

NEW YORK CITY TAX APPEALS TRIBUNAL  
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petition : DETERMINATION  
:   
of : TAT (H)18-12(CT)  
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Robert A. Schmidt :   
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Bunning, A.L.J.:

Robert A. Schmidt (Petitioner) filed a petition for hearing (Petition) dated June 12, 2018 with the New York City (City) Tax Appeals Tribunal (Tribunal). The Petition contests a notice of determination that asserts a cigarette tax penalty in the amount of \$99,000.00 for the tax period of May 4, 2017.

Respondent filed an Answer dated August 13, 2018. The undersigned held several pre-hearing conferences. On May 2, 2019, pursuant to Tribunal Rules of Practice and Procedure (Tribunal Rules) (20 NYCRR) §1-05(d) Respondent filed a motion for summary determination, supported by the affirmation of Kevin R. Harkins, Esq., the affidavit of Sheriff's Detective Judy Lee, and the affidavit of City Police Officer Vincent Gambino,<sup>1</sup> with exhibits, and a memorandum of law. Respondent subsequently submitted another affidavit of Officer Gambino that was properly notarized and executed.

Petitioner filed an Affirmation in Opposition on July 23, 2019. Respondent filed Commissioner's Memorandum of Law in

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<sup>1</sup>Respondent originally submitted an affidavit of Officer Gambino that was unsworn. It was signed and dated April 30, 2019, with a blank space for a notary to sign. On May 6, 2019, Respondent faxed a second Gambino affidavit to the Tribunal with a notary's signature and stamp and a date sworn to of May 6, 2019, with "30" and "April" crossed out and initialed by the notary.

Further Support of His Motion for Summary Determination on August 21, 2019.

Petitioner was represented by Robert J. Helbock, Esq., of Helbock and Nappa, LLP. The City Commissioner of Finance (Respondent) was represented by Kevin R. Harkins, Esq., Senior Counsel with the City Law Department.

For the reasons set forth below, the motion for summary determination is granted.

### **ISSUES**

I. Whether there is no material and triable issue of fact so that summary determination is appropriate pursuant to Tribunal Rules §1.05(d).

II. Whether the penalty imposed by Respondent upon Petitioner was appropriate.

### **FACTS**

Giving all reasonable inferences to Petitioner, the undisputed material facts are as follows.

Police Officer Gambino worked as part of a crime team on Staten Island responding to reports of vehicle break-ins. During the pre-dawn hours of May 4, 2017, he received a call concerning the larceny of a vehicle. When he arrived at the scene, he saw that the left rear window of an unattended van had been shattered. Officer Gambino ran the license plate and learned that Petitioner owned the van and lived around the corner. He rang Petitioner's doorbell. Petitioner appeared and accompanied Officer Gambino and his partner to look at the van.

In Petitioner's presence, Officer Gambino shone a flashlight into the van, and he "could see in plain view a large

amount of cigarettes; both sealed and unsealed cartons contained within open bags and boxes." He saw that the cigarettes were stamped "VA," which he interpreted to mean that they had cigarette tax stamps from the State of Virginia. Officer Gambino asked if the cigarettes were unlawful and Petitioner admitted they were. Officer Gambino placed Petitioner under arrest.

Petitioner and his van were transported to the 122<sup>nd</sup> Precinct in Staten Island. Officer Gambino counted 979 cartons of cigarettes and four cartons of cigars from the van. His affidavit states, "I am aware that subsequently, the Sheriff's Office counted 995 cartons of cigarettes and 4 cartons of cigars. I know that I inadvertently included the 4 cartons of cigars with the cigarettes, which means that I should have noted 975 cartons of cigarettes; the remaining twenty carton difference was a counting error." The corresponding arrest report states, "When A/O [arresting officer] arrived at scene the left rear window of vehicle was shattered. A/O observed 26 cartons of untaxed cigarettes in plain view inside vehicle. Upon inventory search of the vehicle, the vehicle was found to contain 975 cartons of cigarettes with no New York State tax stamp."

Sheriff's Detective Judy Lee is employed in the Bureau of Criminal Investigation in the Office of the Sheriff, which is part of the City Department of Finance. On May 4, 2017, Detective Lee received a telephone call from Officer Gambino. He stated that as part of an arrest, he recovered many cigarette cartons bearing Virginia tax stamps. Officer Gambino told Detective Lee that he had tried to call the New York State Division of Taxation and Finance, as was typical in such cases,

but had been unable to reach anyone there. Detective Lee traveled to the 122<sup>nd</sup> Precinct and to collect the cigarettes.

Detective Lee opened each carton and looked at the tax stamp on each pack of cigarettes. She counted 995 cartons of cigarettes, each with a Virginia tax stamp, and four cartons of cigars. She prepared an evidence card attesting to the count and transported the cigarettes back to the Sheriff's office in Long Island City. This evidence card notes "995.0 Cartons of cigarettes bearing VA tax stamps," and "4.0 Cartons of cigars."

On September 12, 2017 in the Criminal Court of the City of New York, County of Richmond, Petitioner pleaded guilty to State Tax Law §1814(b)<sup>2</sup>. As part of that plea, he stated that on or about May 4, 2017, at 2:30 a.m., he "knowingly, unlawfully possess[ed], transport[ed] for the purpose of sale, unstamped or - unlawfully stamped cigarettes." (Transcript of Criminal Court for the City of New York, County of Richmond, Docket No. 2017RI003408, September 12, 2017, at 4:7-12, attached as Exhibit A to Harkins Affirmation.)

Respondent sent Petitioner a notice of determination, dated August 11, 2017, asserting cigarette tax penalty of \$99,000, pursuant to City Administrative Code (Code) §11-1317(b), based on his possession on May 4, 2017 of 995 cartons of unstamped or unlawfully stamped cigarettes in his possession. The penalty

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<sup>2</sup> Tax Law §1814(b) provides, "Any person, other than an agent licensed by the commissioner, who possesses or transports for the purpose of sale any unstamped or unlawfully stamped packages of cigarettes subject to tax imposed by section four hundred seventy-one of this chapter, or who sells or offers for sale unstamped or unlawfully stamped packages of cigarettes in violation of the provisions of article twenty of this chapter shall be guilty of a misdemeanor. Any person who violates the provisions of this subdivision after having previously been convicted of a violation of this subdivision within the preceding five years shall be guilty of a class E felony."

was computed at \$100 per carton on 995 cartons, exclusive of the first five cartons (1,000 cigarettes): \$99,000.<sup>3</sup>

#### POSITIONS OF THE PARTIES

Respondent argues that Petitioner's plea collaterally estops him from litigating the possession issue. Respondent concedes that there is a discrepancy in the count of cigarette cartons by Officer Gambino (975) and Detective Lee (995) and argues that the lower number of cartons (975) should be used. Respondent therefore argues that there are no material facts at issue and that judgment should be granted in his favor for \$97,000 instead of \$99,000 as originally sought.

Petitioner offers no evidence in opposition to the motion, arguing that the assessment resulted from an unconstitutional search of his vehicle.<sup>4</sup> Petitioner argues that the record offers no explanation for the counting error, and notes that the criminal plea does not specify the number of cigarette cartons in his possession. He also argues that Respondent did not consider the fact that this was his first conviction for this activity, and that Petitioner's plea was to a misdemeanor, rather than a felony. Respondent must show a rational basis for the maximum penalty.

Petitioner also raises two evidentiary arguments. He argues that the affidavit of Officer Gambino should be rejected because the original was not sworn to and notarized. Petitioner also notes that the affidavit of Detective Lee offers a hearsay

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<sup>3</sup> Code §11-1317(b). A carton contains 200 cigarettes, packaged into 10 packs, each containing 20 cigarettes.

<sup>4</sup>The Petition alleges that Respondent failed to establish any of the following: (1) a reasonable basis to tax Petitioner based on the search; (2) that the cigarettes at issue were in Petitioner's possession; or (3) that Petitioner was in possession of more than 400 untaxed cigarettes. The Petition also alleges that the value of the cigarettes forfeited to Respondent should be deemed to resolve this matter.

statement from Officer Gambino regarding the latter's attempts to contact the New York State Department of Taxation and Finance before contacting the City Sheriff's Office.

Respondent counters that the counting error need not be explained because Respondent is relying on the lower number, thus eliminating any factual issue. Respondent points out that the corrected Gambino affidavit is signed and is now notarized. Respondent states that Officer Gambino's contacting the Sheriff's Office after being unable to contact the Department of Taxation and Finance does not create an issue of fact. Respondent argues that the penalty under Code §11-1317(b) was asserted but the penalty under §11-1317(a) was not, demonstrating that Petitioner did not receive the maximum penalty.

## DISCUSSION

### I. Standard of Review

Section 1.05(d)(1) of the Tribunal Rules provides that a motion for summary determination

"shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party."

It further provides that,

"The motion shall be denied if any party shows sufficient basis to require a hearing of any issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion."

This Tribunal Rule is based on CPLR 3212(b). In interpreting this provision, courts have held that the movant must "establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor . . . and he must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citations omitted]; *Matter of Jonis/E. 29th Street LLC*, TAT [E] 09-9 [RP] [City Tax Appeals Trib., Appeals Division, October 24, 2011], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues from the case (*Winegrad*, 64 NY2d at 853). Failure to make this showing requires that the motion be denied, regardless of the sufficiency of the opposing papers (*Winegrad*, 64 NY2d at 853).

If the movant makes this showing, the burden shifts to the opposing party to present facts sufficient to require a trial of any issue of fact, by producing evidentiary proof in admissible form, or by demonstrating acceptable excuse for the failure to meet the strict requirement of tender in admissible form (*Zuckerman*, 49 NY2d at 562).

Deciding whether there is a material and triable issue of fact requires some preliminary determinations. First, Petitioner challenges the hearsay statement in Detective Lee's affidavit that Officer Gambino told her that he unsuccessfully tried to reach the New York State Department of Taxation and Finance before he called her. Petitioner is correct that this is hearsay, but "hearsay statements are admissible and may constitute substantial evidence at administrative proceedings." (*Matter of O'Hara v Brown*, 193 AD2d 564, 565 [1<sup>st</sup> Dept 1993];

City Charter §1046.c ["Adherence to formal rules of evidence is not required"]).

Regardless of this rule, the hearsay statement is not material to this determination. The relevant facts relayed by Detective Lee are that Officer Gambino called her after he arrested Petitioner and sought to impound the seized cigarettes and cigars. They also both counted the cigarettes, with slightly divergent counts. His statement to her that he tried to call another agency before he called her is not relevant to this motion.

Second, Petitioner charges that the Gambino affidavit was not notarized. The notary's changes to and signature of the affidavit do not render it defective. An affidavit is defined as "any voluntary ex parte statement reduced to writing, signed by the party making the statement, and sworn to or affirmed before some person authorized by law to administer an oath or affirmation (1 NY Jur 2d Acknowledgements, §35 and cases cited therein). This document meets those requirements.

These two evidentiary issues resolved, there are no material and triable issues of fact. The penalty provided by §11-1317(b) applies where the person is in possession of unstamped or unlawfully stamped cigarettes. Petitioner's plea agreement establishes that he was in possession of such cigarettes. The doctrine of issue preclusion prevents re-litigation of the issue of possession, which was established by the plea in the criminal case (see e.g., *Parklane Hosiery Co., Inc. v Shore*, 439 U.S. 332 [1979]; *Goldstein v Consolidated Edison Co. of NY, Inc.*, 93 AD2d 589 [1<sup>st</sup> Dept 1983]). Petitioner does not contest possession of unstamped cigarettes but



questions whether the number of cigarettes has been established. It has.

The Petition itself alleges that Petitioner's vehicle contained "closed black plastic bags with untaxed cigarettes." Two law enforcement officers counted the cigarettes; Officer Gambino counted 979 cartons, apparently including four boxes of cigars (Gambino Aff., ¶ 9 and arrest report attached as Exhibit A thereto); Sheriff's Detective Lee counted 995 (Lee Aff., ¶ 6 and Evidence Card, attached as Exhibit A thereto). Based on this evidence, it must be concluded that Petitioner was in possession of at least 975 cartons of cigarettes. Petitioner offers no evidence to the contrary. Accordingly, there are no material and triable issues of fact that preclude the granting of summary determination. The remaining issue is whether Respondent is entitled to a determination as a matter of law.

## **II. The Appropriateness of the Penalty**

Petitioner argues that the penalty is not appropriate because it does not consider the fact that this was Petitioner's first offense and that he pleaded guilty to a misdemeanor rather than a felony. However, case law precludes the Tribunal's consideration of mitigating factors.

The penalty at issue was imposed under Code §11-1317(b). Section 11-1317(a) and (b) provide in relevant part as follows:

"§11-1317. Penalties and interest.

"a.(1) Any person failing to pay a tax payable under section 11-1302 when due shall be subject to a penalty of fifty per centum of the amount of tax due, but the commissioner of finance, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues under this chapter.

Unpaid penalties may be enforced in the same manner as the tax imposed by section 11-1302.

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"b. (1) In addition to any other penalty imposed by this section, the commissioner of finance may (a) impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of one thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person \* \* \* Such penalty shall be determined as provided in section 11-1310 of this chapter, and may be reviewed only pursuant to such section. Such penalty may be enforced in the same manner as the tax imposed by this chapter. The commissioner of finance, in his or her discretion, may remit all or part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues under this chapter."<sup>5</sup>

City Tax Rule (19 NYCRR) §4-23(b)(2) provides:

"In addition to any other penalty imposed by §11-1317 of the Administrative Code of the City of New York, as amended, the Commissioner of Finance may impose a penalty of not more than \$100 for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes<sup>6</sup> in unstamped or unlawfully stamped packages in the possession or under the control of any person. The Commissioner of Finance, in his discretion, may remit all or part of such penalty."

As Respondent points out, no penalty was imposed under Code §11-1317(a). Nor was penalty imposed pursuant to Code §11-1317(b)(2). The penalty was restricted to §11-1317(b)(1). From this some measure of proportionality may be deduced.

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<sup>5</sup> Further, Code §11-1317(b)(2) provides additional penalties which may be imposed "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 . . . ."

<sup>6</sup> City Tax Rule §4-23(b)(2) does not reflect the amendment to Code §11-1317(b)(2) in 2000, Chap 262/2000, eff. November 14, 2000.

Section 170.d of the City Charter requires that this Tribunal "follow as precedent the prior precedential decisions of . . . the New York State Tax Appeals Tribunal . . . ." Authority from the State Tax Appeals Tribunal (State Tribunal) establishes that it is beyond the power of this Tribunal to determine the appropriateness of the penalty. In assessing the \$150 per carton penalty imposed pursuant to Tax Law §481(1)(b)(i)(A), the State Tribunal held, "'there are no statutory [or regulatory] guidelines for the exercise of the Commissioner's discretion in imposing [the] penalty [and thus] it is not necessary for the Division to have considered any mitigating factors prior to the imposition of the penalty'" (*Matter of ERW Enterprises Inc., et al*, DTA Nos. 827209 and 827210 [2019], quoting *Matter of Fakhouri*, DTA No. 820906 [St. Tax Trib., 2007] [brackets in original]; see also, *Matter of Vinter*, DTA No. 816928 [St. Tax Trib., 2001]). In *Vinter*, the administrative law judge held that mitigating factors had not been considered and reduced the penalty by 50%; that decision was reversed by the State Tribunal, which stated,

"it was not necessary for the Division to have considered factors such as the nature, number and degree of the violation by petitioner prior to the imposition of the penalty at issue since this is mandated neither by statute nor regulation. 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. That is properly the subject of legislative reform or regulatory action by the Commissioner."

The statute at issue in *Vinter* was Tax Law §481(1)(b), which provided for a penalty of "not more than one hundred dollars for each two hundred cigarettes or fraction thereof in

excess of two thousand cigarettes in unstamped or unlawfully stamped packages in possession or under the control of any person . . . . The commissioner of taxation and finance, in his discretion, may remit all or part of such penalty." The same provision was at issue in *ERW Enterprises, Inc.*, although the penalty had been increased to "not more than \$150.00 per carton."

The statute considered in the State decisions is indistinguishable from the statute at issue here. Code §11-1317(b)(2) similarly provides for a penalty of "not more than one hundred dollars for every two hundred cigarettes or fraction thereof in excess of one thousand cigarettes" and permits Respondent "in his or her discretion" to "remit all or part of such penalty." There are no statutory or regulatory guidelines to reduce the penalty imposed by Code §11-1317(b) and 19 RCNY §4-23(b)(2). Accordingly, this Tribunal lacks the authority to reduce the penalty.

Petitioner has not raised any other issue for the reduction or annulment of the penalty. The State Tribunal in *Fakhouri* held that it is Petitioner's "burden to demonstrate by clear and convincing evidence that the imposition of the penalty . . . in the amount so imposed was an abuse of discretion." Petitioner has not met that burden here. Summary determination is a drastic remedy, to be granted only where the moving party has demonstrated an absence of material fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). This is an appropriate case, as there are no factual issues to be decided at a hearing.

The lower count of cigarettes was 975 cartons. Eliminating five cartons (1,000 cigarettes) as required by the statute

leaves 970 cartons at a penalty of \$100 a carton, for a total of \$97,000.

For these reasons, Respondent's motion for summary determination is granted, the Petition is dismissed, and the penalty imposed by the notice of determination is upheld in the reduced amount of \$97,000.

IT IS SO ORDERED.

Dated: November 21, 2019  
New York, New York

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/s/  
David Bunning  
Administrative Law Judge