

The burden rests with the Division to prove by clear and convincing evidence that petitioners, with willful intent, were in violation of the tax laws (*see Matter of Cardinal Motors*, State Tax Commn., July 8, 1983, *confirmed Cardinale v. Chu* 111 AD2d 458 [1985]). Fraud must be established with affirmative evidence and may not be presumed (*see Intersimone v. Commissioner, supra*). Therefore, mere suspicion of fraud from the surrounding circumstances is not enough (*see*

Goldberg v. Commissioner, 239 F2d 316 [1956], 57-1 USTC ¶ 9261)” (*Matter of Jay’s Distributors*, citing *Matter of What a Difference Cleaning*, Tax Appeals Tribunal, May 15, 2008).

In this case, petitioner has consistently claimed that he did not purchase and sell tobacco products. Meanwhile, the Division has failed to present sufficient evidence of fraud to meet its burden of proof in this regard. As a result, based upon the facts presented in this case, even if the underlying tax liability in the notice had been sustained the fraud penalty would be canceled.

D. The petition of Ahmed Alhajaj is granted and the notice of determination L-049549023 dated May 19, 2019, is canceled.

DATED: Albany, New York
April 14, 2022

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE