

BEFORE THE STATE TAX APPEAL BOARD  
OF THE STATE OF MONTANA

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DEANNE SAALE,	)	
	)	DOCKET NO.: MT-2007-5
	)	
Appellant,	)	
	)	
-vs-	)	
	)	
THE DEPARTMENT OF REVENUE	)	FACTUAL BACKGROUND,
OF THE STATE OF MONTANA,	)	CONCLUSIONS OF LAW,
	)	ORDER and OPPORTUNITY
Respondent.	)	FOR JUDICIAL REVIEW

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**STATEMENT OF CASE**

The Taxpayer was assessed \$492.00, plus penalty and interest for purchasing tobacco products without paying the required tax due. She seeks dismissal of the taxes. At the telephonic hearing held on July 31, 2007, at 9:30 a.m., Deanne Saale (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.

**ISSUES**

The Taxpayer asks for the taxes to be waived. **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 also 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).

#### 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 the Federal Jenkins Act requiring out-of-state tobacco product distributors shipping cigarette and/or other tobacco products into Montana to submit a monthly sales report to the DOR. (Exhibit 5).
2. The DOR informed the Taxpayer that the information showed that she purchased cigarettes 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. (Exhibit 5). The DOR indicated a specific amount of tax owed.

3. The DOR sent a subsequent letter dated May 4, 2007, informing the Taxpayer she owed taxes, interest and penalties on cigarette purchases due to her failure to report the purchase of tobacco products and pay the tobacco tax as requested in the previous letter. Included with the second letter was a Statement of Account. (Exhibit 5). This statement indicated the Taxpayer purchased at least 27 cartons of cigarettes between June 5, 2006, and November 22, 2006. With this information the DOR assessed the Taxpayer taxes of \$459.00. (DOR Answer, Exhibit A).
4. The Taxpayer does not deny that she purchased tobacco products from BuyCheapCigarettes.com. (Testimony of Ms. Saale).
5. The Taxpayer believed the taxes were included in the sales price. (Testimony of Ms. Saale)
6. The Taxpayer sent a letter to the Board opposing the DOR tax assessment. (Letter to STAB dated February 24, 2007). The Board accepted the appeal. The DOR submitted an answer dated March 30, 2007.

#### **BOARD DISCUSSION and CONCLUSIONS OF LAW**

The Taxpayer believes BuyCheapCigarettes.com used deceptive business practices by not informing her of the responsibility of paying Montana tobacco taxes. She believes that the DOR should collect the taxes from BuyCheapCigarettes.com.

BuyCheapCigarettes.com reported the sale of cigarettes to the DOR pursuant to § 16-11-128, MCA, and 15 U.S.C. §376. Based on invoices of sales, the DOR calculated the Montana tax owed on the cigarettes at \$459.00 + \$33.00 (interest and penalty).

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

Regardless of whether buycheapcigarettes.com used deceptive business practices, the law is clear that the taxpayer is ultimately responsible for paying the tax and the DOR is responsible for collecting that tax from the taxpayer.

The DOR contends that interest and penalties are due and owing from the purchase date of the cigarettes. The Board disagrees.

There are statutes requiring a cigarette manufacturer 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 has informed the Taxpayer of the amount due by sending her a statement of account. (See Exhibit 3). This 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 §§ 16-11-143 and Section 15-1-216, MCA (2005). See also *Shultz v. DOR*, MT-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 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 knowingly 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** that taxes in the amount of \$459.00 are properly due and owing from Deanne Saale. It is further ordered 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 7th 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 7th 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:

Deanne Saale  
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Clinton, MT 59825

Keith Jones  
Tax Counsel  
Office of Legal Affairs  
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Helena, MT 59620

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DONNA EUBANK  
Paralegal