

16-1424

TAX TYPE: CIGARETTE STAMP TAX

TAX YEAR: 2016

DATE SIGNED: 5-5-2017

COMMISSIONERS: J. VALENTINE, M. CRAGUM, R. PERO, R. ROCKWELL

GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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<p>PETITIONER,</p> <p>Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p><b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</b></p> <p>Appeal No. 16-1424</p> <p>Account No. #####</p> <p>Tax Type: Cigarette Stamp Tax</p> <p>Tax Year: 2016</p> <p>Judge: Marshall</p>
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**Presiding:**

Rebecca Rockwell, Commissioner

Jan Marshall, Administrative Law Judge

**Appearances:**

For Petitioner: REPRESENTATIVE FOR PETITIONER, Owner

For Respondent: REPRESENTATIVE-1 FOR RESPONDENT, Assistant Attorney General

REPRESENTATIVE-2 FOR RESPONDENT, Assistant Attorney General

RESPONDENT-1, Audit Manager

RESPONDENT-2, Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on March 15, 2017, in accordance with Utah Code Ann. §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner applied for a Cigarette and Tobacco Retailer License with the Tax Commission on or about November 20, 2014. (Exhibit A).
2. Petitioner is a licensed tobacco retailer (Account No. #####) and operates the BUSINESS-1 in CITY-1, Utah.
3. Petitioner sells cigarettes, along with other products.
4. As a licensed tobacco retailer, the Petitioner must purchase cigarettes from suppliers who have paid the cigarette tax and have already affixed the tax stamp to the cigarettes.

5. RESPONDENT-2, an auditor, testified on behalf of the Auditing Division.
6. RESPONDENT-2 received a lead in May 2016 from the COUNTY-1 Health Department that the Petitioner may not be in compliance.
7. RESPONDENT-2 explained that the COUNTY-1 Health Department inspects various tobacco retailers for sales to underage purchasers. He stated that if Health Department employees notice a potential tax compliance issue while doing their inspections, they notify the Auditing Division.
8. Once RESPONDENT-2 verified the Petitioner did have a tobacco retailer license, he reviewed the account history to see whether there had been a prior inspection of the Petitioner's business.
9. The Division completed a cigarette tax stamp inspection in November 2014. The auditor who completed the December 2014 inspection had no concerns with the Petitioner, and issued a letter to that effect on December 11, 2014. The letter also notified the Petitioner of the penalty potential for selling un-taxed cigarettes. (Exhibit B).
10. On July 28, 2016, RESPONDENT-2 was in the CITY-1 area to conduct a license suspension inspection for a different tobacco licensee. While he was in the CITY-1 area, RESPONDENT-2 stopped at the Petitioner's business location. RESPONDENT-2 explained that generally on these types of stops, auditors do not find unstamped cigarettes, but take copies of Publication 65 and Publication 51 with them, and use it as an opportunity to educate licensees.
11. RESPONDENT-2 spoke with the cashier on duty on July 28, 2016, and explained why he was there. The cashier allowed RESPONDENT-2 behind the counter, and RESPONDENT-2 inspected the display shelves, inventory, and display shelves on the back counter with other tobacco products. He stated the cigarettes in the display shelves and inventory were properly stamped.
12. During his inspection, RESPONDENT-2 noticed a cabinet located underneath the cash register. The cabinet had a latch and lock, but was unlocked at the time. Inside the cabinet were multiple brands of cigarettes. Some of the cigarettes were stamped with a yellow stamp or an "STB" stamp, and others were not stamped at all. RESPONDENT-2 took several photographs of the cigarettes. (Exhibit C).
13. RESPONDENT-2 seized a total of 298 packages of cigarettes that were in the cabinet underneath the cash register. Each of the packages were either improperly stamped, or were not stamped.
14. On August 16, 2016, the Division issued a Statutory Notice to the Petitioner assessing a penalty of \$25 per pack, or \$7,450. (Exhibit C).
15. The Petitioner's representative is the owner of the business. He stated he was present for the 2014 inspection, and knows it is not proper to sell unstamped cigarettes.

16. The Petitioner's representative explained that during this time, he was spending extended periods out of the country. He hired a manager, NAME-1, to run the store in his absence. The Petitioner's representative argued that the cigarettes were not being sold by him, and he believes the manager was responsible.
17. The Petitioner's representative stated the penalty is too high, and asked for kindness on the part of the Commission to reduce the penalty.

APPLICABLE LAW

The following definitions, set forth in Utah Code Ann. §59-14-102, are relevant to these proceedings:

- (11) "Retailer" means a person that:
  - (a) sells or distributes cigarettes to a consumer in the state; or
  - (b) intends to sell or distribute a cigarette to a consumer in the state.
- (12) "Stamp" means the indicia required to be placed on a cigarette package that evidences payment of the tax on cigarettes required by Section 59-14-205.

A license is required under Utah Code Ann. §59-14-201 to sell cigarettes, as follows, in pertinent part:

- (1) It is unlawful for any person in this state to manufacture, import, distribute, barter, sell, exchange, or offer cigarettes for sale without first having obtained a license issued by the commission under Section 59-14-202.

Utah law imposes a tax and requires a stamp on cigarettes before they can be sold within the state under Utah Code Ann. §59-14-205, as follows, in pertinent part:

- (1) In the case of manufacturers, jobbers, importers, distributors, wholesalers, and retailers, 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 retailers 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) (a) Stamps shall be securely affixed to each individual package of cigarettes within 72 hours after the cigarettes are received within the state.
  - (b) All cigarettes shall be stamped before sale within the state...
- (8) (a) Any person failing to properly affix and cancel stamps to the cigarettes, under this section and 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 in accordance with Chapter 1, Part 14, Assessment, Collections, and Refunds Act.
  - (b) Each article, package or container found not having proper stamps affixed to the article, package, or container is a separate offense.
  - (c) 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.

Utah Code Ann. §59-14-207.5 provides that a retailer may only obtain cigarettes from a properly licensed person, as follows:

- (1) A manufacturer or importer may sell or distribute cigarettes to a licensee if that person is located or doing business in the state, including on any tribal lands located in the state.
- (2) An importer may obtain cigarettes only from a licensed manufacturer.
- (3) (a) A distributor may obtain cigarettes only from a licensed manufacturer, importer, or distributor.  
(b) A distributor may sell or distribute cigarettes to a person who is a licensed distributor or retailer, if that person is located or doing business in the state, including on any tribal lands in the state.
- (4) A retailer may obtain cigarettes only from a properly licensed person.

Utah Code Ann. §59-14-208(2) makes it a misdemeanor to refuse inspection for the cigarette tax stamp, as set forth below:

- (2) A person is guilty of a class B misdemeanor who:
  - (a) engages in or permits any practice which is prohibited by law and makes it difficult to enforce the provisions of this chapter by inspection;
  - (b) refuses to allow full inspection of his premises by any peace officer or of any agent of the commission upon demand; or
  - (c) hinders or in any way delays or prevents inspection when the demand is made.

Utah Code Ann. §59-14-213 requires that the Commission seize and destroy cigarettes found in violation of these provisions, as follows in relevant part:

- (1) Any cigarettes in violation of the requirements of this chapter or of any state or federal law, including Sections 59-14-203, 59-14-205, 59-14-209, 59-14-211, Subsection 59-14-212(1), or Section 59-14-214 are contraband goods and may be seized without a warrant by the commission, its employees, or any peace officer of the state or its political subdivisions.
- (2) Any goods seized pursuant to Subsection (1) shall be delivered to the commission and destroyed.

The Cigarette and Tobacco Tax and Licensing Act provides that the Commission may waive, reduce or comprise specified penalties imposed under the Act, in accordance with Utah Code Ann. §59-14-103, below:

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

- (1) Subsection 59-14-212(4)(b)(ii);
- (2) Subsection 59-14-214(5)(b)(ii);
- (3) Subsection 59-14-407(5)(b)(ii);
- (4) Subsection 59-14-606(7)(b)(ii); or
- (5) Subsection 59-14-608(1)(d).

CONCLUSIONS OF LAW

- A. Petitioner is a licensed retailer of cigarettes. Utah Code Ann. §59-14-201 makes it unlawful to sell cigarettes in this state without a license. Petitioner applied for a license on or about November 20, 2014, and a license was granted (Account No. #####). The Petitioner meets the definition of “retailer” in Utah Code Ann. §59-14-102, as Petitioner sells cigarettes to consumers in the state.
- B. Petitioner had improperly stamped and/or unstamped cigarettes for sale. Utah Code Ann. §59-14-205 requires a stamp, indicating that tax has properly been paid, on each pack of cigarettes for sale in this state. The Division’s auditor seized 298 packs of cigarettes from Petitioner that were not stamped, or were improperly stamped. Subsection (8)(b) of Utah Code Ann. §59-14-205 provides, “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.” As the Petitioner is a licensed retailer of cigarettes, the cigarettes seized by the Division were intended for sale, subject to tax, and thus required to be properly stamped.
- C. The Division properly imposed a penalty of \$7,450. Utah Code Ann. §59-14-205 imposes a penalty for failing to properly affix stamps to cigarettes. The penalty is \$25 for each offense. Subsection (8)(b) specifically provides that “each article, package or container found not having proper stamps affixed to the article, package, or container is a separate offense.” The Division seized 298 packages of cigarettes that did not have a proper stamp affixed. Each of the 298 packages seized is a separate offense, and thus subject to a penalty of \$25, for a total of \$7,450.
- D. The Commission does not have discretion to waive, reduce, or compromise the penalty assessed under Utah Code Ann. §59-14-205. The Petitioner’s representative has asked the Commission to exercise kindness and reduce the penalty. Utah Code Ann. §59-14-103 grants the Commission the authority to waive, reduce, or compromise certain penalties imposed under the Cigarette and Tobacco Tax and Licensing Act. Those penalties are specifically enumerated, and do not include the penalties imposed under Utah Code Ann. §59-14-205(8). Regardless of any mitigating factors, such as this being the first violation, or that the Taxpayer’s representative was out of the country, the Legislature has not granted the Commission discretion to waive or reduce the penalties assessed under Utah Code Ann. §59-14-205(8).

Jan Marshall  
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission denies the Petitioner's request for a waiver of penalties assessed in the August 16, 2016 Statutory Notice. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

John L. Valentine  
Commission Chair

Michael J. Cragun  
Commissioner

Robert P. Pero  
Commissioner

Rebecca L. Rockwell  
Commissioner

**Notice of Appeal Rights and Payment Requirement: Any balance due as a result of this order must be paid within thirty (30) days of the date of this order, or a late payment penalty could be assessed.** You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.