IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Tobacco Tax

JOHN G. CAMPBELL and VICTORIA F. CAMPBELL, Plaintiffs, v. DEPARTMENT OF REVENUE, State of Oregon, Defendant.	)	TC-MD 060390A **DECISION**

This matter is before the court on Defendant's Motion for Summary Judgment, argued February 8, 2007, in the courtroom of the Oregon Tax Court, Salem, Oregon. Defendant was represented by Joseph A. Laronge, Senior Assistant Attorney General. Victoria F. Campbell (Campbell) represented Plaintiffs.

The appeal involves the imposition of a cigarette tax on Campbell, as the distributor of untaxed cigarettes to her father. Defendant exacted the tax by withholding a portion of Plaintiffs' 2005 personal income tax refund, evidenced by the issuance of a Notice of Proposed Adjustment and/or Distribution dated March 10, 2006.

I. STATEMENT OF FACTS

The parties submitted the following stipulated facts. Campbell purchased untaxed cigarettes over the Internet from an out-of-state supplier in 2004 and 2005. The untaxed cigarettes were shipped to Campbell in Oregon. Campbell paid for the cigarettes by check with funds drawn from a joint checking account in the names of Victoria F. Campbell and her father, Gary I. Freund. The sole source of funds in that checking account was from monthly social security checks issued to Gary I. Freund (Freund). Upon her receipt of the untaxed cigarettes, Campbell gave the untaxed cigarettes to her father, Freund. The purchase of untaxed cigarettes was made by Campbell for use by her father, Freund. Campbell purchased the cigarettes for use by her father because he has Alzheimer's disease and needed assistance with the purchase. Campbell is not a legal guardian of her father or a conservator of his assets. Freund has not been legally declared incompetent. The parties agree that the total amount of the disputed tax for the time period involved is $821.37. (Parties' Stip of Facts.)

II. ANALYSIS

ORS 323.030(1)[1] provides that "[e]very distributor shall pay a tax upon distributions of cigarettes * * *." ORS 323.015(2) defines "distributor" as "[a]ny person who distributes cigarettes." These statutes do not define the word "distributes" appearing in ORS 323.015(2), but they do define "distribution." ORS 323.015(1)(b) defines "distribution" to include "[t]he use or consumption in this state of untaxed cigarettes." ORS 323.010(16) defines "use or consumption" to include "the *exercise of any right or power over cigarettes incident to the ownership* thereof, other than the sale of the cigarettes or the keeping or retention thereof for the purpose of sale." (Emphasis added.) If Campbell used or consumed the cigarettes by "exercis[ing] * * * any right or power over [the] cigarettes incident to * * * ownership," she is liable for the taxes.

Campbell argues that she did not use her money to purchase the cigarettes and she did not smoke the cigarettes. Rather, she used her father's social security money, previously deposited in the joint account she owns with her father, to order the cigarettes over the Internet to give to her father to smoke. Campbell was stunned when a portion of her refund was taken to pay for the tax, a tax she was not aware needed to be paid. Campbell further argues that Oregon

[1] All references to the Oregon Revised Statutes (ORS) are to 2003.

requires distributors to be licensed, and that to be a "distributor" implies profit, whereas she is unlicensed and made no profit.

The statutory licensing requirements only apply to persons who seek to *sell* cigarettes or other tobacco products as a distributor. ORS 323.105 (licensing for cigarette distributors) and ORS 323.520 (tobacco products licensing requirement). The statutes applicable in this case apply to persons exercising ownership rights over cigarettes and contain no profit requirement. Moreover, it matters not whether Campbell was a "distributor" in the ordinary sense of the word, because the statute provides specific definitions applicable to the tax and, as indicated above, the question ultimately comes down to whether Campbell's actions fit within the definition of "use or consumption" found in ORS 323.010(16).

In *Snyder v. Dept. of Rev.*, TC-MD No 060026A, WL 1311830 (May 10, 2006), this court upheld the tax imposed on an individual who purchased cigarettes over the Internet for a neighbor and transferred the cigarettes to the neighbor without profit and unaware there was a tax that needed to be paid. The difference between *Snyder* and the case at bar is that the taxpayer in *Snyder* used his own funds to purchase the cigarettes, whereas here Campbell used her father's money. While that may be true, the funds came from the joint account Campbell held with her father, and the source of the funds would be unknown to a third party vendor.

Defendant argues that Campbell exercised the requisite right or power over the cigarettes because she purchased the cigarettes from her joint account, caused the cigarettes to be delivered to her home, subsequently received the untaxed cigarettes at her home, and, thereafter, gave them to her father. According to Defendant, those actions constitute the exercise of a right or power incident to ownership and conveyance. Because she exercised a right or power over the untaxed cigarettes, argues Defendant, Campbell used or consumed the cigarettes, thereby engaging in the distribution of cigarettes, and, under ORS 323.015(2)(a), Campbell was a " distributor" of untaxed cigarettes subject to the tax imposed by Defendant.

Campbell did exercise rights and powers over the cigarettes. The statute requires that the exercise of the right or power be "incident to ownership." ORS 323.010(16). The statutes do not define "ownership." During oral argument, Defendant argued that ownership involves a bundle of rights including purchase, receipt, possession, and transfer; that the statute imposes the tax upon the exercise of *any* ownership right; and that Campbell exercised many rights incident to ownership, as described immediately above.

Webster's defines ownership as "the state, relation, or fact of being an owner: lawful claim or title: PROPERTY, PROPRIETORSHIP, DOMINIUM." *Webster's Third New Int'l Dictionary* 1612 (unabridged ed 2002). The term "owner" is defined in terms of possession or "one that owns: one that has the legal or rightful title whether the possessor or not." *Id*. Under those definitions, Campbell clearly had ownership of the cigarettes. She had dominium, possession, and a lawful claim and legal title to the cigarettes, purchased with money in an account she owned. Once the cigarettes arrived at her home, Campbell was in a position to legally defend her claim on the cigarettes and act in accordance with the usual rights of ownership, including subsequent transfer (or distribution) of those cigarettes to her father, albeit free of charge.

The court asked the parties to submit post-hearing memorandums addressing the question of whether the rule in *Greenwood v. Beeson*, 253 Or 318, 454 P2d 633 (1969) impacts the determination of whether Campbell had an ownership interest in the untaxed cigarettes sufficient to subject her to liability for the tax. *Greenwood* involved an action by a creditor's assignee who sought through garnishment proceedings to attach a joint bank account held in the name of the debtor and her husband, where the husband had contributed all of the money in the joint account. The *Greenwood* court ruled that "[w]here the evidence shows that all of the funds in the account were deposited by only one of the signatories, the other signatory is to be deemed a trustee of the donor's power to withdraw from the account unless the intent to create some other legal relationship is proven." *Id*. at 324.

Campbell argues that, under *Greenwood*, she was merely acting as a trustee and was therefore not in a position incident to ownership. As such, she contends she should not be held liable for the tax. The court disagrees. As Defendant noted in its post-trial brief, the facts of the present case are distinguishable from *Greenwood* because in *Greenwood* the assignee was attempting to attach funds in a joint account over which the debtor had exercised no ownership rights. In the present case, Campbell exercised many ownership rights. Campbell withdrew the funds from the joint account with the express or implied consent of the depositing joint holder (her father) and transferred the funds to a third party who was likely unaware of any beneficial interest claims. Campbell received the cigarettes at her home and then transferred them to her father.

III. CONCLUSION

The court concludes that Campbell's actions come within the definition of "use or consumption" found in ORS 323.010(16), which means that she engaged in the distribution of untaxed cigarettes per ORS 323.015(1)(b), making her a distributor of untaxed cigarettes liable for the tax imposed by ORS 323.030(1). Now, therefore,

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IT IS THE DECISION OF THIS COURT that Defendant's imposition of the cigarette tax against Campbell for the purchase of untaxed cigarettes in 2004 and 2005 is upheld and that Plaintiffs' appeal requesting a refund of the tax, penalty and interest taken from Victoria F. Campbell's 2005 income tax refund is denied.

Dated this _____ day of June 2007.

DAN ROBINSON
MAGISTRATE

If you want to appeal this Decision, file a Complaint in the Regular Division of the Oregon Tax Court, by mailing to: 1163 State Street, Salem, OR 97301-2563; or by hand delivery to: Fourth Floor, 1241 State Street, Salem, OR.

Your Complaint must be submitted within 60 days after the date of the Decision or this Decision becomes final and cannot be changed.

This document was signed by Magistrate Dan Robinson on June 21, 2007. The Court filed and entered this document on June 21, 2007.