

05-1366
Audit
Signed 02/21/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	ORDER
)	
Petitioner,)	Appeal No. 05-1366
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: 03/06/2000 – 06/03/2004
)	
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 6, 2000 and June 3, 2004. 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 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 example, 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. Interest on the unpaid use tax for purchases made in other years was assessed in a similar manner.

PETITIONER does not contest that she purchased the cigarettes at issue with her credit card and that they were delivered in her name to her business address. Furthermore, if the taxes were legally imposed, she does not contend that the Division improperly calculated them. However, PETITIONER asks the Commission to consider the circumstances under which the cigarettes were purchased and find that she does not owe the tax. PETITIONER explains that she purchased the cigarettes for her brother-in-law, who has had a history of mental problems and is currently a ward of the state at (X). Although she would buy the cigarettes with her credit card, her brother-in-law would reimburse her for the charges she incurred on her account. Because her brother-in-law worked at her business, she had the cigarettes delivered at the business instead of her home. PETITIONER also explains that the company from which she purchased the cigarettes reassured her that Utah would assess no taxes on the transaction. For these reasons, she asks the Commission to abate the Division's assessment and find that she owes none of the taxes at issue.

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

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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. . . .

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 first issue is whether PETITIONER or her brother-in-law purchased the cigarettes at issue. PETITIONER states that while she may have purchased the cigarettes, they were for her brother-in-law’s use and he reimbursed her the cost of the purchases. Under such circumstances, the Commission has determined in prior decisions that the person purchasing the cigarettes, not the person for whom they were bought, is responsible for the taxes. In a recent case, however, the Commission determined that the person on whose credit card the purchases were charged was not the purchaser responsible for the tax. See *Utah State Tax Commission Appeal No. 05-1361* (issued February 14, 2006). In that case, the credit card holder lent his card

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to a second party. The second party placed the order in his own name and had the cigarettes sent to his, and not the credit card holder's, address. Under these circumstances, the Commission determined that the credit card holder was not the purchaser of the cigarettes and not liable for the taxes that had been imposed to him. However, the circumstances in this case, as proffered at the Initial Hearing, indicate that PETITIONER is the purchaser of the cigarettes at issue because she ordered them in her name and they were delivered in her name to her business address.

The second issue is whether PETITIONER, as purchaser of the cigarettes, is liable for the taxes assessed. PETITIONER purchased these cigarettes from an out-of-state retailer who did not collect the Utah taxes due on them. In addition, PETITIONER has not remitted Utah cigarette tax or Utah sales and use tax on her purchases. Although the retailer told PETITIONER that she would not be liable for the Utah taxes, such representations do not resolve a taxpayer of his or her duty to pay those taxes. Although PETITIONER may have a cause of action against the retailer, she is nevertheless responsible for those Utah taxes that may be imposed by law.

The Division has assessed Utah cigarette tax and sales and use tax on PETITIONER'S purchases, which occurred between March 6, 2000 and June 3, 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 the "manufacturer, jobber, distributor, wholesaler, retailer, user, or consumer" of cigarettes in Utah. The Division asserts that PETITIONER is responsible for the tax because she "stored" the cigarettes prior to transferring them to her brother-in-law. Although a person who "stores" cigarettes is not among those entities

specified in the statute as responsible for the cigarette tax, Rule 20T-2 imposes the tax upon one who stores cigarettes. Furthermore, the Commission belies the word “use” connotes more than just smoking the cigarettes. The Commission finds that PETITIONER “used” the cigarettes when she purchased them for her brother-in-law so that she could transfer them to him upon reimbursement.

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 her use 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. The Division applied the cigarette tax of 69.5 cents per #####-cigarette carton tax to these ##### cartons, resulting in its cigarette tax assessment of \$\$\$\$\$. 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 cigarette tax on a portion of the cigarettes at issue 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

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-

the limitation, either. For these reasons, the Commission finds that the Division does not have authority to 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 has failed to file the return.

The Division issued its Statutory Notice on August 15, 2005. Given this assessment date and the above ruling, any cigarette tax imposed by this notice would have had to be due by August 15, 2002, three years prior to the assessment date. Pursuant to Subsection (A)(2) of Rule 20T-2, an entity subject to the cigarette tax should report and pay the cigarette “on or before the 15th day of the month following the calendar month during which the cigarettes were imported.” Because of this rule, any purchase made in July 2002 would have been due on August 15, 2002, exactly three years prior to the assessment. Given the August 15, 2005 date of the Statutory Notice, the Commission finds that the Division may only assess cigarette tax on those purchases that occurred on or after July 1, 2002. Accordingly, the Commission overturns the Division’s assessment of cigarette tax for those purchases that occurred prior to July 1, 2002. The Commission, however, sustains the Division’s assessment of cigarette tax for those purchases made on or after July 1, 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

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

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Subsection 59-1-402(7). Because the Utah Cigarette and Tobacco Tax and Licensing Act is not excluded in 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 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. 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 15th 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 on 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. In addition, the entire interest assessment for unpaid cigarette tax that relates to

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purchases made prior to July 1, 2002 is overturned because these assessments of unpaid cigarette tax violate the applicable statute of limitations, as explained above.

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 a rate of 6.25% of the purchase price for cigarettes delivered to CITY, Utah. The Petitioner did not challenge that the sales tax rate for the CITY, Utah address was different from the rate 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 liabilities on her individual income tax returns for the 2000 through 2004 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 15th of the year following each tax year; e.g., the use tax on purchases made in 2000 were due April 15, 2001 when the 2000 income tax return filing was due. For these reasons, the Petitioner, at one time, owed the full amount of use tax that the Division imposed in its assessment. However, the statute of limitations to assess use tax on a number of 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

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Petitioner should have paid the use tax by reporting it on her 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 returns is the one that appears to determine how far in the past the Division may assess unpaid 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, etc. 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 its April 15, 2001 due date and that she filed her 2001 return by its 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 on purchases reported on these returns; i.e., purchases made in the 2000 and 2001 calendar years. Accordingly, the Commission abates the use tax that the Division imposed on purchases prior to January 1, 2002. However, the Commission sustains the use tax that the Division imposed on purchases made in 2002, 2003, and 2004.

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

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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 she received an extension to file any of these income tax returns. Accordingly, the Commission sustains the Division's assessment of interest on the unpaid use tax for those purchases that were made on or after January 1, 2002. In addition, the entire interest assessment for unpaid use tax that relates to purchases prior to July 1, 2002 is overturned because the use tax assessment violated the statute of limitations, as explained above.

DECISION AND ORDER

Cigarette Tax and Interest. The Commission finds that the statute of limitations for assessing unpaid cigarette tax is three years after the date that a cigarette tax return is due, even if the taxpayer has never filed the cigarette tax return. Based on this ruling and the foregoing, the Commission sustains the Division's assessment of unpaid cigarette tax on those purchases made on or after July 1, 2002, but overturns the Division's assessment of cigarette tax and interest on it for purchases made prior to July 1, 2002. Furthermore, the Commission sustains the imposition of interest on the unpaid cigarette tax for purchases made on or after July 1, 2002, but orders the Division to recalculate the interest to reflect a delinquency date that begins on the 15th day of the month following the calendar month in which the cigarettes were purchased, as described in Subsection (A)(2) of Rule 20T-2.

Use Tax and Interest. The Commission finds that the statute of limitation for assessing unpaid use tax is three years after the date that an income tax return is filed. Based on this ruling and the foregoing, the Commission sustains the Division's assessment of unpaid use tax and interest on it for purchases made on or after January 1, 2002, but overturns the Division's assessment of unpaid use tax and interest on it for purchases made prior to January 1, 2002. It is so ordered.

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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

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

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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 (X) in Taxpayer Services Division at #####.

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