

05-0239
Audit
Signed 12/28/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Petitioner,)	AND FINAL DECISION
)	
v.)	Appeal No. 05-0239
)	Account No. #####
AUDITING DIVISION OF)	Tax Period: 10/1/00-9/30/04
THE UTAH STATE TAX)	Tax Type: Tobacco Products Tax
COMMISSION,)	
)	Judge: Phan
Respondent.)	

Presiding:

Pam Hendrickson, Commission Chair
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE 1, Attorney At Law
PETITIONER REPRESENTATIVE 2, Former Owner, PETITIONER
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, Auditor
RESPONDENT REPRESENTATIVE 3, Auditor
RESPONDENT REPRESENTATIVE 4, Accounting Technician
RESPONDENT REPRESENTATIVE 5, Compliance Supervisor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on October 31, 2006. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:¹

FINDINGS OF FACT

1. The audit period is 10/01/00 through 9/30/04.
2. Respondent issued a statutory notice of deficiency on February 4, 2005.
3. The statutory notice of deficiency proposes an assessment of \$\$\$\$ of "tobacco

products” tax, based upon a “tobacco products” tax of 35% imposed upon the amount of purchases of “tobacco products” from out-of-state distributors, a penalty in the amount of \$\$\$\$ based upon the assessment of a 10% negligence penalty and a 10% failure to file penalty beginning from December 31, 2003, and interest imposed at the statutory rate, as of the time of the proposed assessment, in an amount of \$\$\$\$

4. An Initial Hearing was conducted in this matter on September 21, 2005, and a decision from that Initial Hearing was issued on September 26, 2005.

5. PETITIONER (hereafter, “PETITIONER”) timely appealed the initial hearing decision to a formal hearing.

6. PETITIONER obtained cigarette/tobacco and sales and use tax licenses from the Utah State Tax Commission (“Tax Commission”) and opened the CITY location in late 2000.

7. During the later part of 2003, PETITIONER attempted to purchase some “tobacco products” from an out-of-state wholesaler/distributor who inquired about PETITIONER’S “tobacco products/tobacco” license.

8. PETITIONER was unaware at that time that it needed a “tobacco products” license to sell “tobacco products,” and it contacted the Tax Commission to find out what it needed to do to obtain such a license.

9. PETITIONER was referred to RESPONDENT REPRESENTATIVE 5 who informed PETITIONER’S former owner PETITIONER REPRESENTATIVE 2, that it needed a “tobacco products” license and to post a bond.

10. The Tax Commission’s Initial Hearing decision cites to notes in RESPONDENT REPRESENTATIVE 5’s files concerning the conversation with PETITIONER REPRESENTATIVE 2 about (a) obtaining a “tobacco products” license and (b) that PETITIONER paid the \$\$\$\$ bond amount and

1 Findings 1 through 19 are from the parties Joint Stipulation of Facts dated October 31, 2006.

activated its “tobacco products” license on November 3, 2003.

11. After obtaining a “tobacco products” license, PETITIONER proceeded to purchase “tobacco products” from various wholesaler/distributors, including various out-of-state entities.

12. PETITIONER REPRESENTATIVE 2’s knowledge of the tobacco industry and state taxation of cigarettes was mostly obtained through his employment by the COMPANY (“COMPANY”) as a sales representative.

13. PETITIONER REPRESENTATIVE 2 was aware that the State of Utah imposes a tax upon the sale of cigarettes in the State of Utah and that the Tax is, generally, collected and paid at the manufacturer or wholesaler/distribution level-not by the retailer.

14. PETITIONER has not had any cigarette tax obligations, including for the audit period.

15. PETITIONER has not had any sales tax obligations, including for the audit period.

16. PETITIONER did not understand that the State’s taxing system is different for “tobacco products” and that this tax is often paid by the retailer.

17. PETITIONER assumed that the tax on its purchases of “tobacco products” was being collected and paid in the same fashion as it was for cigarettes.

18. Various local distributors from which PETITIONER had purchased product did collect the “tobacco products” tax from PETITIONER.

19. The PETITIONER CITY location was sold in 2005, and PETITIONER REPRESENTATIVE 2 owns no retail outlets.

20. The products that resulted in the tax at issue were generally specialty products that were not available from the in-state suppliers that collected the tax at the time of the purchase and remitted it to the state. These were items like premium cigars. Most of the purchases that resulted in the audit deficiency

came from one very large supplier in STATE and PETITIONER REPRESENTATIVE 2 attributed any difference in price at that time to volume discounts.

21. Currently when a business registers with the Taxpayer Services Division (“Division”) to sell tobacco products, the Division sends the business quarterly returns for the tobacco products tax. However, at the time that PETITIONER obtained the license and posted a bond this procedure had not yet been implemented. PETITIONER was one of the first businesses to obtain the license.

22. In 2004 after audits of the tobacco products tax had begun to be commenced, the Division implemented the current procedure of sending out quarterly returns to those businesses registered to sell tobacco products. The Division does not have any evidence to indicate that it provided directly to PETITIONER, prior to the audit, the information that PETITIONER would need to pay the tobacco products tax if the out of state suppliers were not remitting the tax. Even if a taxpayer were to attempt to find information on this tax from the Tax Commission’s current website, the information is not there.

APPLICABLE LAW

1. Provisions relating to the collection of the tobacco products tax and requirement to obtain a license are set forth in UCA §59-14-301, pertinent parts as follows:

(1) All manufacturers and distributors of all tobacco products, as defined in Section 59-14-102, who are responsible for the collection of tax on tobacco products under this chapter, and all retailers of all tobacco products shall:

(a) register with the commission; and

(b) be licensed by the commission under Section 59-14-202.

(2) A fee may not be charged for registration and licensing of manufacturers, jobbers, distributors, or retailers of tobacco products in addition to the cigarette license if such a license is required.

2. The rate of taxation upon the sale, use, or storage of tobacco products is established in UCA §59-14-302, as follows:

(1) There is levied a tax upon the sale, use, or storage of tobacco products in the state. The rate of the tax is 35% of the manufacturer's sales price. The sales price is

the amount charged by the manufacturer less all discounts, and includes original Utah destination freight charges, whether the product is shipped f.o.b. origin or f.o.b. destination and regardless of who pays the freight charge.

(2) The tax levied under Subsection (1) shall be paid by the manufacturer, jobber, distributor, wholesaler, retailer, user, or consumer.

3. UCA §59-14-303 sets forth the filing requirements associated with the tobacco products tax, as well as the authority to impose penalties and interest upon persons who violate the provisions associated with the section, in pertinent parts as follows:

(1) The taxes imposed on all tobacco products shall be remitted to the commission together with quarterly returns as prescribed by the commission. These returns shall be due and payable to the commission quarterly on or before the last day of the month following each calendar quarterly period.

....

(5) Any manufacturer, wholesaler, retailer, or any other person subject to this section who fails to pay the tax prescribed by this chapter, or fails to pay the tax on time, or fails to file a return required by this chapter, shall pay, in addition to the tax, a penalty as provided in Section 59-1-401, plus interest at the rate and in the manner prescribed in Section 59-1-402. The minimum penalty shall be \$10 for each offense.

4. UCA §59-1-401(1) provides that the penalty for failure a tax return within the time prescribed is the greater of \$20 or 10% of the unpaid tax on the return. Subsection 59-1-401(5)(a) further provides for the imposition of a 10% penalty for failure to pay the tax when due if the underpayment is due to negligence.

5. UCA §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.”

6. In those situations where penalty and interest have been properly imposed, the Tax Commission is granted the authority to waive, reduce, or compromise penalties and interest upon a showing of reasonable cause. UCA §59-1-401(10).

CONCLUSIONS OF LAW

1. There is no dispute in this matter that pursuant to UCA §59-14-302 the tobacco products tax should have been collected and remitted to the Tax Commission on the tobacco products that resulted in the audit deficiency. Additionally the parties have no dispute as to the amount of the audit deficiency.

2. Ignorance of the law generally does not excuse the collection and remittance of tax. When a party enters into a trade or business it is that parties responsibility to determine what the applicable taxes are and to collect and remit the tax.

3. Although the Division could have been more helpful in explaining the law and the tax to Petitioner at the time he requested the license to sell tobacco products, or in sending out quarterly returns to Petitioner once the process was in place, the circumstances outlined in the facts present are not sufficient justification to outweigh the general principle that ignorance of the law does not excuse a failure to collect and remit tax.

DISCUSSION

After hearing the testimony and reviewing the evidence in this matter it is the Commission's conclusion that PETITIONER REPRESENTATIVE 2 was unaware of the fact that he was required to pay the tobacco products tax to the state on those purchases at issue. Additionally there was no obvious circumstance that should have drawn this error to his attention and to the extent that his failure to pay the tax resulted in negligence.

There is no dispute that the tax was owned pursuant to the applicable statute. Nor was there any argument that the amount of the tax was incorrect. The issue before the Commission is simply one of whether what may be categorized an inaction on the part of Tax Commission employees to inform a taxpayer about the obligation to collect and remit a tax could be a justification to abate an audit deficiency. Considering

the conversation between PETITIONER REPRESENTATIVE 2 and the Division, the Commission would have hoped that PETITIONER REPRESENTATIVE 2 would have received some instruction on collecting and paying the tax. However, he apparently had called specifically about obtaining the license to sell tobacco products and had been informed of the process for obtaining the license. RESPONDENT REPRESENTATIVE 5, to whom he spoke, may have assumed if Petitioner knew about the license he knew about the tax. Petitioner would not have known enough to ask about the tax. Ultimately, however, the responsibility is on the business owner to learn what taxes are required. There is simply no basis in the facts as presented in this matter for the Commission to abate the audit deficiency as it pertains to tax. The Commission does find cause for abatement of all penalties assessed with the audit.

Interest is generally waived only in the event of an error on the part of a Tax Commission employee that lead to the underpayment or late payment of tax. It is assessed pursuant to UCA §59-1-402(5) to compensate the state for the time value of money. The facts presented in this matter do not rise to the level required for waiver of the interest.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission waives the penalties assessed with this audit. The Tax Commission sustains the audit as it pertains to the tax deficiency and interest. It is so ordered.

DATED this ____ day of _____, 2006.

Jane Phan
Administrative Law Judge

Appeal No. 05-0239

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

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Notice of Appeal Rights and Payment Requirement: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. 63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. 59-1-601 and 63-46b-13 et. seq. 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.

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