

05-1305  
Audit  
Signed 01/27/2006

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,	)		
	)	<b>ORDER</b>	
Petitioner,	)		
	)	Appeal No.	05-1305
v.	)	Account Nos.	##### & #####
	)		
AUDITING DIVISION OF THE	)	Audit Period:	07/03/02 – 05/07/04
UTAH STATE TAX COMMISSION,	)	Tax Type:	Cigarette Tax & Sale and Use Tax
	)		
Respondent.	)	Judge:	Chapman

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**Presiding:**

Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER

For Respondent: RESPONDENT REPRESENTATIVE, from 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 January 11, 2006.

At issue is the assessment of cigarette tax 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. The purchases were made between July 3, 2002 and May 7, 2004. The Division claims that the Petitioner failed to pay Utah cigarette tax and Utah sale and use tax on his purchase of these cigarettes. On these cigarettes, the Division assessed a cigarette tax of 69.5 cents per pack of cigarettes. For those cartons delivered to an CITY, Utah address, the Division assessed a use tax of 6.5% of the purchase price of each carton. For those cartons delivered to a COUNTY, Utah address, the Division assessed a use tax of 6.0% of the purchase price of each carton.

The Division also assessed interest on the unpaid cigarette tax beginning 15 days after the date

Appeal No. 05-1305

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 assessed and based on the due date of the Petitioner's income tax returns. For purchases made in 2002, interest was assessed on the unpaid use tax beginning on April 15, 2003, the date on which the Petitioner's 2002 individual income tax return was due. 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.

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 that he believes the tax assessment is unfair because he was never informed that he would be liable for Utah taxes on cigarettes that were purchased in another state and delivered to him in Utah. In fact, PETITIONER explains that he specifically asked the telephone salesperson at the retailer from which he purchased the cigarettes about taxes and was told that taxes were not due unless he was a resident of STATE. Furthermore, upon speaking with a supervisor at the retailer, PETITIONER discovered that the telephone salesperson neglected to inform him that Utah taxes were due, even though it was a company policy for the salesperson to do so. In addition, PETITIONER explains that he is a disabled veteran and that it would be difficult for him to pay the assessment due to his and his wife's financial circumstances. For these reasons, PETITIONER asks the Commission to waive the assessment.

#### APPLICABLE LAW

Cigarette Tax 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."

Subsection (A) of Utah Admin. Rule R865-20T-2 (“Rule 20T-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 20T-2 provides that, if permission is granted for the monthly filing of returns, the returns are due on or before the 15<sup>th</sup> 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 21U-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:
  - (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[.]”

In UCA §59-10-536, the Legislature provides specific time limitations within which the Tax Commission may assess individual income tax, pertinent parts as follows:

- (1) Except as otherwise provided in this section, the amount of any tax imposed by this chapter shall be assessed within three years after the return was filed (whether or not such return was filed on or after the date prescribed), and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.
  - (2) For purposes of this section:
    - (a) A return of tax imposed by this chapter, except withholding tax, filed before the last day prescribed by statute or by rules promulgated pursuant to statute for the filing thereof, shall be deemed to be filed on such last day.
    - (b) If a return of withholding tax for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be deemed to be filed on April 15 of such succeeding calendar year.
  - (3) The tax may be assessed at any time if:
    - (a) no return is filed;
- ....

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

The Petitioner purchased cigarettes from a STATE retailer by telephone during the audit period, but did not pay Utah cigarette tax or Utah sales and use tax on the purchases. The Division has assessed Utah cigarette tax and sales and use tax on these purchases, which occurred between July 3, 2002 and

Appeal No. 05-1305

May 7, 2004. The Division imposed the Utah cigarette tax of 4.375 cents per cigarette (69.5 cents per #####-cigarette pack) on all of the Petitioner's purchases of cigarettes, in addition to interest from 15 days after the date on which the cigarettes were ordered. 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 evidence and testimony proffered shows that, during the audit period, the Petitioner purchased and used ##### cartons 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 the Division's assessment of \$\$\$\$\$.

Statute of Limitations for Cigarette Tax. 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 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. Perhaps the Legislature did not provide such a limitation because the cigarette tax return that an individual must file is a creation of the rule and not of statute. However, the rule does not provide for the

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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-

limitation, either. For these reasons, the Commission does not find that the Division may assess cigarette tax to an individual at any time if the taxpayer has failed to file a return pursuant to Rule 20T-2, as the Division argues. Instead, the Commission finds that, in accordance with Section 78-12-26(4), the 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 fails to file the return.

Given the above finding, the Commission notes that the Petitioner's July 3, 2002 purchase of ##### cartons of cigarettes occurred more than three years prior to the August 15, 2005 audit assessment date. Nevertheless, pursuant to Subsection (A)(2) of Rule 20T-2, the Petitioner should have reported and paid tax on the July 3, 2002 purchase by filing a return "on or before the 15<sup>th</sup> day of the month following the calendar month during which the cigarettes were imported." Because the cigarettes purchased on July 3, 2002 were imported during July 2002, Rule 20T-2 requires the Petitioner to report the purchase on a return and pay the tax due on or before August 15, 2002. Because the return would have been due exactly three years prior to the August 15, 2005 assessment date, the Commission finds that the Division properly assessed cigarette tax in this matter, including taxes assessed on the purchase made on July 3, 2002.

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

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

Appeal No. 05-1305

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 20T-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 15<sup>th</sup> 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, as there 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 15<sup>th</sup> 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 20T-2; i.e. beginning on the 15<sup>th</sup> 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



Appeal No. 05-1305

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 6.5% of the purchase price for cigarettes delivered to CITY, Utah and 6.0% for cigarettes delivered to COUNTY, Utah. The Petitioner did not challenge that the sales tax rates for the addresses to which the cigarettes were delivered were different than those used by the Division. 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 Subsection (A)(2)(c) of Rule 21U-6, the Petitioner should have paid the use tax he owed by claiming and paying the liability on his individual income tax returns for the 2002, 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, 2003 for the 2002 tax year, April 15, 2004 for the 2003 income 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.

Statute of Limitations for Use Tax. Subsection (A)(2) of Rule 21U-6 provides three different methods for a taxpayer to pay the use tax that is owed. Which method applies to an individual depends upon that person's specific circumstances. Subsection (A)(2)(c) provides that when "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 Division has determined that the Petitioner should have paid the use tax by reporting it on his income tax return, which appears to be correct as there is no evidence to suggest that PETITIONER has sales tax collection responsibility or has use tax liability in excess of \$400 or more per year. Accordingly, the statute of limitations that applies to the Petitioner's income tax return is the one that determines how far in the past the Division may assess use tax to the

Appeal No. 05-1305

Petitioner.

For income tax returns, Section 59-10-536 requires the Division to assess the tax within three years after the return was filed, whether or not the return was filed on the date prescribed. There is no information concerning the date on which PETITIONER actually filed his 2002 tax return. However, if the 2002 return were filed on the date due, April 15, 2003, the Commission would have three years from that date, i.e. until April 15, 2006, to assess any use tax on 2002 purchases that should have been reported on that return. Because the Division's August 15, 2005 assessment fell within this three-year period and it is improbable that PETITIONER filed his 2002 tax return on or before August 15, 2002, the Commission finds that the Division properly assessed use tax on all purchases at issue.

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 2002 would be due on the due date of the 2002 income tax return, April 15, 2003. Similarly, 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.

Petitioner's Arguments Against Cigarette Taxes. Although the retailer from which PETITIONER purchased the cigarettes at issue failed to inform him that he would be liable for the Utah taxes

Appeal No. 05-1305

discussed above, such failure does not negate the taxes due or provide cause for the Commission to waive them. Furthermore, although the Commission is authorized by statute to waive interest, current policy only permits waiver where Commission error has caused the imposition of the interest. As such circumstances are not present in this case, the Commission does not find sufficient cause to waive the interest in this matter, either. Accordingly, except for a recalculation of the interest imposed on the delinquent cigarette tax, the Commission sustains the audit assessment.

The Commission is aware, however, that the assessment may impose a financial hardship upon PETITIONER. In the notice at the end of this decision, the Commission has provided the name and telephone number of a Tax Commission employee with whom PETITIONER may discuss payment arrangements and whether he qualifies for other financial hardship consideration.

#### DECISION AND ORDER

The Commission finds that the statute of limitations for assessing unpaid cigarette tax is three years after the date that the cigarette tax return is due, even if the taxpayer has never filed a cigarette tax return. Based on this ruling and on the foregoing, the Commission sustains the Division's assessment, except for its assessment of interest on the cigarette tax. The Commission orders the Division to recalculate the interest due on the delinquent cigarette tax to reflect a delinquency date that begins on the 15<sup>th</sup> day of the month following the calendar month in which the cigarettes were purchased, as described in Subsection (A)(2) of Rule 20T-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

Appeal No. 05-1305

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.

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

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 you do not plan to request a Formal Hearing but wish to submit an Offer in Compromise due to financial hardship or other reason or wish to discuss payment arrangements, please telephone TAX COMMISSION EMPLOYEE in Taxpayer Services Division at #####.

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