

Cite as Det. No. 99-053, 19 WTD 50 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment/Refund of)	
)	No. 99-053
)	
...)	Registration No. . . .
)	Cigarette Tax Assessment No. . . .
)	
)	

RULE 186; RCW 82.24.030(2); RCW 82.24.120(2), (3); RCW 82.24.260: CIGARETTE TAX – UNSTAMPED CIGARETTES – PENALTY – GOOD REASON TO ABATE. A taxpayer must show “good cause” for the Department to abate the penalty for possession of unstamped packages of cigarettes. A taxpayer has not shown good cause by keeping packages of unstamped cigarettes, and packages bearing other states’ stamps, in a box out of open view and making no effort to obtain Washington tax stamps or to dispose of the cigarettes.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

A sole proprietor appeals a cigarette tax assessment issued by the Department of Revenue for the taxpayer’s possession of unstamped packages of cigarettes and packages of cigarettes bearing tax stamps from other states.¹

FACTS:

Gray, A.L.J.² (successor to Krebs, A.L.J.) -- The Department of Revenue (Department) investigated a complaint of packages of cigarettes bearing tax stamps issued by states other than Washington at the taxpayer’s [Washington] smoke shop. On October 9, 1995, Department agents seized 206 packages of cigarettes that either bore no stamp or other states’ tax stamps.

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

² This case was reassigned to the undersigned A.L.J. on November 1, 1998.

The Department issued Cigarette Tax Assessment No. . . . (assessment) on October 11, 1995. The assessment included cigarette tax . . . and penalty . . . for a total tax assessment of The taxes are imposed in RCW 82.24.020 and .027. To prove that the taxes have been paid, every person must affix the Department's stamps on each package of cigarettes before sale, use, consumption, handling, or removal of the packages. RCW 82.24.030.

The taxpayer explained that he had received complaints from customers that some of his cigarettes were stale. The cigarettes complained of were made wholly of tobacco and go stale quickly. The taxpayer said he opened packages from time to time and offered customers the opportunity to check the cigarettes for freshness. Sometimes a customer bought the package, sometimes they did not. The taxpayer placed the unpurchased packages in a box. He also kept the out-of-state tax-stamped cigarettes in the same box. He said he did not know what he was going to do with that box of cigarettes.

The taxpayer buys his cigarettes at wholesale primarily from two or three major cigarette wholesalers in Washington State. The packages that were stamped with other states' tax stamps came from another smoke shop, formerly located in [Washington], that went out of business.

The taxpayer seeks the cancellation of the cigarette tax assessment.

ISSUES:

Whether the taxpayer lawfully possessed unstamped packages of cigarettes and packages bearing the tax stamps of other states; and whether the taxpayer has shown "good cause" under RCW 82.24.120(2).

DISCUSSION:

Cigarette taxes are authorized in ch. 82.24 RCW. RCW 82.24.030(2) requires every person to affix a Washington cigarette tax stamp to packages of cigarettes before offering those cigarettes for sale. RCW 82.24.050 prohibits any retailer from having unstamped cigarettes in his or her possession within Washington "except as provided in this chapter." There is no statute that provides an exception for the taxpayer's case. The possession of unstamped cigarettes covered by ch. 82.24 RCW is *prima facie* evidence of intent to violate the provisions of this chapter. RCW 82.24.120(3). "Prima facie" evidence consists of proof of each required element of a charge or a claim. *See, State v. Lopez*, No. 16891-3-III, (Slip Op., January 21, 1999). A *prima facie* case may be rebutted. *See, Ware v. Mutual Materials, Inc.*, No. 17263-5-III, (Slip Op., January 21, 1999).

WAC 458-20-186 (Rule 186) is the Department's administrative rule regarding tax on cigarettes. Rule 186(5) provides that "[e]very person unlawfully in possession of unstamped cigarettes in this state shall be liable for the cigarette tax provided for herein." There are provisions in Rule 186 governing the circumstances under which persons, such as the taxpayer, may possess

unstamped cigarettes, but the possession is for limited periods of time for the purpose of procuring the stamps.

The taxpayer admitted that he possessed unstamped cigarettes. It is undisputed that the taxpayer's possession of the cigarettes does not qualify for any of the exceptions in RCW 82.24.260. Although the taxpayer explained why some packages of cigarettes bore no stamps and the others bore other states' tax stamps, the explanation does not excuse the taxpayer's possession of cigarettes that do not bear Washington tax stamps. The tax assessment is affirmed.

RCW 82.24.120(1) directs the imposition of a penalty for the possession of unstamped cigarettes:

If any person, subject to the provisions of this chapter or any rules adopted by the department of revenue under authority hereof, is found to have failed to affix the stamps required, or to have them affixed as herein provided, or to pay any tax due hereunder, or to have violated any of the provisions of this chapter or rules adopted by the department of revenue in the administration hereof, there shall be assessed and collected from such person, in addition to any tax that may be found due, a remedial penalty equal to the greater of ten dollars per package of unstamped cigarettes or two hundred fifty dollars, . . .

(Emphasis added.)

The Legislature used the word "shall" when it directed the Department to assess and collect a penalty. The Washington Supreme Court has construed the word "shall":

It is well settled that the word "shall" in a statute is presumptively imperative and operates to create a duty. [Citations omitted.] The word "shall" in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent.

The Erection Co. v. Department of Labor & Ind., 121 Wn.2d 513, 518, 852 P.2d 288 (1993). The Department is obligated to impose the penalty. However, there is a provision for abatement of the penalty.

RCW 82.24.120(2) provides for abatement of the penalty:

The department, for good reason shown, may remit all or any part of penalties imposed, but the taxpayer must pay all taxes due and interest thereon, at the rate as computed under RCW 82.32.050(2) from the date the tax became due.

Reading RCW 82.24.120(2) and (3) together, we conclude that the penalty should not be canceled. The circumstances surrounding the taxpayer's possession of both the unstamped cigarettes and the cigarettes bearing other states' tax stamps suggest that the taxpayer knew those packages of cigarettes were not lawfully stamped and that he planned to sell them. He kept the cigarettes in a

box out of open view and made no effort either to obtain Washington tax stamps or to get rid of the cigarettes. The penalty is also affirmed.

Because this determination was not issued within one year of the date of our receipt of the taxpayer's petition for correction of the tax assessment, which was October 24, 1995, we shall waive interest that accrued after October 24, 1996.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Dated this 26th day of February, 1999.