

09-3065
AUDIT
SIGNED 02-23-2010
COMMISSIONERS: R. JOHNSON, M. JOHNSON, D. DIXON, M. CRAGUN
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p style="padding-left: 40px;">Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="padding-left: 40px;">Respondent.</p>	<p style="text-align: center;">INITIAL HEARING ORDER</p> <p>Appeal No. 09-3065</p> <p>Account No. #####</p> <p>Tax Type: Cigarette Inspection Penalty</p> <p>Judge: Chapman</p>
---	--

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REP., Owner
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
 RESPONDENT REP. 2, from Auditing 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 February 10, 2010.

On September 8, 2009, Auditing Division (“Division”) issued a Statutory Notice – Cigarette Inspection (“ Statutory Notice”) to PETITIONER (“PETITIONER” or “taxpayer”). In the Statutory Notice, the Division imposed a \$\$\$\$ penalty due to unauthorized cigarettes and tobacco products being found in an inspection of the taxpayer’s store at ADDRESS 1, CITY 1, Utah on August 3, 2009. The Division asks the Commission to sustain the \$\$\$\$ penalty, while the taxpayer asks the Commission to waive it.

APPLICABLE LAW

1. Utah Code Ann. §59-14-603 provides, as follows in pertinent part:

- (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:

....

- (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.

....

2. UCA §59-14-604 provides as follows:

- (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.

3. UCA §59-14-608 sets forth penalties, as follows 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.

....

DISCUSSION

Section 59-14-603 requires the Commission to publish on its website a directory that lists the tobacco brands that have been approved for stamping and sale in the State of Utah. The directory is known as Publication 51. Section 59-14-604 prohibits from stamping and selling in Utah those tobacco brands that are not listed on Publication 51. When the taxpayer's store was inspected on August 3, 2009, the Division found three packs of BRAND 1 cigarettes and 85 ounces of BRAND 2 tobacco, which are products that the Tax Commission had removed from Publication 51 on July 21, 2009. As a result, the Division determined that the taxpayer violated Section 59-14-604 because it provided for sale cigarettes and tobacco products that had been removed from Publication 51.

The Division imposed a \$\$\$\$ penalty in accordance with Section 59-14-608, which establishes a penalty for Section 59-14-604 violations "in an amount not to exceed the greater of 500% of the retail value of the cigarettes or \$5,000." The Division stated that it imposed the maximum penalty of \$\$\$\$\$, as "500% of the retail value" of the cigarettes and tobacco products at issue is only \$\$\$\$.

The taxpayer admits that the BRAND 1 cigarettes and BRAND 2 tobacco products were present and available for sale at his store at the time of inspection. However, the taxpayer does not believe that he should be penalized under the circumstances. The taxpayer explains that he was told by the Tax Commission that he would need to check Publication 51 the first business day of each quarter to determine whether items in his stores had been "delisted" and needed to be removed from store shelves. PETITIONER REP. proffered that he checked the Publication 51 website on Wednesday, July 1, 2009, the first business day of the 3rd Quarter of 2009. He testified that when he checked Publication 51 on this date, the publication included the BRAND 1 and BRAND 2 brands for which he has been penalized and did not show that these brands would be delisted later in the month.

The Division states that on August 3, 2009, the inspection date at issue, the Tax Commission's policy was to update its Publication 51 website on the first business day of each quarter.¹ The Division admits, however, that the Tax Commission did not update Publication 51 for the 3rd Quarter of 2009 until Monday, July 6, 2009 because the Tax Commission's "webmaster" had been on vacation on Wednesday, July 1, 2009. On July 6, 2009, Publication 51 was updated to give notice that a number of products would be delisted on July 21, 2009, including the BRAND 1 cigarettes and BRAND 2 tobacco products at issue in this appeal.

Nevertheless, the Division believes that PETITIONER REP. should have known to continue checking Publication 51 throughout July 2009 until it was actually updated, regardless of the Commission's policy to update the website on the first business day of the quarter. The Division states that when PETITIONER REP. checked the website on July 1, 2009, he should have known that Publication 51 had not yet been updated because a sentence was included in the update that he would have seen that read: "The next scheduled update of this publication is July 1, 2009."

The Commission has considered three prior cases where delisted cigarettes and tobacco products were discovered during inspections of retailers' stores.² In these cases, the retailers had not checked Publication 51, but had relied on the manufacturer of the cigarettes or tobacco products to notify them of delisted products. In two of these cases, the Commission reduced the \$\$\$\$ penalty to \$\$\$\$\$. In the third case, the Commission reduced the \$\$\$\$ penalty to "500% of the retail value" of the (#) packs of cigarettes that were confiscated. Although the decision in the third case does not indicate the amount of the penalty, it is noted that (#) packs of cigarettes with a retail value of \$\$\$\$ per pack would have a

1 On December 8, 2009, Utah Admin. Rule R865-20T-14 became effective and provides for the Publication 51 website to be updated on the first business day of each month. The Division's evidence included a copy of a Publication 51 update dated August 5, 2009. It was not explained why Publication 51 would have updated in August 2009 at a time when the policy was to update the publication quarterly.

2 See *USTC Appeal No. 07-1244* (Initial Hearing Order Apr. 7, 2008); *USTC Appeal No. 07-1323* (Initial Hearing Order Apr. 21, 2008); *USTC Appeal No. 07-1333* (Initial Hearing Order Apr. 14, 2008).

Appeal No. 09-3065

retail value of \$\$\$\$ and that 500% of \$\$\$\$ is \$\$. Accordingly, in these cases, it appears that the Commission has reduced the penalty to an amount around \$.

The circumstances in this case are different. In this case, the taxpayer actually checked Publication 51 on the day the update for the 3rd Quarter of 2009 was supposed to be posted. The retailers in the three cases discussed above never checked Publication 51. In addition, the evidence in this case shows that the Publication 51 website update for the 3rd Quarter of 2009 was delayed because an employee was on vacation. In the three cases cited above, no evidence was presented to show that the website updates had been delayed. It appears that the taxpayer in this case took the appropriate steps to determine whether any of the cigarettes and tobacco products in his store should be removed for the 3rd Quarter of 2009. It is understandable that the taxpayer did not realize that Publication 51 had not been updated on July 1, 2009 and that he should continue to check the website until it was actually updated. For these reasons, the \$ penalty should be waived in its entirety.

The Division states that the \$ penalty should be sustained, noting that payments to the State of Utah under the 1998 Tobacco Master Settlement Agreement (“MSA”) are at stake if the State does not uphold the enforcement provisions of the MSA. Nevertheless, a taxpayer who relied on Tax Commission policy and reviewed delisted brands on the first day of the quarter should not be penalized because the Publication 51 update was delayed. The Commission has recently enacted a rule ensuring that Publication 51 will be updated on the first business day of each month, which is only one small part of the Tax Commission’s continued efforts to uphold the enforcement provisions of the MSA.

Lastly, the taxpayer asked if the Tax Commission could send Publication 51 updates by mail, in part, to avoid the problems that he experienced when he checked the website on the date the update was supposed to have occurred. The Commission, however, has considered this option and has

Appeal No. 09-3065

adopted a rule providing for the website to be updated on the first business day of each month. Retailers are expected to check for updates on the website and will not receive updates by mail.

Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission grants the taxpayer's appeal and waives the entirety of the \$\$\$\$ penalty that the Division imposed. 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.

Appeal No. 09-3065

DATED this _____ day of _____, 2010.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

KRC/09-3065.int