

17-1469  
TAX TYPE: CIGARETTE & TOBAXCO LICENSE  
TAX YEAR: 2017  
DATE SIGNED: 11/9/2017  
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL  
EXCUSED: R. PERO  
GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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<p>PETITIONER,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p style="text-align: center;"><b>INITIAL HEARING ORDER</b></p> <p>Appeal No. 17-1469</p> <p>Account No. #####</p> <p>Tax Type: Cigarette &amp; Tobacco License</p> <p>Tax Year: 2017</p> <p>Judge: Phan</p>
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**Presiding:**

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: REPRESENTATIVE-1 FOR PETITIONER, Attorney at Law  
REPRESENTATIVE-2 FOR PETITIONER, Owner PETITIONER  
REPRESENTATIVE-3 FOR PETITIONER, General Manager,  
BUSINESS-1

For Respondent: REPRESENTATIVE-1 FOR RESPONDENT, Assistant Attorney  
General  
REPRESENTATIVE-2 FOR RESPONDENT, Assistant Attorney  
General  
RESPONDENT-1, Auditing Division Director  
RESPONDENT-2, Audit Manager  
RESPONDENT-3, Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on November 2, 2017 for an Initial Hearing in accordance with Utah Code §59-1-502.5. The Petitioner is appealing a Notice of 30 Day Suspension of Petitioner's Cigarette/Tobacco License. The Notice was issued by Respondent ("Division") on August 18, 2017.

APPLICABLE LAW

Utah Code §26-42-102 defines terms used in the above-referenced act, as follows in pertinent part:

- (1) "Commission" means the Utah State Tax Commission.  
.....
- (3) "Enforcing agency" means the state Department of Health, or any local health department enforcing the provisions of this chapter.  
.....
- (5) "License to sell tobacco" or "license" means a license issued:
  - (a) under Section 59-14-201 to sell cigarettes at retail;
  - (b) under Section 59-14-301 to sell tobacco products at retail; or
  - (c) under Section 59-14-803 to sell an electronic cigarette product.
- (6) "Tobacco" means:
  - (a) a cigarette or a tobacco product, as defined in Section 59-14-102; or
  - (b) an electronic cigarette product, as defined in Section 59-14-802.

Utah Code §26-42-103 addresses the consequences of selling tobacco to a person younger than 19 years of age and the role of the Tax Commission in suspending or revoking a tobacco license, as follows:

- (1) If, following an investigation or issuance of a citation or information under Section 77-39-101, an enforcing agency determines under Section 26-42-104 that a licensee or any employee has sold tobacco to a person younger than 19 years of age, as prohibited by Section 76-10-104, the enforcing agency may impose upon the licensee the following administrative penalties:
  - (a) upon the first violation, a penalty of not more than \$300;
  - (b) upon a second violation at the same retail location, and within 12 months of the first violation, a penalty of not more than \$750; and
  - (c) upon a third or subsequent violation at the same retail location and within 12 months of the first violation, a penalty of not more than \$1,000.
- (2) The enforcing agency shall notify the commission in writing of any order or order of default finding a violation of Subsection (1) which is a third or fourth violation.
- (3) The commission, upon receipt of the written notification under Subsection (2), shall take action under Section 59-14-203.5 or 59-14-301.5 against the license to sell tobacco:
  - (a) by suspending the licensee's license to sell tobacco at that location for not more than 30 days, upon receipt of notification of a third violation under Subsection (1)(c); and
  - (b) by revoking the license to sell tobacco at that location held by the licensee, including any license under suspension, upon receipt of notification of a fourth violation under Subsection (1)(c).
- (4) When the commission revokes a license under Subsection (3)(b), the commission may not issue to the licensee, or to the business entity using the license that is revoked, a license under Section 59-14-202, 59-14-301, or 59-14-

803 to sell tobacco at the location for which the license was issued for one year after:

- (a) the day on which the time for filing an appeal of the revocation ends; or
- (b) if the revocation is appealed, the day on which the decision to uphold the revocation becomes final.

. . . .

Utah Code §26-42-104 describes the role of the state Department of Health and local health departments in enforcing the above-referenced act, as follows:

The state Department of Health and the local health departments shall enforce this chapter under the procedures of Title 63G, Chapter 4, Administrative Procedures Act, as an informal adjudicative proceeding, including:

- (1) notifying licensees of alleged violations of Section 26-42-103;
- (2) conducting hearings;
- (3) determining violations of this chapter; and
- (4) imposing civil monetary administrative penalties.

Utah Code §26-42-106 requires the state Department of Health and local health departments to reduce the amount of the monetary penalty it imposes on a licensee under Section 26-42-103, as follows in pertinent part:

(1) In determining the amount of the monetary penalty to be imposed for an employee's violation of Section 26-42-103, the hearing officer shall reduce the penalty by at least 50% if he determines:

- (a) the licensee has implemented a documented employee training program; and
- (b) the employee has completed that training program within 30 days of commencing duties of selling tobacco products.

. . . .

Utah Code §59-14-201(1) provides that “[i]t 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 Code §59-14-301.5 provides for the Tax Commission to suspend or revoke a tobacco license as required under Section 26-42-103, as follows:

- (1) (a) The commission shall suspend or revoke licenses to sell tobacco, as required under Section 26-42-103 regarding suspension or revocation of a license due to the sale of tobacco products to a person younger than 19 years of age, upon receipt of notice of an enforcing agency's order or order of default, finding a violation of Section 26-42-103.
- (b) The commission shall provide written notice of the suspension or revocation to the licensee.

(2) It is the duty of the enforcing agency to advise the commission of any order or order of default finding a violation of Section 26-42-103, for which suspension or revocation of the license is a penalty.

(3) When the commission revokes a licensee's license under this section the commission may not issue to the licensee, or to the business entity using the license that is revoked, a license under Section 59-14-202 or 59-14-301 to sell tobacco at the location for which the license was issued for one year after:

- (a) the day on which the time for filing an appeal of the revocation ends; or
- (b) if the revocation is appealed, the day on which the decision to uphold the revocation becomes final.

Utah Code §59-14-301 provides for the registration and licensing of manufacturers and distributors of tobacco products, as follows:

(1) All manufacturers and distributors of all tobacco products, as defined in Section 59-14-102, who are responsible for the collection of tax on tobacco products under this chapter, and all retailers of all tobacco products:

- (a) shall register with the commission;
- (b) shall be licensed by the commission under Part 2, Cigarettes; and
- (c) are subject to the requirements, procedures, and penalties described in Part 2, Cigarettes.

(2) A fee may not be charged for registration and licensing of manufacturers, jobbers, distributors, or retailers of tobacco products in addition to the cigarette license if such a license is required.

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#### DISCUSSION

The Petitioner in this appeal is a limited liability company, which owns nine retail locations that are both gas station and convenience stores. Three of the nine locations are located in Utah with two being in COUNTY-1 and one in COUNTY-2, specifically, CITY-1. It is Petitioner's business at the CITY-1 location for which the Division issued the thirty-day suspension of the cigarette/tobacco license. As stated in the Notice of Suspension from the Division, the license was being suspended due to the Division receiving notification from the COUNTY-2 Health Department that tobacco products were sold to persons under 19 on three separate occasions at the CITY-1 business. Based on a press release published by the Petitioner on March 20, 2013 and provided by the Division at the hearing, the CITY-1 location featured a car wash and car detailing shop, a gas station with twelve gas pumps, an express lube shop and convenience store. The press release indicated that the location would employ ##### employees.

Over a twelve-month period, the COUNTY-2 Health Department had found the CITY-1 business in violation for unlawful sales to minors on three separate occasions. The first violation

occurred on July 20, 2016. Petitioner did not appeal this first violation and paid the \$\$\$\$ fine on August 31, 2016. The second violation occurred on October 12, 2016. Petitioner did not appeal the second violation and paid the \$\$\$\$ second violation fine on November 4, 2016. The third violation occurred on July 11, 2017. Petitioner paid the \$\$\$\$ third violation fine on July 31, 2017. Again, Petitioner did not file an appeal of the third violation, but after the appeal period had expired, the manager of the CITY-1 business did call the COUNTY-2 Department of Health about the violation and began a discussion about training employees and compliance with the law regarding sales to persons under 19.

Petitioner asked that the Tax Commission reduce the period of suspension from the thirty-days to some shorter period of time. Petitioner's representative had pointed out that the law states the Commission shall suspend the license for "not more than 30 days." He points to prior Tax Commission decisions in which the Tax Commission had concluded it had discretion to reduce the suspension period and the Commission had done so in prior cases. The Petitioner offered the following factors to consider regarding the length of the suspension. He notes that Petitioner has had locations in Utah since 2001 and that there were no prior violations.<sup>1</sup> The subject location has been open since 2013.

Petitioner's representative indicated that these were unrelated errors by three different employees. The first two employees had checked the customer's identification and typed their birth date into the register but had transposed numbers or made typing errors, so that the age was computed to be 19 or older. The third error occurred when the employee did not ask for identification and sold to the person under 19, which was not compliant with the procedures for the business and Petitioner did fire this employee because of this error. The Petitioner has now implemented additional training with employees and included proof of training at the hearing. Petitioner has increased signage visible to customers and cashiers that states the business asks for identification on these types of purchases. The Petitioner has implemented a testing process to test employees on entering birth dates correctly into the register.

The Petitioner also argues a thirty-day suspension would be a financial hardship for the business. Petitioner's representative proffers that 20% of the sales at the convenience store are cigarette or tobacco products. He states that suspending sales of the cigarette or tobacco products for thirty-days would have even a bigger impact on sales than that suggests because on average customers of the convenience store purchase 3.5 items, so if they come in for cigarettes, they are likely to purchase drinks or snacks as well. Additionally, he argues that a thirty-day suspension

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<sup>1</sup> The Division stated that there previously had been one violation at the CITY-1 business. The violation occurred in 2013.

would change current customers' shopping habits, as they would go to other locations for their cigarettes and tobacco products.

It should be noted that although the cigarette and tobacco sales may have been 20% of the sales at the convenience store, it was not 20% of the total sales from Petitioner's CITY-1 business location. This location also has a large gas station, car wash, and lube service station. For the purposes of the actual financial impact to the Petitioner, Petitioner's representative did not proffer what fraction of its total sales at this one business location came from the convenience store compared to the gas station, car wash, and lube station. To fully understand the financial impact of the suspension, the Commission may consider what fraction of sales came from the CITY-1 business compared to the other eight locations owned by Petitioner. This information was not provided.

The Division had suspended the license for the full thirty-days. The Division provided a letter from NAME-1, Executive Director of the COUNTY-2 Health Department, in which he asked that the Tax Commission impose the full thirty-day suspension. The Division pointed out that in this case it seemed that the suspension was needed in order to get Petitioner's attention, as Petitioner did not respond to the first and second violations. The Division acknowledged that the Tax Commission had reduced the suspension period in the past, but pointed out the reasons from the prior decisions.<sup>2</sup> Factors articulated by the Tax Commission for reduction of the suspension period included concerns that an action on the part of the Health Department had denied that business owner due process. A second reason discussed was a reduction of the suspension period based on that the Health Department had reduced fines. In other cases, a factor noted in the reduction was the financial impact to the business.<sup>3</sup> The Petitioner pointed to the Tax Commission's decision in *Utah State Tax Commission, Initial Hearing Order, Appeal No. 17-595*, in which one factor noted was the financial impact to the business. However, the factors in the subject case are substantially dissimilar. In *Appeal No. 17-595*, there was only one business location for the business entity owner and the business was a specialty tobacco shop, so that 90% to 95% of sales were cigarette and tobacco products. For Petitioner in this matter, the cigarette

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<sup>2</sup> See *Utah State Tax Commission Initial Hearing Orders in Appeal Nos. 05-0459, 08-2639, 17-595 and Findings of Fact Conclusions of Law, and Final Decision Appeal No. 08-1734*. These decisions are available in a redacted format at [tax.utah.gov/commission-office/decisions](http://tax.utah.gov/commission-office/decisions).

<sup>3</sup> In *Appeal No. 05-0492*, the Commission exercised its discretion and imposed a shorter suspension (10 days) citing concerns as to whether the petitioner in that case was provided sufficient due process by the department of health that was involved in that case. In *Utah State Tax Commission Initial Hearing Order Appeal No. 08-2639*, the Commission also reduced the suspension to 10 days based, in part, on the fact that the health department in that case had substantially reduced the fine it had imposed. In *Appeal No. 17-595*, the Commission noted both the financial hardship to the business, for which cigarettes and tobacco products made up 90% to 95% of its sales, as well as the fact that the Health Department had reduced the fine.

and tobacco sales are only a fraction of the total sales at the business location. Also in *Appeal No. 17-595*, the decision noted the fact that the County Health Department had reduced the fine by 50%, which has not occurred in the subject case.

Petitioner did argue that employees at stores that sold primarily cigarette and tobacco products should be more familiar with the requirements of the law and procedures for selling this type of product, as opposed to a business like Petitioner's where not every sale will involve cigarettes or tobacco products. However, this does go back to the point that Petitioner's cigarettes and tobacco sales are only a fraction of the total sales at this business location, so the financial impact to Petitioner is far less than to a one-store specialty shop. The subject appeal is distinguishable to prior Tax Commission decisions where the suspension period was reduced and there is not a basis offered in this matter that would support reduction of the suspension period. The thirty-day suspension should be upheld.

Jane Phan  
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission suspends the Petitioner's Tobacco License for a period of thirty consecutive days. During the suspension period, the Petitioner is prohibited from selling cigarettes and tobacco products.

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, or emailed, 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

or emailed to:  
taxappeals@utah.gov

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

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

John L. Valentine  
Commission Chair

Michael J. Cragun  
Commissioner

Robert P. Pero  
Commissioner

Rebecca L. Rockwell  
Commissioner