

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

CONSTANCE PHILPOTT,)	
)	DOCKET NO.: MT-2007-38
Appellant,)	
)	
-v-)	
)	
THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,)	FACTUAL BACKGROUND, CONCLUSIONS OF LAW, ORDER and OPPORTUNITY
Respondent.)	FOR JUDICIAL REVIEW

STATEMENT OF CASE

The Taxpayer was assessed \$603.00 plus penalty and interest for the purchase of tobacco products without paying the required tax due. She seeks dismissal of the taxes due. At the telephonic hearing on August 3, 2007, at 9:30 a.m., Constance Philpott (Taxpayer) was present with witness Sean Kahoe. They 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.

ISSUES

The Taxpayer asserts that she is 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 tobacco for profit to report to the state tobacco tax administrator every shipment of tobacco 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 tobacco 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 the tobacco product 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, 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 as long as it bears 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 Taxpayer 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.
2. The DOR informed the Taxpayer that the information showed that she purchased tobacco products directly

from out-of-state distributors without paying the requisite tobacco tax. The DOR encouraged the Taxpayer 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. (Taxpayer Exhibit C). The DOR indicated a specific amount of tax owed.

3. The statement of account indicated the Taxpayer purchased at least 27 cartons of cigarettes and 135 cans of moist snuff between May, 2005, and April, 2006. With this information the DOR assessed the Taxpayer taxes of \$603.00. (DOR Answer Exhibit B).
4. The Taxpayer does not deny that she purchased tobacco products from Ordersmokesdirect.com and Smartsmoker.com.
5. The Taxpayer believes Montana law, specifically, § 16-11-133(2), MCA allows a person to obtain or receive 3 cartons of cigarettes or 30 ounces of other tobacco products without paying taxes.
6. The Taxpayer 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.

BOARD DISCUSSION and CONCLUSION OF LAW

In this instance, Ordersmokesdirect.com and Smartsmoker.com reported the sale of tobacco products to the DOR pursuant to § 16-11-128, MCA, and 15 U.S.C §376. The DOR calculated the Montana tax owed on the tobacco products at \$603.00.

The Taxpayer is the admitted ultimate consumer or user of the tobacco products ordered from Ordersmokesdirect.com and Smartsmoker.com. Pursuant to § 16-11-112, MCA, she is therefore required to pay taxes on the purchased tobacco.

The taxpayer argues, however, that under current Montana law, she is exempted from paying taxes on up to 600 cigarettes or 30 ounces of non-cigarette tobacco products 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 taxpayer argues the above statute allows any person to transport cigarettes into the state, and that she may obtain such cigarettes without paying tax. Her interpretation of the law is incorrect. First, she did not transport the cigarettes into the state as required. Second, there is no indication that these cigarettes or tobacco products were stamped with another taxing jurisdiction's insignia. She is 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 tobacco products. The Board disagrees.

There are statutes requiring a tobacco 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 tobacco products or from the DOR itself. In reviewing the DOR's website, there is no method to pay a tobacco 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 tobacco from out of state.

The DOR has informed the Taxpayer of the amount due by sending her a statement of account. (Taxpayer Exhibit C). The Statement of Account is the first notice of a tax amount due. The statement allows the Taxpayer 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 Section 15-1-216, MCA (2005). See also *Shultz v. DOR*, State Tax Appeal Board, 2006-13.

However, the Taxpayer filed a timely appeal. There is no notice on the statement of account that interest and

penalties will accrue until the tax is paid in full, regardless of whether an appeal has been filed.

The taxes imposed upon the individual are significant. That is not to say that the tax is not properly due and owing. However, it is unnecessary and a significant hardship on individuals to attach on-going interest and penalties to these tax bills when the Taxpayer has no method to calculate taxes owed or make payment at the time of purchase. The Board concludes that the accrual of penalty and interest will be suspended when a timely appeal has been filed with this Board.

The DOR is commended for its work in attempting to collect taxes from individuals. Leniency to taxpayers is recommended while the DOR works to streamline the tobacco tax collection system.

The Taxpayer filed a timely appeal with the Board prior to the tax payment due date of March 30, 2007. Therefore, penalties and interest shall not begin to accrue until 30 days after the entry of this judgment by the Board. The Board would also urge the DOR to waive subsequent accrual of interest and penalties if a payment schedule is entered into and the Taxpayer complies with the schedule until full payment has been rendered.

The Taxpayer purchased cigarettes from an out of state distributor who did not precollect Montana taxes. The DOR is required to collect said taxes from the ultimate consumer. See §16-11-111, MCA.

ORDER

IT IS THEREFORE ORDERED taxes in the amount of \$603.00 are properly due and owing from Constance Philpott. 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 9th 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 10th 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:

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