

05-1264
Audit
Signed 01/10/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)		
	)	ORDER	
Petitioner,)		
	)	Appeal No.	05-1264
v.	)	Account Nos.	##### & #####
)		
AUDITING DIVISION OF THE	)	Audit Period:	6/30/03 – 10/31/03
UTAH STATE TAX COMMISSION,	)	Tax Type:	Cigarette Tax & Sale and Use Tax
)		
Respondent.	)	Judge:	Phan

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER

For Respondent: RESPONDENT REPRESENTATIVE, Manager, Miscellaneous Tax Unit

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5 on December 7, 2005. At issue is the audit deficiency of cigarette and sales and use tax to the Petitioner, as imposed by Auditing Division (“Division”) in a Statutory Notice dated August 15, 2005. The amount of the deficiency was \$\$\$\$\$ in tax and \$\$\$\$\$ in interest for a total of \$\$\$\$\$ as of the date of the notice. Interest continues to accrue on the unpaid balance.

APPLICABLE LAW

Utah Code §59-14-204(1), (2) provides that a tax is levied upon the sale, use, storage, or distribution of cigarettes in Utah at the rate of “3.475 cents on each cigarette.” Subsection 59-14-204(3) provides that the tax shall be paid by any person who is “the manufacturer, jobber, distributor, wholesaler, retailer, user, or consumer.”

Utah Admin. Rule R865-20T-2(A) (“Rule 2”) provides that “[i]f the tax is due as a result of use, storage, or consumption of imported cigarettes, the tax may be paid by affixing stamps or by filing a return prescribed by the Tax Commission.” Subsection (A)(1) of the rule provides that a return must be filed and the tax paid within 15 days from the date of use, storage, or consumption unless application is made for permission to file monthly returns and pay the tax on a monthly basis. Section (A)(2) of Rule 2 provides that, if permission is granted for the monthly filing of returns, the returns are due on or before the 15th day of the month following the calendar month in which the cigarettes were purchased.

Utah Code §59-12-103(1)(a) provides that “[a] tax is imposed on the purchaser as provided in this part for amounts paid or charged for . . . retail sales of tangible personal property made within the state[.]”

For sales subject to taxation under Section 59-12-103, Utah Code §59-12-107(1)(d) provides that a person shall pay a use tax, as follows:

A person shall pay a use tax imposed by this chapter on a transaction described in Subsection 59-12-103(1) if:

- (i) the seller did not collect a tax imposed by this chapter on the transaction;
- and
- (ii) the person:
 - (A) stores the tangible personal property in the state;
 - (B) uses the tangible personal property in the state; or
 - (C) consumes the tangible personal property in the state.

Utah Admin. Rule R865-21U-6 (“Rule 6”) provides for the payment of use tax as follows, in pertinent part:

A. Purchasers of tangible personal property - the storage, use, or other consumption of which is subject to tax - must account for the tax liability by paying the tax:

. . . .

2. directly to the Tax Commission if the retailer from whom the property was purchased does not hold a certificate of registration. Under these circumstances, one of the following procedures must be followed:

- (a) if the purchases are made by a business required by Section 59-12-106 to hold or obtain a sales tax license or a use tax certificate of registration, the tax is paid on a sales and use tax return;

- (b) if the purchases are made by any person as defined in Utah Code Ann. Section 59-12-102, who has no sales tax collection responsibility, and if the annual taxes due may be reasonably expected to exceed \$400, such person must apply for registration as a consumer and pay the tax using a quarterly use tax return; or
- (c) if the purchases are made by an individual who has no sales tax collection responsibility and the annual use tax liability is less than \$400, the tax is remitted using the individual income tax return filed each year. The tax is computed by using the rates provided in the income tax instructions for the address of the consumer as shown on the individual income tax form. . . .

Utah Code §59-12-107(10)(c) provides that “[e]ach person who fails to pay any tax to the state or any amount of tax required to be paid to the state . . . within the time required by this chapter . . . shall pay, in addition to the tax, penalties and interest as provided in Section 59-12-110.”

Utah Code §59-12-110(4) provides that:

- (a) Subject to the provisions of Subsection (4)(b), the commission may impose on a deficiency under this section:
 - (i) a penalty as provided in Section 59-1-401; and
 - (ii) interest as provided in Section 59-1-402.
- (b) The commission may impose a penalty and interest on the entire deficiency if any part of the deficiency is due to:
 - (i) negligence;. . . .

Utah Code §59-10-539(1) provides for the imposition of interest, which in pertinent parts state as follows:

-
- (8) In addition to the penalties added by this section, there shall be added to the tax due interest payable at the rate and in the manner prescribed in Section 59-1-402 for underpayments.

Utah Code §59-10-537 provides for the payment of interest as prescribed in Section 59-1-402 if any amount of income tax is not paid on before the last date prescribed in the Individual Income Tax Act for payment.

Appeal No. 05-1264

Utah Code §59-10-514 provides that, in most instances, an individual income tax return shall be filed “on or before the 15th day of the fourth month following the last day of the taxpayer's taxable year[.]”

Utah Code §59-1-402(5) provides that “[i]nterest on any underpayment, deficiency, or delinquency of any tax or fee administered by the tax commission shall be computed from the time the original return is due, excluding any filing or payment extensions, to the date the payment is received.”

DISCUSSION

From an Internet site, the Petitioner purchased cigarettes on which the Utah cigarette tax and Utah sales and use tax were not paid. The Division’s assessment is imposed on purchases that occurred from June 2003 through October 2003. The Division imposed the Utah cigarette tax of 3.475 cents per cigarette on all of the Petitioner’s purchases of cigarettes, in addition to interest from 15 days after the date on which the cigarettes were ordered. The audit indicates that Petitioner had purchased a total of ##### cartons of cigarettes during this period. On the purchase price of each carton, the Division also imposed Utah use tax, plus interest on the unpaid use tax from the date on which Petitioner’s Utah Individual Income Tax Returns were due.

Utah Code Section 59-14-204 imposes a Utah cigarette tax of 3.475 cents per cigarette upon any user or consumer of cigarettes in Utah. Petitioner was unable to provide any evidence that would refute the amount of cartons purchased from the Internet during the audit period. The packs did not have a Utah cigarette stamp affixed to them, and the Petitioner did not pay the Utah cigarette tax due on her use or consumption of them. In accordance with Section 59-14-204, the Petitioner is required to pay a cigarette tax of 3.475 cents per cigarette. Applying the cigarette tax to the number of cigarettes purchased results in a tax of \$\$\$\$\$. Additionally sales or use tax is imposed on all purchases of tangible personal property used or consumed in the state at Utah Code Sec 59-12-103. The amount of the sales tax is 6.50% of the purchase price and totaled \$\$\$\$\$ for all purchase at issue in this matter.

At the hearing Petitioner argued that it was unfair to assess this tax against her now. She

Appeal No. 05-1264

indicates that she had no idea when she made the purchases at issue that they were subject to tax. She states that there was no information on the website that she had ordered from indicating that a tax may be owed and that had she know she certainly would have paid the tax because she was not trying to evade the tax law. She states that the public in general would have been unaware of the law during the period at issue and pointed out that had she known there would be a tax she would not have made the purchases over the Internet because she could have purchased the cigarettes locally for less.

Additionally she indicates that she had her tax returns prepared by a professional and they had never asked her about cigarette purchases, or any other purchases over the internet. She felt that it was unfair for the State Tax Commission to be singling out Internet cigarette purchases for audit, when there were all types of purchases made over the Internet and she argues that the Tax Commission should provide better information to the public regarding the use tax that these purchases would be subject to.

The Division's representative indicated that the audit had been based on the sales information provided by the company that had sold the cigarettes to Petitioner over the Internet. He indicated that the Tax Commission did have a section that audited out of state purchases for use tax and that Petitioner had not been singled out for the use tax audit. For the cigarette tax the Division had imposed interest beginning fifteen days from the date of purchase. The interest on the use tax had been imposed from April 15, 2004, when the use tax should have claimed and paid with Petitioner's 2003 Utah Individual Income Tax return.

The Commission has considered the issue of the interest in prior cases and concluded that it would be more appropriate to impose the interest on the Cigarette Tax from the 15th day of the month following the calendar month during which the cigarettes were imported. Because the orders were small in this case the difference in interest calculation would be minimal, but to be consistent the Commission requests the interest be recalculated in a manner consistent with its earlier decisions.

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the Division's assessment as to the tax amounts and interest on the use tax. The Commission orders the Division to recalculate the interest due on the delinquent cigarette tax to reflect a delinquency date that begins on the 15th day of the month following the calendar month in which the cigarettes were purchased, as described in Subsection A.2. of Rule 2. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2006.

Jane Phan
Administrative Law Judge

Appeal No. 05-1264

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2006.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

Notice: If a Formal Hearing is not requested as discussed above, failure to pay the balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.

If a Formal Hearing is not requested and you would like to submit an Offer in Compromise or request payment arrangements, please telephone TAX COMMISSION EMPLOYEE in Taxpayer Services Division at #####.

KRC/05-1264.int.doc