

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS**

In the Matter of:

ANTHONY P. MASELLA

OAH No. 07-0135-TAX

Tax Period 2005

**DECISION AND ORDER**

**I. Introduction**

Anthony Masella is appealing an informal conference decision that resulted in an assessment by the Tax Division of the Alaska Department of Revenue (Division) of \$16,049.11 in unpaid excise taxes, interest and penalties on 71,200 cigarettes that he had shipped to Alaska in 2005.<sup>1</sup> Christopher Poag, Assistant Attorney General, represented the Taxation Division of the Alaska Department of Revenue (Division). Mr. Masella represented himself.

Because the law does not allow these taxes, penalties and interest to be abated, based on the facts of this case, the Administrative Law Judge denies Mr. Masella's appeal.

**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.

Mr. Masella does not dispute that in 2005 he ordered 71,200 cigarettes over the Internet. Mr. Masella had those cigarettes delivered to his home in Fairbanks, Alaska. Mr. Masella admits that he did not pay any tax to the Division at the time he purchased these cigarettes. Mr. Masella does not assert that he had an Alaska license to bring tobacco into the state. Mr. Masella admits that he did not file any tobacco purchase tax returns or pay the tax due.

Mr. Masella explained at the hearing that he did not understand that any of these things were required when he purchased the cigarettes. Mr. Masella explained that he did not realize that these purchases were illegal or subject to additional tax. Mr. Masella explained that he had purchased these cigarettes for himself.

Mr. Masella lives on a low income and he purchased the cigarettes over the internet to save money. Mr. Masella has high medical and medication expenses.

The Division assesses Mr. Masella a total of \$16,049.11 due as of November 2, 2006.<sup>2</sup> The Division does not dispute that it will be very difficult for Mr. Masella to pay the tax, interest and the penalties due.

### **III. Discussion**

#### ***A. No Provision to Waive Tax***

There is no legal provision that allows the Division to waive the tax charged for the cigarettes that Mr. Masella imported.<sup>3</sup>

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 Mr. Masella first acquired 71,200 cigarettes by purchasing them over the internet from an out-of-state supplier, who shipped them directly to him. The Division assessed the cigarette tax for each of the untaxed cigarettes that Mr. Masella purchased.<sup>4</sup>

#### ***B. No Provision to Abate Interest***

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" defenses to the imposition the Failure-To-Pay penalty, which will be discussed below, does not apply to the interest on delinquent taxes 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 interest will cause the taxpayer.<sup>5</sup>

#### ***C. Unlicensed Importation Penalty Must be Assessed***

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

<sup>1</sup> See Division's Informal Conference Decision at agency record at pages 1-3.

<sup>2</sup> See Division's letter to Mr. Masella dated November 2, 2006, at Agency Record pages 7-8, for a table that shows the number of cigarettes that Mr. Masella imported in different months in 2005, and the taxes, penalties and interest that the Division assessed for these cigarettes.

<sup>3</sup> Alaska Statute 43.05.220(a).

<sup>4</sup> See Agency Record pages 7-19. The Division assessed a tax of \$0.08 or \$0.0925 per cigarette.

<sup>5</sup> Alaska Statute 43.50.100 & Alaska Statute 43.05.220(a).

penalty appear in the statute. The Division assessed this penalty for each of the untaxed cigarettes that Mr. Masella purchased.<sup>6</sup>

***D. Failure-To-Pay and 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. Under 15 A A C 50.190, anyone who imports cigarettes must file the required returns. Mr. Masella was required to both timely file returns and pay the tax due.

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.

Mr. Masella was, therefore, subject to both the failure to file and failure to pay penalties under Alaska Statute 43.05.220(a). However, 15 A A C 05.210(c) states that when both the failure to file and the 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. This five percent penalty is added after each thirty days passes without the tax being paid. This penalty cannot exceed 25% of the total tax due.

***E. Ignorance of the Tax Was Not Reasonable Cause***

The failure to file and failure to pay penalties under Alaska Statute 43.05.220(a), which are reduced to just the failure to file penalty in this case, must be added unless there was reasonable cause for the failure to pay and file. The definition of "reasonable cause" is found in Alaska Regulation 15 A A C 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 his 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

<sup>6</sup> See Agency Record pages 7-19. The Division assessed a "Failure to have a License Penalty" that was equal to the cigarette taxes due.

<sup>8</sup> See the examples of reasonable cause found in Alaska Regulation 15 A A C 05.200(c).

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.

Mr. Masella's failure to realize that he was engaged in activity that required him to pay taxes was not reasonable cause for late payments.<sup>8</sup> The regulation quoted above provides examples that indicate that "reasonable cause" requires causes that are outside the taxpayer's control. It should come as no surprise to any Alaskan, especially one who consumes these products, that the sale and importation of tobacco products, like the sale and importation of alcohol, are heavily regulated, and taxed, by the state of Alaska. Mr. Masella should have inquired with the Alaska Department of Revenue about the consequences of purchasing untaxed cigarettes from out-of-state, or otherwise checked on the legal restrictions on importing tobacco products to Alaska; this was a reasonable step that he should have taken to ensure timely filing of required returns and payment of Alaska taxes. Taking this step would have avoided his failure to file and to pay the tax.<sup>9</sup>

Based on the facts of this case, Mr. Masella's failure to file returns and pay the tax was not due to reasonable cause.

#### ***F. 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 simply paying the tax on time. The purpose of the penalty is to provide a negative financial consequence as an incentive for taxpayers to timely file returns and pay the tax due.

<sup>9</sup> There is some question about whether ignorance of the tax prevented Mr. Masella from timely paying the tax, as there is evidence that he continued to order cigarettes without paying the tax after he was directly notified of the tax implications by the Division.

The inability to pay the tax itself, when it was originally due, 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.<sup>10</sup> Mr. Masella's failure to pay was, at best, 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.

Mr. Masella's ignorance of the tax obligation may have caused his 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, but Mr. Masella could have paid the taxes on time without hardship. If he had educated himself about the cigarette tax, Mr. Masella would have been able to obtain a license and pay the taxes within 30 days after each purchase without financial hardship, or he could have foregone the purchases.

#### **IV. Conclusion**

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

#### **V. Order**

The Division's Informal Conference Decision in this case, titled "Re: Appeal to Informal Conference, Cigarette Tax, Penalty & Interest," dated February 14, 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.<sup>13</sup>
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

<sup>10</sup> 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."

<sup>13</sup> Alaska Statute 43.05.465(f)(1).

specified parts of the record be kept confidential.

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.<sup>15</sup>
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.<sup>16</sup>

DATED this 18th day of August 2008.

By: Mark T. Handley

Administrative Law Judge

The undersigned certifies that this is a true and exact copy of the original and that on this date an exact copy of the foregoing was provided to the following individuals:

Case Parties  
8/18/08

<sup>14</sup> Alaska Statute 43.05.470.

<sup>15</sup> Alaska Statute 43.05.470(b).

<sup>16</sup> Alaska Statute 43.05.465 sets out the timelines for when this decision will become final.