

07-0768
Cigarette Stamp Penalty
Signed 09/17/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, vs. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	ORDER Appeal No. 07-0768 Tax Type: Cigarette Stamp Penalty Account No. ##### Judge: Robinson
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Presiding:
 R. Spencer Robinson, 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 August 21, 2007.

On May 31, 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 April 17, 2007, and discovering five packs of cigarettes without the proper Utah cigarette stamp affixed. The Division assessed a penalty of \$\$\$\$ for each of the five 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 five 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, from Petitioner’s perspective, COMPANY A, from which Petitioner purchased the cigarettes, should have affixed the stamps to the packages it sent to Petitioner. PETITIONER REPRESENTATIVE also said he found the fifth unstamped package. He said he understood the Division usually does not penalize for four or fewer unstamped packs.

RESPONDENT REPRESENTATIVE 1 said the fourth pack would trigger a citation. Three or less are confiscated without penalty.

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 before it offers them for sale. Under the circumstances in this matter, the Commission sustains the assessment.

DECISION AND ORDER

Based on the foregoing, the Commission sustains the \$\$\$\$ in penalties that were assessed. It is

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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 _____, 2007.

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 _____, 2007.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner