

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

DIANNE SHULTZ,)
) DOCKET NO.: MT-2006-13
)
 Appellant,)
)
 -vs-)
)
 THE DEPARTMENT OF REVENUE) FACTUAL BACKGROUND,
 OF THE STATE OF MONTANA,) CONCLUSIONS OF LAW,
) ORDER and OPPORTUNITY
 Respondent.) FOR JUDICIAL REVIEW

The above-entitled appeal was heard on April 5, 2007, at 1:30 p.m. in Helena, Montana, in accordance with an order of the State Tax Appeal Board of the State of Montana (Board). The notice of the hearing was duly given as required by law. Dianne Shultz (Appellant) represented herself and 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.

Findings of Fact

1. The State Tax Appeal Board has jurisdiction over this matter pursuant to § 16-11-149, MCA and § 15-2-302, MCA.

2. On or about June 23, 2006, the DOR sent a letter to Ms. Shultz 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.
3. Upon review of the sales report submitted by Esmokes.com, the DOR informed Ms. Shultz that the information showed that she purchased cigarettes directly from out-of-state distributors without paying the requisite tobacco tax. The DOR encouraged Ms. Shultz to comply with Montana law, and pay the tobacco tax without any added penalties or interest. (Section 16-11-112, MCA). The DOR enclosed a Tobacco Product Self-Reporting Form and requested payment with a completed form within 30 days. (Exhibit 13, DOR letter dated June 23, 2006). The DOR indicated a specific amount of tax owed and Ms. Shultz did not respond to the DOR. (Shultz testimony; DOR letter dated September 13, 2006).
4. The DOR sent a subsequent letter dated September 13, 2006, informing Ms. Shultz she owed taxes, interest and penalties on cigarette purchases due to her failure to

report tobacco products and pay the tobacco tax as requested in the previous letter. Included with the second letter was a Statement of Account. This statement indicated that Ms. Shultz purchased at least 369 cartons of cigarettes between June 4, 2003, and March 1, 2005. With this information the DOR assessed Ms. Shultz taxes of \$2,799.00 (exhibits A & B). (Statement of Account, dated September 14, 2006). Ms. Shultz does not deny that she purchased tobacco products from Esmokes.com.

5. The second letter also included an explanation of appeal rights which informed Ms. Shultz that a written objection could be filed with the State Tax Appeal Board within 30 days of receiving the notification.
6. Ms. Shultz sent a letter to the Board opposing the DOR assessment of tax. (Letter to STAB dated October 18, 2006). The Board accepted the appeal. The Department of Revenue submitted an answer dated November 16, 2006. A hearing was subsequently held on April 5, 2007.
7. Ms. Shultz testified and submitted exhibits stating that she wanted the tax assessment dismissed because the DOR lacked jurisdiction to tax or collect taxes from her. Instead the DOR should have collected the

taxes from the distributor, Esmokes.com. Ms. Shultz specifically objected to the assessment on the Nat Sherman brand of cigarettes as they were sold in cubes. Cubes were packaged in packs of 5 instead of the normal 10 pack carton, resulting in an overcharge of taxes. (Exhibit 15 and § 16-11-111, MCA).

8. Ms. Shultz submitted 19 exhibits; many detailed the legislative history of the tobacco tax statutes in Montana. (Exhibits 1-19).
9. The DOR, represented by counsel, outlined the Jenkins Act which 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)). DOR also noted that 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).
10. The DOR argues that the Appellant, as the ultimate consumer, is required to pay the taxes on the cigarettes she purchased through the mail from an internet vendor.

Section 16-11-112, MCA states:

Tax on Ultimate Consumer. All taxes paid pursuant to 16-11-111 shall be 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.

BOARD DISCUSSION

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). 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).

Pursuant to § 16-11-128, MCA, prior to delivering, mailing, or shipping tobacco products into Montana to a person other than a licensed wholesaler or retailer, a

person who accepts purchase orders for tobacco products shall file a statement with the DOR setting forth certain information, including the name and address of the consumer to whom the sale was made, the brand of tobacco sold and the quantity of tobacco sold. *See also*, 15 U.S.C. §376.

In this instance, Esmokes.com reported cigarette sales to Ms. Shultz. The DOR calculated the Montana tax owed on the cigarettes at \$2,799.00.

In this matter, no cigarette taxes have been paid on the cigarettes in question. Pursuant to § 16-11-112, MCA, Ms. Shultz is the admitted ultimate consumer or user of the cigarettes ordered from Esmokes.com. She is therefore, required to pay taxes on the purchased cigarettes. Among the cigarettes purchased were 29 cubes of Nat Sherman brand with five packs per cube. Since 21 cubes of these cigarettes were purchased prior to, and 8 cubes after January 1, 2005, a reduction of \$141.50 is properly made to the DOR assessment, making the total tax owed \$2,657.50.

In the matter at hand, the Department argues that the interest and penalties are due and owing from the purchase date of the cigarettes. There is, however, a problem with its argument and we commend Ms. Shultz for her work in

providing credible testimony and evidence about tobacco taxes and notice of the DOR procedure. There is no form available for payment of those taxes from a cigarette shipping company or the Department of Revenue itself. In fact, in reviewing the Department's own website, there is no method to pay a cigarette tax and no notification that such a tax is due and owing. 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.

There are, however, statutes requiring a cigarette manufacturer to inform the Department of the amount an individual purchased. See §16-11-128, MCA. There is also a method for the Department to collect such taxes. See, e.g. §16-11-142; 149, *et seq.* Thus, the statutes read as a whole contemplate that the Department must, in some method, notify the ultimate user of the tax owing for the purposes of collection. The DOR has in fact done so by sending the consumer a statement of account. (See Exhibit 15). The Statement of Account is the first notice of a tax amount due to the Department, and the statement allows for 30 days for payment or filing an appeal.

Thus, the Board determines that it is proper for the assessment of a late payment 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 § 15-1-216(2005).

In this case, however, Ms. Shultz filed an appeal before the due date on the statement. There is no notice on the statement of account that interest and penalties accrue until full payment of the tax has been rendered, regardless of whether an appeal has been filed.

In this instance, as in other tobacco cases, the taxes imposed upon the individual are significant and will likely be a hardship for the taxpayer to pay such an amount. That is not to say that the tax is not properly due and owing. It does argue, however, that 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. With this in mind, the Board determines that it is proper to suspend the accrual of interest when an appeal has been filed with this Board.

The Board commends the DOR for its work in attempting to collect taxes from individuals. The Board additionally urges leniency to taxpayers while the DOR works to streamline the tobacco tax collection system.

In this case, the Board determines that Ms. Shultz timely filed an appeal with this Board prior to the tax payment due date of October 13, 2006. Therefore, the Board holds that 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 Department to waive subsequent accrual of interest and penalties if a payment schedule is entered into with the taxpayer and the taxpayer complies with the schedule until full payment has been rendered.

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ORDER

The Board hereby orders that taxes in the amount of \$2,657.50 are properly due and owing from Ms. Shultz. It is further ordered that penalties and interest associated with this assessment may not accrue until 30 days after the entry of this judgment. This Board urges the DOR to adopt as lenient a repayment program as possible.

Dated this 1st day of May, 2007.

BY ORDER OF THE
STATE TAX APPEAL BOARD

(S E A L)

KAREN E. POWELL, Chairwoman

SUE BARTLETT, Member

DOUGLAS A. KAERCHER, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), 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 1st day of May, 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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DONNA EUBANK
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