

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:

ADINA BAISDEN

OAH No. 07-0189-TAX

Tax Period 2002-2004

DECISION AND ORDER

I. Introduction

Adina Baisden is appealing the Informal Conference Decision in this case, dated February 22, 2007, 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 78,800 cigarettes that she had shipped to Alaska from 2002 through 2004.¹ Christopher Poag, Assistant Attorney General, represented the Taxation Division of the Alaska Department of Revenue (Division). Ms. Baisden represented herself.

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 Ms. Baisden'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.

Ms. Baisden is not sure that the Division is correct that from 2002 through 2004 she ordered 78,800 cigarettes over the Internet. Ms. Baisden had cigarettes delivered to her home in Talkeetna, Alaska. Ms. Baisden admits that she did not pay any tax to the Division at the time she purchased these cigarettes. Ms. Baisden does not assert that she had an Alaska license to bring tobacco into the state. Ms. Baisden admits that she did not file any tobacco purchase tax returns or pay the tax due.

The Division assesses Ms. Baisden a total of \$10,646.75 due as of January 27, 2007.²

Ms. Baisden explained at the hearing, and in her letter, dated May 14, 2007, that she does not think all of the 78,800 cigarettes, which the documents provided by the Division indicate that she imported from 2002 through 2004, "were hers." In her May 14, 2007 letter, Ms. Baisden wrote: "What they say is an awful lot of cigarettes." Ms. Baisden admits that she has not been able to obtain any documentation that would indicate that she imported fewer cigarettes than the Division's records indicate. Ms. Baisden wrote that she had attempted to contact the company she purchased the cigarettes from, but discovered that the company was out of business. Based on the evidence in the record, I conclude that it is more likely than not that Ms. Baisden imported 78,800 cigarettes into Alaska, by purchasing them over the Internet from 2002 through 2004, without a license to import cigarettes to Alaska, without paying tax on those cigarettes, and without filing the required returns.

Ms. Baisden explained that she did not realize that these purchases were illegal or subject to additional tax and that she would not have purchased them if she had known.

III. Discussion

Ms. Baisden argued that it is not legal for the Division to charge to charge people extra taxes on cigarettes just because they do not buy them in Alaska. Ms. Baisden questions whether the number of cigarettes that the Division determined that she purchased was correct. Ms. Baisden argued that it was unfair to charge penalties and interest when she did not know that it was illegal to import untaxed cigarettes into Alaska.

A. Division Determined the Correct Number of Cigarettes

As a party appealing the Division's tax assessment, Ms. Baisden had the burden to show by a preponderance of the evidence that the factual determinations on which the Division based its assessment were incorrect.³ The only one of the Division's factual determinations in dispute in this case is the number of cigarettes that Division determined that she had purchased 78,800. Ms. Baisden does not so much directly dispute this number as share her suspicion that it seems as though it may be too high. The Division determined this number from reports filed with the

¹ See Division's Informal Conference Decision at agency record at pages 1 & 2.

² AS 43.05.435.

³ See Division's letter to Ms. Baisden dated November 29, 2006, which incorrectly addresses her as "Aaron Finch" at Agency Record pages 7-10, for tables that show the number of cigarettes that Ms. Baisden imported in different months between 2002 and 2004, and the taxes, penalties and interest that the Division assessed for these cigarettes.

Division by the company that sold Ms. Baisden the cigarettes.⁴ Ms. Baisden simply failed to meet her burden of proof to show that the Division's determination about the number of cigarettes she imported, which was based on these reports, was incorrect.

B. Division Must Tax These Cigarettes

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. Baisden first acquired 78,800 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. Baisden purchased.⁵ There is no legal provision that allows the Division to waive the tax charged for the cigarettes that Ms. Baisden imported.⁶

C. Division Must Charge 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.⁷

D. 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 penalty appear in the statute. The Division assessed this penalty for each of the untaxed cigarettes that Ms. Baisden purchased.⁸

E. 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

⁴ See Agency Record pages 44-46.

⁵ See Agency Record pages 7-43. The Division assessed a tax of \$0.05 per cigarette.

⁶ Alaska Statute 43.05.220(a).

⁷ Alaska Statute 43.50.100 & Alaska Statute 43.05.220(a).

⁸ See Agency Record pages 7-43. The Division assessed a "Failure to have a License Penalty" that was equal to the cigarette taxes due.

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. Ms. Baisden 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.

Ms. Baisden 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.¹⁰

F. 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 her 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,

¹⁰ See Tables at Agency Record pages 7-10, that show the number of cigarettes that Ms. Baisden imported in different months between 2002 and 2004, as well as the taxes, penalties and interest that the Division assessed, including the amounts assessed for failure to file penalties.

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. Baisden's failure to realize that she was engaged in activity that required her to pay taxes was not reasonable cause for late payments. 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. Ms. Baisden 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 she should have taken to ensure timely filing of required returns and payment of Alaska taxes. Taking this step would have avoided her failure to file and to pay the tax.¹¹

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

IV. Conclusion

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

V. Order

The Division's Informal Conference Decision in this case, dated February 22, 2007, is

AFFIRMED.

DATED this ____ day of August 2008.

By: Mark T. Handley
Administrative Law Judge

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.¹²
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.¹³
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.¹⁴
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.¹⁵

The undersigned certifies that this is a true and correct 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

¹² Alaska Statute 43.05.465(0(1)).

¹³ Alaska Statute 43.05.470.

¹⁴ Alaska Statute 43.05.470(b).

¹⁵ Alaska Statute 43.05.465 sets out the timelines for when this decision will become final.