

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

IN THE MATTER OF

TEZLYN CLARK

Case No. OAH 07-0242-TAX

**DECISION**

**I. Introduction**

The Tax Division of the Department of Revenue ("the division") assessed Tezlyn Clark cigarette tax penalties of \$880.00. Ms. Clark requested an informal conference, and the division affirmed its decision. Ms. Clark then requested a formal hearing. Administrative Law Judge Dale Whitney heard the appeal on June 14, 2007. Ms. Clark appeared by telephone. Assistant Attorney General Chris Poag represented the division by telephone. The administrative law judge affirms the division's decision.

**II. Facts**

The facts in this case are not in dispute. Ms. Clark ordered and received 10,800 tax-free cigarettes over the internet during the months of March, May, June, and August of 2005<sup>1</sup> for delivery to her home in Anchorage.<sup>2</sup> Ms. Clark did not have a license to possess untaxed cigarettes,<sup>3</sup> nor did she pay the taxes on these cigarettes by purchasing tax stamps from the division and affixing them to the cigarette packs, or by submitting payment for the cigarette tax to the division by the end of the month following the month in which she imported them.<sup>4</sup> Finally, Ms. Clark did not timely file tax returns with the state for these cigarettes.<sup>5</sup>

The division typically assesses penalties when people import cigarettes and do not pay tax, but as a matter of practice it recognizes that some people might honestly not know they are required to pay tax when they import cigarettes purchased over the internet. For that reason, the division offers people a one-time chance to be excused from paying penalties on undeclared imported cigarettes, so long as the person agrees to pay the taxes owed. In some cases the division will offer payment plans if the amount of tax is large.

In August of 2005, the division discovered that Ms. Clark had ordered and received 2,000 untaxed cigarettes during the month of April. On August 15, 2005, the State sent Ms. Clark a letter notifying her that the State had received information from an out-of-state unlicensed cigarette

<sup>1</sup> See State's Exhibits 17 and 18

<sup>2</sup> *Id.*

<sup>3</sup> See June 14, 2007 hearing.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

vendor<sup>6</sup> that she had received untaxed cigarettes in Alaska.<sup>7</sup> This letter advised Ms. Clark that she was responsible for paying taxes on all cigarettes received in Alaska from an out-of-state unlicensed vendor.<sup>8</sup> Enclosed with this letter was a blank tax return<sup>9</sup> and a one-page spreadsheet referencing an order of 2,000 cigarettes for the time period 4/1/2005-4/30/2005.<sup>10</sup>

The division's August 15, 2005, letter requested that Ms. Clark "file the appropriate tax return and pay the excise tax for each month in which you purchased untaxed cigarettes since Jan. 1, 2002."<sup>11</sup> This letter went on to warn Ms. Clark that failure "to file the required returns and pay the tax within 45 days of the date of this letter (September 29, 2005)," would result in the assessment of taxes, interest, and penalties of 125% of the tax due for: 1) possession of cigarettes without a license; and 2) failing to file the required monthly tax returns.<sup>12</sup>

Ms. Clark responded to the division's August 15, 2005, letter by filling out the enclosed tax return and mailing it to the division on September 29, 2005. However, Ms. Clark's tax return only reported having acquired the 2,000 cigarettes that the division had become aware of and sent the notice for. Ms. Clark remitted payment of \$160.00 to cover those 2,000 cigarettes,<sup>13</sup> but she did not mention that at the time she filled out this tax return Ms. Clark had received an additional 8,800 untaxed cigarettes in three separate orders made during the months of May, June, and August of 2005.<sup>14</sup> Ms. Clark did not contact the division to ask for additional tax return forms to cover taxes owing for those additional orders, nor did she ask whether she was required to report these additional untaxed cigarettes.<sup>15</sup>

It was not until well after September 29, 2005 that the division discovered that Ms. Clark had received these additional 8,800 tax-free cigarettes. Having waived penalties once for the first 2000 cigarettes and explained that imported cigarettes must be declared, the division declined to waive penalties for the second set of undeclared purchases it discovered. Therefore, on July 24,

<sup>6</sup> Such information is called a "Jenkins Report" and is required by 15 U.S.C. § 375.

<sup>7</sup> Exhibit 15-16.

<sup>8</sup> *Id.*

<sup>9</sup> Exhibit 13. The division did type onto this tax return Ms. Clark's Name, SSN#, and wrote in the period ending "2005-04".

<sup>10</sup> Exhibit 17.

<sup>11</sup> Exhibit 16.

<sup>12</sup> *Id.*

<sup>13</sup> Exhibit 14.

<sup>14</sup> Exhibit 18.

<sup>15</sup> June 14, 2007, hearing.

2006, the division assessed Ms. Clark taxes, interest, and penalties for the cigarettes imported in the months of May, June, and August.<sup>16</sup> The total assessment is as follows:

Order date	May, 2005	June, 2005	August, 2005
Number of Cigarettes	2200	2200	4400
Tax at \$0.08 per cigarette	\$176.00	\$176.00	\$352.00
Penalty - failure to have a license	\$176.00	\$176.00	\$352.00
Penalty: Failure to File	\$44.00	\$44.00	\$88.00
Interest to 9/22/06	\$25.25	\$23.47	\$39.73
<b>Total</b>	<b>\$421.25</b>	<b>\$419.47</b>	<b>\$831.73</b>
<b>Total Assessment</b>			<b>\$1,672.45</b>

Ms. Clark has now paid the tax due on all of her cigarette purchases plus the interest. This case concerns the remaining \$880.00 in unpaid penalties for failure to file and failure to have a license.

### III. Discussion

While she does not contest her liability for the tax and interest assessed, Ms. Clark argues that she should not be required to pay any penalties. She states that when she received the division's August 15, 2005, letter, she asked what she owed and then paid the full amount. Ms. Clark writes,

In the paragraph of the August 2005 letter that discussed the penalties, it does not state if you do not list all of the cigarettes you purchased that you will be penalized, it just states that "If you do not file the required return and pay the tax within 45 days of the date of this letter" then the penalties will be assessed. Further it states in the same paragraph in bold and underlined, "**we will not assess these penalties if you voluntarily comply and pay the tax within the 45 days.**" I did file the return and pay the tax within the 45 days, thus I should not be assessed any penalties.

The "State of Alaska, Cigarette Tax Return" does not state on the section entitled "Schedule of Unstamped Cigarettes imported into Alaska," that one must list all the cigarettes they have bought in that section, nor does it state at the bottom when you sign that you are agreeing that you have read the letter enclosed (emphases in original).

Alaska Statutes 43.50.090 and 43.50.190 levy an excise tax on each cigarette imported or acquired in this state. This excise tax is levied upon the person who first acquires the cigarette in this state<sup>17</sup> and is paid through the use of a tax stamp which is purchased from the state and affixed to the bottom of each package of cigarettes immediately upon the opening of the shipping container

<sup>16</sup> Exhibits 4-9.

<sup>17</sup> AS 43.50.090(b) provides that "It is the intent and purpose of this section to provide for the collection of this excise tax from the person who first acquires the cigarettes in this state."

containing packages of cigarettes.<sup>18</sup> The taxpayer must then file monthly tax returns with the State reporting the quantity of taxable cigarettes imported or acquired in the preceding calendar month.<sup>19</sup>

Prior to purchasing tax stamps and acquiring untaxed cigarettes, a person must apply for and receive a license from the state.<sup>20</sup> There is a special "buyer" license for cigarette consumers who wish to import untaxed cigarettes from a non-licensee which have not been affixed with the required tax stamp.<sup>21</sup> These "buyer" licensees must purchase and affix the required tax stamps and file tax returns, just like all other licensees, and, their failure to do so subjects them to the same penalties and potential criminal charges.<sup>22</sup> If a person buys untaxed cigarettes through the internet without a buyer's license, that person must still declare and pay tax on the cigarettes.<sup>23</sup>

Failing to timely pay these taxes or timely file the required tax return requires the imposition of a five percent penalty for each 30-day period<sup>24</sup> during which the taxpayer fails to timely pay or file the required tax return.<sup>25</sup> However, because the tax return and payment are due at the same time for non-licensees, only the failure to file penalty is assessed.<sup>26</sup>

This failure to file penalty is mandatory and must be imposed by the State.<sup>27</sup> However, the State has authority to abate this penalty if the taxpayer shows that their failure to timely file the return was "due to a reasonable cause and not willful neglect."<sup>28</sup>

Possession of unstamped cigarettes without a license not only subjects the possessor to liability for the required taxes on the unstamped cigarettes, it also subjects the possessor to a penalty that equals 100% of the taxes owing on these unstamped cigarettes.<sup>29</sup> This 100% unlicensed possession penalty is also mandatory but does not provide a "reasonable cause" exception allowing for its abatement.

<sup>18</sup> AS 43.50.090(a) requires the cigarette excise tax to "be paid through the use of stamps as provided in AS 43.50.500-43.50.700." AS 43.50.520(a) requires the licensee to affix the stamp "immediately upon the opening of the shipping container containing the package and before, sale, distribution, or consumption in this state."

<sup>19</sup> AS 43.50.630.

<sup>20</sup> AS 43.50.100 and AS 43.50.530.

<sup>21</sup> AS 43.50.010 and AS 43.50.170(1).

<sup>22</sup> Possession of unstamped cigarettes is prohibited under AS 43.50.520(b)(2) and (3) and AS 43.50.580, and subjects the person to potential criminal liability. AS 43.50.640-43.50.650.

<sup>23</sup> 15 A A C 50.120 requires a tax return for non-licensee cigarette purchases subject to state excise taxes.

<sup>24</sup> Maximum penalty that can be imposed is 25 percent. AS 43.05.220(a).

<sup>25</sup> AS 43.05.220(a).

<sup>26</sup> 15 A A C 05.210(c) requires the state to assess only the failure to file penalties, even though the failure to pay penalties could also be assessed.

<sup>27</sup> AS 43.05.220(a) provides that this penalty "shall" be imposed for each 30-day period the payment or return is late.

<sup>28</sup> AS 43.05.220(a). 15 A A C 05.200 provides guidance on what circumstances constitute "reasonable cause" for the taxpayer's delay. This regulation also incorporates by reference administrative and judicial rulings on the federal tax code's "reasonable cause" exception. 15 A A C 05.200(b).

<sup>29</sup> AS 43.50.100(d).

The law of this state is that a person importing cigarettes must declare them and pay tax on them. A person failing to do so must pay a penalty. Ms. Clark argues that she didn't know about the taxes and penalties. After the division informed her of the law, she asserts that she didn't know that the law applied to all of the cigarettes she imported, not just the ones the division had discovered. This argument is without merit. The division could have assessed penalties for the first violation of the law. The fact that it declined to do so and gave Ms. Clark a break does not mean that Ms. Clark is entitled to a break every time she violates the law. Further, it is Ms. Clark's duty to declare and pay tax on cigarettes she imports when she imports them, not whenever the division happens to discover that she has imported contraband.

Ms. Clark's argument that the division's August 15, 2005, letter did not adequately inform her of her duty to pay tax on contraband the division was unaware of in addition to the contraband that it had discovered fails for two reasons. First, the letter did say that "under state law, the Alaska cigarette tax must be paid on all cigarettes brought or shipped into the state. This includes cigarettes imported for personal consumption." This advice is adequate to advise the reader that all cigarettes are subject to tax, not just those discovered by the division. Second, ignorance of the law is no excuse, and it is not the division's burden to advise every person how to comply with the law in every case. Had the division not sent the August 15 letter at all, Ms. Clark would still be liable for the same taxes and penalties. Ms. Clark's argument that the declaration form the division provides does not "state at the bottom when you sign that you are agreeing that you have read the letter enclosed" fails for the same reason. The division did not have to enclose the letter at all. If a person declines to read a courtesy letter explaining the law, she does so at her peril.

#### **IV. Conclusion**

Ms. Clark is liable for all taxes, interest and penalties that the division has assessed. The division's assessment should be affirmed.

#### **V. Order**

Upon adoption of this decision as the final administrative determination in this matter, the Tax Division's assessment in this case for taxes, interest and penalties shall be **AFFIRMED**.

DATED this 24th day of October, 2007.

By: DALE WHITNEY  
Administrative Law Judge

## NOTICE

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>30</sup>

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.

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.<sup>31</sup> 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>32</sup>

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>33</sup>

DATED this 24th day of October, 2007.

By: Dale Whitney  
Administrative Law Judge

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

Case Parties  
10/24/07

<sup>30</sup> AS 43.05.465(0(1)).

<sup>31</sup> AS 43.05.470.

<sup>32</sup> AS 43.05.470(b).

<sup>33</sup> Alaska Statute 43.05.465 sets out the timelines for when this decision will become final.