

05-1241
Audit
Signed 01/12/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)		
	)	ORDER FROM INITIAL HEARING	
Petitioner,)		
	)	Appeal No.	05-1241
v.	)	Account Nos.	#####
)		#####
AUDITING DIVISION OF THE	)	Audit Period:	05/06/02 – 08/21/02
UTAH STATE TAX COMMISSION,	)	Tax Type:	Cigarette Tax &
	)		Sale and Use Tax
Respondent.	)	Judge:	Jensen

Presiding:

Clinton D. Jensen, 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 on December 5, 2005 for an Initial Hearing in accordance with Utah Code § 59-1-502.5. The Auditing Division of the Utah State Tax Commission (the “Division”) issued an assessment against Petitioner for unpaid cigarette tax and use tax on purchases of cigarettes from COMPANY, an out-of-state internet vendor. The cigarette tax assessment is in the amount of \$\$\$\$ (including \$\$\$\$ in interest), and the use tax assessment amounts to \$\$\$\$ (including \$\$\$\$ in interest). The purchases were made during the period of May 6, 2002 to August 21, 2002. No penalty was assessed.

Petitioner admits that she authorized the purchase of these cigarettes on her credit card but states that she did not know that tax was due on the purchases. Petitioner states that she did not buy the cigarettes for her own use and does not even smoke. Rather, she was merely facilitating a purchase for her ex-boyfriend. At the time of the purchase of the cigarettes, Petitioner had a credit card while the ex-boyfriend had only a

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debit card. The Petitioner argues that the Tax Commission should collect from the vendor who failed to collect the tax rather than from her. Finally, the petitioner points out that the State waited more than three years from the cigarette purchase to inform the Petitioner of the tax due on the cigarettes.

APPLICABLE LAW

Cigarette Tax

Utah law imposes a cigarette tax on “the sale, use, storage or distribution of cigarettes in the state.” Utah Code § 59-14-204. Typically, cigarettes distributed for sale in Utah are affixed with a cigarette stamp on each pack, which indicates that the manufacturer, distributor or vendor has paid the tax. Utah Code §§ 59-14-204 and 59-14-205. When a person causes untaxed cigarettes to be delivered into the state, that person must 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.

Use Tax

Utah law additionally imposes sales and use tax on retail sales in Utah. Utah Code §59-12-103(1). Utah vendors and some out-of-state vendors are required by law to collect Utah sales tax on behalf of the Tax Commission on each Utah sale. However, if the seller does not collect the tax on items sold and delivered into Utah, the purchaser is required to accrue and remit use tax directly to the Tax Commission on his or her individual income tax return. Utah Code §59-12-107 (1)(d); Utah Admin. Rule R865-21U-3; and Utah Admin. Rule R865-21U-6.

Penalties and Interest

If a person 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 § 59-1-402 (5).

Statutes of Limitation

The Tax Commission has three years from the date of the filing of a tax return to claim that the return is incorrect or that the taxpayer owes additional taxes on the return. Utah Code § 59-12-110 (6)(a). When the taxpayer does not file a required tax return, there is no time limit for the Tax Commission to assess taxes that would have been required with the return. Utah Code § 59-12-110 (6)(c)(ii).

DISCUSSION

Under federal law, the Jenkins Act, vendors such as COMPANY are required to report their Utah internet sales to the Tax Commission. In compliance with this act, COMPANY reported cigarette purchases made in the Petitioner's name using the Petitioner's credit card. Upon receiving this report and identifying the Petitioner as a Utah taxpayer, the Division issued an assessment for the unpaid cigarette tax and the unpaid use tax on each transaction. Petitioner does not deny that she authorized these purchases, but she states she was unaware that tax was due.

Cigarette Tax. Section 59-14-204 of the Utah Code imposes a Utah cigarette tax on the "sale, use, storage, or distribution" of cigarettes in the state. The occurrence of any one of these will suffice and will trigger the tax. The evidence in this action shows that although the Petitioner did not smoke the cigarettes in question and therefore did not use them, she did allow them to be purchased with her credit card and therefore was involved in a "sale." The internet seller had the cigarettes delivered to the Petitioner's home where the Petitioner stored them, even if the time of storage was short. The Petitioner distributed the cigarettes to her then-boyfriend by allowing him to take them following delivery to her home. In accordance with Section 59-14-204, the Petitioner is required to pay a cigarette tax on these cigarettes because she was involved in a sale, storage, and distribution of the cigarettes. The Tax Commission finds the Petitioner's statement that she did not know that taxes were due on these cigarettes to be credible.

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Even so, Utah law requires payment of this the tax even if the Petitioner was not aware of it.

Use Tax. The Petitioner caused cigarettes to be delivered from an out-of-state retailer. These transactions are considered Utah retail sales of tangible personal property and, in accordance with Section 59-12-103(1)(a), are subject to Utah sales and use tax. The retailer from whom the Petitioner placed the order for cigarettes did not collect and remit Utah sales and use tax to Utah on the transactions. This is because the retailer is an out of state seller and Utah cannot require an out of state retailer without sufficient presence in Utah to collect Utah sales tax. Section 59-12-107(1)(d) provides that, under these circumstances, the person bringing the goods into the state is to pay the Utah use tax that is due. In accordance with Utah Admin. Rule R865-21U-6(A)(2)(c), the Petitioner should have paid the use tax she owed by claiming and paying the liability on her individual income tax returns for the 2002 tax year. The Petitioner indicated that she did not report these transactions or pay a use tax on these transactions. Accordingly, the Division was correct in assessing the use tax for the 2002 tax year.

Interest. Utah Code Section 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.” The use tax on the cigarettes in this matter was for the 2002 tax year. The Petitioner’s return for the 2002 tax year was due April 15, 2003. The Division was correct in assessing interest on the 2002 use tax beginning on April 15, 2003.

For interest on the cigarette tax, the Division computed interest from a starting date 15 days after the Petitioner charged cigarettes on her credit card. But Utah statute does not require that the purchaser file a cigarette tax return until “15 days from the date of use, storage, or consumption” of the cigarettes in Utah. Utah Admin. Rule R865-20T-2. Because delivery into Utah would not have been instantaneous with purchase, using purchase date as the starting date for interest would yield too long a time period for

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interest. The interest assessed on unpaid cigarette taxes needs to be calculated using dates that begin on or after the date of delivery of cigarettes into Utah.

Statutes of Limitation. Utah law recognizes that there needs to be a time limit for the Tax Commission to bring an action to challenge a taxpayer's tax return. That time limit is three years and begins to run on the date the taxpayer files their tax return. Utah Code § 59-12-110 (6)(a). When the taxpayer does not file a return, the three-year time limit does not apply and there is no time limit. Utah Code § 59-12-110 (6)(c)(ii).

For the use tax at issue in this case, the three-year limit applies to the Petitioner's 2002 cigarette purchase. Use taxes for 2002 purchases would have been reported on the Petitioner's tax return that was due April 15, 2003. The parties did not indicate when the Petitioner filed her 2002 tax return, but the earliest the Petitioner could have filed the 2002 return would have been January 1, 2003. Three years from January 1, 2003 would be January 1, 2006. The use tax notice in this case was timely because the Division sent it on August 15, 2005. This is several months before January 1, 2006, the earliest date the statute of limitation could have run.

The cigarette tax for the 2002 cigarette purchases required a filing of a separate return from the Petitioner's normal 2002 tax return. This separate return would have been due within 15 days from the delivery of the cigarettes into Utah. *See* Utah Code § 59-14-204. The Petitioner and the Division both indicated that the Petitioner never filed this return. Under Utah Code Section 59-12-110 (6)(c)(ii), there is no time limit applicable to the Division's efforts to collect the cigarette tax at issue in this case. Because the Division acted within the three-year time limit for giving notice for use tax and because there was no time limit applicable to the cigarette taxes in this case, the Tax Commission finds that the Division acted within the applicable statute of limitation deadlines.

DECISION AND ORDER

The Tax Commission has very little latitude to waive tax and interest that is due under Utah law. It has discretion to waive penalties, but no penalties were imposed in this case. The Commission affirms the assessment for the cigarette tax and the use tax and interest on the use tax. However, the Commission directs the Division to 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. The provision for monthly filings appears to be in place for those who import cigarettes regularly who are authorized to report and pay the tax on a monthly basis. In the case of the individual taxpayer here, the Division applied the first provision and calculated the interest beginning 15 days after the date of purchase. However, the rule states that the interest runs from 15 days after the date the cigarettes were stored, used or consumed in Utah, and not 15 days from the date of purchase. Because there is no evidence regarding the timing of delivery of the cigarettes into Utah, the Commission resorts to the second provision of the rule and directs the Division to calculate the interest from the 15th of the month following the month of purchase.

The Petitioner indicated that payment of this assessment as a lump sum would create a financial burden. The Petitioner may contact TAX COMMISSION EMPLOYEE of the Taxpayer Services Division ##### to discuss financial 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 days of the date of this decision to proceed to a Formal Hearing. Such a request shall be

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mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

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.

Clinton D. Jensen
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

Notice: If a Formal Hearing is not requested as discussed above, 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. If a Formal Hearing is not requested and you would like to submit an Offer in Compromise or request payment arrangements, please telephone TAX COMMISSION EMPLOYEE in Taxpayer Services Division at #####.

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