

**NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION**

In the Matter of the Petition

of

Juan Abreu

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DETERMINATION

TAT (H) 09-10 (CT)

Murphy, A.L.J.:

Petitioner, Juan Abreu, filed a Petition with the New York City ("City") Tax Appeals Tribunal for redetermination of a deficiency of City Cigarette Tax ("CT") under Chapter 13 of Title 11 of the Administrative Code ("Code"), for the period ended October 10, 2007.

A Hearing was held before the undersigned on July 13, 2010. Petitioner was represented by an attorney when the Petition was filed, but Mr. Abreu appeared at Hearing *Pro Se*. Martin Nussbaum, Esq., Assistant Corporation Counsel, represented Respondent Commissioner of Finance. At Hearing documents were submitted and testimony was taken. The testimony of Petitioner was provided by Spanish language interpretation. The Hearing record remained open until August 13, 2010, to allow Petitioner to submit a letter from the office of the attorney who represented him in a related criminal matter. Petitioner submitted that correspondence on August 6, 2010.

ISSUE

Whether Petitioner, a newly-hired part-time stock clerk, is liable for City Cigarette Tax penalties assessed by Respondent on his alleged possession of 17.9 cartons of unstamped or unlawfully stamped cigarettes seized from his employer's premises on October

10, 2007, by New York State ("State") Department of Taxation and Finance ("DTF") investigators and officers from the New York City Police Department.

FINDINGS OF FACT

1. Shyreny Mini Market, Inc., a small neighborhood grocery store, is located at 2704 Third Avenue, Bronx, New York ("Business"). The Business was also known as Reseln [sp.] Deli Grocery during the period in issue. In 2007, the Business employed three persons, including a person in charge of the counter and of handling money, and an individual to clean the store. The Business offered cigarettes for sale.

2. Beer, soda and groceries were kept in the basement of the Business premises. Cigarettes were stored in a locked office in the basement area and the owner kept the key in his possession. Cigarettes offered for sale were kept behind a counter.

3. Petitioner Juan Abreu was employed by the Business as a stock clerk. His employment began on October 1, 2007. Petitioner worked part-time at the Business for not more than ten days, approximately three hours a day, five days a week, until October 10, 2007. His responsibilities included filling the freezer, stocking shelves, cleaning windows and sweeping floors. Mr. Abreu would go to the basement to get items for restocking. He did not have access to the stored cigarettes, and did not work behind the counter or act as a salesperson. He was present on October 10, 2007.

4. On October 10, 2007, State Petroleum, Alcohol and Tobacco Bureau ("PATB") investigators and officers from the NYC Police

Department 40th Precinct, conducted an inspection of the Business premises. They seized 17.9 cartons of counterfeit-stamped cigarettes, which they placed in a shopping bag.

5. Petitioner was working in the basement of the Business when the officers arrived. He called the owner of the Business to inform him of the inspection, but the owner did not come to the site.

6. Petitioner was arrested and charged with various counts of cigarette tax evasion which were misdemeanors under the State Tax Law §§1814(a)(1); 1814(d); 1814(i) and New York Penal Law §§170.20, 170.25. Although there were other employees present at the premises, Petitioner was the only individual arrested and brought to court.¹

7. The State Tax Enforcement Cigarette Tax Unit referred the matter to the City Department of Finance ("Department") on November 26, 2007. A Tax Enforcement Referral Report ("Report") was issued with respect to the October 10, 2007 cigarette confiscation from the Business and the arrest of Petitioner. The copy of the Report admitted into evidence, which bears a stamp "2007 NOV 26 PM:3:25" but is otherwise undated and unsigned, states that at the time of the Report the Business had been in operation for one year, employing three (3) persons. The Report identified Petitioner as the Store Manager of the Business. The violations described in the Report included possession of a forged instrument, possession of a counterfeit tax stamp and possession of unstamped cigarettes. The Report states that the majority of the cigarettes seized, 15.9

¹ Petitioner testified that he believed he was the only one arrested because he was the only individual at the premises with identification. Tr. 18.

cartons, were located in a "display rack behind the store counter," while 2 cartons were discovered in "a half cigarette case wrapped with black plastic, located in an office in the store's basement."

8. On May 23, 2008, based upon the Report, Respondent issued Petitioner a Notice of Determination asserting a penalty of \$1290.00 against Petitioner pursuant to Code §11-1317.b for the possession of 12.9 cartons of unstamped and/or unlawfully stamped cigarettes seized on the premises of the Business. Although the total 17.9 cartons were seized, the Code permits a five carton exclusion when computing the penalty. Code §11-1317.b(1) (a).

9. The Clerk's Office, Supreme Court Criminal Division, Bronx County, issued an Adjournment in Contemplation of Dismissal ("ACD")² of the criminal case against Petitioner on July 13, 2008. The notice stated that the case involving Petitioner had been adjourned, to be dismissed on October 28, 2009, at which time the record would be sealed. Subsequently the case was dismissed and the record was sealed.

10. On July 24, 2009, the State DTF issued Petitioner a Consolidated Statement of Tax Liabilities (State Form DTF-086.41) which asserted an outstanding penalty assessment in the amount of \$1935, under Assessment Identification number L-029487080-9, for

² An ACD is an adjournment of the action without date, ordered with a view towards the ultimate dismissal of the accusatory instrument in furtherance of justice. (NY Criminal Procedure Law §170.55(2)). The case is adjourned for up to six months, and the defendant is released on his own recognizance. (*Id.*) After six months, if the case is not restored to the court's calendar, it is deemed dismissed in furtherance of justice (*i.e.*, not on the merits). (*Id.*) Upon the ultimate dismissal of the case, "the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution." NY CPL § 170.55(8). The final effect of an ACD is the sealing of the record that "a criminal action or proceeding against a person shall be considered terminated in favor of such person" NY CPL §160.50(3) (b) .

the period ended "10/10/07." The amount assessed is consistent with the application of a penalty of \$150 per carton for 12.9 cartons after applying the State statutory exclusion of five cartons.

11. Petitioner disagreed in writing with the Statement. He stated on the Disagreement with Findings Section of the Statement that he was not the Business owner and that the case against him was dismissed, referencing and attaching a copy of the July 13, 2009 ACD. The DTF did not pursue the matter.

12. On February 2, 2010, the Court Clerk for the Supreme Court of the State of New York, Bronx County, issued a Certificate of Disposition - Misdemeanor/Violation, with respect to the case against Petitioner. The Clerk certified that on October 28, 2009, the State criminal action against Petitioner was dismissed including "all pending criminal charges related to [this] action" by Judge Test. The Clerk stated that the dismissal was a "termination of the criminal action in favor of the accused" and "the arrest and prosecution shall be deemed a nullity and the accused shall be restored . . . to the status occupied before the arrest and prosecution."

STATEMENTS OF POSITION

Petitioner asserts that he is not liable for the penalty, as he was employed by the Business as a part-time clerk, his job responsibilities did not include any possession of or control over cigarettes, and the related criminal charges were dismissed by ACD. Respondent argues that, notwithstanding the ACD, Petitioner is

liable for the civil penalty because he was in possession and control of 17.9 cartons of unstamped or illegally-stamped cigarettes on October 10, 2007.

CONCLUSIONS OF LAW

State Tax Law Section 471 imposes a tax on all cigarettes for sale in the State by any person. T.L. §471.1. All cigarettes within the State are presumed subject to tax. *Id.* The tax is collected by selling tax stamps to agents who are responsible for affixing the stamps to cigarette cartons, and the cost of the tax is added to the sales price of the cigarettes. *Id.*

Penalties are imposed under the State Tax Law for cigarette tax evasion. Section 1814(a)(1) provides that "any person who willfully attempts in any manner to evade or defeat any tax imposed by [T.L. §470] or the payment thereof shall, in addition to other penalties provided by law, be guilty of a misdemeanor." T.L. §1814(d). Selling unstamped or unlawfully stamped cigarettes is also a misdemeanor (T.L. §1814(d)) as is the knowing and willful possession of counterfeit stamps (T.L. §1814(i)).³

Significant State civil penalties may be assessed for possession of unstamped or unlawfully stamped cigarettes. Tax Law Section 481 provides for the imposition of a penalty of up to one hundred fifty dollars (\$150) for each two hundred cigarettes or fraction thereof in excess of one thousand cigarettes in "unstamped

³ Petitioner was also charged with related criminal violations involving possession of a forged instrument: NY P.L. §170.20, Criminal Possession of a Forged Instrument in the Third Degree and NY P.L. §170.25, Criminal Possession of a Forged Instrument in the Second Degree. The essential element of criminal possession of a forged instrument is knowledge that the instrument is forged, which may not be shown solely from possession or presentation of the instrument.

or unlawfully stamped packages *in the possession or under the control of any person . . .*” T.L. §481(1)(b)(I). [Emphasis supplied.]

Penalties are imposed by the City Code as well, where unstamped or unlawfully stamped cigarettes are “*in the possession or under the control of any person.*” [Emphasis supplied.] Code §11-1317. The City penalty amount is \$100 for each two hundred cigarettes in excess of one thousand unstamped or unlawfully stamped cigarettes. Code §11-1317(b)(1). Both State and City provisions permit discretionary remission of the penalty amounts. See, T.L. §481(1)(b)(iii) and Code §11-1317(b)(1).

Both State and City penalty provisions require *knowing possession of and control over* unstamped or unlawfully stamped cigarettes. *Matter of Bayridge Supermarket, Inc. et al.*, DTA Nos 817910, 817911, 817912 (New York State Tax Appeals Tribunal January 2, 2003). See, also, *Abuzaid v. Woodward*, United States District Court, Northern District of New York, 2010 WL 653307, February 19, 2010. (The U.S. District Court noted that the imposition of T. L. §481 penalties depends on the offender’s mental state.) Several facts may be considered to determine whether an individual was in possession and control of unstamped or unlawfully stamped cigarettes.⁴ See, e.g., *Matter of Fuad Azzubidi*, DTA No, 821784 (NYS Tax Appeals Tribunal ALJ Determination, March 5, 2009) (petitioner actually purchased and took possession of cartons of untaxed cigarettes at different times from a confidential informant and DTF Supervising Investigator); *Matter of Rifat Saleh*, DTA No.

⁴ Administrative Law Judge Determinations are not precedential, but may be considered. See, *United Features Syndicate*, TAT(E) 93-95(CG) (NYC Tax Appeals Tribunal, August 4, 1997).

817875 (NYS Tax Appeals Tribunal ALJ Determination, November 15, 2001) (petitioner was the store manager, possessed keys to store, access to the cash register, and knowledge of the suppliers; petitioner pled guilty to the criminal sale of unstamped cigarettes); *Matter of Hilarion Cano and Taveras Snatos*, DTA Nos. 817570 and 817571 (NYS Tax Appeals Tribunal ALJ Determination, October 4, 2001) (although petitioners conceded possession of 329 cartons found in their truck, the ALJ found no possession and control of 1,039 other cartons located in the basement apartment where they picked up the 329 cartons).

A State Division of Tax Appeals Small Claims Determination, *Matter of Petition of Nailia Haider*, DTA No. 820362 (NYS Tax Appeals Tribunal ALJ Determination, October 23, 2006), while not precedential, is instructive.⁵ Petitioner Nailia Haider was arrested after she accepted a package of unstamped cigarettes addressed to her husband. The package, which originated outside the United States, was intercepted by United States Customs Service and unstamped cigarettes were discovered. The State DTF was informed, and a controlled delivery was arranged, which Ms. Haider accepted. Criminal charges were filed against her pursuant to T. L. §1814, but the charges were adjourned in contemplation of dismissal (ACD) and ultimately dismissed. The State DTF subsequently issued a Notice of Determination asserting a T.L. §481 penalty, which Ms. Haider protested.

The Presiding Officer held that liability for a Section §481 penalty turned on whether the individual "knowingly possessed or

⁵ This determination was published by the State Division of Tax Appeals before that Division's decision to no longer publish small claims determinations.

had control of the unstamped cigarettes.”⁶ T.L. §481(1)(b)(I). He found several facts which supported Ms. Haider’s position: (1) she was not proficient in the English language and may not have expressed herself clearly to investigators; (2) the intercepted package was not addressed to her; (3) she had no first-hand knowledge that the boxes contained unstamped cigarettes; (4) she was not involved with the purchase, sale, transportation or distribution of the cigarettes; and (5) she was not previously involved in the possession or control of unstamped cigarettes. *Matter of Haider, supra*. The Presiding Officer concluded that Ms. Haider was neither in possession of nor had control over the cigarettes, granted the Petition and canceled the Notice of Determination.

The facts of this matter are similarly compelling. Petitioner Abreu has a limited facility with the English language, and translation services were required during the pre-hearing conference and hearing proceedings. There is no evidence that Mr. Abreu was involved in the purchase, sale, transportation or distribution of the cigarettes, or that he knew that the cigarettes were unstamped or unlawfully stamped at the time of the inspection. Mr. Abreu had no access to the unstamped cigarettes at the Business site. The record does not support the State Enforcement Report statement that Petitioner was the store manager. Finally, criminal charges against Petitioner were dismissed ACD.

Petitioner was neither in possession of nor did he have control over the unstamped or unlawfully stamped cigarettes which were seized at the Business premises. Mr. Abreu had only been employed by the Business for a short period of time before the

⁶ The Presiding officer used the term “knowingly” although the statutory language does not make “knowingly” a requirement.

agents came to the store and confiscated the unstamped cigarettes. His job responsibilities were those of a clerk: he swept and cleaned the premises and stocked some of the items offered for sale. Mr. Abreu was not a salesperson and had no contact with the sales counter or access to the cash register. He had no authority to order, store or offer for sale cigarettes and other tobacco products. Finally, the cigarettes were kept outside areas of his control: either behind the sales counter, or in a locked closet.

Although the Tribunal is not bound by the results of a related State criminal proceeding when imposing civil penalties, the fact that the charges against Mr. Abreu were dismissed ACD is persuasive.⁷ Moreover, since the result of an ACD is sealing of a record and returning of the individual to the *status quo ante*, the fact that Mr. Abreu was arrested and charged cannot ultimately support the imposition of City civil penalties.

ACCORDINGLY IT IS CONCLUDED THAT Petitioner Juan Abreu, a newly-hired part-time stock clerk, is not liable for Cigarette Tax penalties asserted for the possession of unstamped or unlawfully stamped cigarettes found at his employer's business. The Petition

⁷ There is discussion in the cases whether or not double jeopardy attaches when an individual is simultaneously charged with criminal offenses and civil penalties for possession of unstamped or unlawfully stamped cigarettes. Since the criminal charges against Petitioner were dismissed following an ACD, the issue is not directly presented. See, *Matter of Yahya Said*, TAT(H)95-141 (January 23, 2002), where the City Tribunal found that on a *Hudson* analysis (*Hudson v. U.S.*, 522 U.S. 93 (1997)), the City penalty provisions (Code §11-1317.b) are civil provisions and the Due Process Clause is not violated where the taxpayer assessed this penalty has pled guilty or been convicted of cigarette tax crimes. But, see, the recent decision in *Abuzaid v. Woodward*, *supra*, February 19, 2010; the U.S. District Court for the Northern District of New York stated that Section 481(1)(b)(i) "effectively operates as a criminal penalty" and that imposition subsequent to a prior criminal prosecution is precluded under the Fifth Amendment.

is granted and the Notice of Determination dated May 23, 2008 is canceled.

DATED: April 13, 2011
New York, NY

ANNE W. MURPHY
Administrative Law Judge