

05-1240  
Audit  
Signed 05/05/2006

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,	)	<b>INITIAL HEARING ORDER</b>
	)	
Petitioner,	)	Appeal No.    05-1240
	)	
v.	)	
	)	Tax Type:    Cigarette/Use Tax
AUDITING DIVISION OF THE	)	
UTAH STATE TAX COMMISSION,	)	Tax Period:  03/19/02 – 09/14/05
	)	
Respondent.	)	Judge:       Robinson

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**Presiding:**

R. Spencer Robinson, Administrative Law Judge

**Appearances:**

For Petitioner:    PETITIONER, Petitioner, via telephone

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 7, 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 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 seller's.

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 15<sup>th</sup> 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. COMPANY is not a Utah vendor. 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 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.

On August 22, 2005, Petitioner paid the taxes that were due. She did not remit payment of the interest. Respondent credited her payment to interest first, and applied the balance to the taxes due. Thus, a balance of \$\$\$\$ has been accruing interest since that date.

Petitioner does not contest the taxes assessed. She requests a waiver of the interest. The Division objects to her request on the grounds no reasonable cause exists.

Petitioner's ignorance of the law does not rise to the level of reasonable cause. Additionally, she had the time value of the money.

#### 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 15<sup>th</sup> 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.<sup>1</sup> However, no such

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<sup>1</sup> 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 §59-12-110(6) (sale and use tax); UCA §59-13-

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 Rule 20T-2, an entity subject to the cigarette tax should report and pay the cigarette “on or before the 15<sup>th</sup> day of the month following the calendar month during which the cigarettes were imported.” Because of this rule, 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 that occurred on or after July 1, 2002. Accordingly, the Commission overturns the Division’s assessment of cigarette tax for those purchases that occurred prior to July 1, 2002. The Commission, however, sustains the Division’s assessment of cigarette tax for those purchases made on or after July 1, 2002.

The Commission affirms the assessment for the cigarette tax, the use tax, and interest on purchases made on or after July 1, 2002. 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

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210(6) (motor fuel tax); UCA §59-13-313(4)(special fuel tax).

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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 \_\_\_\_\_, 2006.

\_\_\_\_\_  
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 \_\_\_\_\_, 2006.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Palmer DePaulis  
Commissioner

Marc B. Johnson  
Commissioner

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