

05-1293
Audit
Signed 04/24/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	INITIAL HEARING ORDER
)	
Petitioner,)	Appeal No. 05-1293
)	
v.)	
)	Tax Type: Cigarette/Use Tax
AUDITING DIVISION OF THE)	
UTAH STATE TAX COMMISSION,)	Tax Period: 08/25/03 – 09/16/04
)	
Respondent.)	Judge: Robinson

Presiding:

R. Spencer Robinson, Administrative Law Judge

Appearances:

For Petitioner: No one appeared

For Respondent: RESPONDENT REPRESENTATIVE, Audit Manager, Auditing
Division

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 November 29, 2005. Petitioner did not appear or call. A telephone call was made to Petitioner. A message was left. After fifteen minutes without a response, the hearing concluded. However, Petitioner had checked the box on his Petition for Redetermination indicating he was willing to submit the matter on the documents he filed.

Respondent was given ten days in which to file a written response to Petitioner's assertions. It arrived on November 30, 2005. With this information, it is possible to render a decision.

Based on information acquired via the Jenkins Act, the Division conducted an audit and issued an assessment against Petitioner for unpaid cigarette tax and use tax on purchases of cigarettes from COMPANY via the Internet. The audit determined Petitioner owed \$\$\$\$ in cigarette excise tax and \$\$\$\$ in use tax. Respondent also assessed interest. Respondent did not assess a penalty.

Petitioner acknowledged the purchase of the cigarettes, but stated that he believed applicable taxes were included in the purchase price. He said there was no notice from the Internet merchants that tax was due. He said had the taxes been included, it would have been less expensive to purchase the cigarettes at the store.

Respondent submitted the case on the audit it performed and the brief it filed. Respondent said the audit was conducted in accordance with the statutes. Because of the circumstances, it did not seek a penalty.

APPLICABLE LAW

Cigarette Tax

Utah Code Ann. §59-14-204 provides, in pertinent part,

- (1) Except for cigarettes described under Subsection 59-14-210(3), there is levied a tax upon the sale, use, storage, or distribution of cigarettes in the state.
- (2) The rates of the tax levied under Subsection (1) are:
 - (a) 3.475 cents on each cigarette, for all cigarettes weighing not more than three pounds per thousand cigarettes; and
 - (b) 4.075 cents on each cigarette, for all cigarettes weighing in excess of three pounds per thousand cigarettes.
- (3) The tax levied under Subsection (1) shall be paid by any person who is the manufacturer, jobber, distributor, wholesaler, retailer, user, or consumer.

Cigarettes distributed for sale in Utah typically have a cigarette stamp on each pack, which indicates that the tax has been paid by the manufacturer, distributor or vendor. Utah Code §§59-14-204 and 59-14-205. The cigarettes purchased by Petitioner did not have stamps affixed. Petitioner caused the cigarettes to enter the State of Utah when he purchased them. Petitioner was required to file a statement and pay the tax directly to the Tax Commission within 15 days of storage, use or consumption in Utah, or by the 15th of the month following the calendar month in which the cigarettes were imported, if authorized by the Commission. Utah Admin. Rules R865-20T-1 and R865-20T-2. He did not know of the requirement. Therefore, he did not file a statement or pay the tax.

Use Tax

Utah Code Ann. §59-12-103(1) provides, in pertinent part,

(1) A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions:

• • • •

(1) amounts paid or charged for tangible personal property if within this state the tangible personal property is:

- (i) stored;
- (ii) used, or
- (iii) consumed;

Utah vendors, and out-of-state vendors with nexus to Utah, are required by law to collect Utah sales tax on behalf of the Tax Commission on each Utah sale. COMPANY is not Utah vendors. It does not have nexus to Utah. Therefore, Utah cannot regulate its activities and require it to collect and remit sales tax.

If the seller does not collect sales tax on items sold and delivered into Utah, as occurred in this case, the purchaser is required to accrue and remit use tax directly to the Tax Commission

on his or her individual income tax return. This is true for all untaxed Internet purchases, not merely cigarettes. Utah Code §59-12-107(1) (d); Utah Admin. Rule R865-21U-3; and Utah Admin. Rule R865-21U-6.

Penalties and Interest

If the purchaser fails to report and pay any tax due within the prescribed time period, the Commission may assess the tax, plus interest and penalties. Interest runs from the date that the return was due. Utah Code §59-1-204(5).

DISCUSSION

COMPANY recently came into compliance with the reporting requirement set forth in the Jenkins Act, a federal law requiring merchants selling tobacco products across state lines to report the purchases to the taxing authorities of the state where the purchaser resides. Upon receiving information regarding the Petitioner's untaxed cigarette purchases, the Division issued an assessment for the unpaid cigarette tax and the unpaid use tax on each transaction.

Petitioner does not deny that he made these purchases, but he states he was unaware that tax was due. While this apparently prompted the Division not to seek a penalty, Petitioner's lack of awareness does not warrant waiving the taxes or interest.

DECISION AND ORDER

Under section 59-1-402(5) of the Utah Code, interest runs from the date that the return is due. Utah Administrative Rule R865-20T-2 states that the return is due (1) 15 days from the date of use, storage or consumption in Utah, or (2) the 15th day of the month following the calendar month in which the cigarettes were purchased. Because it is unknown when the cigarettes were delivered into Utah, the second provision of the rule applies.

Utah Code Ann. §78-12-26 provides that “[a]n action may be brought within three years: . . . (4) for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state.” For most other Utah taxes, the Legislature has enacted a different limitation that permits the Commission to assess a tax at any time if the taxpayer fails to file a return on which the tax should have been reported.¹ However, no such statute has been enacted in the Utah Cigarette and Tobacco Tax and Licensing Act to govern the assessment of cigarette taxes, as reported on the return described in Rule 20T-2. Rule 20T-2 does not provide for the limitation, either. Therefore, the Commission finds Division may only assess cigarette tax three years after the date that a cigarette tax return is due under Rule 20T-2, even where the taxpayer has failed to file the return.

The Division issued its Statutory Notice on August 15, 2005. Given this assessment date and the above ruling, any cigarette tax imposed by this notice would have had to be due by August 15, 2002, three years prior to the assessment date. Pursuant to Subsection (A)(2) of R865-20T-2, an entity subject to the cigarette tax should report and pay the cigarette “on or before the 15th day of the month following the calendar month during which the cigarettes were imported.” Because of this rule, cigarette tax on any purchase made in July 2002 would have been due on August 15, 2002, exactly three years prior to the assessment. Given the August 15, 2005 date of the Statutory Notice, the Commission finds that the Division may only assess cigarette tax on those purchases

¹ See UCA §59-5-114(1) (severance tax); UCA §59-7-519 (corporate franchise tax); UCA §59-9-106 (insurance tax); UCA §59-11-113 (inheritance tax); UCA §59-13-210(6) (motor fuel tax); UCA §59-13-313(4)(special fuel tax).

that occurred on or after July 1, 2002. All purchases in the instant case occurred on or after that date.

As noted above, §59-12-103(1)(l) imposes use tax on tangible personal property stored, used, or consumed in this State. §59-12-107 (1)(d) requires a person to pay a use tax imposed on a transaction described in §59-12-103 (1) if the seller did not collect the tax imposed (which, in this case, the sellers did not collect) and the person stores, uses, or consumes the tangible personal property in the State.

Administrative Rule R865-21U-6 (A)(2)(c) states that individuals who have no sales tax collection responsibility and who have less than \$400 in use tax liability per year are to remit the use tax on their annual State income tax return. Line 24 of Form TC-40, the Utah Individual Income Tax Return, is where persons declare and pay use tax in the amount of \$400 or less. §59-10-536 requires additional tax due on a return be assessed within three years after the return was filed.

A tax return covering the 2002 tax year would be timely filed on April 15, 2003. The Division sent its notice to Petitioner on August 15, 2005. It may go back three years from that date, to August 15, 2002. Therefore, assuming Petitioner filed a State income tax return, the Division may properly assess use tax for purchases made after January 1, 2002, but not prior to January 1, 2002. Again, the purchases at issue in the instant case are within the period of limitation.

The Commission affirms the assessment for the cigarette excise tax on purchases made on or after July 1, 2002, and interest on that tax. Any assessment for transactions prior to July 1, 2002, is outside the period of limitations.

Because neither party provided evidence regarding whether the Petitioner filed a Utah income tax return, Respondent may review Commission records to see if Petitioner filed Utah income tax returns. If Petitioner filed returns during the pertinent years, Respondent may assess use tax, plus interest on the tax due, for returns filed for the period of January 1, 2002, forward. If returns were not filed, there is no limitation period. It is so ordered. The Commission directs the Division to review and recalculate the tax, penalty, and interest on the cigarette tax in accordance with this decision.

The Commission understands that making a lump sum payment may create a hardship for Petitioner. If so, Petitioner may contact the Taxpayer Services Division to make payment arrangements.

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 make a timely request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2006.

Appeal No. 05-1293

R. Spencer Robinson
Administrative Law Judge

Appeal No. 05-1293

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

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