

05-1360
Audit
Signed 02/21/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	ORDER
)	
Petitioner,)	Appeal No. 05-1360
v.)	
)	Tax Type: Cigarette Tax / Sales & Use Tax
AUDITING DIVISION)	Acct. Nos. ##### (Cigarette Tax)
OF THE UTAH STATE)	##### (Sales & Use Tax)
TAX COMMISSION,)	Audit period: 03/01/2000 – 07/20/2001
)	
Respondent.)	Judge: Chapman

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 February 15, 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 March 1, 2000 and July 20, 2001. The Division claims that the Petitioner failed to pay Utah cigarette tax and Utah sale and use tax on her purchase of these cigarettes. On these cigarettes, the Division assessed a cigarette tax of 69.5 cents per pack of cigarettes. Because all the cartons were delivered to a CITY, Utah address, the Division assessed a use tax of 6.25% of the purchase price of each carton.

The Division also assessed interest on the unpaid cigarette tax 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,

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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 2000, interest was assessed on the unpaid use tax beginning on April 15, 2001, the date on which the Petitioner's 2000 individual income tax return was due. For purchases made in 2001, interest was assessed on the unpaid use tax beginning on April 15, 2002, the date on which the Petitioner's 2001 individual income tax return was due.

PETITIONER does not contest that she purchased the cigarettes at issue or, if the taxes were legally imposed, that the Division improperly calculated them. However, she does ask the Commission to reconsider the assessment because of the length of time that expired between the purchases and the Commission's assessment of tax and the large amount of interest that accrued as a result. PETITIONER also states that she timely filed her 2000 and 2001 Utah individual income tax returns.

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 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 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. . . .

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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 an Internet retailer 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 March 1, 2000 and July 20, 2001. 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

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packs did not have a Utah cigarette stamp affixed to them, and the Petitioner did not pay the Utah cigarette tax due on her use or consumption of them. In accordance with Section 59-14-204, the Petitioner owed a cigarette tax of 69.5 cents on each of these #####-cigarette packs. However, as explained below and pursuant to the Commission's decision in *Utah State Tax Commission Appeal No. 05-1305* (issued January 27, 2006), the statute of limitations to assess such cigarette tax has expired.

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.¹ 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. Regardless, Rule 20T-2 does not provide for the 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. 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 all of the Petitioner's cigarette purchases at issue occurred more than four years prior to the August 15, 2005 assessment date. Pursuant to Subsection

¹ 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-

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(A)(2) of Rule 20T-2, the Petitioner should have reported and paid tax on the last of the purchases at issue (July 20, 2001) by filing a return “on or before the 15th day of the month following the calendar month during which the cigarettes were imported.” As a result, the date on which the last return associated with these purchases was due would have been August 15, 2001, which is four years prior to the assessment date. For these reasons, the Division’s assessment of cigarette tax violates the statute of limitation provided by law. Accordingly, the Commission overturns the Division’s assessment of cigarette tax and abates the amount of cigarette taxes that it imposed in its Statutory Notice.

Interest on Cigarette Tax. Because the cigarette tax at issue has been abated, any interest associated with it is also abated.

Use Tax. The Petitioner purchased cigarettes that were delivered to her 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 6.25% of the purchase price for cigarettes delivered to CITY, Utah. The Petitioner did not challenge that the sales tax rates for the CITY, Utah address was different than that used by the Division.

Pursuant to Subsection (A)(2)(c) of Rule 21U-6, the Petitioner should have paid the use tax she owed by claiming and paying the liability on her individual income tax returns for the 2000 and 2001 income tax years. By assessing the use tax, the Division is asserting that the Petitioner did not pay the use tax when she filed her income tax returns for these years, which were due on April 15, 2001 for the 2000 tax year and April 15, 2002 for the 2001 tax year. For these reasons, the Commission finds that the Petitioner once

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

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owed use tax in the amount imposed by the Division in its assessment. However, the statute of limitations to assess use tax on these purchases has also expired, as explained below.

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 Petitioner.

For income tax returns, Section 59-10-536 requires the Division to assess additional tax due on the return within three years after the return was filed, whether or not the return was filed on the date prescribed. PETITIONER states that she filed her income tax returns in a timely manner; i.e., by April 15, 2001 for the 2000 tax year and April 15, 2002 for the 2001 tax year. The Division states that it does not know when PETITIONER filed her returns. Based on the information proffered at the Initial Hearing, the Commission finds that PETITIONER filed her 2000 tax return by the April 15, 2001 due date and that she filed her 2001 return by the April 15, 2002 due date. As both of these dates are more than three years prior to the August 15, 2005 assessment date, the Commission finds that the Division did not have authority to impose the use tax at issue and, as a result, it abates the use tax imposed in the assessment.

Interest on Use Tax. Because the use tax at issue has been abated, any interest associated with it is also abated.

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DECISION AND ORDER

The Commission finds that the Division's assessment of cigarettes tax and use tax on the purchases at issue violates the statutes of limitations associated with both taxes. Accordingly, the Commission abates the Division's assessment in its entirety. 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 _____, 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

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Palmer DePaulis
Commissioner

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Marc B. Johnson
Commissioner