

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

Robert & Michelle Vanderbyl,)	DOCKET NO.: MT-2007-66
)	
Appellants,)	
)	
-v-)	
)	
THE DEPARTMENT OF REVENUE)	FACTUAL BACKGROUND,
OF THE STATE OF MONTANA,)	PRINCIPLES OF LAW,
)	ORDER and OPPORTUNITY
Respondent.)	FOR JUDICIAL REVIEW

STATEMENT OF CASE

The Taxpayers were assessed \$2,686.00 plus penalty and interest for purchasing tobacco products without paying the required tax due. The taxpayers contest the assessment of certain tobacco taxes assessed. At the telephonic hearing on August 30, 2007, at 2:45 p.m., Robert Vanderbyl (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 certain 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 two letters to the Taxpayers regarding untaxed tobacco product purchases. These letters 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. (DOR 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. (DOR Exhibit C). The DOR indicated a specific amount of tax owed.
 3. The statement of account indicated the Taxpayers purchased at least 158 cartons of cigarettes between April, 2006, and December, 2006. With this information the DOR assessed the Taxpayers taxes of \$2,686.00. (DOR Exhibit B).
 4. The Taxpayers do not deny that they purchased tobacco products from Smartsmoker.com. (Testimony Mr. Vanderbyl)
 5. The Taxpayer believes Smartsmokers.com should be responsible to inform consumers they owe Montana taxes on the products they sell. (Testimony Mr. Vanderbyl)

BOARD DISCUSSION and CONCLUSIONS OF LAW

In this instance, 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 \$2,686.00 + \$122.00 (penalties and interest).

The Taxpayer raises two arguments. First, the Taxpayers believe Smartsmoker.com operators were deceptive for not informing consumers of taxes owed. Pursuant to §16-11-112, MCA, however, the taxpayer is required to pay taxes on the purchased cigarettes. Regardless of alleged deceptive practices on the part of a distributor, the consumer is ultimately responsible under law.

The Taxpayers also claim a portion of the cigarettes were purchased by friends and family to save on shipping. The taxpayer failed to provide any information relating to these contentions and therefore the Taxpayers must be deemed the ultimate consumers or users of the cigarettes ordered from Smartsmoker.com. The DOR contends that interest and penalties are due and owing from the purchase date of the

cigarettes. The Taxpayers had no way of knowing how much tax was owing or that they could pay under protest to avoid further penalties and interest.

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. 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.

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(2005). See also *Shultz v. DOR*, State Tax Appeal Board, 2006-13. However, the Taxpayers filed a timely appeal. The Taxpayers 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 Taxpayers comply with the schedule until full payment has been rendered.

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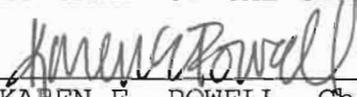
ORDER

IT IS THEREFORE ORDERED that taxes in the amount of \$2,686.00 are properly due and owing from Robert & Michelle Vanderbyl. 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 October, 2007.

BY ORDER OF THE STATE TAX APPEAL BOARD

(S E A L)


KAREN E. POWELL, Chairwoman


DOUGLAS A. KAERCHER, Member

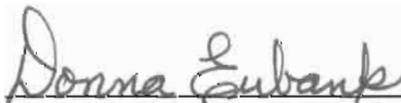
NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA and Section 16-11-150, MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of October, 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:

Robert & Michelle Vanderbyl
135 Pine Hollow Road
Stevensville, Montana 59870

Keith Jones
Tax Counsel
Office of Legal Affairs
Department of Revenue
Mitchell Building
Helena, MT 59620

A handwritten signature in cursive script that reads "Donna Eubank". The signature is written in black ink on a light-colored background.

DONNA EUBANK
Paralegal