

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

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**In the Matter of the Petition**

**Of**

**MEHRAB RASUL**

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**DETERMINATION**

**TAT(H) 12-2 (CT)**

Gallancy-Wininger, A.L.J.:

Petitioner, Mehrab Rasul, residing at 2842 Brigham Street, Ground Floor, Brooklyn, New York 11235, filed a Petition for Hearing (Petition) with the New York City (City) Tax Appeals Tribunal (Tribunal) seeking a redetermination of a tax deficiency of Cigarette Tax under Chapter 13 of Title 11 of the City Administrative Code (Administrative Code), asserted in a Notice of Determination dated August 2, 2011, in the amount of \$160,465.01 consisting of principal of \$20,625.00<sup>1</sup>, interest of \$2,340.01 calculated to August 1, 2011, and penalties of \$137,500.00.<sup>2</sup>

Petitioner appeared by Richard S. Kestenbaum, Esq. of the firm of Kestenbaum & Mark, Attorneys at Law. The Commissioner of Finance (Respondent) was represented by Amy Bassett, Esq., Assistant Corporation Counsel.

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<sup>1</sup>Administrative Code § 11-1302 establishes a tax of \$1.50 for every 20 cigarettes (*i.e.*, for each pack of cigarettes). The Cigarette Tax asserted in the NOD is based on 1,375 cartons of cigarettes x 10 packs per carton x \$1.50 = \$20,625.

<sup>2</sup>The penalty asserted in the NOD is \$100 per carton x 1375 cartons. (See, Administrative Code § 11-1317).

A Hearing was held on August 21, 2013, at which time testimony was taken and a Stipulation of Facts and Documents was admitted into evidence. Petitioner submitted a Post Hearing Memorandum on November 12, 2013. Respondent submitted a Brief on January 10, 2014.

### **ISSUES**

1. Whether Petitioner is liable for Cigarette Tax, including penalties, on 1,375 cartons of unstamped cigarettes.

2. Whether Respondent is precluded from asserting a civil assessment for possession of untaxed cigarettes following the dismissal of a criminal case against Petitioner for possession of unstamped cigarettes.

### **FINDINGS OF FACT**

On March 23, 2010, (Incident Date) the City police seized 1,380 cartons of unstamped cigarettes from two vans located at 9<sup>th</sup> Avenue and 66<sup>th</sup> Street in Brooklyn.<sup>3</sup>

However, because Administrative Code § 11-1327 provides a 5 carton exclusion, 1,375 cartons of unstamped cigarettes are at issue. Each carton of cigarettes contains 10 packs and each pack contains 20 cigarettes.

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<sup>3</sup>Tribunal exhibit 1.

Petitioner testified that on March 21, 2010, he returned from Pakistan where he had just gotten married. Upon his return, he received a voice message from a man named Ali who owned a construction company and for whom Petitioner performed a paint job a year earlier. The message was, that if Petitioner was looking for work, a job moving boxes of clothing to a warehouse was available. Petitioner was to be paid for a specific number of hours for this work.

Petitioner testified that on the Incident Date, he worked a 12-hour shift at his full-time job that ended at 11:00 P.M. After work, Ali took him to Ninth Avenue and 66<sup>th</sup> Street in Brooklyn, where Petitioner met two men with two vans, parked parallel to each other. The warehouse was in front of the vans.

Petitioner testified that he had not previously met either of the men and had never seen either van before the Incident Date.

Petitioner stated that the two men advised him that the warehouse was closed, and therefore, the goods could not be moved inside. Instead, Petitioner was instructed to move the goods from a big Chevrolet van with a Virginia license plate to a smaller Dodge Caravan with a Connecticut license plate.

It is undisputed that Petitioner did not own or lease either of the two vans.

Petitioner testified that he moved three or four black trash bags, which were about three feet high and knotted at the top, from one van to the other. At that time, the police appeared.

Petitioner testified that he did not know what was in the black bags. However, he had previously been told that the bags contained clothing. He did not observe any loose cigarettes or packages or cartons of cigarettes.

Petitioner also testified that had he known what the bags contained, he would not have taken any kind of risk that would jeopardize his life and hard work.<sup>4</sup> Such testimony is entitled to some weight in view of Petitioner's recent educational and career achievements.

Petitioner and the other two individuals were arrested. A criminal case against Petitioner with respect to the incident was dismissed.<sup>5</sup> The other individuals were convicted.

Bryan Sandvik, presently an employee of the United States Department of Homeland Security, was the arresting City police officer on the Incident Date. He testified at the Hearing that on the Incident Date, he was in a police car when he saw three individuals standing between the vans, which were approximately 2

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<sup>4</sup>At the time of the Hearing, Petitioner was expecting a promotion. One year prior to the Hearing, Petitioner completed his master's degree from Pace University with a GPA of 3.7.

<sup>5</sup>The Certificate of Disposition Dismissal issued by the Supreme Court of the State of New York, Kings County, states, "the above mentioned dismissal is a termination of the criminal action in favor of the accused. . . ." (Tribunal exhibit 1 Tab 18)

feet apart, moving large boxes and garbage bags from one van to the other.

Officer Sandvik testified that Petitioner was standing between the two vans, holding one black plastic bag by the top and moving it to the other van. In a Criminal Court Statement, Officer Sandvik stated that he observed Petitioner and the other two individuals "removing large plastic bags from the above-mentioned Chevrolet van and then placing said large black plastic bags into the rear of the above-mentioned Dodge Caravan." (Trib. exhibit 1, Tab 12.)

Officer Sandvik testified that when he exited the police car the three individuals began to walk off. However, Petitioner testified that he did not walk away.

Officer Sandvik testified that the bags were not tied at the top, because when the individuals dropped the bags, he could see the contents of the bags, large boxes and bags of cigarettes, on the street and in both vehicles.

Officer Sandvik testified that from a distance of approximately 50 feet, at a location perpendicular to the vans, he was able to see what was in the vans. He stated that the size of the tax stamp on a carton of cigarettes is approximately the size of a baseball card. He further stated that he didn't enter either van but, by using his flashlight, he was able to see from the street, that there were no tax stamps on the cartons of cigarettes on the floorboard of the larger blue van. 960 cartons of cigarettes were recovered from the Chevrolet and 420 cartons

of cigarettes and 48 loose packs of cigarettes were recovered from the Dodge.

### **STATEMENT OF POSITIONS**

Petitioner asserts that he did not knowingly possess untaxed cigarettes with the intent to sell them and therefore did not violate the Administrative Code.

Petitioner asserts that Officer Sandvik's testimony is not credible. Further, Petitioner's counsel asserted at the Hearing that the search following Officer Sandvik's observation of the black bags was illegal. He did not assert this in his post-hearing Brief.

Respondent asserts that Petitioner has not met his burden of proof that he was not in possession of the untaxed cigarettes. Respondent further asserts that Officer Sandvik's testimony should be afforded significant weight.

Respondent further asserts that the discontinuance of the criminal case against Petitioner should have no influence on the instant civil tax and penalty.

### **CONCLUSIONS OF LAW**

Section 11-1302 (a)(1) of the Administrative Code imposes a City tax of \$1.50 for each pack of 20 cigarettes on "all cigarettes possessed in the [C]ity for sale. . . ." (Emphasis

supplied.) The tax is administered by the issuance of tax stamps to agents, distributors or dealers who advance the amount of the tax. Tax stamps must be affixed to the packages of cigarettes. The tax is added to the price of the cigarettes and borne by the ultimate consumer. (Administrative Code § 11-1302)

The word "sale" is defined as "any transfer of title or possession or both. . . in any manner or by any means whatsoever. . . ." (Administrative Code § 11-1301 [1])

Administrative Code § 11-1306 provides that possession of more than 400 unstamped cigarettes is prima facie evidence that a person is subject to Cigarette Tax. Administrative Code § 11-1317 (c) (1) states that possession of more than 400 hundred cigarettes in unstamped or unlawfully stamped packages is be presumptive evidence that such cigarettes are subject to tax as provided by this chapter."

Prima facie evidence "will establish a fact or sustain a judgment unless contradictory evidence is produced." (See, Black's Law Dictionary [9<sup>th</sup> ed 2009], evidence; *prima facie evidence*) [Note: online version available at <https://westlaw.com> accessed June 24, 2014].

Article 20 of the New York State (State) Tax Law imposes a State tax on cigarettes. Agents who are licensed to purchase tax stamps, affix the stamps to packages of cigarettes. The tax is added to the price paid by the consumer. (State Tax Law § 473). State Tax Law § 481 imposes penalties for possession of unstamped or unlawfully stamped cigarettes.

In *Matter of Harder's Express v. State Tax Commission* (93 Misc 2d 449 [Supreme Court, Albany County, 1978], affd 70 AD2d 1010 [3<sup>rd</sup> Dept 1979]), the Court considered a case which involved the theft of untaxed cigarettes from a common carrier lawfully transporting the cigarettes from a tobacco company to a person lawfully entitled to possession. The Supreme Court, Albany County, noted that the common carrier did not acquire possession of the cigarettes for sale while transporting them. (*Harder's Express* at 450) The Appellate Division held that "mere change of physical custody does not constitute a sale of cigarettes." (*Harder's Express* at 1101) (See also, *Matter of Wylie Distribution & Warehousing* (sic), Inc. TSB-H-(22)M [1980], involving stolen cigarettes on which no tax had been paid. The State Tax Commission found that the petitioner did not acquire possession of untaxed cigarettes in order to transfer them to thieves).

The City Administrative Law Judge Determination in *Matter of Abreu*, (TAT (H) 09-10 [CT]), while not precedential, is instructive. In that case, Respondent sought a civil penalty for possession of unstamped cigarettes against a newly hired, part-time stock clerk employed at a small neighborhood grocery to sweep and clean the premises and stock shelves. The Administrative Law Judge determined that the newly hired part time stock clerk was not in possession and did not have control over the untaxed cigarettes.<sup>6</sup> The Administrative Law Judge in *Abreu* analyzed *Matter of Naila Haider*, DTA No. 820362 (State Tax Appeals Tribunal Administrative Law Judge Determination, October

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<sup>6</sup>City Administrative Law Judge Determinations may not be cited as binding precedent but may be considered.

23, 2006), which while not precedential, is also instructive.<sup>7</sup> Naila Haider was arrested after she accepted a package of unstamped cigarettes addressed to her husband. The Presiding Officer concluded that Ms. Haider did not knowingly possess or control of unstamped cigarettes. Among the factors considered were: (1) Ms. Haider was not proficient in the English language; (2) the package was not addressed to her; (3) Ms. Haider 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.

Administrative Code § 11-1317 (b) (2) provides:

The penalties imposed by this paragraph may be imposed by the commissioner of finance in addition to any other penalty imposed by this section, but in lieu of the penalties imposed by subparagraph (a) of paragraph one of this subdivision . . . (c) not less than one hundred dollars but not more than two hundred dollars for each two hundred cigarettes, or fraction thereof, in excess of twenty thousand in unstamped or unlawfully stamped packages, knowingly in the possession or knowingly under the control of any person. Such penalty may be determined as provided in section 11-1310 of this chapter and may be reviewed only pursuant to such section. . . (Emphasis supplied.)

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<sup>7</sup>This determination was published by the State Division of Tax Appeals before that Division's decision to no longer publish small claims determinations.

Clearly, Administrative Code § 11-1317 (b) (2) requires knowing possession or knowing control of unstamped cigarettes before penalties may be asserted.

Knowing possession or knowing control has been found where an individual actually purchased and took possession of cartons of untaxed cigarettes several times during the course of a sting operation (See, for example, *Matter of Faud Azzubidi*, DTA No. 821784, State Tax Appeals Tribunal ALJ Determination, March 5, 2009); and where a petitioner was the store manager, possessed keys to the store and pled guilty to criminal possession of the sale of unstamped cigarettes (See, for example, *Matter of Rifat Saleh*, DTA No. 817875 State Tax Appeals Tribunal ALJ Determination, November 15, 2001).

On the other hand, see *Matter of Salvatore Priditera* (TSB-H-79(21)[M]) which concerns unstamped cigarettes stored in the garage of the petitioner's home by the petitioner's brother. A criminal complaint against Mr. Priditera was dismissed by the District Attorney for lack of a legally sufficient case. The State Tax Commission determined that there was no evidence that Mr. Priditera had knowledge of any improperly stamped cigarettes in his garage nor was there credible evidence of the number of cigarettes seized.

Respondent asserts that the dismissal of the criminal case involving Petitioner does not preclude Respondent from pursuing its claim for Cigarette Tax and penalties because the criminal case and this matter have different burdens of proof. (See, *Matter of Davis*, DTA No. 820262, July 20, 2006, which holds that

in a criminal proceeding the state has the burden to establish guilt beyond a reasonable doubt while the petitioner has the burden of proof to demonstrate by clear and convincing evidence "that the imposition of the penalty by the Commissioner in the amount so imposed was an abuse of discretion".) The criminal charges against Petitioner were dismissed for reasons that are not clear and Petitioner does not assert that this proceeding is barred by reason of double jeopardy.<sup>8</sup> Nevertheless, its dismissal was a "termination of the criminal action in favor of the accused" whereas the other individuals were convicted.

In this matter, 960 cartons of cigarettes were recovered from the Chevrolet van and 420 cartons of cigarettes and 48 loose packs of cigarettes were recovered from the Dodge. Petitioner did not own, rent or have possession or control over either vehicle or their contents. Petitioner's testimony that the cigarettes were contained in black trash bags is supported by Officer Sandvik's statement in the Omniform-System Complaint. Petitioner's testimony that he never met either of the other individuals prior to the date of the incident is uncontroverted. The two individuals, who were strangers to Petitioner, never gave Petitioner actual control over the cigarettes. It is not reasonable to believe that the two strangers gave Petitioner possession sufficient to enable Petitioner to sell the cigarettes.

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<sup>8</sup>There is discussion in the cases whether or not double jeopardy attaches when an individual is charged with criminal offenses and civil penalties for possession of unstamped or unlawfully stamped cigarettes. Since the criminal charges against Petitioner were dismissed for reasons that are unclear, the issue is not directly presented. (See, *Matter of Yahya Said*, TAT(H) 95-141; *Abuzaid v Woodward*, 2010 WL 653307 United States District Court, ND NY [February 19, 2010])

Under these facts, I find that Petitioner did not acquire possession or control of untaxed cigarettes. Petitioner merely moved several black trash bags, subsequently found to contain untaxed cigarettes, from one vehicle to another. Petitioner never had control over either van or its contents. Such circumstances did not permit him to sell the cigarettes and falls short of the possession required under Administrative Code § 11-1302.

Such activity also falls short of the knowing possession and knowing control required for the assertion of penalties under Administrative Code § 11-1317 (b) (2).

Since Petitioner did not have possession or control over the unstamped cigarettes, it is unnecessary to determine whether Officer Sandvik's search of the two vehicles satisfied the requirements of law.

ACCORDINGLY, it is concluded that Petitioner Mehrab Rasul was not in possession or control of untaxed cigarettes for the purpose of either Administrative Code § 11-1302 or Administrative Code § 11-1317 and is not liable for the Cigarette Tax or the penalties asserted by Respondent. The Petition of Mehrab Rasul is granted and the Notice of Determination dated August 2, 2011 is canceled.

New York, New York  
June 27, 2014

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Jean Gallancy-Wininger  
Administrative Law Judge