

Cite as Det. No. 13-0367, 33 WTD 578 (2014)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Correction of ) Assessment of ) ) ) . . . ) ) )	<u>D E T E R M I N A T I O N</u>  No. 13-0367  Registration No. . . .
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[1] RULE 186; RCW 82.24.020: CIGARETTE TAX – IMPOSITION. The Cigarette tax is levied and collected upon the sale, use, consumption, handling, possession, or distribution of all 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.

Lewis, A.L.J. – Following the federal government’s seizure of cigarettes from a residence in Washington, the Department of Revenue (“Department”) assessed Taxpayer cigarette tax, and a ten-dollar per-pack penalty on those cigarettes. Taxpayer objects to the assessment. We deny the petition.<sup>1</sup>

ISSUE:

Did Taxpayer possess unstamped cigarettes within the meaning of RCW 82.24.020 and WAC 458-20-186, and therefore owe cigarette tax?

FINDINGS OF FACT:

On July 13, 2011, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) seized 4,000 packs of unstamped cigarettes from the upstairs portion of a home located in . . . Washington . . . . The . . . County website shows that the home is owned by [Taxpayer]. The cigarettes seized included:<sup>2</sup>

12 cartons (unspecified) cigarettes  
150 cartons Marlboro Gold cigarettes  
168 cartons Marlboro Red cigarettes

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

<sup>2</sup> Information obtained from the ATF seizure records.

19 cartons Marlboro Black cigarettes  
45 cartons Marlboro Light cigarettes  
7 cartons 555 cigarettes

[The seizure also] included . . . cash, financial/bank records, and cellular phone records.

Based on the ATF Evidence Log, the Department's Audit Division issued an audit report for the period July 1, 2011 through September 30, 2011. On October 10, 2012 the Department issued a \$. . . assessment against [Taxpayer].<sup>3</sup>

On December 11, 2012, Taxpayer filed a petition protesting the assessment. Taxpayer's petition challenged the assessment based on the facts that:

- Investigation of the case is ongoing;
- The auditor did not provide taxpayer with copies of the information on which the assessment was based and disputes that there were over 4,000 packs of cigarettes;
- The auditor did not interview the taxpayer before issuing the assessment and thus [Taxpayer] had no opportunity to challenge the basis of the assessment;
- Two other families lived with Taxpayer and that it does not appear the Department considered that a portion of the cigarettes may have belonged to the other families; and,
- Taxpayer does not smoke cigarettes.

#### ANALYSIS

RCW 82.24.020 imposes a cigarette tax at a specified rate per cigarette:

(1) There is levied and collected as provided in this chapter, a tax upon the sale, use, consumption, handling, possession, or distribution of all cigarettes, in an amount equal to 12.125 cents per cigarette.

\* \* \*

(3) For purposes of this chapter, "possession" means both (a) physical possession by the purchaser and, (b) when cigarettes are being transported to or held for the purchaser or his or her designee by a person other than the purchaser, constructive possession by the purchaser or his or her designee, which constructive possession is deemed to occur at the location of the cigarettes being so transported or held.

RCW 82.24.020 (emphasis added). WAC 458-20-186 ("Rule 186") provides:

(101) **In general.** The Washington cigarette tax is due and payable by the first person who sells, uses, consumes, handles, possesses, or distributes the cigarettes in this state.

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<sup>3</sup> The assessment consisted of \$. . . in cigarette tax, \$. . . penalty, and \$. . . interest.

(a) **Possession.** For the purpose of this rule, a “possessor” of cigarettes is anyone who personally or through an agent, employee, or designee, has possession of cigarettes in this state.”

Rule 186(101). RCW 82.24.080 explains the legislative intent:

(1) It is the intent and purpose of this chapter to levy a tax on all of the articles taxed under this chapter, sold, used, consumed, handled, possessed, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively, in accordance with RCW 82.24.020) or distributes them in the state. It is further the intent and purpose of this chapter that whenever any of the articles taxed under this chapter is given away for advertising or any other purpose, it shall be taxed in the same manner as if it were sold, used, consumed, handled, possessed, or distributed in this state.

(2) It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state.

RCW 82.24.080 (emphasis added). In order to enforce the collection of the cigarette tax, stamps printed by the Department must be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the Department to ascertain by inspection whether or not the tax has been paid. RCW 82.24.030; Rule 186(201)(a) (“Stamps indicating payment of the cigarette tax must be affixed prior to any sale, use, consumption, handling, possession, or distribution of all cigarettes other than those specifically exempted . . .”). If unstamped cigarettes are consigned or purchased by any person in Washington State, the purchaser or consignee must be a person authorized under Chapter 82.24 RCW to possess such cigarettes. RCW 82.24.250(3). Any person who receives in Washington State any shipment of unstamped cigarettes for the purpose of avoiding payment of tax, is guilty of a gross misdemeanor. RCW 82.24.110(1)(m); Rule 186(101)(b), (603). It is presumed that persons other than dealers who purchase or receive shipments of unstamped cigarettes do so to avoid payment of cigarette tax. *Id.*

Here, the cigarettes were seized at [the location of] property owned by Taxpayer. Taxpayer argues that because two other families occupied the home that some of the cigarettes may have belonged to them and not Taxpayer. Nothing has been presented except unsubstantiated assertions . . . that any of the cigarettes belonged to anyone other than Taxpayer, the owner of the home in which they were found.

. . . [A]ny person in possession of unstamped cigarettes in Washington State, unless specifically exempted, is liable for cigarette tax on those cigarettes. Rule 186(102)(a). Prior to the ATF seizing the unstamped cigarettes, Taxpayer was in possession of them. The assessment of tax was based on a detailed inventory (evidence log) made by the ATF agents. Accordingly, we conclude that under RCW 82.24.020, Rule 186(101), and Rule 186(102)(a), Taxpayer is liable for cigarette tax included in the Assessment.

Taxpayer possessed unstamped cigarettes. Per RCW 82.24.120(3), this is prima facie evidence of Taxpayer's intent to violate the provisions of Chapter 82.24 RCW. RCW 82.24.120 requires that a penalty be imposed on any person who keeps unstamped cigarettes:

(1) If any person, subject to the provisions of this chapter or any rules adopted by the department of revenue under authority of this section, is found to have failed to affix the stamps required, or to have them affixed as provided in this section, or to pay any tax due under this section, or to have violated any of the provisions of this chapter or rules adopted by the department of revenue in the administration of this chapter, there must 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 ten dollars per twenty roll-your-own cigarettes, or two hundred fifty dollars, plus interest on the amount of the tax at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment, and upon notice mailed to the last known address of the person or provided electronically as provided in RCW 82.32.135. The amount is due and payable in thirty days from the date of the notice. If the amount remains unpaid, the department or its duly authorized agent may make immediate demand upon such person for the payment of all such taxes, penalties, and interest. . . .

(3) The keeping of any unstamped articles coming within the provisions of this chapter is prima facie evidence of intent to violate the provisions of this chapter.

RCW 82.24.120 (emphasis added).

. . . With respect to the waiver or cancellation of the cigarette per pack penalty (\$10 per pack), RCW 82.24.120 provides:

(2) The department, for good reason shown, may waive or cancel 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 until the date of payment.

RCW 82.24.120(2) (emphasis added). Rule 186 explains the Department's role regarding the waiver of the cigarette tax penalty:

The department may, in its sole discretion, cancel all or part of the penalty for good cause.

Rule 186(605) (emphasis added).

Rule 186(605) uses the phrase "good cause," which we analogize to "good reason," which is the language in RCW 82.24.120(2). The notion of what constitutes "good cause" has been addressed in case law. With regards to good cause in the unemployment context, and whether a claimant is entitled to benefits, it was stated in *Cowles Publishing Co. v. Employment Security Dep't*, 15

Wn. App. 590, 550 P.2d 712 (1976):

Unemployment was forced upon the claimant by these external circumstances, thereby creating good cause for voluntary unemployment and entitling the claimant to benefits under RCW 50.20.050.

*Cowles Publishing*, 15 Wn. App. at 594-95 (emphasis added). [In a footnote, the Court of Appeals, goes on to explain]:

Another example of the second category of unemployment fault, third-party fault, is *Matison v. Hutt*, 85 Wash.2d 836, 539 P.2d 852 (1975). Union members voluntarily quit employment when their employer became a nonunion house. Under the facts of the case, to continue employment with the nonunion employer would mean the loss of union health, welfare, and pension benefits. Again it was found that entirely external circumstances had compelled the employees to voluntarily quit. Fault being with the union and external to the claimants, their voluntary unemployment was for good cause, entitling them to unemployment benefits under RCW 50.20.050.<sup>4</sup>

*Cowles Publishing*, 15 Wn. App. at 594-95 n.9 (emphasis added).

Taxpayer has presented no evidence that substantiates that possession of unstamped cigarettes was forced upon [them] by external circumstances. We find no grounds to cancel the penalty imposed.

#### DECISION AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 26th day of November 2013.

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<sup>4</sup> RCW 50.20.050 states:

An individual shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has left work voluntarily without good cause and thereafter for seven calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to seven times his or her weekly benefit amount.

RCW 50.20.050(1)(a) (emphasis added).