

05-1254
Audit
Signed 12/05/2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)		
	)	ORDER	
Petitioner,)		
	)	Appeal No.	05-1254
v.	)	Account Nos.	##### & #####
)		
AUDITING DIVISION OF THE	)	Audit Period:	4/11/03 – 12/17/04
UTAH STATE TAX COMMISSION,	)	Tax Type:	Cigarette Tax & Sale and Use Tax
)		
Respondent.	)	Judge:	Chapman

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 3, 2005. The Petitioner did not appear at the hearing. However, the Petitioner requested on his Petition for Redetermination that the Commission issue a decision based on the written record submitted by the parties. The Petitioner submitted a written letter with his Petition for Redetermination that detailed his arguments. Auditing Division (“Division”) was ordered at the time scheduled for the Initial Hearing to submit its arguments in writing, which the Commission received on November 14, 2005. The Commission’s decision is based on the information received in these documents and the applicable law existing during the audit period.

At issue is the assessment of cigarette tax, cigarette equity assessment, and sales and use tax to the Petitioner, as imposed by Auditing Division (“Division”) in a Statutory Notice – Cigarette Stamp, dated August 15, 2005. The Division’s assessment imposed tax on the Petitioner’s purchase of ##### cartons of cigarettes that contained ##### packs of ##### cigarettes each and one carton of cigarettes that contained ##### packs of ##### cigarettes. The purchases were made between April 11, 2003 and December 17, 2004. The Division claims that the Petitioner failed to pay Utah cigarette tax, Utah cigarette equity assessment, and Utah sale and use tax on his purchase of these cigarettes. For the ##### cartons with ##### packs each, the

Appeal No. 05-1254

Division assessed a cigarette tax of 69.5 cents per pack of cigarettes and a use tax of 6.6% of the purchase price of each carton, based on the addresses to which the cigarettes were delivered. The Division claims that the one carton with ##### packs was manufactured by a “nonparticipating manufacturer” and, for this carton, assessed an equity assessment of 35 cents per pack, in addition to the cigarette tax of 69.5 cents per pack and the use tax of 6.6% on the purchase price.

The Division also assessed interest on the unpaid cigarette tax and cigarette equity assessment beginning 15 days after the date of purchase of each carton. Because use tax is reported and paid on a person’s individual income tax return, interest for the unpaid use tax was based on the due date of the Petitioner’s income tax returns. For purchases made in 2003, interest was assessed on the unpaid use tax beginning on April 15, 2004, the date on which the Petitioner’s 2003 individual income tax return was due. For purchases made in 2004, interest was assessed beginning on April 15, 2005, the date on which the Petitioner’s 2004 individual income tax return was due.

The Petitioner does not contest that he purchased the cigarettes at issue or, if the taxes were legally imposed, that the Division improperly calculated them. However, he does assert his belief that the assessments were not legally imposed. First, the Petitioner believes that the Commission should overturn the assessment because all the packs of cigarettes at issue either had a STATE 1 or a STATE 2 cigarette stamp affixed to the packs upon his receiving them. In addition, the Petitioner asserts that the Internet purchases over the Internet are usually only taxable if the seller and buyer are in the same state. Furthermore, the Petitioner contends in his letter that the Internet Tax Freedom Act provides that “taxing authorities may not levy ‘multiple or discriminatory taxes on electronic commerce.’” Lastly, if the Commission finds the taxes to be legally imposed, the Petitioner asks the Commission to waive the assessment because he believed he had properly paid taxes when he made the purchases.

APPLICABLE LAW

Cigarette Tax and Cigarette Equity Assessment Applicable Law. UCA §59-14-204(1), (2) provides that a tax is levied upon the sale, use, storage, or distribution of cigarettes in Utah at the rate of “3.475 cents on each cigarette.” Subsection 59-14-204(3) provides that the tax shall be paid by any person who is “the manufacturer, jobber, distributor, wholesaler, retailer, user, or consumer.”

UCA §59-14-214(2) provides for the imposition of a cigarette equity assessment, as follows in pertinent part:

(a) There is levied an equity assessment, at the rate of 1.75 cents on each cigarette, for all cigarette packages of nonparticipating manufacturers to which a stamp is affixed as required under Section 59-14-205.

...

(d) Except as otherwise provided in this section, the equity assessment shall be collected, paid, administered, and enforced in the same manner as the tax on cigarettes levied by Section 59-14-205.

Utah Admin. Rule R865-20T-2(A) (“Rule 2”) provides that “[i]f the tax is due as a result of use, storage, or consumption of imported cigarettes, the tax may be paid by affixing stamps or by filing a return prescribed by the Tax Commission.” Subsection (A)(1) of the rule provides that a return must be filed and the tax paid within 15 days from the date of use, storage, or consumption unless application is made for permission to file monthly returns and pay the tax on a monthly basis. Section (A)(2) of Rule 2 provides that, if permission is granted for the monthly filing of returns, the returns are due on or before the 15th day of the month following the calendar month in which the cigarettes were purchased.

Sale and Use Tax Applicable Law. UCA §59-12-103(1)(a) provides that “[a] tax is imposed on the purchaser as provided in this part for amounts paid or charged for . . . retail sales of tangible personal property made within the state[.]”

For sales subject to taxation under Section 59-12-103, UCA §59-12-107(1)(d) provides that a person shall pay a use tax, as follows:

A person shall pay a use tax imposed by this chapter on a transaction described in Subsection 59-12-103(1) if:

- (i) the seller did not collect a tax imposed by this chapter on the transaction; and
- (ii) the person:
 - (A) stores the tangible personal property in the state;
 - (B) uses the tangible personal property in the state; or
 - (C) consumes the tangible personal property in the state.

Utah Admin. Rule R865-21U-6 (“Rule 6”) provides for the payment of use tax as follows, in

pertinent part:

A. Purchasers of tangible personal property - the storage, use, or other consumption of which is subject to tax - must account for the tax liability by paying the tax:

. . . .

2. directly to the Tax Commission if the retailer from whom the property was purchased does not hold a certificate of registration. Under these circumstances, one of the following procedures must be followed:

- (a) if the purchases are made by a business required by Section 59-12-106 to hold or obtain a sales tax license or a use tax certificate of registration, the tax is paid on a sales and use tax return;
- (b) if the purchases are made by any person as defined in Utah Code Ann. Section 59-12-102, who has no sales tax collection responsibility, and if the annual taxes due may be reasonably expected to exceed \$400, such person must apply for registration as a consumer and pay the tax using a quarterly use tax return; or
- (c) if the purchases are made by an individual who has no sales tax collection responsibility and the annual use tax liability is less than \$400, the tax is remitted using the individual income tax return filed each year. The tax is computed by using the rates provided in the income tax instructions for the address of the consumer as shown on the individual income tax form. . . .

UCA§59-12-107(10)(c) provides that “[e]ach person who fails to pay any tax to the state or any amount of tax required to be paid to the state . . . within the time required by this chapter . . . shall pay, in addition to the tax, penalties and interest as provided in Section 59-12-110.” UCA§59-12-110(4) provides that

- (a) Subject to the provisions of Subsection (4)(b), the commission may impose on a deficiency under this section:
 - (i) a penalty as provided in Section 59-1-401; and
 - (ii) interest as provided in Section 59-1-402.
- (b) The commission may impose a penalty and interest on the entire deficiency if any part of the deficiency is due to:

Appeal No. 05-1254

(i) negligence;

....

Individual Income Tax Applicable Law. UCA §59-10-539(1) provides for the imposition of interest, pertinent parts as follow:

....

(8) In addition to the penalties added by this section, there shall be added to the tax due interest payable at the rate and in the manner prescribed in Section 59-1-402 for underpayments.

UCA §59-10-537 provides for the payment of interest as prescribed in Section 59-1-402 if any amount of income tax is not paid on before the last date prescribed in the Individual Income Tax Act for payment.

UCA §59-10-514 provides that, in most instances, an individual income tax return shall be filed “on or before the 15th day of the fourth month following the last day of the taxpayer's taxable year[.]”

General Penalty and Interest Applicable Law. 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.”

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. Utah Code Ann. §59-1-401(10).

DISCUSSION

From an Internet site, the Petitioner purchased cigarettes on which the Utah cigarette tax, Utah cigarette equity assessment, and Utah sales and use tax were not paid. The Division’s assessment is imposed on purchases that occurred from April 2003 through December 2004. The Division imposed the Utah cigarette tax of 4.375 cents per cigarette (69.5 cents per 20-cigarette pack) on all of the Petitioner’s purchases of

Appeal No. 05-1254

cigarettes, in addition to interest from 15 days after the date on which the cigarettes were ordered. The Division also claims that a “nonparticipating manufacturer” manufactured the one carton containing ##### packs of cigarettes that the Petitioner purchased on October 4, 2004. On these ##### packs of cigarettes, the Division imposed an additional Utah cigarette equity assessment of 1.75 cents per cigarette (35 cents per 20-cigarette pack). On the purchase price of each carton, the Division also imposed Utah use tax, plus interest on the unpaid use tax from the date on which the Petitioner’s income tax returns were due.

Cigarette Tax. Section 59-14-204 imposes a Utah cigarette tax of 3.475 cents per cigarette upon any user or consumer of cigarettes in Utah. The written evidence proffered shows that, during the audit period, the Petitioner purchased and used ##### cartons with ##### packs of ##### cigarettes and one carton with ##### packs of ##### cigarettes. The packs did not have a Utah cigarette stamp affixed to them, and the Petitioner did not pay the Utah cigarette tax due on his use or consumption of them. In accordance with Section 59-14-204, the Petitioner is required to pay a cigarette tax of 69.5 cents on each of these #####-cigarette packs. Applying the cigarette tax of 69.5 cents per #####-cigarette tax to these ##### packs results in an assessment of \$\$\$\$.

Cigarette Equity Assessment. Section 59-14-214(2)(a) imposes a Utah cigarette equity assessment of 1.75 cents per cigarette for all cigarette packages produced by nonparticipating manufacturers to which a stamp is affixed as required under Section 59-14-205. The Petitioner did not refute that he purchased one carton with ##### packs of ##### cigarettes that was manufactured by a “nonparticipating manufacturer,” on which a Utah stamp was not affixed and on which the Petitioner did not pay the Utah cigarette equity assessment.

Subsection 59-14-214(2)(a) provides that the equity assessment only applies to packages “to which a stamp is affixed as required under Section 59-14-205.” No stamp was affixed to these packs as required under Section 59-14-205. However, Subsection 59-14-214(2)(d) provides that “the equity assessment

Appeal No. 05-1254

shall be collected, paid, administered, and enforced in the same manner as the tax on cigarettes levied by Section 59-14-205.” The Commission does not believe that a person can avoid the cigarette equity assessment by violating another Utah statute; i.e., by not affixing a Utah stamp. Furthermore, Utah Admin. Rule R865-20T-2 (“Rule 2”) provides that, as an alternative to affixing a Utah cigarette stamp to a package to pay the cigarette tax, a person who uses, stores, or consumes cigarettes may file a return and pay the tax. In accordance with Subsection 58-14-214(2)(d) and Rule 2, the Commission finds that the Utah cigarette equity assessment may be imposed in this matter, even though no “stamp [was] affixed as required under Section 59-14-205.” Accordingly, the Commission sustains the Division’s imposition of the Utah cigarette equity assessment on the ##### packs, which totaled \$\$\$\$\$.

Adding the \$\$\$\$\$ Utah cigarette equity assessment to the \$\$\$\$\$ cigarette tax assessment equals \$\$\$\$\$, which is the total amount of tax the Division assessed under the Utah Cigarette and Tobacco Tax and Licensing Act. Because the Commission finds these amounts are due under Utah law, it sustains this assessment.

Petitioner’s Arguments Against Cigarette Taxes. The Petitioner states that the cigarettes at issue all had a STATE 1 or STATE 2 cigarette stamp affixed to the packs and inquires whether the requirement to affix a Utah stamp, as well, would be required under such circumstances. The answer is yes. Multiple jurisdictions may impose their individual taxes without the result deemed double taxation. For example, both a federal government and a state government may tax the same income. Furthermore, many states apply sales tax to the same sales transaction. In addition, Utah law does not provide a credit against the amount due for Utah cigarettes taxes for amounts also paid to another jurisdiction.

The Petitioner also states that that the federal Internet Freedom Act does not allow a taxing authority to levy “multiple or discriminatory taxes on electronic commerce.” The Petitioner believes that the Division’s assessment of tax violates this federal act. The Petitioner presents no evidence to show that the Act

Appeal No. 05-1254

had been upheld to reverse the taxes such as those at issue in this appeal. Furthermore, the imposition of the taxes at issue are not “multiple or discriminatory” because the imposition is to put the purchaser in the same position as one who purchased the cigarettes from a Utah seller. The taxes are not ones applied only to Internet sales. The taxes imposed by the Division are imposed on any cigarettes purchased in Utah or brought into Utah by any other means, such as transport from another state by personal vehicle.

Interest on Cigarette Tax. There exists no statute in the Utah Cigarette and Tobacco Tax and Licensing Act that imposes interest on unpaid cigarette taxes or unpaid cigarette equity assessments. However, 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 Commission believes that the “shall be computed” language of the general statute, Section 59-1-402(5), is sufficient not only to provide the basis for how to calculate interest, but also to impose interest for violations that occur in tax chapters not excluded in Subsection 59-1-402(7). Because the Utah Cigarette and Tobacco Tax and Licensing Act is not excluded in Subsection 402(7), the general statute, Section 59-1-402(5) applies to violations of the Cigarette and Tobacco Tax and Licensing Act that result in tax being due.

Pursuant to Section 59-1-402(5), the Division assessed interest from one of the dates that a cigarette tax return is due under Subsection A of Rule 2 is due. Subsection A.1. provides that a return is due: (1) within 15 days from the date of use, storage, or consumption of the cigarettes; or (2) on or before the 15th day of the month following the calendar month during which the cigarettes were imported, if application to file monthly returns is made to the Commission. In this case, the Division assessed interest under the first of the two due dates; i.e., within 15 days from the date of use, storage, of consumption. However, the Division concluded that the date of order is the date of use, storage, or consumption because it began assessing interest on each purchase 15 days after the date of order. The Commission finds it implausible that cigarettes ordered

from an Internet site can be used, store, or consumed on the date the cigarettes were ordered. A period of time would expire before the cigarettes could be delivered for use or consumption. Accordingly, it is clear that the Division's interest assessment is excessive, and appears to be no method of determining when the cigarettes were actually used, stored, on consumed by the Petitioner. Furthermore, in a prior decision where the taxpayer had made no application to file on a monthly basis, the Division assessed interest based on the second of the two due dates; i.e., the 15th day of the month following the calendar month in which the cigarettes were purchased. For consistency and because the Division's assessment in this matter is clearly excessive, the Commission sustains an imposition of interest, but finds that the Division should recalculate interest based on the second of the two due dates as described in Subsection A.2. of Rule 2; i.e. beginning on the 15th day of the month following the calendar month in which the cigarettes were purchased.

Use Tax. The Petitioner purchased cigarettes that were delivered to him 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. In addition, the retailer from whom the Petitioner purchased the cigarettes did not collect and remit Utah sales and use tax to Utah on the transactions. Section 59-12-107(1)(d) provides that, under these circumstances, the purchaser (the Petitioner) shall pay the Utah use tax that is due. The Division assessed the Petitioner use tax based on 6.6% of the purchase price. The Petitioner did not challenge that the sales tax rate for the addresses to which the cigarettes were delivered was different than 6.6%. For these reasons, the Commission finds that the Petitioner is required to pay use tax in the amount imposed by the Division in its assessment.

Pursuant to Utah Admin. Rule R865-21U-6(A)(2)(c), the Petitioner should have paid the use tax he owed by claiming and paying the liability on his individual income tax returns for the 2003 and 2004 income tax years. By assessing the use tax, the Division is asserting that the Petitioner did not pay the use tax when he filed his income tax returns for these years, which were due on April 15, 2004 for the 2003 income

Appeal No. 05-1254

tax year and April 15, 2005 for the 2004 tax year. Although the Division proffered no income tax returns to show that the Petitioner failed to claim and pay the use tax that it imposed, the Petitioner, who has the burden of proof, did not assert or prove that he had already paid the use tax.

The Petitioner also states that the Internet is generally considered a “duty free” zone. The Petitioner is incorrect. An Internet retailer that also has property in Utah or other incident of nexus is required to collect and remit Utah sales tax on its Utah sales in accordance with Utah Code Ann. §59-12-107. Furthermore, when the Commission receives information that other Utah taxpayers have ordered taxable transactions on the Internet and not paid the required use tax, such as businesses that have been audited, the Commission has assessed the use tax. For these reasons, the Commission does not find the Petitioner’s argument that the assessment of use tax on Internet cigarette sales is discriminatory to be persuasive. Accordingly, the Commission sustains the Division’s assessment of use tax.

Interest on Use Tax. Section 59-10-537 imposes interest, as prescribed in Section 59-1-402, if tax due on an income tax return is not paid before the last date prescribed in the Individual Income Tax Act for payment. Section 59-10-514 provides that, in most instances, an individual income tax return shall be filed “on or before the 15th day of the fourth month following the last day of the taxpayer's taxable year[.]” Section 59-1-402(5) provides that interest “shall be computed from the time the original return is due, excluding any filing or payment extensions, to the date the payment is received.”

Accordingly, any use tax due on purchases made in 2003 would be due on the due date of the 2003 income tax return, April 15, 2004 and, on purchases made in 2004, on the due date of the 2004 return, April 15, 2005. The Division has assessed interest on the unpaid use tax in this manner. The Petitioner has not shown that he received an extension to file either of these income tax returns. Accordingly, the Commission sustains the Division’s assessment of interest on the unpaid use tax.

DECISION AND ORDER

Appeal No. 05-1254

Based upon the foregoing, the Commission sustains the Division's assessment, except for its assessment of interest on the cigarette tax and cigarette equity assessment. The Commission orders the Division to recalculate the interest due on the delinquent cigarette tax and cigarette equity assessment to reflect a delinquency date that begins on the 15th day of the month following the calendar month in which the cigarettes were purchased, as described in Subsection A.2. of Rule 2. In all other aspects, the Petitioner's appeal is denied. 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.

Kerry R. Chapman
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.

Appeal No. 05-1254

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 (#####).

KRC/05-1254.int