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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,

Petitioner,

v.

PROCESSING DIVISION OF THE UTAH  
STATE TAX COMMISSION,

Respondent.

**INITIAL HEARING ORDER**

Appeal No. 08-1808

Account No. #####

Tax Type: Cigarette Stamp Tax

Tax Year: 2006

Judge: Jensen

**Presiding:**

Clinton Jensen, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER REP, Taxpayer

For Respondent: RESPONDENT REP 1, Assistant Attorney General  
RESPONDENT REP 2, Processing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5 on April 8, 2009. At issue is the confiscation of cigarettes not listed on the approved directory (Publication 51) and imposition of the associated penalty in the amount of \$\$\$\$.

APPLICABLE LAW

Utah Code Ann. §59-14-603 creates a directory of the cigarettes approved for stamping and sale in the State of Utah, as follows:

- (1) No later than August 30, 2005, the commission shall develop and publish on its website a directory listing:
  - (a) all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of Section 59-14-602; and
  - (b) all brand families that are listed in the certifications required by Section 59-14-602, except the commission shall not include or retain in the directory:

- (i) the name or brand families of any nonparticipating manufacturer:
    - (A) who failed to provide the certification required by Section 59-14-602; or
    - (B) whose verification is determined by the commission to be out of compliance with Section 59-14-602, unless the commission has determined that the violation has been cured to the satisfaction of the commission; or
  - (ii) a tobacco product manufacturer or brand family of a nonparticipating manufacturer or which the commission determines:
    - (A) any escrow payment required by Section 59-22-203 for any period, for any brand family, whether or not listed by the nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement; or
    - (B) any outstanding final judgment, including interest thereon, for a violation of the Model Tobacco Settlement Act has not been fully satisfied for the brand family or the tobacco product manufacturer.
- (2) The commission shall update the directory required by this section as necessary:
- (a) to correct mistakes;
  - (b) to add or remove a tobacco product manufacturer, or brand family; and
  - (c) to keep the directory in conformity with the requirements of this part.
- (3) (a) Every stamping agent shall provide to the commission a current and valid electronic mail address for the purpose of receiving notifications from the commission concerning information required by this section and this part.

(b) The stamping agent shall update the electronic mail address as necessary.

(4) A determination by the commission to not include or to remove a brand family or tobacco product manufacturer from the directory required by this section is subject to review in the manner prescribed by Title 63, Chapter 46b, Administrative Procedures Act.

Utah Code Ann. §59-14-603 (2007).

There is a prohibition against the sale of cigarettes that are not in the directory, as set forth in Utah Code Ann. §59-14-604, below:

(1) It is unlawful for any person:

(a) to affix a stamp to a package or other container of cigarettes, of a tobacco product manufacturer or brand family not included in the directory required by Section 59-14-603; or

(b) to sell, offer, or possess for sale, in this state, or import for personal consumption in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory required by Section 59-14-603.

(2) (a) It is unlawful for any person to sell or distribute cigarettes, or acquire, hold, own, possess, transport, import, or cause to be imported cigarettes, that the person knows or should know are intended for distribution or sale in the state in violation of Section 59-14-603.

(b) A violation of this Subsection (2) is a class B misdemeanor.

Utah Code Ann. §59-14-604 (2007).

Penalties are imposed for violations of Utah Code Ann. §59-14-604, as set forth below in pertinent part:

(1) (a) The commission may revoke or suspend the license of a stamping agent in the manner provided in Section 59-14-202 if the commission determines that the stamping agent has violated Sections 59-14-604, 59-14-606, or other rule adopted under the provisions of this part.

(b) The penalty imposed under Subsection (1)(a) is in addition to or in lieu of any other civil or criminal remedy provided by law.

- (c) Each stamp affixed and each sale or offer to sell cigarettes in violation of Section 59-14-604, or other rule adopted under the provisions of this part, shall constitute a separate violation.
  - (d) For each violation under Subsection (1)(c), the commissioner may, in addition to the penalty imposed by Subsection (1)(a), impose a civil penalty in an amount not to exceed the greater of 500% of the retail value of the cigarettes or \$5,000.
- (2) (a) Any cigarettes that have been sold, offered for sale, or possessed for sale, in this state, or imported for personal consumption in this state, in violation of Section 59-14-604 are:
- (i) contraband under Section 59-14-213; and
  - (ii) subject to seizure and forfeiture as provided in Section 59-14-213.
- (b) Cigarettes seized and forfeited under the provisions of this section shall be destroyed and not resold.

Utah Code Ann. §59-14-608 (2007).

The Commission has been granted discretion to waive penalties and interest, as set forth in Utah Code Ann. §59-1-401(13) below:

Upon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part.

Utah Code Ann. §41-1-401 (2007).

#### DISCUSSION

In May 2007, the Taxpayer filed a quarterly report with the Division indicating the sale of 474 oz. of a tobacco products listed with brand names of BRAND A, BRAND B, and BRAND C. On the basis of that report and the Division's efforts to verify the information contained in the report, the Division sent a Statutory Notice of Agency Action on July 15, 2008 in which the Division levied a \$\$\$\$ penalty for the sale of tobacco products that were not on the approved directory.

The Taxpayer's representative does not dispute that the Taxpayer sold tobacco products that were not on Utah's approved directory. However, the Taxpayer's representative indicated that he relied on an assurance from employees of the Utah State Tax Commission indicating that the tobacco products sold were on the approved directory at the time of their purchase and listing for sale. The Taxpayer provided

testimony that at the time of the tobacco sales at issue in this action, the Taxpayer relied on phone calls to the Commission to determine which products were approved for sale in the State of Utah. The Taxpayer's representative indicated that before June 2007, the Taxpayer was unaware of any directory of tobacco products approved for sale in Utah. The Taxpayer identified EMPLOYEE A and EMPLOYEE B as the Commission employees who had provided information that the BRAND B products were approved for sale in Utah. In support of its position that its management understood that it was selling legal products, the Taxpayer argued that if it were going to try to sell tobacco products that were illegal for sale in Utah, it would never have listed these products on its quarterly sales reports. The Taxpayer estimates the retail value of the products sold at \$\$\$\$\$.

The Division presented testimony from EMPLOYEE A. EMPLOYEE A indicated that he began his employment with the Commission in April 2007. He remembered speaking with the Taxpayer's representative but did not recall the details of any conversations. He did testify, however, that his response to any taxpayer requesting information regarding whether a given product was approved for sale in Utah would be to provide instruction regarding the location and use of Publication 51, which is Utah's publication listing tobacco products approved for sale in Utah.

The Division presented testimony from EMPLOYEE B. EMPLOYEE B indicated that he was employed with the Tax Commission from September 2006 to March 2007. His job duties did include speaking with taxpayers regarding the sale of tobacco products. He agreed that he spoke with a representative of the Taxpayer, but did not recall the details of any conversations. He did indicate that he would not have indicated which products are approved for sale in Utah. Rather, he would have provided instruction in the use of Publication 51.

The Division argued that it is the responsibility of the manufacturer, distributor, and retailer to keep current with the brands and manufacturers on the directory. It pointed to Utah Code Ann. §59-14-604, which makes it unlawful for any person "to sell, offer, or possess for sale...cigarettes of a tobacco manufacturer or brand family not included in the directory..." It is the Division's position that it has no discretion on the imposition of the penalty, which is the greater of \$5,000 or 500% of the retail value of the cigarettes under Utah Code Ann. §59-14-604. The Division asked that the \$\$\$\$\$ penalty be upheld, and noted that there is an increased enforcement effort for violations of this type because the payments under the 1998 master settlement agreement are at stake if the State does not uphold the enforcement provisions of the master settlement agreement.

Utah Code Ann. §59-14-608(c) provides that “[e]ach stamp affixed and each sale or offer to sell cigarettes in violation of Section 59-14-604...shall constitute a separate violation.” *Id.* The legislature establishes the penalty in Utah Code Ann. §59-14-608(d), as follows, “[f]or each violation under Subsection (1)(c), the commissioner *may*...impose a civil penalty in an amount not to exceed the greater of 500% of the retail value of the cigarettes or \$5,000.” *Id.* The word “may” grants discretion in the assessment of the penalty, and use of the phrase “not to exceed” allows for the imposition of a penalty less than the maximum set by the legislature.

Generally, the directory of tobacco products approved for sale in the State of Utah is well known and understood in the cigarette industry. As a result, the imposition of the penalties for violations of Sections 59-14-604 and 59-14-606 are frequently justified up to the maximum amount allowable. This is particularly true for cases of intentional fraud or similar violations. However, the Commission recognizes that other circumstances support an exercise of discretion in imposing less than the maximum penalty amount. In this case, two things are clear. First, the Taxpayer spoke with personnel in an attempt to learn how to follow Utah law with regard to tobacco sales. While accounts vary with regard to the representations made in telephone conversations between Taxpayer and Division representatives, there is general agreement that these conversations took place. Second, it is clear that following these conversations, the Taxpayer sold tobacco products that were not approved for sale in Utah. Taking the facts as a whole, the Commission is not convinced that Division employees told the Taxpayer’s management to sell tobacco products that were not approved for sale in Utah. However, there does appear to be persuasive evidence that the Taxpayer’s management thought the products at issue were approved for sale in Utah at the time of sale and that this belief came after conversations with Division employees. The Taxpayer’s actions in selling products not approved for sale in Utah support the imposition of a fine, but Taxpayer’s good faith efforts to contact the Division for guidance support a reduction in that fine, notwithstanding the Taxpayer’s subsequent confusion.

#### DECISION AND ORDER

Based on the foregoing, the Commission finds that the \$\$\$\$ penalty shall be reduced to \$\$\$\$.

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

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request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

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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 \_\_\_\_\_, 2009.

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Clinton Jensen  
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 \_\_\_\_\_, 2009.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
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 a Formal Hearing is not requested and you would like to submit an Offer in Compromise or request payment arrangements, please telephone Taxpayer Services Division at (801) 297-7703.

*CDJ/08-1808.int*