

05-1361
Audit
Signed 02/14/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	ORDER FROM INITIAL HEARING
)	
Petitioner,)	Appeal No. 05-1361
)	
v.)	
)	Tax Type: Cigarette/Use Tax
AUDITING DIVISION OF THE UTAH)	
STATE TAX COMMISSION,)	Tax Year: November 2003 – April 2004
)	
Respondent.)	Judge: Rees
)	

Presiding: Irene Rees, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER, Petitioner
For Respondent: RESPONDENT REPRESENTATIVE, Auditing Division

STATEMENT OF THE CASE

The Division issued an assessment notice to Petitioner, assessing cigarette and use tax on purchases of untaxed cigarettes that were delivered into from November 22, 2003 through April 2, 2004. The cigarette tax assessment is in the amount of \$\$\$\$ (including \$\$\$\$ in interest), and the use tax assessment amounts to \$\$\$\$ (including \$\$\$\$ in interest). No penalty was assessed. Petitioner filed an appeal of the assessment and appeared at a hearing on February 2, 2006.

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 tax has been paid by the manufacturer, distributor or vendor. Utah Code §59-14-205. When a purchaser causes untaxed cigarettes to be delivered into the state, that purchaser must file a statement and pay the tax directly to the Tax Commission within 15 days. Utah Code §59-14-303 (3) and Utah Admin. Rules R865-20T-1 and R865-20T-2.

Use Tax

Utah law 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) and (2) (a); 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 tax was due. Utah Code §59-1-204 (5).

DISCUSSION

Under federal law, the Jenkins Act, COMPANY is required to report its Utah internet sales. Upon receiving that report and identifying the untaxed cigarette purchases billed to Petitioner’s credit card. Petitioner states that he did not make the purchases. He loaned his credit card to his son, who made purchases for himself and a friend. The records indicate that the cigarettes were order in Petitioner’s son’s name and shipped to his son’s address. One issue here is a determination of liability for the tax. Another issue arises because the cigarettes purchased are clove cigarettes, which are prohibited under Utah Code Section 76-10-105.3. The question is whether Utah cigarette tax applies to purchases of a cigarette that is illegal in this state.

Taxation of Clove Cigarettes

Utah law defines “cigarette: as “any roll for smoking made wholly or in part of tobacco . . . whether or not such tobacco is flavored, adulterated, or mixed with any other ingredient” See Utah Code §59-14-102 (1). The products purchased were Djarum Special Filter, Djarum Splash, and Djarum Black. Each of these products is a blend of tobacco and cloves. Because they contain tobacco, they fall within the definition of “cigarette” and they are subject to cigarette tax.

Clove cigarettes are illegal for sale in Utah if they contain more than 10%, by weight, of clove.

Appeal No. 05-1361

See, Utah Code §76-10-105.3. However, criminal prosecution of this statute is outside of the Tax Commission's jurisdiction, so we do not attempt to determine whether Section 76-10-105.3 has been violated or who is subject to the penalty for criminal violation. We do, however, uphold the imposition of the cigarette tax on clove cigarettes.

Liability for the Tax

Use tax is an excise tax on the storage, use, or other consumption of tangible personal property in Utah on which no sales tax was paid. The use tax is complementary to the sales tax and applies when an out-of-state vendor does not collect Utah sales tax on transactions that are taxable in Utah. The purchaser of items subject to Utah tax is responsible for reporting and remitting the tax in conjunction with the individual income tax return. See Utah Code §59-12-107 and Utah Administrative Rules R865-21U-1 and R865-21U-6. In this case, the taxable products were purchased on Petitioner's credit card, but they were ordered by, and shipped to, a different party. Petitioner testified that he did not receive or use the cigarettes and that he merely allowed his son to use his credit card so he could make the purchases online. He testified further that his son reimbursed him in the amount of the invoices. The evidence indicates that Petitioner was not the purchaser in this case. Therefore, he is not liable for the tax.

DECISION AND ORDER

The Commission finds that tax is due on these purchases, but Petitioner is not the person liable for the taxes imposed on these sales.

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.

Appeal No. 05-1361

DATED this _____ day of _____, 2006.

Irene Rees
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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