

04-1065  
Audit  
Signed 01/28/2005

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,	)		
	)	<b>ORDER</b>	
Petitioner,	)		
v.	)	Appeal No.	04-1065
	)	Account No.	#####
	)		
AUDITING DIVISION OF	)	Tax Type:	Sales/Tourism Tax
THE UTAH STATE TAX	)		
COMMISSION,	)	Judge:	Phan
	)		
Respondent.	)		

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**Presiding:**

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER REPRESENTATIVE 1, Former Vice President of PETITIONER  
PETITIONER REPRESENTATIVE 2, CPA  
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General  
RESPONDENT REPRESENTATIVE 2, Assistant Director Auditing Division  
RESPONDENT REPRESENTATIVE 3, Tax Audit Manager

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 6, 2004.

APPLICABLE LAW

A county legislative body of any county may impose a tax not to exceed 1% of all sales of prepared foods and beverages that are sold by restaurants. (Utah Code Sec. 59-12-603(1)(b).)

A tax imposed under this part shall be levied at the same time and collected in the same manner as provided in Part 2, Local Sales and Use Tax Act, except that the collection and distribution of the tax revenue is not subject to the provisions of Subsection 59-12-205(2). (Utah Code Sec. 59-12-603(4)(a).)

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“Restaurant” includes any coffee shop, cafeteria, luncheonette, soda fountain, or fast-food service where food is prepared for immediate consumption. (Utah Code Sec. 59-12-602(4)(a).)

Notwithstanding the provisions of Title 63, Chapter 46b, Administrative Procedures Act, a county, city, or town shall not have the right to any of the following, except as specifically allowed by Subsection (2) and Section 59-12-210: . . . (b) to be informed of, participate in, intervene in, or appeal from any adjudicative proceeding commenced pursuant to Section 63-46b-3 to determine the liability of any taxpayer for sales and use tax imposed pursuant to Title 59, Chapter 12, Sales and Use Tax Act. (Utah Code Sec. 59-12-209(1).)

#### DISCUSSION

Effective July 1, 2001, COUNTY imposed the tourism tax on sales of prepared food and beverages that are sold by restaurants as provided in Utah Code Sec. 59-12-603(1)(b). The County notified the general public of the imposition of this additional tax by publication in the local newspaper. During 2001 the State Tax Commission had published Utah Tax Bulletin 9-01, which indicated that private clubs and taverns were considered to be included in the definition of a restaurant.

In the audit Respondent had determined that Petitioner owed \$\$\$\$ in tourism tax along with the interest accrued thereon. Petitioner’s representative explained that she was unaware that Petitioner should have collected the tourism tax. She indicated that she did not remember receiving a Tax Bulletin, tax forms, or any other information concerning the requirement to collect this additional tax. She did acknowledged that had she received any such information she would not have reviewed it personally, and would have instead forwarded it to Petitioner’s accountant. Petitioner’s representative points out that Petitioner had always collected and remitted sales tax to the state and had she known Petitioner would have done so with the tourism tax. She pointed out that the ( X ) had been in business for 29 years and that they had never before had this type of problem.

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The tourism tax is a tax that may be imposed by the various Counties. However, it is collected and administered by the State Tax Commission and then the proceeds are sent back to the county imposing the tax. COUNTY submitted a letter in this matter and COUNTY Commissioners appeared by telephone at the hearing. They requested that the Tax Commission forgive the unpaid tourism tax as they were persuaded that Petitioner's principals were unaware of the requirement to collect the tax and that it would be unfair to demand payment of the tax from their limited personal assets. Petitioner's principals have recently closed the business. The County Commissioners also indicated that there were other similar businesses that may have been unaware of the tax. When questioned, however, the attorney for the County indicated that he was unaware of any statutory provisions that would allow the County to intervene in the tax audit.

Respondent does not dispute that Petitioner's principals were unaware of the tourism tax. Instead Respondent's representative argued that it is the business owner's responsibility to know the tax law and ignorance of the law does not excuse payment. Because the County imposed the tourism tax under Utah Code Sec. 59-12-603 every business is required to pay the tax. Respondent's representative did indicate that he did not have a record of whether Tax Bulletin 9-01 had been sent directly to Petitioner. He pointed out, however, that Petitioner's representative acknowledged she would have forwarded it unread to her accountant. Respondent also argued that the County Commission did not have the statutory right to intervene in this process or to determine whether or not the audit should be abated.

A second issue at the hearing was the additional tax of \$\$\$\$ indicated in the audit related to unreported tobacco sales. Petitioner's representative explained that during the audit period they had some problems with employee theft. As these items were never sold to the public the tax was not collected. Petitioner installed a surveillance system after discovering the problem as well as better inventory accounting. Petitioner indicates that stolen cigarettes did not get accounted for in the tax remittance.

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In considering the facts in this matter and whether to abate the audit, the State Tax Commission is aware that the tourism tax was a tax intended to be imposed on the customers of Petitioner and not Petitioner directly. However, there is no statutory provision that would allow abatement of the audit on the basis that Petitioner was unaware of the tax. In fact, should this be allowed the ability to collect the tax would be severely impacted. Absent legislation to the contrary, the Commission must find on the issue of the tourism tax that Petitioner's ignorance of the law is insufficient for abatement of the audit. No penalty was assessed with the audit, as Respondent did not find that there was negligence or intent to evade the tax. However, that being said, once the tax is paid to the Tax Commission and then remitted to the County, it becomes part of the County's budget and under County control. At that point the County may consider whether it has the authority to refund the tax to Petitioner and do so if the County determines the refund is appropriate.

On the issue of the unreported tobacco sales, as neither side presented this argument fully, it is unclear whether the amount assessed pertained to the 35% tax on tobacco products that is imposed by Utah Code Sec. 59-14-302 or a tax pertaining to the sale of cigarettes under Utah Code Sec. 59-14-204. The limited information from the audit summary, which was all that was presented by Respondent on this issue, indicates the tax related to tobacco products. Petitioner, on the other hand, indicated the theft had pertained to cigarettes. Cigarettes are specifically excluded from the definition of "tobacco products," but are subject to their own tax under Utah Code Sec. 59-14-204. As Petitioner argues cigarettes were stolen it would not be relevant to a tax on tobacco products. In addition Petitioner did not submit a police report or other evidence of charges being filed. If in fact tobacco products had been stolen, the law imposing the tax on tobacco products indicates that the tax is levied on the "sale, use, or storage" of the product. See Utah Code. Sec. 59-14-302. Petitioner clearly stored the product after purchase.

DECISION AND ORDER

Based on the foregoing the Commission denies Petitioner's appeal in this matter. 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 \_\_\_\_\_, 2005.

\_\_\_\_\_  
Jane Phan  
Administrative Law Judge

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 \_\_\_\_\_, 2005.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Palmer DePaulis  
Commissioner

Marc B. Johnson  
Commissioner