

**Matter of Tiger Tobacco & Food Distrib., Inc. v  
Commissioner, New York State Dept. of Taxation  
and Fin.**

2010 NY Slip Op 32474(U)

April 30, 2010

Supreme Court, Queens County

Docket Number: 34047/09

Judge: Patricia P. Satterfield

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Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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In the matter of the Petition of TIGER  
TOBACCO & FOOD DISTRIBUTION, INC.,

Index No: 34047/09  
Motion Date: 2/3/10  
Motion Cal. No: 26  
Motion Seq. No: 1

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil  
Practice Law and Rules,

-against-

COMMISSIONER, NEW YORK STATE  
DEPARTMENT OF TAXATION and FINANCE,

Respondent.

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The following papers numbered 1 to 20 read on this petition for an order: 1) pursuant to CPLR Article 78, reviewing respondent New York State Department of Taxation and Finance’s determination, dated December 16, 2009, canceling petitioner Tiger Tobacco & Food Distribution, Inc.’s licenses as a Cigarette Agent, Wholesale Dealer of Cigarettes, Wholesale Dealer of Tobacco Products and Appointment as a Distributor of Tobacco Products, upon the grounds that “Mr. Sakhai and Tiger have failed to obtain a buyer for the business and the proposed transactions have not obtained approval from NYS-DTF as set forth in Section 3 of the Settlement Agreement,” and upon such review, vacating and setting aside the determination as being contrary to the terms of the Settlement Agreement, arbitrary and capricious, and an abuse of discretion; and 2) pursuant to CPLR Article 63, enjoining and restraining respondent New York State Department of Taxation and Finance from taking any action that would interfere with or threaten petitioner Tiger Tobacco & Food Distribution, Inc.’s licenses and compelling respondent New York State Department of Taxation and Finance to approve one of the prospective buyers for petitioner Tiger Tobacco & Food Distribution, Inc.’s business, as required by the Settlement Agreement between petitioner Tiger Tobacco & Food Distribution, Inc.’s and respondent New York State Department of Taxation and Finance.

	PAPERS NUMBERED
Order to Show Cause-Petition-Affidavits-Exhibits.....	1 - 5
Verified Answer-Exhibits-Memorandum of Law.....	6 - 11

Reply-Memorandum of Law.....	12 - 15
Sur-Reply.....	16 - 18
Hearing Transcript.....	19 <sup>1</sup>
Order Continuing Temporary Stay.....	20

Upon the foregoing papers, it is hereby ordered that the petition is disposed of as follows:

This is a special proceeding instituted by petitioner Tiger Tobacco & Food Distribution, Inc. (“Tiger”) against respondent the New York State Department of Taxation and Finance (“DTF”) arising from the determination of the DTF to cancel Tiger’s licenses as a Cigarette Agent, Wholesale Dealer of Cigarettes, Wholesale Dealer of Tobacco Products and Appointment as a Distributor of Tobacco Products (“Licenses”). Tiger seeks an order, inter alia, vacating and annulling the determination for the cancellation of the aforementioned licenses.

#### Relevant Facts

Pursuant to “Notice of Cancellation of Your Licenses as a Cigarette Agent, Wholesale Dealer of Cigarettes, Wholesale Dealer of Tobacco Products and Appointment as a Distributor of Tobacco Products Under Articles 20 and 20-A of the Tax Law,” dated October 5, 2009, Ely Sakhai, the president of Tiger, was advised that Tiger’s licenses were being “canceled under Articles 20 and 20-A of the Tax law, effective 12:01a.m.” of the same day. The three page letter set forth four detailed reasons for the cancellation of the licenses, and stated, in pertinent part, the following:

1. On May 13, 2002, you signed an Application for License as a Cigarette Stamping Agent and a Cigarette Wholesaler as president of the applicant corporation, reporting yourself as 100% shareholder of the entity. A recent review of the 2005 and 2006 corporate tax returns of Tiger [] disclosed Andre Sakhai as 100% shareholder. This change in ownership constitutes as unauthorized assignment (transfer) of the above noted licenses rendering them invalid and cancelled by operation of law.
2. As part of an ongoing criminal investigation, [DTF] has determined that as a Cigarette Agent/Wholesaler:
  - Tiger provided rebates to at least one of its customers;
  - Tiger knowingly sold stamped cigarettes to an unlicensed wholesale cigarette dealer;
  - Tiger committed fraud or deceit in its day-to-day business

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<sup>1</sup> A copy of the transcript of the hearing was provided to this Court on February 26, 2010.

- operations; and
- Tiger does not have an individual on-site who is a controlling and/or responsible party pertaining to the daily operations of the business.

Several scheduled appointments were made with Tiger to discuss their illegal rebating of customers and cigarette sales to an unlicensed cigarette wholesaler. During these direct discussions with Mr. Ely Sakhai, Tiger and [DTF], Mr. Sakhai was advised to immediately cease all illegal transactions. Tiger ignored [DTF's] warnings and continued to engage in these illegal activities, [constituting] a second violation [] for rebating within a three (3) year period.

3. On August 21, 2009, [] an inspection at Tiger's place of business [identified three entities] conducting business within Tiger's warehouse. You violated Tax Law §§ 480.1 and 480.3 [] by committing fraud or deceit in the operation of your cigarette stamping agent and/or cigarette wholesale business by failing to notify [DTF] that you were carrying on other businesses in conjunction with your warehouse facility.
4. Additionally, New York State Department of State, Division of Corporations reports Tiger's current entity status as inactive- dissolution by proclamation as of April 29, 2009. This account must be active to conduct business in New York State.

The letter further indicated that DTF had serious concerns about who was running the business in light of information that it received that Mr. Sakhai was at the business location for only a few hours on Friday mornings, and stated the following with regard to reconsideration of the determination:

This Notice of Cancellation may be protested by filing a Request for Conciliation Conference or by filing a Petition for a Tax Appeals Hearing within thirty (30) days of this notice. For additional information on protesting this action, refer to the enclosed TA-9.1, Notification of Your Right to Protest and Action Taken by the New York State Department of Taxation and Finance.

In response thereto, Tiger filed a Request for Conciliation dated October 6, 2009, seeking an expedited conference to challenge the validity of DTF's charges, which led to the cancellation of its licenses. The parties entered into negotiations in an effort to resolve the matter, however, upon a breakdown of the discussions, Tiger commenced an Article 78 proceeding in this Court before the

Honorable David Elliot, pending under Index No. 27850/09, which was resolved by Settlement Agreement dated October 19, 2009. This agreement, which was executed by Peter Bloch, the Director for DTF, and Ely Sakhai, the president of Tiger, states, in pertinent part, the following:

1. Contemporaneously with the execution of this Agreement, NYS-DTF shall rescind the Notice of Cancellation dated October 5, 2009, and reinstate the licenses, thereby allowing Tiger to resume its business operations for a period of sixty (60) days, commencing from date of signing of said Agreement.
2. Tiger and/or its employees or representatives must comply with all the provisions of Article 20 and Article 20-A, in addition to any other applicable laws, rules and regulations, during this sixty-day period.
3. During the sixty-day period, Mr. Ely Sakhai and Tiger shall be permitted to attempt to obtain a buyer for the business, who shall be subject to approval by NYS-DTF, which approval shall not be unreasonably withheld.
4. Within this sixty-day period, if Mr. Ely Sakhai of Tiger is unable to obtain a buyer, or if the buyer is not approved by NYS-DTF, Tiger's licenses will be voluntarily surrendered for cancellation, effective on 12:01 a.m. of the sixty-first (61<sup>st</sup>) day, except that if the delay in closing of the sale is due to investigation of the prospective buyer by NYS-DTF, then this agreement and Tiger's operation shall be extended for an additional thirty-day period.

Thereafter, Tiger requested the necessary documents from DTF to facilitate the sale of its business and on November 20 and December 7, 2009, it submitted an application on behalf of Michael Mazza (the "Mazza Purchase Agreement"), as a prospective buyer. Additionally, on December 14, 2009, Tiger also submitted documents on behalf of Sobhi Turkieh (the "Turkieh Purchase Agreement"), as a prospective buyer. By separate letters dated December 16, 2009, DTF rejected both the Mazza and Turkieh Purchase Agreements, on the basis that they were insufficient to satisfy DTF's requirements for the purchase of Tiger, as the proposed purchases did not constitute "a total sale of the company or an assignment." DTF stated, in relevant part, the following in both letters:

The proposed sale of the business (Tiger Tobacco) outlined in the Agreement is based upon a sale of thirty shares of capital stock representing a 15 percent interest in the company and delivery of an irrevocable proxy as to the balance of the one-hundred and seventy

shares of stock. Any proxy involving corporate stock, whether irrevocable or otherwise, is the right to exercise control of the shares of such stock for the purposes of voting those shares in the business of the corporation. The transfer of a proxy does not in fact constitute a sale of the stock to a current shareholder of stock or to a third party. Mr. Sakhai will still retain the majority interest in Tiger Tobacco.

The letters further indicated that both applications were deficient in several areas, and advised as to the proper documentation that would be necessary for the submission of a complete application for DTF's consideration.

Subsequently, by letter dated December 16, 2009, DTF advised Tiger that it would be compelled to surrender its licenses on December 19, 2009, as it failed to find a suitable purchaser within the requisite time frame, as set forth in the underlying Settlement Agreement dated October 19, 2009. DTF further informed Tiger that the proposed purchase agreements were insufficient and stated:

The Stock Agreements & Irrevocable Proxys do not constitute a sale of Tiger by Mr. Sakhai to Mr. Mazza or to Mr. Turkieh, sufficient to satisfy the requirements for transfer of ownership of Tiger from Mr. Sakhai (seller) to Mr. Mazza or to Mr. Turkieh (purchaser) as set forth in section 3 of the Settlement Agreement. Under the proposed agreements, Mr. Sakhai will still retain the majority interest in Tiger. Consequently, they are not approved as a sale of the business as called for by section 3.

Mr. Sakhai and Tiger failed to obtain a buyer for the business, and the proposed transactions have not obtained approval from NYS-DTF as set forth in Sections 3 of the Settlement Agreement. As a result, pursuant to section 4, the licenses subject to the Settlement Agreement are to be voluntarily surrendered to the Department as of 12:01 a.m., December 19, 2009. As of that date Tiger may no longer operate as a New York State Stamping Agent, a Wholesale Dealer of Cigarettes or Tobacco Products, or as an appointed Distributor of Tobacco Products.

It is upon the foregoing that Tiger petitions this Court for an order, pursuant to CPLR Article 78, reviewing the December 16, 2009 determination of DTF that cancelled Tiger's licenses as a Cigarette Agent, Wholesale Dealer of Cigarettes, Wholesale Dealer of Tobacco Products and Appointment as a Distributor of Tobacco Products ("Licenses"), upon the grounds that "Mr. Sakhai and Tiger have failed to obtain a buyer for the business and the proposed transactions have not obtained approval from DTF as set forth in Section 3 of the Settlement Agreement," and upon such review, vacating and setting aside the determination as being contrary to the terms of the Settlement

Agreement, arbitrary and capricious, and an abuse of discretion. Tiger further seeks an order, pursuant to CPLR Article 63, enjoining and restraining DTF from taking any action that would interfere with or threaten Tiger's licenses and compelling DTF to approve one of the prospective buyers for Tiger's business, as required by the Settlement Agreement between the parties.<sup>2</sup>

### Discussion

Petitioner seeks judicial review of DTF's determination to revoke its licenses, pursuant to the October 19, 2009 Settlement Agreement, on the basis that such determination was contrary to the terms of the Settlement Agreement, arbitrary and capricious, and an abuse of discretion. It is well-settled that in a CPLR article 78 proceeding to review a determination of an administrative agency, the court is limited to a review of the record which was before that agency in determining whether the decision was arbitrary and capricious and without a rational basis. See, Peckham v. Calogero, 12 N.Y.3d 424 (2009); IG Second Generation Partners L.P. v. New York State Div. of Housing and Community Renewal, 10 N.Y.3d 474 (2008); Gilman v. New York State Div. of Housing and Community Renewal, 99 N.Y.2d 144 (2002); Matter of Nehorayoff v. Mills, 95 N.Y.2d 671, 675 (2001). "In applying the arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was arbitrary, unreasonable, irrational or indicative of bad faith. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Halperin v. City of New Rochelle, 24 A.D.3d 768 (2<sup>nd</sup> Dept. 2005); see, Baker v. Village of Elmsford, 70 A.D.3d 181 (2<sup>nd</sup> Dept. 2009) Rendely v. Town of Huntington, 44 A.D.3d 864 (2<sup>nd</sup> Dept. 2007); East End Property Co. No. 1, LLC v. Kessel, 46 A.D.3d 817 (2<sup>nd</sup> Dept. 2007); Gjerlow v. Graap, 43 A.D.3d 1165 (2<sup>nd</sup> Dept. 2007); Lyons v. Whitehead, 2 A.D.3d 638 (2<sup>nd</sup> Dept. 2003). "A determination will be deemed rational if it has some objective factual basis." Merlotto v. Town of Patterson Zoning Bd. of Appeals, 43 A.D.3d 926 (2<sup>nd</sup> Dept. 2007). "The agency's determination must be upheld if the record shows a rational basis for it, even where the court might have reached a contrary result (citation omitted)." Kaplan v. Bratton, 249 A.D.2d 199 (1<sup>st</sup> Dept. 1998); see, Hughes v. Doherty, 5 N.Y.3d 100 (2005); Cherry v. New York State Civil Service Com'n, 55 A.D.3d 604 (2<sup>nd</sup> Dept. 2008).

Moreover, it is recognized that the purpose of a preliminary injunction is to preserve the status quo of an action pending trial. See, Dixon v. Malouf, 61 A.D.3d 630 (2<sup>nd</sup> Dept. 2009); Automated Waste Disposal, Inc. v. Mid-Hudson Waste, 50 A.D.3d 1072 (2<sup>nd</sup> Dept. 2008); Kelley

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<sup>2</sup> The up-front relief sought by Tiger, to wit, to reinstate its licenses and enjoin DTF from interfering with the subject licenses, was denied by this Court in signing the order to show cause on December 21, 2009. Thereafter, on December 23, 2009, the Appellate Division, Second Department granted Tiger a temporary restraining order enjoining DTF from taking any action that would interfere with Tiger's licenses pending the hearing of the motion. Based upon this determination, this Court, by order dated February 3, 2010, issued "a temporary restraining order to remain in effect until a determination of the merits of the application by a Justice of the Supreme Court."

v. Garuda, 36 A.D.3d 593 (2<sup>nd</sup> Dept. 2007). As such, the granting of a preliminary injunction is a drastic remedy which is to be used sparingly, and such remedy will not be granted “unless a clear right thereto is established.” Doe v. Poe; 189 A.D.2d 132 (2<sup>nd</sup> Dept.1993). To prevail on a motion for a preliminary injunction, the movant has the burden of demonstrating by clear and convincing evidence a probability of success on the merits, a danger of irreparable injury in the absence of an injunction, and a balancing of equities in his or her favor. See, Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 N.Y.3d 839 (2005); Shasho v. Pruco Life Ins. Co. of New Jersey, 67 A.D.3d 663 (2<sup>nd</sup> Dept. 2009); Glorious Temple Church of God in Christ v. Dean Holding Corp., 35 A.D.3d 806 (2<sup>nd</sup> Dept. 2006).

In support of the motion, Tiger asserts that in compliance with the underlying Settlement Agreement entered into between the parties, it proffered applications for two bona fide purchasers for DTF’s approval. In support of that assertion, it states the following with regard to the Mazza and Turkieh Purchase Agreements:

- a. Michael J. Mazza: a wholesale tobacco distributor already licensed by NYS-DTF; owner of Bay Ridge Distributors in Brooklyn since 1992; no criminal record; offered to purchase the business for \$1,150,000.00 (\$200,000.00 at closing, \$950,000.00, in equal monthly installments over 5 years).
- b. Sobhi Turkieh: sole owner of Value Industry, a corporation based in Brooklyn; no criminal record; offered to purchase the business for \$1,000,000.00 (\$200,000.00 upon preliminary approval by NYS-DTF and Philip Morris, et. al., and \$800,000.00 at closing).

Tiger contends that although the Purchase Agreements were structured in an unusual way, it was necessary for it to sell fifteen percent of the stock and give an irrevocable proxy for the remaining eighty-five percent, in order to preserve its established business agreements. It further contends that “if Mazza or Turkieh had simply bought all 100% of the Tiger shares (as they were and are prepared to do), then Philip Morris (if not all the cigarette manufacturers), would have terminated their agreements to provide product to Tiger based upon a change of ‘ownership.’” Thus, Tiger asserts that DTF unreasonably withheld its approval of the Purchase Agreements, and is acting in bad faith.<sup>3</sup>

In opposition to the order to show cause and petition, and in its answer to the petition, DTF contends, inter alia, that the determination to reject the Purchase Agreements proffered by Tiger is

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<sup>3</sup> In support of this allegation, Tiger annexes, as Exhibit “F,” a copy of a May 30, 2006 report by the New York Office of the State Inspector General, entitled, *Investigation of a Complaint of Abuse of Authority by Employees of the Department of Taxation and Finance*, which resulted in a 10 day suspension without pay of Thomas Stanton, who is currently the Director of Tax Investigations.

supported by a rationale basis, and is neither arbitrary and capricious, nor contrary to the terms of the Settlement Agreement; and that injunctive relief does not lie.<sup>4</sup> DTF asserts that it had two independently sufficient reasons for rejecting the Mazza and Turkieh Purchase Agreements. It states:

First and most fundamentally, the Tax Department rejected both Mr. Mazza and Mr. Turkieh because neither proposed to buy Tiger, as required by the Settlement Agreement. Instead, each proposed to buy only 15% ownership share of Tiger, and an irrevocable voting proxy for the remaining portion of Tiger's corporate stock. Either of the proposed transactions would leave the ownership of 85% of Tiger's stock unchanged, and so could not reasonably be regarded as a purchase of Tiger.

Additionally, neither Mr. Mazza nor Mr. Turkieh submitted a complete application for the licenses necessary to operate Tiger. Both application were missing the following necessary documents: audited current financial statements; letters from at least two cigarettes manufacturers whose market share is at least 40 percent of the New York State cigarette market stating that they are willing to sell cigarettes to the prospective licensee; and documentation for a lease extending at least two years on the premises where Tiger would operate. In the absence of this necessary and material documentation, the Tax Department would have been reasonable and properly within its discretion to reject both Mr. Mazza and Mr. Turkieh as buyers for Tiger, even if either had proposed to buy Tiger in its entirety.

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<sup>4</sup> DTF opposes the application on three grounds, to wit, that the determination was not arbitrary; mandamus does not lie to compel the discretionary action of approving the proposed Purchase Agreements; and the temporary restraining order should not be extended. However, in response thereto in its reply memorandum of law, Tiger indicated, inter alia, the following:

Tiger Tobacco is not seeking relief under subsection 1 of [CPLR] § 7803, but rather subsection 3. That section provides in relevant part that:

The only questions that may be raised in a proceeding under this article are whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion...

In light thereof, this Court will only address the issues of whether DTF's actions were arbitrary and capricious, and whether there is a basis for injunctive relief.

Thus, DTF states that Tiger's assertions, that the rejection of the Mazza and Turkieh Purchase Agreements was unreasonable and irrational, is unfounded. This Court agrees.

Notwithstanding the contentions of Tiger, a review of the record before this Court clearly demonstrates that the determination of DTF was not arbitrary and capricious, and thus had a rational basis. See, Peckham v. Calogero, 12 N.Y.3d 424 (2009); IG Second Generation Partners L.P. v. New York State Div. of Housing and Community Renewal, 10 N.Y.3d 474 (2008). Indeed, the instant determination to reject the subject Purchase Agreements and revoke Tiger's licenses, devolves from the October 19, 2009 Settlement Agreement reached by the parties as an accord for previous transgressions. In fact, there is a long and tortured history between Tiger and DTF, which serves as an appropriate backdrop for the rationality for the revocation of the licenses. The facts germane to this matter are the following:

In July 5, 2005, Ely Sakhai, Tiger's president, was sentenced to 41 months in a federal penitentiary for mail fraud involving an international art forgery ring. As a result, DTF commenced an investigation to determine who was handling the day-to-day operations of Tiger during Ely Sakhai's incarceration, and whether Tiger was in compliance with the relevant Tax laws. The inspections of the premises revealed that there was no responsible person supervising Tiger's operations, and that Tiger had engaged in unlawful conduct in violation of the Tax Laws from January 2005 to October 2006, by paying a rebate or concession in connection with the purchase of cigarettes. Moreover, by an undated stipulation, Tiger admitted to the findings of DTF's investigation, paid a civil fine in the amount of \$25,000.00 and its licenses were suspended from November 13 to November 27, 2006. During routine enforcement inspections in 2007 and 2008, both before and after Ely Sakhai was released from prison in March 2008, and in 2009, DTF found that the business remained unsupervised. DTF was advised by Ely Sakhai that the issue of having a responsible person running the day-to-day operations would be resolved as he intended to sell the business, which, to date, has not occurred. Further, Ely Sakhai was advised, prior to proffering an application on behalf of Michael Mazza, that he was an unacceptable purchaser for Tiger as DTF was engaged in enforcement proceedings against Mr. Mazza in relation to his current licenses.

Notwithstanding the history between the parties, Tiger comes to this Court with unclean hands seeking redress for the potential revocation of licenses that its actions, or lack thereof, have placed in peril. In short, whether this Court looks at the extensive history of obfuscatory behavior on the part of Tiger and the pattern of compromise on the part of DTF, or review the actions of the parties in a vacuum, based upon the actions flowing from the October 19, 2009 Settlement Agreement, there is a wholly rational basis for DTF's determination for revocation, which cannot be deemed arbitrary and capricious.

Moreover, the record is well-documented and establishes a factual basis for the independent rejections of the Mazza and Turkieh Purchase Agreements. See, Merlotto v. Town of Patterson Zoning Bd. of Appeals, 43 A.D.3d 926 (2<sup>nd</sup> Dept. 2007). Here, Tiger seems to imply, by way of the annexation of the May 30, 2006 report by the New York State Inspector General who found abuses of authority by employees of DTF, that there is an endemic problem of subterfuge and conspiracy amongst the ranks of the DTF, which is the underlying basis for the subject determination. However, this Court finds this claim spurious at best, and totally unsupported by the record. To the contrary, the record reveals numerous conciliatory attempts by DTF to resolve the ongoing failures of Tiger, which, incredibly, were countered by deception and misdirection on the part of those affiliated with Tiger. Further, Tiger makes numerous allegations with regard to the DTF conspiracy theory which were inappropriately asserted in its reply, and therefore, not considered by this Court. Nevertheless, save conjecture, the record is devoid of actions which would compel this Court to disturb the underlying determinations of DTF as arbitrary, unreasonable, irrational or indicative of bad faith. See, Baker v. Village of Elmsford, 70 A.D.3d 181 (2<sup>nd</sup> Dept. 2009); Halperin v. City of New Rochelle, 24 A.D.3d 768 (2<sup>nd</sup> Dept. 2005).

#### Conclusion

Accordingly, based upon the foregoing the motion is denied in its entirety. Consequently, the petition hereby is dismissed, and the temporary restraining order issued pursuant to this Court's February 3, 2010 order, is hereby lifted.

Dated: April 30, 2010

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J.S.C.