

TAX COURT OF NEW JERSEY

Joshua D. Novin
Judge



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OF THE TAX COURT COMMITTEE ON OPINIONS

August 26, 2015

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Kenneth Hudacko
4 O'Brien Court
Bayonne, New Jersey 07002

Re: Kenneth Hudacko v. Director, Division of Taxation
Docket No. 015082-2014

Dear Ms. Uger and Mr. Hudacko:

This constitutes the court's opinion deciding the motion for summary judgment brought by the Director of the Division of Taxation (the "Director"), seeking dismissal of plaintiff's Complaint with prejudice under R. 4:46-1. At issue is the Director's assessment of sales and use tax, under N.J.S.A. 54:32B-1 to -29 (the "Sales and Use Tax" or "Sales and Use Tax Act"), and cigarette tax, under N.J.S.A. 54:40A-1 to -45 (the "Cigarette Tax" or "Cigarette Tax Act"), against plaintiff for unstamped cigarettes purchases made by him through an out-of-state vendor between November 29, 2007 and May 21, 2010. The Cigarette Tax Act and Sales and Use Tax Act impose taxes on the sale, possession for sale, consumption or use of all cigarettes in New Jersey. When a consumer purchases unstamped cigarettes from an out-of-state vendor, the Cigarette Tax Act and

Sales and Use Tax Act require a consumer to file tax returns with the Director and to pay the taxes that are due thereon. For the reasons stated below, the Director's motion for summary judgment, under R. 4:46-1, is hereby granted.

I. Procedural History and Factual Findings

Kenneth Hudacko ("plaintiff"), a New Jersey resident, purchased cigarettes from Smart Smoker ("Smart Smoker"), a New York mail order and internet cigarette vendor. Between November 29, 2007 and June 29, 2009, plaintiff purchased and received 102 cartons of cigarettes from Smart Smoker. Between August 18, 2009 and May 21, 2010, plaintiff purchased and received an additional 60 cartons of cigarettes from Smart Smoker. In total, plaintiff purchased 162 cartons of cigarettes from Smart Smoker for a reported consideration of \$4,111.38. Smart Smoker did not collect either Cigarette Tax or Sales and Use Tax on plaintiff's behalf. Instead, pursuant to 15 U.S.C. § 375 et seq. (the "Jenkins Act"), Smart Smoker remitted to the Director copies of the sales records for the cigarettes purchased by, and delivered to, plaintiff in New Jersey. The Jenkins Act obligates persons or entities shipping consumers either cigarettes or smokeless tobacco products in interstate commerce to file a monthly report of all shipments with the tax administrator of the State into which such shipment was made. 15 U.S.C. § 376. Plaintiff did not pay the Cigarette Tax or Sales and Use Tax on his cigarette purchases, nor did he file returns with the Director evidencing the taxes due therefrom. Consequently, on August 8, 2014 the Director issued plaintiff a Notice of Assessment for taxes, interest and penalties on the 162 cartons of cigarettes he purchased between November 29, 2007 and May 21, 2010 (the "Notice of Assessment"). The Notice of Assessment was in the following amounts:

Cigarette Excise Tax	\$4,246.50
Sales and Use Tax	\$ 287.80
Late Payment Penalty	\$ 226.71
Amnesty Penalty	\$ 87.37

<u>Interest (through 8/20/2014)</u>	\$1,909.75
TOTAL	\$6,758.13

On September 8, 2014, plaintiff forwarded a lengthy handwritten letter to the Director and the Office of the Attorney General in response to the Notice of Assessment, a copy of which is attached to his Complaint in this matter. In that letter plaintiff acknowledges receipt of “a Notice of Assessment for Sales Taxes & Penalties for cigarette purchases from 3-28-05 to 8-20-2014...” Plaintiff alleges in his letter, among other things, that the Director’s Notice of Assessment is untimely as he was “never notified [of his tax liability] by the State or the company I bought them from.” Plaintiff maintains that he is disabled and has limited income and when he “saw the ad for the cigarettes in a magazine or newspaper [he] saw it as a way to save money, as the price was so low.” Plaintiff claims that he had “no idea about sales taxes” and questions “why did the state wait 9 years to tell me about this.” Plaintiff further asserts that because a “company [is] required to get licenses, pay corporate taxes, sales taxes & such to do business in the state”, the “proper way is for the seller to pay the sales tax & collect it @ [at] time of purchase & not come after the purchaser...”

On October 21, 2014 plaintiff filed a Complaint with the Tax Court challenging the Notice of Assessment. On December 19, 2014, the Director filed an Answer.

After engaging in discovery, the Director filed the instant motion for summary judgment under R. 4:46-1. The Director maintains the Notice of Assessment is accurate and must be accorded a presumption of correctness. The Director further points out that plaintiff has conceded, in response to the Director’s interrogatories, that he purchased all of the cigarettes that are the subject matter of the Notice of Assessment. Hence, no genuine issue of material fact exists because it is undisputed that plaintiff purchased 162 cartons of cigarettes for which no Cigarette Taxes and Sales and Use Taxes were collected.

No opposition was filed by plaintiff prior to the initial return date of the Director's motion for summary judgment. Accordingly, the court adjourned the motion for a period of two weeks to afford plaintiff the opportunity to submit opposition. Notwithstanding the court's adjournment of the motion, plaintiff did not submit opposition prior to the ensuing return date and the Director waived oral argument. Having received no opposition from plaintiff to the Director's motion, the court will rely upon the pleadings, depositions, answers to interrogatories and admissions on file to ascertain if a genuine issue as to any material fact exists or if the moving party is entitled to judgment as a matter of law. R. 4:46-2(c).

II. Conclusions of Law

A. Summary Judgment

Summary judgment should only be granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the [moving] party is entitled to a judgment or order as a matter of law." Alpha I, Inc. v. Director, Division of Taxation, 19 N.J. Tax 53, 56 (Tax 2000)(citing R. 4:46-2).

In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 536 (1995)(quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)), our Supreme Court adopted the federal approach to resolving motions for summary judgment, in which "the essence of the inquiry [is] whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." In conducting this inquiry, the trial court must engage in a "kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." Id. at 536. The standard established by our Supreme Court in Brill is as follows:

[W]hen deciding a motion for summary judgment under R. 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential material presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

In considering all of the material evidence before it with which to determine if there is a genuine issue of material fact, the court must view most favorably those items presented to it by the party opposing the motion and all doubts are to be resolved against the movant. Ruvolo v. American Gas Co., 39 N.J. 490, 491 (1963). The moving party bears the burden “to exclude any reasonable doubt as to the existence of any genuine issue of material fact” with respect to the claims being asserted. United Advertising Corp. v. Metuchen, 35 N.J. 193, 196 (1961). “By its plain language, R. 4:46-2 dictates that a court should deny a summary judgment motion only where a party opposing the motion has come forward with evidence that creates a ‘genuine issue as to any material fact challenged.’” Brill, supra, 142 N.J. at 529. When the party opposing the motion merely presents “facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious,” then an otherwise meritorious application for summary judgment should not be defeated. Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954). Hence, “when the evidence is so one-sided that one party must prevail as a matter of law...the trial court should not hesitate to grant summary judgment.” Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 252).

In applying these standards to the instant motion, the court concludes that no genuine issue as to any material fact challenged exists regarding the Director’s assessment of Cigarette Tax and Sales and Use Tax against plaintiff. Thus, this matter is ripe for summary judgment.

B. Cigarette Tax

As a starting point, New Jersey imposes two separate and exclusive taxes upon the sale or use of cigarettes, the Cigarette Tax and the Sales and Use Tax.

The Cigarette Tax, is imposed as an excise tax on the sale, use, consumption or possession of cigarettes in New Jersey. N.J.S.A. 54:40A-8.¹ New Jersey adopted the Cigarette Tax Act “to facilitate the collection of all applicable sales and use taxes on cigarettes sold to residents of this State and to enforce the Jenkins Act.” N.J.S.A. 54:40A-47; See also N.J.S.A. 54:40A-46. The legislation sought to collect tax revenue which would otherwise be lost when taxpayers purchased unstamped cigarettes from out-of-state vendors who do not “have enough legal connection with the State to be required to pay and collect taxes.” Kasot, Inc. v. Director, Div. of Taxation, 24 N.J. Tax 588, 596 (Tax 2009). According to the legislative history of the Cigarette Tax Act,

[w]hen cigarettes are sold at retail in this State, the vendor is responsible for payment or verification of payment (through seeing State tax stamps on the cigarette pack) of cigarette tax and is responsible for collection of the sales tax. A vendor outside of the State usually does not have enough legal connection to the State to be required to pay and collect taxes, so when a person buys cigarettes from an out-of-State seller for consumption in the State, the purchaser must pay cigarette tax and the "use tax" component of the sales and use tax directly. (emphasis added) Use taxes are difficult to collect from consumers

[Assembly Budget and Appropriations Committee Statement to A. 1838, February 9, 2004]

Thus, any cigarettes acquiring “a taxable status in New Jersey immediately become subject” to the Cigarette Tax, regardless of whether they are stored or possessed for sale, used or stored for use, or consumed in New Jersey. N.J.A.C. 18:5-2.1(b). The tax is applied to the purchase

¹ Prior to July 1, 2009, the Cigarette Tax Act, N.J.S.A. 54: 40A-1, et seq., imposed a tax on “the sale, use or possession for sale or use within New Jersey of all cigarettes at the rate of \$0.12875 for each cigarette.” Effective July 1, 2009, the Cigarette Tax Act was amended, increasing the tax rate to \$0.135 for each cigarette.

price of cigarettes, exclusive of any additionally assessed Sales and Use Tax. Sogness v. Director, Division of Taxation, 25 N.J. Tax 355 (Tax 2010). The Cigarette Tax takes the form of a revenue tax stamp, which can only be purchased and “affixed to the cigarette package” by licensed distributors. N.J.S.A. 54:40A-11; N.J.A.C. 18:5-3.1.² Thus, it is “designed to impose a tax on the sale of cigarettes and to prescribe a method for collection of that tax through a system of licensing distributors, dealers and consumers...at the top of the distribution chain.” Kasot, Inc., supra, 24 N.J. Tax at 593. Hence, the presence of a revenue tax stamp on cigarette packaging signals that payment of the Cigarette Tax has been made, thereby relieving the customer from liability for payment of the Cigarette Tax.

However, a “consumer” is liable to the Director for payment of the Cigarette Tax. A “consumer” is statutorily defined as a person who, is not a distributor or a manufacturer, and purchases cigarettes for consumption, storage or use in New Jersey “to which New Jersey revenue stamps have not been attached.” N.J.S.A. 54:40A-2(f). As such, any person purchasing unstamped cigarettes for use, storage or consumption in New Jersey is a “consumer” and is therefore liable for the Cigarette Tax due thereon.

A consumer seeking to purchase and consume unstamped cigarettes is first required to procure a license, for a nominal fee.³ N.J.S.A. 54:40A-3. Additionally, within 20 days of purchasing unstamped cigarettes for consumption, a licensed consumer must “file a monthly report on Form CC-1 (Consumer's Report of Cigarette Purchases), together with Schedule A (Unstamped

² Dealers (wholesale and retail) are prohibited from accepting delivery of unstamped or illegally stamped cigarette packages. N.J.S.A. 54:40A-16.

³ “Each consumer is required to apply for a consumer's license on Cigarette Tax Bureau Form CC-2” for a \$1 fee. N.J.A.C. 18:5-6.11

Cigarette Purchases)" and remit to the Director the full amount of Cigarette Tax due.⁴ N.J.S.A. 54:40A-7; N.J.A.C. 18:5-5.12.

Plaintiff is a New Jersey resident who purchased and received unstamped cigarettes for use or consumption from Smart Smoker, an enterprise who was not a New Jersey cigarette distributor, manufacturer or dealer. Thus, plaintiff's status as a "consumer" is uncontested. Hence, plaintiff was required to procure a license, file monthly reports for the unstamped cigarettes he purchased, and pay the Cigarette Tax due on those purchases, which he admittedly failed to do.

Although no opposition to the Director's motion was filed, as a threshold matter, plaintiff argues in his Complaint that the Notice of Assessment is untimely. However, plaintiff's argument on this issue is unavailing. It is uncontested that plaintiff is a "consumer", as such term is ascribed meaning under N.J.S.A. 54:40A-2(f). As a consumer, plaintiff was required to procure a license to purchase and consume unstamped cigarettes. N.J.S.A. 54:40A-3. A licensed consumer is required, within 20 days of receipt of unstamped cigarettes, to file a report with the Director identifying the number of cigarettes purchased and to remit the Cigarette Taxes due thereon. N.J.S.A. 54:40A-7. Here, plaintiff was required, but failed, to notify the Director of his status as a consumer, having purchased unstamped cigarettes from an out-of-state vendor. Moreover, as a consumer, plaintiff was required, but failed, to file reports with the Director evincing his purchases of unstamped cigarettes and remitting the Cigarette Taxes due thereon. The statutory procedures requiring a consumer to procure a license and file monthly reports enables the Director to discern that unstamped cigarette purchases have been made and to assess and collect the Cigarette Tax in

⁴ The Jenkins Act requires persons or entities shipping consumers either cigarettes or smokeless tobacco products in interstate commerce to file a monthly report of all shipments with the tax administrator of the State into which such shipment was made. 15 U.S.C. § 376. The report must include a memorandum or copy of the invoice covering each shipment of cigarettes during the previous month into the state, including the name and address of the person to whom the shipment was made, and the brand and the quantity of cigarettes. 15 U.S.C. §376 (a)(2).

a timely matter. The plaintiff did not adhere to these statutory requirements, thereby inhibiting and hindering the Director's ability to assess the Cigarette Taxes due.

Moreover, if a consumer fails to file a report, the Director is permitted to make an estimate of the taxable liability from available resources, and to assess such taxes, fees, penalties and interest thereon. N.J.S.A. 54:49-5. Here, pursuant to the Jenkins Act, Smart Smoker provided copies of invoices to the Director demonstrating that between November 2007 and May 2010 the plaintiff purchased and received 162 cartons of cigarettes. Following receipt of that information, the Director issued the Notice of Assessment to plaintiff. Thus, plaintiff's failure to comply with the Cigarette Tax Act reporting requirements results in a waiver of the time constraints typically imposed on the Director, thereby permitting the Director to assess and collect tax due when it becomes privy to information on such transactions.

The plaintiff next asserts that neither the Director, nor Smart Smoker advised him of his tax liability at the time he purchased the cigarettes. This argument has no merit. It is rudimentary that all individuals are chargeable with a knowledge of the law and ignorance of the law constitutes an excuse for no one. Gibraltar Factors Corp. v. Slapo, 41 N.J. Super. 381, 384 (App. Div. 1956), aff'd, 23 N.J. 459, appeal dismissed, 355 U.S. 13 (1957). Plaintiff's purchases of unstamped and untaxed cigarettes from an out-of-state vendor were the type of transactions the Cigarette Tax sought to address. Namely, ensuring that "every unstamped cigarette that comes into New Jersey...destined for sale or use here" is properly taxed. Kasot, Inc., supra, 24 N.J. Tax at 596. Although the Cigarette Tax Act may not be advertised by out-of-state cigarette vendors, it is nonetheless valid and effective legislation, readily available to the public and must be adhered to by consumers purchasing unstamped cigarettes. Moreover, neither the United States Constitution, nor the New Jersey Constitution require the Director to "give individual and actual notice of valid

legislative action to potentially affected citizens....To the contrary, every person is conclusively presumed to know the law, statutory and otherwise.” Graham v. N.J. Real Estate Commission, 217 N.J. Super. 130, 138 (App. Div. 1987); see In re Mild, 25 N.J. 467, 485 (1957); Widmer v. Township of Mahwah, 151 N.J. Super. 79 (App. Div. 1977); Schirmer-National Co. v. Director, Div. of Taxation, 17 N.J. Tax 495, 504 (Tax 1998). Thus, plaintiff’s allegations that he “was never notified [of his tax obligation] by the State or the company I bought them [the cigarettes] from” are not persuasive.

Finally, plaintiff asserts in his Complaint that the vendor should be responsible for collecting and remitting the taxes to the Director. However, in response to the Director’s interrogatories plaintiff admits, under oath, to purchasing and receiving the 160 cartons of cigarettes from Smart Smoker that are the subject matter of the Notice of Assessment. Additionally, plaintiff is not a distributor, manufacturer or wholesale or retail dealer of cigarettes as those terms are defined under N.J.S.A. 54:40A-2. Therefore, it is undisputed that plaintiff is a “consumer” that purchased cigarettes from an out-of-state vendor “to which New Jersey revenue stamps have not been attached.” N.J.S.A. 54:40A-2(f). The Cigarette Tax Act is clear and unambiguous, when a consumer purchases unstamped cigarettes from an out-of-state vendor for use or consumption in the State, the consumer is responsible for, and must directly pay, the Cigarette Tax and the use tax component of the Sales and Use Tax Act. Assembly Budget and Appropriations Committee Statement to A. 1838, February 9, 2004.

C. Sales and Use Tax

The second tax is imposed on the sale or use of cigarettes in New Jersey under the Sales and Use Tax Act. The Sales and Use Tax Act provides for a tax to be collected on the receipts from certain retail sales of tangible personal property, services and event admissions sold in New

Jersey, unless express exemption is afforded under statute. N.J.S.A. 54:32B-3. Specifically, the sales tax is imposed on the receipts of every retail sale of tangible personal property. N.J.S.A. 54:32B-3(a). The ‘use tax’ component, of the Sales and Use Tax Act, is imposed on the use within New Jersey of any tangible personal property purchased at retail. N.J.S.A. 54:32B-6. The tax is imposed “on the exercise of a right or power over tangible personal property.” Diamondhead Corp. v. Director, Div. of Taxation, 4 N.J. Tax 255, 257 (Tax 1982). Comparably, the use tax and the Cigarette Tax, share a similar legislative purpose; to “prevent the State from losing revenue when tangible personal property [is] purchased out-of-state and therefore not subject to New Jersey sales tax [but] is nonetheless used here to the same extent as is property purchased here for which New Jersey sales tax is paid.” Id. at 258. Thus, use tax is complementary to the sales tax “as an aid to its enforcement” since it aims to capture the sales tax that should have but was not collected from the buyer. Boardwalk Regency Corp. v. Director, Div. of Taxation, 18 N.J. Tax 328, 334 (App. Div. 1999).

Pursuant to N.J.S.A. 54:32B-14(b), a purchaser who does not pay sales tax to the seller at the time of purchase, has a duty to pay the tax directly to the Director within 20 days from the date the tax was required to be paid. N.J.S.A. 54:32B-14(b). Here, the use tax should have been paid by plaintiff on the date of each purchase of the unstamped cigarettes. It is undisputed that plaintiff did not pay Sales and Use Tax on the unstamped cigarettes he purchased from Smart Smoker at the time of the purchase. Thus, plaintiff was required to directly pay Sales and Use Tax to the Director within 20 days from the date of his cigarette purchases. The record indicates that plaintiff failed to do so.

Under N.J.S.A. 54:32B-14(b), the buyer has a “duty to file a return” and the failure to comply with those filing requirements authorizes the Director to estimate the unpaid Sales and Use

Tax by using available sources of information. N.J.S.A. 54:32B-19; see also N.J.S.A. 54:49-5.⁵

Here, the out-of-state cigarette vendor, Smart Smoker, did not collect Sales and Use Tax from the plaintiff at the time the unstamped cigarettes were purchased, thus plaintiff did not pay Sales and Use Tax as required under N.J.S.A. 54:32B-3(a). It is further undisputed that although plaintiff was required to file Sales and Use Tax Reports, and pay the Sales and Use Tax directly to the Director, the plaintiff failed to do so. N.J.S.A. 54:32B-14(b). It was plaintiff's failure to comply with his statutory duties to timely file reports and pay the Sales and Use Tax due and owing which resulted in the imposition of the Notice of Assessment.

Thus, plaintiff's arguments against imposition against him of uncollected Sales and Use Tax are unpersuasive. The Director is authorized to determine the unpaid Sales and Use Tax by using available sources of information and to collect same from the purchaser. N.J.S.A. 54:32B-19; See also N.J.S.A. 54:49-5; N.J.S.A. 54:32B-28.⁶

III. Conclusion

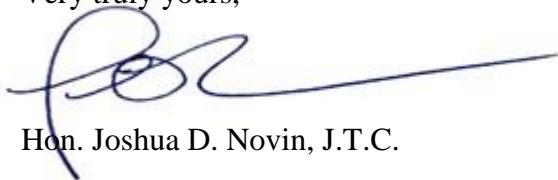
The issue before this court is the validity of the Director's assessment of Sales and Use Tax and Cigarette Tax against plaintiff taxpayer for unstamped cigarettes purchased through an out-of-state vendor, Smart Smoker. New Jersey law imposes a Cigarette Tax and Sales and Use Tax on cigarette purchases made in and delivered to New Jersey. It is the responsibility of the purchaser to report and pay the Cigarette Taxes and Sales and Use Taxes due if those purchases were made from an out-of-state vendor who did not collect the taxes due. Our courts have recognized the

⁵ The Sales and Use Tax on the "out-of-state purchase of cigarettes from unlicensed vendors" is computed "only on the purchase price" and not by adding the assessed Cigarette Tax to the purchase price. Sogness v. Director, Div. of Taxation, 25 N.J. Tax 355, 361 (Tax 2010).

⁶ It should be noted that the use tax on "out-of-state purchase of cigarettes from unlicensed vendors" can be computed "only the purchase price" and not by adding the assessed cigarette tax to the purchase price. Sogness v. Director, Div. of Taxation, 25 N.J. Tax 355, 361 (Tax 2010).

Director's expertise in the highly specialized and technical area of taxation and, hence, the Director's assessment of tax due is accorded a presumption of correctness. None of the facts material to this issue were disputed. Therefore, and for the reasons explained herein, summary judgment in favor of the Director is appropriate. The Director has properly computed the Cigarette Tax and Sales and Use Tax due from the plaintiff. Therefore, the Director's Notice of Assessment is proper and thus, upheld by this court. Consequently, the court grants the Director's motion for summary judgment and dismisses plaintiff's Complaint.

Very truly yours,

A handwritten signature in blue ink, appearing to read "JDN", is written over a horizontal line.

Hon. Joshua D. Novin, J.T.C.