

Cite as Det. No. 13-0278, 33 WTD 472 (2014)

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 of)	
)	No. 13-0278
...)	
)	Registration No. . . .
)	

[1] RULE 186(101), (102); RCW 82.24.020; RCW 82.24.080: CIGARETTE TAX. Any person in possession of unstamped cigarettes in Washington State, unless specifically exempted, is liable for cigarette tax on those cigarettes. Prior to the federal government seizing unstamped cigarettes from Taxpayer, Taxpayer stored them in her storage facility located in Washington, and was therefore in possession of them. Therefore, Taxpayer is liable for cigarette tax on such cigarettes.

[2] RULE 186(601); RCW 82.24.090: TAXPAYER'S DUTY TO KEEP AND PRESERVE ACCURATE RECORDS CONCERNING TRANSACTIONS INVOLVING CIGARETTES. Contrary to Taxpayer's assertion, the burden is on retailers and wholesalers of cigarettes in Washington State to keep and preserve accurate records, and have them available for the Department to inspect. Taxpayer admits they has no records concerning their purchase and sale of cigarettes, and therefore has failed to meet the burden.

[3] RULE 186(605); RCW 82.24.120(2): GOOD CAUSE TO WAIVE OR CANCEL THE CIGARETTE PER PACK PENALTY (I.E., POSSESSION PENALTY). Taxpayer merely alleges that since divorcing their ex-spouse they are financially unable to pay the possession penalty against them because they live on a minimum wage and that paying it would force them to lose their personal residence. However, such reasons do not equate with good cause for the Department to cancel the possession penalty.

[4] U.S. CONST. amend. V (FIFTH AMENDMENT): WHETHER DEPARTMENT'S ASSESSMENT OF CIGARETTE TAX PENALTY AGAINST TAXPAYER, WHILE TAXPAYER IS PARTY TO A FORFEITURE ACTION AND CRIMINAL PROSECUTION INVOLVING THE SAME CIGARETTES, IS A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT. As explained in *Hudson v. U.S.*, 522 U.S. 93, 118 S.Ct. 488 (1997), monetary penalties have historically been viewed as not

punishment. Moreover, the fact that conduct which gives rise to penalties also provides the basis for criminal sanctions is insufficient to render such penalties punitive. Under *Hudson*, the possession penalty the Department assessed Taxpayer does not constitute punishment. Even in conjunction with forfeiture proceedings, and a criminal indictment against Taxpayer for trafficking in contraband cigarettes, the possession penalty does not violate the Double Jeopardy Clause of the Fifth Amendment.

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.

Pardee, A.L.J. – Following the federal government’s seizure of cigarettes from a storage facility 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.¹

ISSUES

1. Did Taxpayer possess unstamped cigarettes within the meaning of RCW 82.24.020 and WAC 458-20-186(101) (Rule 186(101)), and therefore owe cigarette tax?
2. Has Taxpayer satisfied the recordkeeping requirements of RCW 82.24.090 and Rule 186(601)?
3. Does Taxpayer’s alleged financial hardship amount to good cause under RCW 82.24.120(2) and Rule 186(605), such that the Department may cancel the ten dollar per pack penalty?
4. Does the Department’s assessment of the ten dollar per pack penalty violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution because Taxpayer is a defendant in both a pending criminal cause of action for trafficking of contraband cigarettes, and forfeiture proceedings, both related to the seizure of the cigarettes?

FINDINGS OF FACT

[In] 2011, The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) seized . . . packs of unstamped cigarettes from a storage facility located in . . . Washington that was leased by [the Taxpayer and ex-spouse]. At the time ATF seized the cigarettes, Taxpayer was still married to [the ex-spouse]. The cigarettes originated [outside the United States], and Taxpayer’s plan was to sell the cigarettes in Washington State and send the money back to relatives [outside the United States].

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

The Department's Audit Division (Audit) performed a partial audit of Taxpayer's books and records for the period July 1, 2011, through September 30, 2011. While performing the partial audit, Audit examined specific records, including unstamped cigarette inventories ATF seized during the course of an investigation of Taxpayer. On August 17, 2012, the Department issued Taxpayer an assessment (Document No. 201302248 – "Assessment") totaling \$. . . ,² comprised of \$. . . of cigarette tax, a cigarette possession penalty of \$. . . (or \$10 a pack), and interest of \$. . . .

Taxpayer explains that following the seizure of the unstamped cigarettes:

- The United States initiated an *in rem* forfeiture proceedings against Taxpayer's real property;
- The United States indicted Taxpayer for the crime of trafficking in contraband cigarettes, for which Taxpayer faces jail time; and
- Both matters (forfeiture and criminal proceedings) are currently pending.

ANALYSIS

1. Whether Taxpayer possessed the cigarettes seized

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.

(Emphasis added). *See also* WAC 458-20-186(101) (Rule 186(101)) ("The. . . cigarette tax is due and payable by the first person who sells, uses, consumes, handles, possesses, or distributes the cigarettes in this state.") Possession of cigarettes includes: "[A]nyone who personally or through an agent, employee, or designee, has possession of cigarettes in this state." Rule 186(101)(a).

The legislative intent of Chapter 82.24 RCW is articulated in part follows:

² Taxpayer has paid nothing toward the Assessment.

(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).

Per RCW 82.24.020 and RCW 82.24.080, Taxpayer had . . . possession of the cigarettes at the storage facility in Seattle. . . .

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, that 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.* Any 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. Accordingly, we conclude that under RCW 82.04.020, Rule 186(101), and Rule 186(102)(a), Taxpayer is liable for cigarette tax included in the Assessment.

2. Taxpayer’s burden to provide records concerning purchase and sale of cigarettes

Taxpayer’s representative argues that the burden is on the Department to prove that Taxpayer had possession of unstamped cigarettes, and to verify the quantity of cigarettes seized. Failing this, Taxpayer argues that the Assessment should be cancelled, and states:

Absent certification under the penalty of perjury from the officer who allegedly seized these cigarette packages, the State has failed to meet its burden of proof. Accordingly, the tax and penalty assessed on these cigarettes must be dismissed.

Taxpayer's Brief dated June 19, 2013 (Brief), Page 3.

We concluded above that Taxpayer possessed the unstamped cigarettes in question. Taxpayer's assertion that the Department must verify the quantity of cigarettes seized is an attempt to transfer Taxpayer's responsibilities to the Department. Contrary to Taxpayer's assertion, the burden is on retailers and wholesalers of cigarettes in Washington State to keep and preserve accurate records, and have them available for the Department to inspect:

(1) Every wholesaler or retailer subject to the provisions of this chapter shall keep and preserve for a period of five years an accurate set of records. These records must show all transactions relating to the purchase and sale of any of the articles taxed under this chapter and show all physical inventories performed on those articles, all invoices, and a record of all stamps purchased. All such records and all stock of taxable articles on hand shall be open to inspection at all reasonable times by the department of revenue or its duly authorized agent.

(2) All wholesalers shall within fifteen days after the first day of each month file with the department of revenue a report of all drop shipment sales made by them to retailers within this state during the preceding month. The report shall show the name and address of the retailer to whom the cigarettes were sold, the kind and quantity, and the date of delivery thereof.

RCW 82.24.090 (emphasis added). *See also* Rule 186(601) ("An accurate set of records showing all transactions related to the purchase, sale, or distribution of cigarettes must be retained").

Taxpayer admits [they have] no records relating to the purchase and sale of the cigarettes that originated [outside the United States], and which ATF seized from [the] storage facility. Taxpayer has failed to meet [the] burden (i.e., recordkeeping requirements) under RCW 82.24.090 and Rule 186(601). Taxpayer's claim that ATF failed to provide a certification of the amount of cigarettes they seized from Taxpayer's storage facility does not alter this conclusion. In fact, page 1 of Taxpayer's Brief includes a table that lists the item number, ATF identification code, and description of the property seized from Taxpayer's storage facility. Taxpayer received this information from ATF.

3. Whether taxpayer has shown good cause to waive the per pack penalty on unstamped cigarettes in [their] possession

In general, any person who keeps unstamped cigarettes in violation of Chapter 82.24 RCW owes a ten dollar per pack penalty on such 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).

. . . The Department has only the authority granted by statute. *Id.* While the Department has implemented programs to inform and assist taxpayers (such as education letters), the ultimate responsibility for knowing its tax obligations rests upon the taxpayer. *Id.* Because of the nature of Washington's tax system, the burden of becoming informed about tax liability falls upon the taxpayer, and it is the taxpayer who bears the consequences of a failure to be correctly informed. Det. No. 01-165R, 22 WTD 11 (2003). Financial hardship does not constitute a basis for canceling a tax assessment.³

With respect to the waiver or cancellation of the cigarette per pack penalty (\$10 per pack), RCW 82.24.120(2) 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.

(Emphasis added.)

Taxpayer bears the burden of proving [they qualify] for a penalty waiver. Det. No. 04-0268 (citing Det. No. 00-030, 20 WTD 154 (2001); Det. No. 86-261, 1 WTD 209 (1986)). Taxpayer has not shown good cause for a waiver. Rule 186(605) 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.

³ E.g., financial hardship is an example of a circumstance that is generally not considered to be beyond the control of the taxpayer and will not qualify for a waiver or cancellation of certain penalties. Rule 228(9)(a)(iii).

(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, 594-95, 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.

(Emphasis added) (citing *Matison v. Hutt*, 85 Wn.2d 836, 539 P.2d 852 (1975)).

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. Unlike in *Cowles Publishing*, external circumstances have not caused Taxpayer to be financially unable to pay the possession penalty. Taxpayer merely alleges that since divorcing [the ex-spouse, they are] financially unable to pay the possession penalty assessed against [them], and that [they] live on a minimum wage. Taxpayer also claims that if [they have] to pay penalties included in the Assessment [they] will be forced to sell [their] personal residence. The reasons Taxpayer asserts do not equate with good cause or reason to waive the possession penalty. In the absence of a showing of good cause, it is well within the Department’s discretion not to cancel penalties included in the Assessment.

4. Whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prevents the Department from imposing the per pack penalty on property that was seized from Taxpayer, and for which Taxpayer faces federal criminal charges

Taxpayer’s representative argues that for the Department to assess the \$10 per pack penalty against Taxpayer in the Assessment is a violation of the Double Jeopardy Clause of the United States Constitution:

Assessing a penalty in this case shall not be allowed because it implicates double jeopardy, which is not allowed under our Constitution. . . . In *United States v. Halper*,⁴ the Supreme Court held that a civil penalty imposed by the government can constitute “punishment” for purposes of double jeopardy analysis. *Id. at 448-449*. . . . in addition to this proceeding, the [Taxpayer] is subjected to the forfeiture action and criminal action. In both of these actions, [Taxpayer] is assessed with (sic) civil penalty. Ultimately, assessing a penalty in this case would equate to repetitive punishment for the same offense.

Brief, page 4 (Footnote and brackets added, and emphasis in original Brief).

⁴ *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989).

Problematic to Taxpayer's argument is the fact that in *Hudson v. U.S.*, 522 U.S. 93, 118 S.Ct. 488 (1997) the Supreme Court effectively overruled its decision in *Halper*, stating:

The [Double Jeopardy] Clause protects only against the imposition of multiple *criminal* punishments for the same offense. . .

* * *

Our opinion in *United States v. Halper* marked the first time we applied the Double Jeopardy Clause to a sanction without first determining that it was criminal in nature.

Hudson, 522 U.S. 93, 99-100 (brackets added). In *Hudson*, the Court explained that its decision in *Halper* deviated from its traditional double jeopardy analysis in two key respects, and admitted that it was ill considered:

The analysis applied by the *Halper* Court deviated from our traditional double jeopardy doctrine in two key respects. First, the *Halper* Court bypassed the threshold question: whether the successive punishment at issue is a “criminal” punishment. Instead, it focused on whether the sanction, regardless of whether it was civil or criminal, was so grossly disproportionate to the harm caused as to constitute “punishment.” In so doing, the Court elevated a single *Kennedy* factor—whether the sanction appeared excessive in relation to its nonpunitive purposes—to dispositive status. But as we emphasized in *Kennedy* itself, no one factor should be considered controlling as they “may often point in differing directions.” 372 U.S., at 169, 83 S.Ct., at 568. The second significant departure in *Halper* was the Court's decision to “asses[s] the character of the actual sanctions imposed,” 490 U.S., at 447, 109 S.Ct., at 1901, rather than, as *Kennedy* demanded, evaluating the “statute on its face” to determine whether it provided for what amounted to a criminal sanction, 372 U.S., at 169, 83 S.Ct., at 568.

We believe that *Halper's* deviation from longstanding double jeopardy principles was ill considered. As subsequent cases have demonstrated, *Halper's* test for determining whether a particular sanction is “punitive,” and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable. We have since recognized that all civil penalties have some deterrent effect. See *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 777, n.14, 114 S.Ct. 1937, 1945 n.14, 128 L.Ed.2d 767 (1994); *United States v. Ursery*, 518 U.S. 267, 284–285, n. 2, 116 S.Ct. 2135, 2145–2146, n. 2, 135 L.Ed.2d 549 (1996). If a sanction must be “solely” remedial (*i.e.*, entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause. Under *Halper's* method of analysis, a court must also look at the “sanction actually imposed” to determine whether the Double Jeopardy Clause is implicated. Thus, it will not be possible to determine whether the Double Jeopardy Clause is violated until a defendant has proceeded through a trial to judgment. But in those cases where the civil proceeding follows the criminal proceeding, this approach flies in the face of the notion that the Double Jeopardy Clause forbids the government from even “attempting a second

time to punish criminally.” *Helvering*, 303 U.S., at 399, 58 S.Ct., at 633 (emphasis added).

Hudson, 522 U.S. at 101-102 (underlined emphasis added).

Monetary penalties have historically been viewed as not punishment. *Hudson*, 522 U.S. at 104. Similarly, “the payment of fixed or variable sums of money [is a] sanction which ha[s] been recognized as enforceable by civil proceedings since the original revenue law of 1789.” *Id.* (Citing *Helvering*, 303 U.S. at 399). The fact that conduct which gives rise to penalties also provides the basis for criminal sanctions is insufficient to render such penalties criminally punitive. *Id.* at 105.

On its face, RCW 82.24.120(1) specifically states that the \$10 per pack penalty is *remedial* in nature. In any question of statutory construction, we strive to ascertain the intention of the legislature by first examining a statute’s plain meaning. *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010). Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Id.*; see also Det. No. 04-0180E, 26 WTD 206 (2007).

Under the standards articulated in *Hudson*, the penalty included in the Assessment does not constitute punishment. Even in conjunction with the forfeiture proceedings and the criminal indictment for trafficking in contraband cigarettes, the \$10 per pack penalty does not violate the Double Jeopardy Clause of the Fifth Amendment. Therefore, we sustain the Assessment.

DECISION AND DISPOSITION

Taxpayer’s petition is denied.

Dated this 5th day of September 2013.