

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

Alex & Joanie Cantrell,)	
)	DOCKET NO.: MT-2007-42
Appellants,)	
)	
-v-)	
)	
THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,)	FACTUAL BACKGROUND, PRINCIPLES OF LAW, ORDER and OPPORTUNITY
Respondent.)	FOR JUDICIAL REVIEW

STATEMENT OF CASE

The Taxpayers were assessed \$935.00 plus penalty and interest for purchasing tobacco products without paying the required tax due. They seek dismissal of the taxes due. At the telephonic hearing on August 3, 2007, at 10:45 a.m., Joanie Cantrell (Taxpayer) provided testimony and evidence in support of the appeal. The Department of Revenue (DOR), represented by Keith Jones, tax counsel, presented testimony and evidence in opposition to the appeal. The Board left the hearing open for certain post-hearing submissions.

ISSUES

The Taxpayers assert that they are not responsible for the tobacco taxes. **The issue is:** Are taxes due and owing on tobacco products purchased from an entity existing outside the State of Montana and shipped to a purchaser residing in Montana?

PRINCIPLES OF LAW

1. The State Tax Appeal Board has jurisdiction over this matter pursuant to § 16-11-149, MCA, and § 15-2-302, MCA.
2. The DOR administers certain tobacco tax laws. *See, e.g.,* § 16-11-103, MCA. For example, if a person fails or refuses to pay the required tobacco product tax when due, the DOR shall determine the tax due and assess tax and penalty. (Section 16-11-143(1), MCA). The tax on each package containing 20 cigarettes is \$.70 prior to

- January 1, 2005, and \$1.70 after that date. (Section 16-11-111(1), MCA).
3. **Tax on ultimate consumer.** All taxes paid pursuant to § 16-11-111, MCA, shall be conclusively presumed to be direct taxes on the retail consumer precollected for the purpose of convenience and facility only. (Section 16-11-112, MCA).
 4. The federal Jenkins Act requires any person selling or transferring cigarettes for profit to report to the state tobacco tax administrator every shipment of cigarettes into a state. (15 U.S.C. § 376(a)).
 5. Montana law requires a person who has made a sale or delivered, mailed, or shipped tobacco products into Montana to report those transactions to the DOR. (Section 16-11-128(2), MCA).
 6. All taxes paid pursuant to § 16-11-111, MCA, are conclusively presumed to be direct taxes on the retail consumer precollected for the purpose of convenience and facility only. The full face value of the insignia or tax shall be added to the cost of the cigarettes and recovered from the ultimate consumer or user. When the tax is paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of cigarettes and recovered from the ultimate consumer or user. (Section 16-11-112, MCA).
 7. If a person fails or refuses to pay the required tobacco product tax when due, the DOR shall determine the tax due and assess tax and penalty. (Section 16-11-143(1), MCA).
 8. Montana statute makes it unlawful for a person to use or consume a cigarette within this state if it is taken from a package that does not bear the required insignia. This statute may not be construed to prohibit a natural person from physically transporting into the state of Montana for the person's own personal consumption or use a specified number of cigarettes as long as they bear the tax insignia of another state. (Section 16-11-133(2), MCA).

FINDINGS OF FACT

1. On or about February 23, 2007, the DOR sent a letter to the Taxpayers regarding untaxed tobacco product purchases. This letter outlined Montana laws forbidding an individual from selling, using or consuming tobacco

- products that were purchased without the tax paid to the State of Montana. (Taxpayers' Exhibit C).
2. The DOR informed the Taxpayers that the information showed that they purchased cigarettes directly from out-of-state distributors without paying the requisite tobacco tax. The DOR encouraged the Taxpayers to comply with Montana law and pay the tobacco tax without any added penalties or interest. The DOR enclosed a Tobacco Product Self-Reporting Form and requested payment with a completed form within 30 days. (Taxpayers' Exhibit B). The DOR indicated a specific amount of tax owed.
 3. The statement of account indicated the Taxpayers purchased at least 55 cartons of cigarettes between July, 2005, and July, 2006. With this information the DOR assessed the Taxpayers taxes of \$935.00. (Taxpayers Exhibit B).
 4. The Taxpayers do not deny that they purchased tobacco products from BuyCheapCigarettes.com and Smartsmoker.com.
 5. The Taxpayers sent a letter to the Board opposing the DOR tax assessment. (Letter to STAB dated March 1, 2007). The Board accepted the appeal. The DOR submitted an answer dated April 16, 2007.
 6. The Taxpayers received a second letter on May 4, 2007, informing them that their account had been transferred to Accounts Receivable and Collections Unit. (Taxpayer Exhibit C).

BOARD DISCUSSION and CONCLUSIONS OF LAW

In this instance, BuyCheapCigarettes.com and Smartsmoker.com reported the sale of cigarettes to the DOR pursuant to § 16-11-128, MCA, and 15 U.S.C §376. The DOR calculated the Montana tax owed on the cigarettes to be \$935.00.

The Taxpayers are the admitted ultimate consumers or users of the cigarettes ordered from BuyCheapCigarettes.com and Smartsmoker.com. Pursuant to § 16-11-112, MCA, the taxpayer is therefore required to pay taxes on the purchased cigarettes.

The Taxpayers argue, however, that under current Montana law, they are exempted from paying taxes on up to three cartons obtained from out of state.

The section at issue, § 16-11-133(2), MCA, allows a

natural person to physically transport a limited amount of tobacco product into the state, without requisite Montana insignia, for their personal consumption or use when such product bears the insignia of another taxing jurisdiction. See Principles of Law #8.

The taxpayers argue the above statute allows any person to transport cigarettes into the state, and that they may subsequently obtain such cigarettes without paying tax. Their interpretation of the law is incorrect. Admittedly, they did not transport the cigarettes into the state as required by statute. Therefore, they are not exempt from paying taxes on the tobacco products.

The DOR contends that interest and penalties are due and owing from the purchase date of the cigarettes. The Taxpayers argue they had no way of knowing how much tax was owing or that they could pay under protest to avoid further penalties and interest. The Board agrees with the Taxpayer.

Montana law requires an out-of-state cigarette distributor to inform the DOR of the amount an individual purchased. See § 16-11-128, MCA. There is also a method for the DOR to collect such taxes. See, e.g., § 16-11-142, 149, *et seq.* Thus, the statutes read as a whole contemplate that the DOR must notify the ultimate user of the tax due for the purposes of collection or create some method for the Taxpayer to submit the tax due.

There is no form for payment of those taxes available from a company shipping cigarettes or from the DOR itself. In reviewing the DOR's website, there is no method to pay a cigarette tax and no notification that such a tax is due when purchasing tobacco products out of state. Thus, it would be impossible for an individual to determine what amount of tax is owed, how to calculate the tax owed, and where to send the tax owed when purchasing cigarettes from out of state.

The DOR informed the Taxpayers of the amount due by sending them a statement of account. (See SOA, dated February 23, 2007 attached to Taxpayers' Notice of Appeal). The Statement of Account is the first notice of a tax amount due. The statement allows the Taxpayers 30 days to pay the tax or file an appeal.

It is proper for penalty and interest to accrue as of the due date placed on the statement of account when an appeal has not been filed. See Section 16-11-143 and

ORDER

IT IS THEREFORE ORDERED that taxes in the amount of \$935.00 are properly due and owing from Alex and Joanie Cantrell. It is further ordered that the penalties and interest associated with this assessment will not begin to accrue until 30 days after the entry of this judgment. It is also recommended that the DOR adopt as lenient a repayment program as possible.

Dated this 15th day of August, 2007.

BY ORDER OF THE STATE TAX APPEAL BOARD

(S E A L)

/s/ _____
KAREN E. POWELL, Chairwoman

/s/ _____
DOUGLAS A. KAERCHER, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA and Section 16-11-150, MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of August, 2007, the foregoing Order of the Board was served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

Alex and Joanie Cantrell
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DONNA EUBANK
Paralegal