

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of)
)
 MICHAEL E. PELCIN)
)
) OAH No. 10-0069-TAX
)
 _____)

DECISION AND ORDER

I. Introduction

Michael E. Pelcin is appealing an informal conference decision that upheld an assessment by the Alaska Department of Revenue’s Tax Division (Division) of \$2,475 in unpaid taxes, \$519.17 in interest, \$2,475 in unlicensed importation penalties, and \$618.75 in failure-to-file penalties, yielding a total of \$6,087.92 for 22,000 cigarettes that he had shipped to Alaska between August of 2007 and August of 2008 from SmartSmoker.com.¹

On March 31, 2010, Administrative Law Judge Mark T. Handley of the Office of Administrative Hearings (OAH) held a hearing in this appeal. Michele Kane, Assistant Attorney General, represented the Alaska Department of Revenue (DOR). Michael E. Pelcin represented himself. Martin Bassett, with the Division, also participated. The record in this appeal closed on May 14, 2010.

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. Pelcin's 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. Pelcin does not dispute that in 2007 and 2008 he ordered 22,000 cigarettes over the Internet. Mr. Pelcin had those cigarettes delivered to his home in Wasilla, Alaska. Mr. Pelcin admits that he did not pay any tax to the Division at the time he purchased these cigarettes. Mr. Pelcin does not assert that he had an Alaska license to bring tobacco into the state. Mr. Pelcin admits that he did not file any tobacco purchase tax returns or pay the tax due.

Mr. Pelcin explained at the hearing that he understood that he was required to pay taxes on these cigarettes because the Division had assessed taxes against him before for Internet

tobacco purchases. Mr. Pelcin testified that before he made the cigarette purchases at issue in this appeal, he called the Division for assistance. Mr. Pelcin testified that he called the Division because he was trying to figure out the tax paperwork that he needed to file to purchase cigarettes over the Internet, but that the Division employee he spoke with was very rude to him.

Mr. Pelcin testified that the Division employee told him that if he was too stupid to figure out the paperwork he should quit smoking. In his appeal, Mr. Pelcin complained that the Division employee he spoke with lectured him on quitting smoking. Mr. Pelcin explained that he was very offended and frustrated by this interaction. Mr. Pelcin said he decided just to go ahead and purchase cigarettes over the Internet without filing anything with the Division. Mr. Pelcin explained that he thought this approach would work out, and that the Division would simply send him a bill for the tax due as they had in the past. Mr. Pelcin stated that he does not think he should have to pay all the penalties, given these circumstances.

The Division did send Mr. Pelcin an offer to simply pay the tax and interest for his purchases, a total at that time of \$2,975.78, in a letter dated September 1, 2009. That letter informed him that this offer to avoid the penalties for illegally importing tobacco and failing to file returns or pay taxes was conditioned on payment in full by October 16, 2009. The letter provided information about how to legally import tobacco products and a contact number for the Division.²

At the hearing, Mr. Pelcin testified that he had never received this letter, and explained problems that he had receiving mail in the past due to frequent vandalism of his mailbox. After the hearing, however, the Division produced documentation showing that the letter had been delivered to Mr. Pelcin's wife, Kelly Pelcin, who signed for it on September 5, 2009.

III. Discussion

A. *Alaska Cigarette Tax*

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. Pelcin first acquired 22,000 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. Pelcin

¹ See Division's Informal Conference Decision at Agency Record pages 1-8.

² This letter is found in the Agency Record at page 35.

purchased.³ There is no legal provision that allows the Division to waive the tax charged for the cigarettes that Mr. Pelcin imported.⁴

B. 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” defense to the imposition of 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.⁵

C. Unlicensed Importation Penalty

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 Mr. Pelcin purchased.⁶

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 AAC 50.190, anyone who imports cigarettes must file the required returns. Mr. Pelcin 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. Pelcin was, therefore, subject to both the failure to file and failure to pay penalties under Alaska Statute 43.05.220(a). However, 15 AAC 05.210(c) states that when both the

³ See Agency Record pages 6-7. The Division assessed a tax of \$0.1125 per cigarette.

⁴ Alaska Statute 43.05.220(a).

⁵ Alaska Statute 43.50.100 & Alaska Statute 43.05.220(a).

⁶ See Agency Record pages 6-7.

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. Division Employee's Alleged Rudeness 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 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 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 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. Pelcin admits that he knew he was engaged in activity that required him to pay taxes to the Division. If a Division employee was rude to him, his frustration would be understandable, but rudeness would nonetheless not be reasonable cause for failing to comply with the law or to

make timely tax payments.⁷ The regulation quoted above provides examples that indicate that “reasonable cause” requires causes that are outside the taxpayer’s control. A frustrating interaction with the Division while trying to determine what he needed to do to buy cigarettes over the Internet legally does not create circumstances that forced Mr. Pelcin to import cigarettes without obtaining a license, filing returns, and paying taxes.

It was no surprise to Mr. Pelcin 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. Pelcin knew it was not legal to purchase untaxed cigarettes from out of state without filing returns and obtaining a license because he had been assessed taxes for importing cigarettes before. Mr. Pelcin could have either purchased his cigarettes through a local retailer who already paid the Alaska tax, as do most Alaskan tobacco consumers, or he could have been more persistent in his attempt to learn how to import cigarettes legally. These are reasonable steps that he could have taken to avoid illegal importation and the untimely filing of required returns and payment of Alaska taxes. Either approach would have avoided his failure to file returns and to timely pay the tax due.

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

F. Inability to Pay the Penalty is Not Reasonable Cause

Mr. Pelcin indicated that he would have difficulty paying the penalties. 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. The inability to timely pay a tax penalty without incurring financial hardship, therefore, is not reasonable cause for failing to timely pay a tax.

The inability to pay the timely tax itself may, in limited circumstances, qualify a taxpayer for a “reasonable cause” abatement of the Failure-to-Pay penalty. Mr. Pelcin’s situation is not one of those limited circumstances. If a taxpayer cannot pay the tax when it is due or could not

⁷ See the examples of reasonable cause found in Alaska Regulation 15 AAC 05.200(c).

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.⁸ Mr. Pelcin's failure to pay was not caused by his inability to pay the tax, but by his underestimation of the full extent of the penalties that would be assessed if he purchased cigarettes illegally again and did not timely pay the tax due. Mr. Pelcin had the ability to pay at the time that the tax was originally due, that is, when the cigarettes were purchased. He could easily have paid the tax and avoided the filing and licensing requirements by making his purchases through a local retailer.

Mr. Pelcin's failure to appreciate the consequences of importing cigarettes illegally may have caused the hardship that will result from having to pay the tax, penalties and interest that have accumulated over time, but Mr. Pelcin could have paid the taxes on time without hardship, or he could have foregone the out-of-state purchases.

G. Enforcement of Tax Laws

In his post hearing briefing, Mr. Pelcin points out that not all laws are always enforced, and he provides examples of laws that he believes are not frequently enforced. Mr. Pelcin explains why he believes it is unfair to assess tax penalties against him.

To the extent that there is any discretion in the enforcement of tax penalties in this case, the exercise of that discretion would be within the authority of the Division, rather than in the administrative law judge reviewing the assessment on appeal. The Division's assessment of penalties in this case is consistent with the law, including the law that requires the Division to abate penalties under certain circumstance. As discussed above, Mr. Pelcin did not show that his failure to pay his taxes was due to any of the circumstances that would require an abatement of the penalties. The law provides no basis to order the Division to abate the tax penalties.

IV. Conclusion

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

⁸ 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, dated January 25, 2010, is
AFFIRMED.

DATED this 27th day of July 2010.

By: Signed
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.⁹
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.¹⁰
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.¹¹
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 this decision becomes final.¹²

[This document has been modified to conform to the technical standards for publication.]

⁹ Alaska Statute 43.05.465(f)(1).

¹⁰ Alaska Statute 43.05.470.

¹¹ Alaska Statute 43.05.470(b).

¹² Alaska Statute 43.05.465 sets out the timelines for when this decision will become final.