

05-1363
Audit
Signed 06/01/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	ORDER
)	
Petitioner,)	Appeal No. 05-1363
v.)	
)	Tax Type: Cigarette Tax / Sales & Use Tax
AUDITING DIVISION)	
OF THE UTAH STATE)	Audit period: 03/06/2000 – 06/03/2004
TAX COMMISSION,)	
)	
Respondent.)	Judge: Phan

Presiding:
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER
For Respondent: RESPONDENT REPRESENTATIVE, Assistant Attorney General

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 the Auditing Division (“Division”) in a Statutory Notice of Deficiency, dated August 15, 2005. The Division’s assessment imposed cigarette tax and sales and use tax on Petitioner’s purchases cigarettes. The amount of the cigarette tax at issue was \$\$\$\$\$. The amount of the use tax was \$\$\$\$\$. Interest was assessed against the deficiency. The audit period was from February 20, 2000 to March 21, 2005. Petitioner contested the audit and argued that he smoked most of the cigarettes out of state during his extensive business travels.

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.

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:

....

(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.”

DISCUSSION

Petitioner argues that he did not use or consume most of the cigarettes at issue in Utah. Petitioner ordered the cigarettes from an Internet vendor. He did not understand that he would be liable for the cigarette tax or use tax at the time of the purchases. The cigarettes were delivered to his residence in Utah. Petitioner states that he traveled extensively for his employment and would be out of state approximately three weeks per month. The cigarettes would be received at his residence and may have been stored there days or weeks, some were consumed by Petitioner in Utah and other taken with him when he traveled.

It is Respondent’s position that receipt in Utah and storage for only a few hours would constitute sufficient use and storage under UCA §59-14-204(1) to make Petitioner liable for the tax in this matter. The Commission agrees with Respondent’s position and additionally would note that there is no evidence on how long the cigarettes were stored in Utah as it could have been days or it could have been weeks depending on Petitioner’s travel schedule. Additionally, ignorance of the law is not justification for waiver of the tax. There were numerous audits issued on the Internet purchases of cigarettes and the Commission has uniformly rejected ignorance of the law as the basis for abating tax. Petitioner is liable for both the cigarette and use tax on those purchases that are not beyond the applicable statute of limitations.

In a prior decision, Tax Commission Order, Appeal 05-1366, dated February 21, 2006, the

Commission made an extensive analyses of the applicable statute of limitations for both the cigarette and use taxes. The decision is explained in detail in that order. Consistent with that decision it is the Commission's position that given the August 15, 2005 date of the Statutory Notice, the Division may only assess cigarette tax on those purchases that occurred on or after July 1, 2002. Regarding use tax, Petitioner should have claimed this tax and paid it with his Utah Individual Income Tax Returns each year as they became due. Assuming these returns were filed timely, any use tax that should have been claimed on his 2000 or 2001 income tax returns is beyond the statute of limitations.

Interest on the cigarette tax is assessed pursuant to Section 59-1-402(5) from one of the dates that a cigarette tax return is due under Subsection A of Rule 20T-2. 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. The Commission has also in prior decisions concluded that the interest on cigarette tax should be based on the second, or later of the two due dates. For consistency the Commission sustains an imposition of interest on the unpaid cigarette tax for those purchases made on or after July 1, 2002, 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 15th day of the month following the calendar month in which the cigarettes were purchased. Interest on the use tax would be calculated from the April 15th date for filing his individual income tax returns and this is consistent with how the Division has calculated interest on the use tax.

DECISION AND ORDER

Based on the foregoing, the Commission abates the Division's assessment of cigarette tax for those purchases that occurred prior to July 1, 2002. The Commission sustains the Division's audit for the

Appeal No. 05-1363

cigarette tax on those purchases made on or after July 1, 2002. However, the Commission orders that the Division recalculate the interest according to the terms listed above. The Commission abates the use tax for cigarettes that were purchased during 2000 and 2001 and sustains the use tax and interest on use tax for the cigarette purchases in calendar year 2002 through the end of the audit period. 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.

Jane Phan
Administrative Law Judge

Appeal No. 05-1363

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 Kathy Swartout in Taxpayer Services Division at (801) 297-6229.

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