

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of : DETERMINATION
9 CIENTO DELI AND GROCERY CORP. : DTA NO. 831121
for Review of a Denial, Suspension, Cancellation or :
Revocation of a License, Permit or Registration under :
Articles 28 and 29 of the Tax Law. :

Petitioner, 9 Ciento Deli and Grocery Corp., filed a petition for review of a denial, suspension, cancellation or revocation of a license, permit or registration under articles 28 and 29 of the Tax Law.

An expedited hearing was held before Barbara J. Russo, Administrative Law Judge, by videoconference via Cisco Webex, on February 8, 2023 at 10:30 A.M., with the final brief due by June 21, 2023, which date began the period for the issuance of this determination pursuant to Tax Law § 2008 (2). Petitioner appeared by Selig & Associates, Inc. (David Selig, CPCU, EA). The Division of Taxation appeared by Amanda Hiller, Esq. (Eric R. Gee, Esq., of counsel).

ISSUE

Whether petitioner has established that the proposed revocation of its sales tax certificate of authority was improper and should be canceled.

FINDINGS OF FACT

1. By a notice of proposed revocation of sales tax certificate of authority (notice of proposed revocation or notice), dated August 5, 2022, the Division of Taxation (Division) notified petitioner, 9 Ciento Deli and Grocery Corp., of its intention to revoke its certificate of

authority, pursuant to Tax Law § 1134 (a) (4) (A), on the ground that petitioner had three possessions or sales of unstamped or unlawfully stamped packages of cigarettes within a five-year period under Tax Law § 480-a (4) (a).

2. Petitioner operated a deli and grocery located at 900 Allerton Avenue, Bronx, New York, making retail sales. Petitioner was issued a sales tax certificate of authority dated May 28, 2015. Ali Alhajjaji is petitioner's owner.

3. On November 22, 2019, investigators from the Division's Criminal Investigation Division (CID) conducted a regulatory inspection at petitioner's premises. Mr. Alhajjaji presented identification to the investigators. During the inspection, CID Investigator Russell observed a "trap" adjacent to the cash register behind the counter.¹ The trap contained 5.5 cartons of Virginia stamped cigarettes. Mr. Alhajjaji pointed out another trap located behind a shelf also behind the counter. The second trap contained 11.2 cartons of Virginia stamped cigarettes. Mr. Alhajjaji informed the investigators that he pays \$70.00 to \$75.00 per carton and sells them for \$9.00 a pack. The investigators seized and vouchered the 16.7 cartons of untaxed cigarettes.

4. Based on the November 22, 2019 inspection, the Division issued a notice of suspension of registration as a retail dealer of cigarettes and/or tobacco products, dated December 6, 2019 (notice of suspension), to petitioner. By written decision dated January 16, 2020, a reviewing officer with the Division's CID upheld the suspension, and petitioner's certificate of registration as a retail dealer of cigarettes and/or tobacco products was suspended for six months. Petitioner did not appeal the reviewing officer's decision.

5. On January 26, 2020, CID investigators performed a follow-up inspection of

¹ The "trap" is described as a shelving unit wall trap where the shelving panel moves to the side.

petitioner's premises. The store was being operated by Mr. Alhajjaji, who was working at the cash register and in control of the retail store making sales at the time of the inspection. During the inspection, CID Investigator Almanzar found a total of 14.7 cartons of untaxed cigarettes behind the counter, inside the trap, with Virginia and Georgia stamps. Mr. Alhajjaji informed the investigators that he sells the cigarettes for \$9.00 a pack. The investigators seized and vouchered the 14.7 cartons of untaxed cigarettes.

6. A notice of suspension, dated January 26, 2020 (second notice of suspension), was issued to petitioner. Mr. Alhajjaji was issued a summons for the possession for sale of untaxed cigarettes and for selling cigarettes without a valid certificate of registration.

7. Petitioner did not request a review of the second notice of suspension. By written decision, dated February 25, 2020, a reviewing officer with the Division's CID upheld the second notice of suspension, and petitioner's certificate of registration as a retail dealer of cigarettes and/or tobacco products was suspended for three years. Petitioner did not appeal the reviewing officer's decision.

8. On January 4, 2021, CID investigators performed another inspection of petitioner's premises. At the time of the inspection, the store was being operated by its manager, Mohamed Zaid Alsaïdi, who provided identification to the investigators. During the inspection, CID Investigator Domenech found a total of 17.5 cartons of untaxed cigarettes behind the counter, inside the trap, bearing Virginia tax stamps. The investigators seized and vouchered the 17.5 cartons of untaxed cigarettes.

9. As a result of petitioner's third offense for the possession of untaxed cigarettes, the Division issued a notice of revocation, dated January 4, 2021, revoking petitioner's certificate of registration as a retail dealer of cigarettes and/or tobacco products.

10. Petitioner did not request a review of the notice of revocation. By written decision, dated February 5, 2021, a reviewing officer with the Division's CID upheld the notice of revocation, and petitioner's certificate of registration as a retail dealer of cigarettes and/or tobacco products was revoked for five years. Petitioner did not appeal the reviewing officer's decision.

11. The Division's CID referred the matter to its Criminal Enforcement Division (CED) for the revocation of petitioner's sales tax certificate of authority. The referral was made as a result of petitioner's three violations within a period of five years, to wit: violations for the possession of untaxed cigarettes on January 4, 2021, January 26, 2020, and November 22, 2019 (notice of suspension dated December 6, 2019).

12. Marshall Vanderpool, Tax Compliance Agent II with the Division's CED, testified that he reviewed the referral and the CED investigation reports, notices of suspension, notice of revocation, and reviewing officer decisions and determined that based on petitioner's violations, its certificate of authority was required to be revoked. Upon review and approval by Mr. Vanderpool's supervisors, the Division issued the notice of proposed revocation.

13. Petitioner requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). By order dated October 14, 2022, BCMS sustained the statutory notice.

14. Petitioner did not offer any testimony or evidence during the hearing in this matter. Petitioner's representative conceded that petitioner received the three violations indicated in the notices of suspension and revocation for the possession of untaxed cigarettes.

CONCLUSIONS OF LAW

A. Tax Law § 1134 (a) (4) (A) (vii) provides that where a person who holds a certificate

of authority has had a retail dealer registration issued pursuant to Tax Law § 480-a revoked pursuant to Tax Law § 480-a (4) (a) (iii) and such person possesses or sells unstamped or unlawfully stamped packages of cigarettes three or more times within a period of five years, the commissioner may revoke or suspend such certificate of authority, provided that such suspension or revocation shall continue for as long as the revocation of the retail dealer registration remains in effect.

Tax Law § 480-a (4) (a) (i) through (iii) provides that if a retail dealer possesses or sells unstamped or unlawfully stamped packages of cigarettes, its registration shall be revoked for one year, that for a second possession or sale within a five-year period, its registration shall be revoked for a period of three years, and for a third possession or sale within a period of five years, its registration shall be revoked for a period of five years.

B. The record is clear that petitioner possessed unlawfully stamped packages of cigarettes, namely packages of cigarettes with out-of-state tax stamps, three times within a period of five years (*see* findings of fact 3 through 10) and had its certificate of registration as a retail dealer of cigarettes and/or tobacco products revoked for five years pursuant to Tax Law § 480-a (4) (a) (iii). Petitioner's representative conceded that petitioner had such violations.

While not disputing petitioner's liability, petitioner's representative argues that its "owner has taken extraordinary measures to avoid this from happening again" and contends that "putting him out of business . . . seems unduly harsh."

C. Contrary to petitioner's argument, taking alleged remedial measures after-the-fact to prevent future violations does not constitute grounds for avoiding the revocation of a sales tax certificate of authority. The Tax Law is clear that where a retail dealer possesses unlawfully stamped cigarettes three or more times within a five-year period, the commissioner may suspend

or revoke its certificate of authority (*see* Tax Law § 1134 [a] [4] [A] [vii]). Moreover, the Tax Law does not provide for any exceptions to revocation where the taxpayer institutes subsequent remedial measures.

Petitioner's representative's argument that putting it out of business is "unduly harsh" is akin to contending that some settlement of a lesser degree should be imposed upon the Division. However, this forum does not have the jurisdictional authority to mandate a settlement agreement between petitioner and the Division (*see Matter of Cal Snyder*, Tax Appeals Tribunal, May 5, 2011).

C. The petition of 9 Ciento Deli and Grocery Corp. is hereby denied and the notice of proposed revocation, dated August 5, 2022, is sustained.

DATED: Albany, New York
July 06, 2023

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE