

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:)
CECILIA C. MAPES)
) OAH No. 07-0064-TAX
)
Tax Periods 2002-2004)

DECISION AND ORDER

I. Introduction

This is a tax penalty case. Cecilia C. Mapes is appealing an assessment by the Tax Division of the Alaska Department of Revenue (Division) of \$1,750 in unpaid excise taxes on 42,000 cigarettes that she had shipped to Alaska from 2002 through 2004, plus interest on these unpaid taxes, plus \$437.50 in penalties for failing to file a timely tax returns or pay the tax when she had these cigarettes shipped, plus \$1,750 in penalties for shipping these cigarettes to Alaska without a license.¹

Because the law does not allow these taxes, penalties and interest to be abated to prevent a hardship to a taxpayer, the Administrative Law Judge denies Ms. Mapes' request to order the to abate the taxes, penalties and interest assessed by the Division for her importation of untaxed cigarettes.

II. Facts

The relevant facts in this case are not in dispute. Unless another source is cited, all facts below are drawn from testimony at the recorded hearing.

Ms. Mapes does not dispute that between 2002 and 2004, she ordered 42,000 cigarettes over the internet and had those cigarettes were delivered to her home in Yakutat, Alaska. Ms. Mapes admits that she did not pay any tax to the Division at the time she purchased these cigarettes. Ms. Mapes does not assert that she had an Alaska to license to bring tobacco into the state. Ms. Mapes admits that she did not file any tobacco purchase tax returns or pay the tax due within thirty days of each purchase. Ms. Mapes explained at the hearing that she did not

¹ See Division's Informal Conference Decision at Ex. 8.

understand that any of these things were required when she purchased the cigarettes.

Ms. Mapes explained that she did not realize that these purchases were illegal or subject to additional tax because the internet company advertised in both the Anchorage and Juneau newspapers. Ms. Mapes explained that she had purchased these cigarettes for herself, her husband, who has passed away, and her adult daughter, who lives with her.

Ms. Mapes lives on a very small fixed income and she purchased the cigarettes over the internet to save money. Ms. Mapes carefully budgets her household expenditures, including her expenses for cigarettes for herself and her daughter, Barbara. Ms. Mapes does not receive any of her husband's retirement benefits since his death. Ms. Mapes explained that smoking is one of her few pleasures and that smoking helps to relax her when she is under stress. She has been under a great deal of stress recently because seven close family members have died in the past three years. The Division does not dispute that it will be very difficult for Ms. Mapes to pay the tax, interest and the penalties due.

Regarding its choice to pursue the consumer rather than the selling company, the Division explained that under the federal Jenkins Act the internet tobacco companies are required only to report untaxed sales to the state that the cigarettes are shipped to. The Division has chosen not to attempt to prosecute internet companies that sell untaxed tobacco products in Alaska as long as they comply with the federal act because of the federal preemption issues and because these companies have a history of responding to state prosecutions by simply going out-of-business and reappearing under a new name.

III. Discussion

A. No Provision for Abatement of Tax, Unlicensed Possession Penalties or Interest

There is no legal provision that allows the Division to waive or abate the failure to pay, and failure-to-file penalties or interest charged in a case like that of Ms. Mapes.²

Under AS 43.50.090 and AS 43.50.190, the person who first acquires cigarettes in Alaska must pay a tax on each cigarette. In this case Ms. Mapes first acquired 42,000 cigarettes by purchasing them over the internet from an out-of-state supplier, who shipped them directly to her. The Division assessed the cigarette tax for each of the untaxed cigarettes that Ms. Mapes

² Alaska Statute 43.05.220(a).

purchased.

Under AS 43.50.100(d) a person who has untaxed cigarettes shipped into Alaska without first obtaining a license allowing them to do so must pay a penalty of 100% of the tax due, that is, an additional charge equal to the tax on each cigarette. No alternatives to assessing the full penalty appear in the statute. The Division assessed this penalty for each of the untaxed cigarettes that Ms. Mapes purchased.

Under AS 43.05.225 interest, compounded quarterly, is charged on any delinquent state tax due. Again, the statute simply states the requirement for interest, giving no alternatives.

The “reasonable cause” defense to the imposition the Failure-To-Pay penalty, which will be discussed below, does not apply to the interest on delinquent taxes or on the penalties which the Division is required to assess for unlicensed purchase of untaxed cigarettes. There is no provision that allows abatement based on the financial hardship that having to pay the penalty or interest will cause the taxpayer.³

B. Failure-To-Pay & Failure-To-File Penalties

There is an additional penalty of five percent of the total tax due for failing to timely file the required tax returns and pay the required tax. The Division focuses on Ms. Mapes’ failure to file timely returns in its brief supporting its imposition of this penalty.⁴ Under AS 43.50.630, the reporting statute cited by the Division, only those who have licenses to import tobacco appear to be required to file the returns. Under 15 AAC 50.190, however, anyone who imports cigarettes must file the required returns. Under AS 43.50.090(a) those who do not have a license are explicitly made subject to the tax and are also required to pay the tax at the end of the month following the month that the cigarettes were acquired. Under AS 43.05.220(a), this penalty of five percent of the total tax due is assessed if there is a failure to pay a tax when due. This means that Ms. Mapes is subject to the Failure-to-Pay penalty in AS 43.05.220(a), even if she were not required to file the returns that licensees must file in order to comply with AS 43.50.630. She can only be charged for the Failure-to-Pay penalties if she is liable for both the Failure-to-Pay

³ Alaska Statute 43.50.100 & Alaska Statute 43.05.220(a).

⁴ It appears that what may have happened in this case is that the Division determined that Ms. Mapes was required to both timely file returns and pay the tax due, and was therefore subject to both the failure to file and failure to pay penalties under Alaska Statute 43.05.220(a). The Division then applied 15 AAC 05.210(c), which states that when both the failure to file and failure to pay penalties under Alaska Statute 43.05.220(a) apply to the same period of time, only the failure to file penalty will be imposed.

and the Failure-to-File for the same period.⁵

The Failure-to-File penalty in AS 43.05.220(a) must be imposed and there is no reasonable cause defense to its imposition. This Failure-to-Pay penalty in AS 43.05.220(a) must be imposed unless there is reasonable cause for the failure to timely pay the tax due. There is no provision that allows abatement of this penalty based on the financial impact of the penalty on the taxpayer. This five percent penalty is added after each thirty days passes without the tax being paid. Fortunately for Ms. Mapes, this penalty cannot exceed 25% of the total tax due.

C. Ignorance of the Tax Was Not Reasonable Cause

The definition of “reasonable cause” is found in Alaska Regulation 15 AAC 05.200, which provides:

Reasonable cause for delay

(a) The civil penalty under AS 43.05.220 will not be imposed if the taxpayer shows reasonable cause for delay in filing the return or paying the tax.

(b) A taxpayer who wishes to avoid the penalty established by AS 43.05.220 for failure to file a tax return or pay a tax must make an affirmative showing of all facts alleged as a reasonable cause for his or her failure to file the return or pay the tax on time in a written statement containing a declaration that it is made under penalty of perjury. The statement should be filed with the return or filed with the Department of Revenue as soon as possible thereafter. In determining whether the delinquency was due to reasonable cause and not to willful neglect, the department will apply the administrative and judicial interpretations of Internal Revenue Code § 6651 and the Treasury Regulation § 301.6651-1(c).

(c) Circumstances which may constitute reasonable cause under AS 43.05.220 include, but are not limited to, the following:

(1) war, riot, rebellion, act of God or other disaster which rendered it impossible to make the filing or payment or which made delay unavoidable in making the filing or payment; or

(2) acts or omissions by a third party which were beyond the control of the person making the filing or payment and which made delay unavoidable in making the filing or payment; or

(3) the person took in good faith all steps and precautions reasonably necessary to ensure the timeliness of the filing or payment.

Ms. Mapes’ failure to realize that she was engaged in activity that required her to pay taxes was not reasonable cause for late payments.⁶ Ms. Mapes should have inquired with the

⁵ 15 AAC 05.210(c).

⁶ See the examples of reasonable cause found in Alaska Regulation 15 AAC 05.200(c).

Alaska Department of Revenue about the consequences of purchasing untaxed cigarettes from out-of-state; this was a reasonable step that she should have taken to ensure timely filing of required returns and payment of Alaska taxes. Taking this step would have avoided the late payments.

Based on the undisputed facts of this case, Ms. Mapes' late payments were not due to reasonable cause. The Division could have assessed a Failure-to-Pay penalty if there had not already been a Failure-to-File penalty.

D. Inability to Pay Penalty is Not Reasonable Cause

The inability to timely pay a tax penalty without incurring financial hardship is not reasonable cause for failing to timely pay a tax. A taxpayer can avoid the penalty by paying the tax on time. The purpose of the penalty is to provide a negative financial consequence as an incentive to timely payment. The inability to pay the tax itself, when it was originally due, is may qualify a taxpayer for a "reasonable cause" abatement of the Failure-to-Pay penalty. If a taxpayer cannot pay the tax when it is due or could not pay the tax on time without suffering an undue hardship, in the sense of having to sell off assets at a substantial loss, the penalty could be abated based on the reasonable cause defense.⁷ In this case, the failure to pay was caused by ignorance of the duty to pay the tax, not the inability to pay at the time that the tax was originally due, that is, when the cigarettes were purchased. Ms. Mapes' ignorance of the tax obligation caused her failure to pay on time and caused the hardship that will result from having to pay the tax, penalties and interest that have accumulated over time. Ms. Mapes could have paid the taxes on time without hardship. If she had educated herself about the cigarette tax, Ms. Mapes would have been able to pay tax within 30 days after each purchase without financial hardship, or she could have foregone the purchases.

IV. Conclusion

Based on the undisputed facts in the record, the taxes, interest and penalties assessed Ms. Mapes by the Division must be upheld.

⁷ See 26 CFR 1.6161-1(b). "The term `undue hardship' means more than an inconvenience to the taxpayer. It must appear that substantial financial loss, for example, loss due to the sale of property at a sacrifice price, will result to the taxpayer for making payment on the due date of the amount with respect to which the extension is desired. If a market exists, the sale of property at the current market price is not ordinarily considered as resulting in an undue hardship."

V. Order

The Division's Informal Conference Decision in this case, titled "Re: Appeal to Informal Conference, Cigarette Tax, Penalty & Interest," dated February 2, 2007, is AFFIRMED.

NOTICE

1. This is the hearing decision of the Administrative Law Judge under Alaska Statute 43.05.465(a). Unless reconsideration is ordered, this decision will become the final administrative decision 60 days from the date of service of this decision.⁸
2. A party may request reconsideration in accordance with Alaska Statute 43.05.465(b) within 30 days of the date of service of this decision.
3. When the decision becomes final, the decision and the record in this appeal become public records unless the Administrative Law Judge has issued a protective order requiring that specified parts of the record be kept confidential.⁹
4. A party may file a motion for a protective order, showing good cause why specific information in the record should remain confidential, within 30 days of the date of service of this decision.¹⁰
5. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Statute 43.05.480 within 30 days of the date of this decision becomes final.¹¹

DATED this 2 day of ~~June~~ ^{July} 2007.

By: _____

Mark T. Handley

Administrative Law Judge

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

Cecilia Mapes

Chris Poag, AAG

Signature _____

Date

7/2/07

⁸ Alaska Statute 43.05.465(f)(1).

⁹ Alaska Statute 43.05.470.

¹⁰ Alaska Statute 43.05.470(b).

¹¹ Alaska Statute 43.05.465 sets out the timelines for when this decision will become final.