

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

JOEL Q. SMITH,)	DOCKET NO.: MT-2007-62
)	
)	
Appellant,)	
)	
-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 Taxpayer was assessed a tax of \$221.00 for purchasing tobacco products without paying the required tax due. He seeks dismissal of the taxes due. A telephonic hearing was held on August 29, 2007, at 10:45 a.m. Joel Smith (Taxpayer) provided testimony and evidence in support of the appeal. The Department of Revenue (DOR), represented by Brenda Gilmer, tax counsel, presented evidence and legal argument in opposition to the appeal.

ISSUES

The Taxpayer asserts that the tobacco tax is unfair taxation and he should not be responsible for tobacco taxes a retailer failed to collect. **The issue is:** Are taxes due and owing on tobacco products purchased through the internet 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, MCA).
9. Federal statute under the "Internet Tax Freedom Act" has placed a moratorium where "No State or political subdivision thereof shall impose any of the following

taxes during the period beginning November 1, 2003, and ending November 1, 2007". (47 USC 151, §1101(a)).

- 1) Taxes on internet access.
- 2) Multiple or discriminatory taxes on electronic commerce

10. Discriminatory tax under 47 USC 151 §1105(2).--The term "discriminatory tax" means--
- A) any tax imposed by a State or political subdivision thereof on electronic commerce that--
- i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means;
 - ii) is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period;
 - iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means;
 - iv) establishes a classification of Internet access service providers or online service providers for purposes of establishing a higher tax rate to be imposed on such tax rate generally applied to providers of similar information services delivered through other means;

FINDINGS OF FACT

1. On or about February 23, 2007, the DOR sent two letters to the Taxpayer regarding untaxed tobacco product purchases. These letters outlined the Montana Tobacco Laws forbidding an individual from selling, using or consuming contraband tobacco products. (Taxpayer Exhibit)
2. The DOR informed the Taxpayer that the information showed that he 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. (DOR Statement of Account). The DOR indicated a specific amount of tax owed.

3. The Taxpayer paid under protest the full amount of the tax due.
4. The Taxpayer does not deny that he purchased tobacco products from Esmokes.com.
5. The Taxpayer believes Esmokes.com misleads consumers and should be responsible for Montana taxes on the products they sell.
6. The Taxpayer contends his purchases were internet sales and are, therefore, exempt from Montana sales tax.
7. The Taxpayer sent a letter to the Board opposing the DOR tax assessment. (Letter to STAB received April 2, 2007). The Board accepted the appeal. The DOR submitted an answer dated May 3, 2007.

BOARD DISCUSSION and CONCLUSIONS OF LAW

The Taxpayer believes Esmokes.com misleads consumers by not informing them of the responsibility to pay Montana tobacco taxes. He believes that the DOR should collect these taxes from Esmokes.com.

Montana voters imposed certain tobacco taxes through the initiative process. The Legislature statutorily granted the DOR the authority and means to collect these taxes.

Pursuant to those statutes, 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).

Statutes require a cigarette distributor to inform the DOR of the amount an individual purchases. *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.

In this instance, Esmokes.com reported the sale of

ORDER

IT IS THEREFORE ORDERED that taxes in the amount of \$221.00 are properly assessed and due from Joel Q. Smith.

Dated this 19th day of September, 2007.

BY ORDER OF THE
STATE TAX APPEAL BOARD

(S E A L)



SUE BARTLETT, Acting Chairwoman



DOUGLAS A. KAERCHER, Member

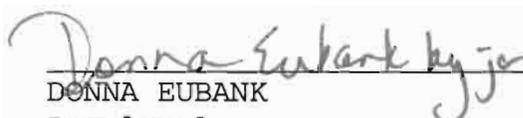
NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA and Section 16-11-150, MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of September, 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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