

07-0178  
Cigarette Stamp Penalty  
Signed 05/14/2007

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,	)	
	)	
	)	<b>ORDER</b>
Petitioner,	)	
	)	Appeal No. 07-0178
v.	)	
	)	Acct No. #####
AUDITING DIVISION OF THE	)	
UTAH STATE TAX COMMISSION,	)	Tax Type: Cigarette Stamp Penalty
	)	
Respondent.	)	Judge: Chapman

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**Presiding:**  
Kerry R. Chapman, Administrative Law Judge

**Appearances:**  
For Petitioner: PETITIONER REPRESENTATIVE  
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General  
RESPONDENT REPRESENTATIVE 2, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on May 10, 2007.

On January 11, 2007, Auditing Division (“Division”) issued a Statutory Notice – Cigarette Stamp Inspection (“Statutory Notice”), in which it imposed \$\$\$\$ in penalties on the Petitioner. The Division assessed the penalties after conducting a cigarette stamp inspection of the Petitioner’s business on December 14, 2006, and discovering 16 packs of cigarettes without the proper Utah cigarette stamp affixed. The Division assessed a penalty of \$\$\$\$ for each of the 16 packs, which totals \$\$\$\$\$. The Petitioner asks the Commission to waive the penalties.

APPLICABLE LAW

When the Statutory Notice was issued, Utah Code Ann. §59-14-205 provided for the payment of the cigarette tax and for penalties for failure to properly affix cigarette stamps, as follows in pertinent part:

(1) The taxes imposed on cigarettes by this chapter shall be paid by affixing stamps in the manner and at the time prescribed in this section.

(2) All manufacturers, importers, distributors, wholesalers, and retail dealers shall securely affix the stamps to each individual package or container of cigarettes sold in the state, and may not sell or provide cigarette stamps to any other person.

(3) Stamps shall be securely affixed to each individual package of cigarettes within 72 hours after any of the cigarettes are received by any wholesaler, distributor, or retailer within the state. All cigarettes shall be stamped before sale within the state. If products subject to this chapter are manufactured within the state they shall be stamped by the manufacturer when and as sold.

....

(7) Any person failing to properly affix and cancel stamps to the cigarettes, under rules promulgated by the commission, may be required by the commission to pay as part of the tax, and in addition to any other penalty provided in this chapter, a penalty of \$25 for each offense, to be assessed and collected by the commission as provided in Section 59-14-405. Each article, package, or container found not having proper stamps affixed to it shall be deemed a separate offense. The presence of any package or container in a place of business conducting retail sales shall be prima facie evidence that it is intended for sale and subject to taxes under this chapter.

#### DISCUSSION

The Petitioner does not dispute that the Division auditors discovered 16 packs of cigarettes at its place of business that did not have cigarette stamps properly affixed. Accordingly, the Commission finds that the Division properly assessed the \$\$\$\$ of penalties at issue, in accordance with Section 59-14-205(7). Nevertheless, Section 59-14-205(7) states that the Commission *may* assess a penalty. Given the permissive nature of the word “may,” the Commission finds that it has the authority to consider a waiver or reduction of the penalties at issue.

The Petitioner asks the Commission to waive the penalty because it is the first time in 11 years of business that it has been penalized for failure to have stamps property affixed to the packs of cigarettes that it sells. The Petitioner explains that it only purchases cigarettes where the manufacturer or wholesaler has affixed the stamps by machine to each pack of cigarettes in a carton. The Petitioner states that, occasionally, the machine will malfunction and affix the stamps to the inside of the carton flap instead of affixing a stamp to each individual pack of cigarettes. Furthermore, the Petitioner states that its employees are instructed to check

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that the stamps have been affixed correctly when they remove the packs from a carton for individual sale. However, due to employee turnover and inattention, employees will, on occasion, neglect to check that the stamp is properly affixed to each individual pack. For these reasons and because the offense for which the penalties have been assessed was unintentional, the Petitioner asks the Commission to waive the penalties.

The Division confirms that the Commission has the authority to waive or reduce the penalties, but does not recommend what action it would prefer the Commission to take under these circumstances. The Division auditors confirm, however, that they occasionally find a carton during its inspections where the machine has affixed the stamps to the flap or outside of the carton by mistake.

The duty to have a cigarette stamp affixed to a pack of cigarettes is well known in the cigarette business. The Commission believes that a seller of cigarettes has a duty to ensure that the cigarette stamp is properly affixed to each pack of cigarettes it offers for sale. Under the circumstances in this matter, the Commission finds that it would be reasonable to waive \$\$\$\$ of the penalties that were assessed, but to sustain the remainder of the assessment.

#### DECISION AND ORDER

Based on the foregoing, the Commission waives \$\$\$\$ of the total \$\$\$\$ in penalties that was assessed. Accordingly, the Commission sustains \$\$\$\$ of the penalties. 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.

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DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

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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 \_\_\_\_\_, 2007.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

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