

05-1362
Audit
Signed 10/19/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	INITIAL HEARING ORDER
)	
Petitioner,)	Appeal No. 05-1362
)	
v.)	
)	Tax Type: Cigarette/Use Tax
AUDITING DIVISION OF THE)	
UTAH STATE TAX COMMISSION,)	Tax Period: 01/05/03 – 04/05/03
)	
Respondent.)	Judge: Robinson

Presiding:

R. Spencer Robinson, Administrative Law Judge

Appearances:

For Petitioner: No one appeared

For Respondent: RESPONDENT REPRESENTATIVE, Audit Manager, 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 30, 2006. The matter before the Commission is Petitioner’s appeal of a Utah Cigarette Tax Audit that had been issued on August 15, 2005, and indicates that Petitioner owed \$\$\$\$ in cigarette tax, sales tax and interest. Petitioner did not appear at the Initial Hearing either in person or by telephone conference call. Attempts to reach Petitioner by telephone were unsuccessful. However, Petitioner had checked the box on his Petition for Redetermination indicating he was willing to have the matter decided on the record without a hearing.

Respondent was given ten days in which to file a written response to Petitioner’s

assertions so the decision could be made based on the record. Respondent's response was received on February 1, 2006. As Respondent's information did not fully address a question with the audit an interim Order was issued on April 24, 2006, ordering the parties to provide information on whether Petitioner is the PETITIONER whose cigarette purchases were the subject of the audit. The parties were given until May 5, 2006 to submit this additional information. No further information from Petitioner was received. Respondent did submit a memorandum and some additional documents on April 26, 2006.

DISCUSSION

Respondent had conducted the audit based on information acquired through the Jenkins Act, which indicated that PETITIONER of ADDRESS 1, CITY 1, Utah #####, had purchased cigarettes from COMPANY during the period from January 5, 2003 and April 5, 2003. The audit determined Petitioner owed \$\$\$\$\$ in cigarette tax, \$\$\$\$\$ in use tax and the interest accrued thereon. Respondent did not assess a penalty.

When he had originally filed the appeal, Petitioner, a PETITIONER of ADDRESS 2, CITY 2, STATE, had attached a letter to his Petition for Redetermination. The Petition and letter were the only information from PETITIONER in the record in this matter. In the letter, PETITIONER of STATE stated, "I do not live in Utah, so how can Utah tax me on Cigarettes. Second and most important I don't smoke and have never ordered cigarettes from this COMPANY or any other smoking establishment . . ." The Commission notes that PETITIONER of STATE had listed his social security number on the Petition for

Redetermination form as #####. PETITIONER also said he was unable to work and received \$\$\$\$ per month for a family of four, so he could not pay the deficiency.

Considering Petitioner's first issue, that Petitioner does not live in Utah, so how can Utah assess tax on cigarettes, the evidence submitted in this matter indicates that Petitioner PETITIONER of CITY 2, STATE, did live in Utah during the audit period at issue, which is the relevant consideration. Respondent has tracked and assessed the correct PETITIONER. In the written submissions, Respondent's representative explained that Respondent had reviewed the name and address provided by the cigarette internet vendor and was able to identify the social security number of the purchaser, that being #####, from drivers license records. A PETITIONER had worked in Utah during 2003 and filed a Utah Individual Income tax Return for 2003 using that social security number. Tax Commission Master File Information indicated an address change for PETITIONER with social security number ##### on October 22, 2004, to the ADDRESS 2, CITY 2, STATE address. For purposes of this tax assessment it is not relevant that PETITIONER moved from the state after the audit period and prior to the issuance of the audit deficiency.

Turning to PETITIONER'S second contention, that he doesn't smoke and never ordered cigarettes from COMPANY, PETITIONER provides insufficient evidence on this point. The information from COMPANY identifies PETITIONER as the purchaser and his CITY 1 address as both the billing address and the shipping address. If another person in his household was ordering cigarettes and using PETITIONER'S credit card as payment, PETITIONER could still be considered the purchaser under some circumstances. The lack of

information from PETITIONER, when weighed against the fact that COMPANY reports that he did purchase the cigarettes is insufficient to support PETITIONER'S contention on this point.

PETITIONER'S third contention with the audit was that he could not pay the amount due. Financial hardship is not basis for reducing an audit deficiency in the audit appeal proceeding. The audit appeal is to determine whether or not the audit is correct based on the facts and the law. However, after the appeal is closed, PETITIONER may contact the Taxpayer Services Division about the Offer in Compromise program. Through that process financial hardship is taken into account in determining how much of the audit deficiency PETITIONER will be required to pay. It is a separate process and PETITIONER should contact that division directly at #####.

APPLICABLE LAW

Cigarette Tax

Utah Code Ann. §59-14-204 provides, in pertinent part,

- (1) Except for cigarettes described under Subsection 59-14-210(3), there is levied a tax upon the sale, use, storage, or distribution of cigarettes in the state.
- (2) The rates of the tax levied under Subsection (1) are:
 - (a) 3.475 cents on each cigarette, for all cigarettes weighing not more than three pounds per thousand cigarettes; and
 - (b) 4.075 cents on each cigarette, for all cigarettes weighing in excess of three pounds per thousand cigarettes.
- (3) The tax levied under Subsection (1) shall be paid by any person who is the manufacturer, jobber, distributor, wholesaler, retailer, user, or consumer.

Use Tax

Utah Code Ann. §59-12-103(1) provides, in pertinent part,

(1) A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions:

....

(l) amounts paid or charged for tangible personal property if within this state the tangible personal property is:

- (i) stored;
- (ii) used, or
- (iii) consumed;

Utah vendors, and out-of-state vendors with nexus to Utah, are required by law to collect Utah sales tax on behalf of the Tax Commission on each Utah sale. Mycigarettes.com is not a Utah vendor. It does not have nexus to Utah. Therefore, Utah cannot regulate its activities and require it to collect and remit sales tax.

If the seller does not collect sales tax on items sold and delivered into Utah, as occurred in this case, the purchaser is required to accrue and remit use tax directly to the Tax Commission on his or her individual income tax return. This is true for all untaxed Internet purchases, not merely cigarettes. Utah Code §59-12-107(1) (d); 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 return was due. Utah Code §59-1-204(5).

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. Because it is unknown when the cigarettes were delivered into Utah, the second provision of the rule applies.

DECISION AND ORDER

Based on the forgoing, the Commission sustains the audit assessment as to the cigarette tax and the interest accrued thereon and the use tax. However, Respondent is to adjust the interest that has accrued on the use tax so that it is based on the tax being due on the 15th day of the following month and is consistent with the Tax Commission's prior decisions. It is so ordered.

As noted above Petitioner may contact the Taxpayer Services Division about making an Offer in Compromise based on financial hardship, or making payment 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 (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 make a timely request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2006.

R. Spencer Robinson
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

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner