

Cite as Det. No. 19-0308, 41 WTD 15 (2022)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund/Correction)	<u>D E T E R M I N A T I O N</u>
of Assessment of)	
)	No. 19-0308
)	
...)	Registration No. ...
)	

[1] RCW 82.24.020: CIGARETTE TAX—UNSTAMPED CIGARETTES. A taxpayer was not liable for cigarette tax on unstamped cigarettes packs when it returned the unstamped cigarette packs to the wholesaler for the wholesaler to affix the proper cigarette tax stamps.

[2] RCW 82.24.120: CIGARETTE TAX—UNSTAMPED CIGARETTES—REMEDIAL PENALTY. A taxpayer was liable for the remedial penalty for the possession of unstamped cigarettes packs that it later returned to the wholesaler.

[3] RCW 82.24.020; RCW 82.24.020(2), (10): CIGARETTE TAX—UNSTAMPED ROLL-YOUR-OWN CIGARETTES. A taxpayer was not liable for cigarette tax on unstamped, roll-your-own cigarettes when the Washington Liquor and Cannabis Board did not document a commercial rolling machine, roll-your-own cigarettes, or any other evidence that Taxpayer produced any roll-your-own cigarettes. The taxpayer’s sale of bags of loose tobacco and paper rolling tubes did not meet the definition of roll-your-own cigarettes under RCW 82.24.010(10).

[4] RCW 82.24.120: CIGARETTE TAX— UNSTAMPED ROLL-YOUR-OWN CIGARETTES—REMEDIAL PENALTY. A taxpayer was not liable for the remedial penalty for the possession of unstamped, roll-your-own cigarettes when Taxpayer did not possess any unstamped, roll-your-own 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.

Peña, T.R.O. – A cigarette retailer requests the adjustment of an assessment for unstamped cigarettes because it returned the unstamped cigarettes to the original wholesaler to be correctly stamped. We grant Taxpayer’s petition in part and deny it in part.¹

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

ISSUES

1. Did the Department correctly assess cigarette tax under RCW 82.24.020 for unstamped cigarettes a taxpayer returned to the wholesaler?
2. Did the Department correctly assess a remedial penalty under RCW 82.24.120 for the possession of unstamped cigarettes later returned to a wholesaler?
3. Did the Department correctly assess cigarette tax under RCW 82.24.020 and a remedial penalty under RCW 82.24.120 for the possession of unstamped roll-your-own cigarettes?

FINDINGS OF FACT

. . . (Taxpayer) is a cigarette and tobacco products retailer. On December 4, 2018, the Washington Liquor and Cannabis Board (LCB) conducted a tobacco inspection at Taxpayer's business location. The LCB agent found 14 packs of cigarettes that did not have the appropriate Washington State cigarette tax stamp affixed. The LCB report of the inspection states that the wholesale distributor's representative arrived during the inspection and agreed to take the unstamped cigarettes back in order to correctly stamp them.

LCB also found 7 containers of loose tobacco weighing a total of 30.67 ounces. When LCB asked Taxpayer what the loose tobacco was used for, Taxpayer explained it was for rolling cigarettes and pointed to the paper rolling tubes available for purchase separately. LCB did not find a roll-your-own cigarette machine at Taxpayer's location, nor did it locate any pre-rolled roll-your-own cigarettes on the premises.

On May 10, 2019, the Department of Revenue (Department) issued a cigarette tax and remedial penalty assessment (Assessment) based on the LCB investigation on 31 packs of unstamped cigarettes: 14 packs of unstamped cigarettes and 17 calculated, unstamped roll-your-own cigarettes packs.² The Assessment consisted of \$. . . of cigarette tax, \$. . . of cigarette tax remedial penalty, and \$. . . of interest.

On May 28, 2019, Taxpayer filed a petition for review, stating the wholesaler who sold Taxpayer the unstamped cigarettes admitted it made a cigarette stamping mistake prior to selling them to Taxpayer. Taxpayer states it returned the unstamped cigarettes to the wholesaler who then stamped the cigarettes and returned them to Taxpayer. Taxpayer asks for a correction of the Assessment.

On August 9, 2019, the Department's Special Programs Division (Special Programs) contacted the LCB officer that conducted the tobacco investigation. The LCB agent stated that it did not confiscate the 14 packs of unstamped cigarettes and allowed Taxpayer to return them to the same cigarette distributor Taxpayer had purchased them from for proper stamping.

² LCB divided 30.67 ounces of roll-your-own tobacco by an assumed 0.09 ounces of tobacco per cigarette to determine the equivalent number of roll-your-own cigarettes, divided that number by 20 cigarettes per pack, and concluded that Taxpayer possessed the equivalent of approximately 17 packs of unstamped cigarettes.

In its response to Taxpayer's petition, Special Programs stated that based on the information from LCB, Taxpayer has no liability for the tax stamps on the 14 packs of unstamped cigarettes. Special Programs maintains that the wholesaler to whom Taxpayer returned the unstamped packs will pay the tax owed by affixing cigarette tax stamps to the packs in the future. However, Special Programs states that Taxpayer is still liable for the penalty assessed on the unstamped cigarettes because Taxpayer possessed unstamped cigarettes in violation of RCW 82.24.050.

Special Programs also stated in its response that the Department erred when it assessed Taxpayer for the 17 unstamped roll-your-own cigarettes because Taxpayer did not have a commercial cigarette-making machine at the business location nor did LCB confiscate any roll-your-own cigarettes. According to Special Programs, the presence of loose tobacco and paper rolling tubes alone do not constitute roll-your-own 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.

See also WAC 458-20-186(101) (“[C]igarette tax is due and payable by the first person who sells, uses, consumes, handles, possesses, or distributes the cigarettes in this state.”).

Chapter 82.24 RCW requires a cigarette tax stamp, designed by the Department, to be affixed to the smallest container or package of cigarettes that will be sold, distributed, or consumed. RCW 82.24.030(1); RCW 82.24.060(1). No retailer may possess unstamped cigarettes. RCW 82.24.050(1). The definition of “cigarette” includes roll-your-own cigarettes. RCW 82.24.010(2). “Roll-your-own cigarettes” are “cigarettes produced by a commercial cigarette-making machine.” RCW 82.24.010(10).

Generally, only a wholesaler may affix each cigarette pack with a cigarette tax stamp. RCW 82.24.030(2). However, for roll-your-own cigarettes, “a *retailer* must affix a stamp or stamps to each box or similar container *provided* by the retailer to the consumer.” RCW 82.24.030(6) (Emphasis added). WAC 458-20-186(402) further states: “Retailers of roll-your-own cigarettes must purchase and affix roll-your-own cigarette tax stamps for the cigarettes *produced* through the cigarette making machine.” (Emphasis added).

Violations of Chapter 82.24 RCW subject the person to a remedial penalty:

(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.

...

(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.

Here, we agree with Special Programs that the Department erred when it assessed Taxpayer cigarette tax on 14 packs of unstamped cigarettes. LCB did not confiscate them and witnessed Taxpayer return them to the wholesaler so that the wholesaler could affix the proper cigarette tax stamps. If the Department were to assess Taxpayer cigarette tax on these packs, the tax would be paid twice on the same packs: once by the wholesaler in the form of the cigarette tax stamps and once by Taxpayer in the form of the Assessment. However, the remedial penalty for unstamped cigarettes still applies to Taxpayer, as it does not dispute its possession of the 14 packs of unstamped cigarettes. Taxpayer, as a retailer, is prohibited from possessing unstamped cigarettes, and this violation subjects Taxpayer to the remedial penalty. RCW 82.24.050(1); RCW 82.24.120(1), (3).

We also agree with Special Programs that the Department erred when it assessed Taxpayer cigarette tax for the 17 packs of unstamped, roll-your-own cigarettes. LCB did not document a commercial rolling machine, roll-your-own cigarettes, or any other evidence that Taxpayer produced any roll-your-own cigarettes. Taxpayer's sale of bags of loose tobacco and paper rolling tubes does not meet the definition of roll-your-own cigarettes under RCW 82.24.010(10). The Department also improperly assessed the remedial penalty for unstamped roll-your-own cigarettes. As Taxpayer did not possess unstamped roll-your-own cigarettes, it was not in violation of a provision of Chapter 82.24 RCW and the penalty was unwarranted.³

³ We note that while Taxpayer does not owe cigarette tax on sales of bags of loose tobacco and paper rolling tubes, as they are not roll-your-own cigarettes under RCW 82.24.010 (10), the loose tobacco falls within the definition of "tobacco products" contained in RCW 82.26.010(21). "Tobacco products" are subject to tax when a distributor first handles the products within this state under RCW 82.26.020(2), and so the distributor who sold the loose tobacco to retailers like Taxpayer would have been liable for this tax.

DECISION AND DISPOSITION

We grant Taxpayer's petition in part and deny it in part. We grant Taxpayer's petition with respect to cigarette tax assessed on the 14 packs of unstamped cigarettes. We also grant Taxpayer's petition with respect to cigarette tax and a remedial penalty assessed for 17 packs of roll-your-own cigarettes.

We deny the petition with respect to the remedial penalty imposed on Taxpayer's possession of 14 packs of unstamped cigarettes.

Dated this 26th day of November 2019.