

09-3825
CIGARETTE SALES AND USE
SIGNED 07-28-2010

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p style="text-align: center;">Petitioner,</p> <p>vs.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 09-3825</p> <p>Account No. #####</p> <p>Tax Type: Cigarette, Sales and Use Tax</p> <p>Audit Period: 04/01/08 to 12/31/08</p> <p>Judge: Jensen</p>
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Presiding:

Clinton Jensen, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER, Taxpayer

For Respondent: RESPONDENT REP., for the Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on April 14, 2010 for an Initial Hearing in accordance with Utah Code §59-1-502.5. The Auditing Division of the Utah State Tax Commission (the "Division") issued an assessment against Petitioner (the "Taxpayer") for unpaid cigarette tax and use tax on purchases of cigarettes from WEBSITE, an out-of-state Internet vendor. The cigarette tax assessment is in the amount of \$\$\$\$ (including \$\$\$\$ in interest), and the use tax assessment amounts to \$\$\$\$ (including \$\$\$\$ in interest). The Division alleges that the purchases were made during the period of April 1, 2008 to December 31, 2008. No penalty was assessed.

The Taxpayer admits to purchasing of these cigarettes but states that he did not know that tax was due on the purchases. The Taxpayer argues that the Tax Commission should collect from the vendor who failed to collect the tax rather than from him. Finally, the Taxpayer explains that he lives on a fixed income and that it would be a hardship for him to pay taxes on these cigarette purchases.

APPLICABLE LAW

Cigarette Tax

Utah law imposes a cigarette tax on "the sale, use, storage or distribution of cigarettes in the state." Utah Code § 59-14-204. Typically, cigarettes distributed for sale in Utah are affixed with a cigarette stamp on each

pack, which indicates that the manufacturer, distributor or vendor has paid the tax. Utah Code §§59-14-204 and 59-14-205. When a person causes untaxed cigarettes to be delivered into the state, that person must file a statement and pay the tax directly to the Tax Commission within 15 days of storage, use or consumption in Utah, or by the 15th of the month following the calendar month in which the cigarettes were imported, if authorized by the Commission. Utah Admin. Rules R865-20T-1 and R865-20T-2.

Use Tax

Utah law additionally imposes sales and use tax on retail sales in Utah. Utah Code §59-12-103(1). Utah vendors and some out-of-state vendors are required by law to collect Utah sales tax on behalf of the Tax Commission on each Utah sale. However, if the seller does not collect the tax on items sold and delivered into Utah, the purchaser is required to accrue and remit use tax directly to the Tax Commission on his or her individual income tax return. Utah Code §59-12-107 (1)(d); Utah Admin. Rule R865-21U-3; and Utah Admin. Rule R865-21U-6.

Penalties and Interest

If a person fails to report and pay any tax due within the prescribed time period, the Commission may assess the tax, plus interest and penalties. Interest runs from the date that the return was due. Utah Code §59-1-402 (5).

DISCUSSION

Under federal law, the Jenkins Act, vendors such as WEBSITE are required to report their Utah internet sales to the Tax Commission. In compliance with this act, WEBSITE the Taxpayer's reported cigarette purchases. Upon receiving this report and identifying the Taxpayer as a Utah resident, the Division issued an assessment for the unpaid cigarette tax and the unpaid use tax on each transaction. The Taxpayer does not deny that he made these purchases, but states he was unaware that tax was due.

Cigarette Tax. Section 59-14-204 of the Utah Code imposes a Utah cigarette tax on the "sale, use, storage, or distribution" of cigarettes in the state. The occurrence of any one of these will suffice and will trigger the tax. The evidence in this action shows that the Taxpayer purchased the cigarettes at issue, used them by smoking them, and stored them between the time he received them and when he used them. While any one of these actions would make the cigarette purchases taxable, the Taxpayer did all three actions. In accordance with Section 59-14-204, the Taxpayer is thus required to pay a cigarette tax on these cigarettes. The Tax Commission finds the Taxpayer's statement that he did not know that taxes were due on these cigarettes to be credible. Even so, Utah law requires payment of this the tax even if the Taxpayer was not

aware of it.

Use Tax. The Taxpayer caused cigarettes to be delivered 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. The retailer from whom the Taxpayer placed the order for cigarettes did not collect and remit Utah sales and use tax to Utah on the transactions. This is because the retailer is an out of state seller and Utah cannot require an out of state retailer without sufficient presence in Utah to collect Utah sales tax. Section 59-12-107(1)(d) provides that, under these circumstances, the person bringing the goods into the state is to pay the Utah use tax that is due. In accordance with Utah Admin. Rule R865-21U-6(A)(2)(c), the Taxpayer should have paid the use tax he owed by claiming and paying the liability on his individual income tax returns for the 2008 tax year. The Taxpayer indicated that he did not report these transactions or pay a use tax on these transactions. Accordingly, the Division was correct in assessing the use tax for the 2008 tax year.

Interest. Utah Code 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 use tax on the cigarettes in this matter was for the 2008 tax year. The Petitioner’s return for the 2008 tax year was due April 15, 2009. The Division was correct in assessing interest on the 2008 use tax beginning on April 15, 2009.

For interest on the cigarette tax, the Division computed interest from a starting date 15 days after the delivery of the Taxpayer’s cigarettes into Utah. Utah statute requires that the purchaser file a cigarette tax return “15 days from the date of use, storage, or consumption” of the cigarettes in Utah. Utah Admin. Rule R865-20T-2. The Division was thus correct in assessing interest from the time the cigarettes were received in Utah.

Clinton D. Jensen
Administrative Law Judge

DECISION AND ORDER

The Tax Commission has very little latitude to waive tax and interest that is due under Utah law. It has discretion to waive penalties, but no penalties were imposed in this case. The Commission affirms the

Appeal No. 09-3825

assessment for the cigarette tax and the use tax as well as interest on these taxes.

The Taxpayer indicated that payment of this assessment as a lump sum would create a financial burden. The Taxpayer may contact the Taxpayer Services Division by calling 801-297-7703 to discuss financial arrangements.

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 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:

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 _____, 2010.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
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 Jeff Christiansen in Taxpayer Services Division at (801) 297-6209.

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