

05-1211
Audit
Signed 01/12/2006

BEFORE THE UTAH STATE TAX COMMISSION

| | | |
|----------------------------|---|---------------------------------|
| PETITIONER, |) | INITIAL HEARING ORDER |
| |) | |
| Petitioner, |) | Appeal No. 05-1211 |
| |) | |
| v. |) | |
| |) | Tax Type: Cigarette/Use Tax |
| AUDITING DIVISION OF THE |) | |
| UTAH STATE TAX COMMISSION, |) | Tax Period: 08/18/03 – 09/28/04 |
| |) | |
| Respondent. |) | Judge: Robinson |

Presiding:

R. Spencer Robinson, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER, Petitioner

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 October 4, 2005.

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 A and COMPANY B via the Internet. The audit determined Petitioner owed \$\$\$\$\$ in cigarette 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 she had no idea about tax liability on the purchases. She assumed the price she saw on the Internet was the total price. She asserted liability, if any, should be the sellers'.

Respondent said the website lists a disclaimer. It states the purchaser is responsible for taxes. However, Respondent did not know when the disclaimer was included on the website. Petitioner said she had not seen the disclaimer when ordering.

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 she 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. She did not know of the requirement. Therefore, she 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:

....

(l) 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. Neither COMPANY A nor COMPANY B are Utah vendors. They do not have nexus to Utah. Therefore, Utah cannot regulate their activities and require them 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 A and COMPANY B 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 she made these purchases, but she states she was unaware that tax was due. While this apparently prompted the Division not to seek a penalty, her lack of awareness does not warrant waiving the taxes or interest.

DECISION AND ORDER

The Commission affirms the assessment for the cigarette tax, the use tax, and interest. It is so ordered. However, the Commission directs the Division to review, and, if necessary, recalculate the interest on the cigarette tax. 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. If it did not do so, the Division should calculate interest from the 15th of the month following the month of purchase.

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 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