

05-0039
Audit
Signed 08/02/2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	
)	
)	ORDER
Petitioner,)	
)	Appeal No. 05-0039
v.)	
)	Acct No. #####
AUDITING DIVISION,)	
UTAH STATE TAX COMMISSION,)	Tax Type: Cigarette Stamp Tax
)	
Respondent.)	Judge: Robinson

Presiding:
R. Spencer Robinson, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REPRESENTATIVE 1
 PETITIONER REPRESENTATIVE 2
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
 RESPONDENT REPRESENTATIVE 2, Auditing Division

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on April 5, 2005. Petitioners are appealing the assessment of \$\$\$\$\$. The Division imposed the assessment after it conducted an audit on November 16, 2004. The audit produced ##### packages of (X) cigarettes, identified as illegal imports.

Petitioner also sells (X) cigars. Petitioner purchased some (X) cigarettes from the same distributor that supplies it (X) cigars. (X) cigarettes are not listed in Publication 51. They have no warning label. Publication 51 states, "Products not appearing on this list are prohibited, may not be stamped and are subject to confiscation as contraband."

Those confiscating the cigarettes said there would be no fine associated with the confiscation. They explained there would be no fine because they were not familiar with the cigarettes.

Appeal No. 04-0418

Petitioner pays sales taxes quarterly on the (X) cigars it sells. It noticed the (X) cigarettes lacked the necessary tax stamp, so it submitted payment for the cigarettes with the payment for the cigars. This was the first violation for Petitioner. (X), of the CITY Police Department, appeared on his personal time in support of Petitioner.

APPLICABLE LAW

The Tax Commission may assess a \$25.00 penalty for each violation. Each article without the required stamps is a separate offense. Utah Code Ann. §59-14-205 (7).

Sale of cigarettes not manufactured for sale, distribution, or use in the United States is prohibited. Utah Code Ann. §59-14-210. The penalty that may be imposed is not to exceed the greater of 500% of the retail value or \$5,000.00. Utah Code Ann. §59-14-211.

DISCUSSION

Publication 51, which lists the Utah approved tobacco manufacturers and cigarette brands, is referenced at the time of licensure. It is not provided to licensees. They are told they may view it on the Internet. (X) brand cigarettes were not listed in Publication 51 at the time they were seized. Therefore, they are prohibited and contraband. The (X) cigarettes sold for \$\$\$\$ per carton.

DECISION AND ORDER

Utah Code Ann. §59-14-205 (7) states the Commission may fine offenders \$25.00 for each violation. Each package constitutes a violation. §59-14-211 (2)(b)(i) and (ii) state the Commission may impose a civil penalty not to exceed the greater of 500% of the retail value of the cigarettes or \$5,000.00. Use of the term “may,” rather than “shall,” grants discretion to the Commission. The Division assessed the maximum civil penalty of \$5,000.00 for the ##### packages of (X) cigarettes.

The Commission finds that this is a case where it is appropriate to exercise discretion. While Petitioner should be held responsible for violations, a maximum fine of \$5,000.00 for a first offense involving unapproved cigarettes without additional aggravating circumstances seems disproportionate.

Appeal No. 04-0418

Based on the foregoing, the Commission sets the civil penalty in this case at \$\$\$\$ for the ##### packages of (X) cigarettes. 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.

R. Spencer Robinson
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