JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2002-01-15-014 / NOT PRECEDENTIAL**
ID: **JM010002**
DATE: **01-15-02**
DISPOSITION: **REVOCATION DENIED**
TAX TYPE: **UNFAIR CIGARETTE / TOBACCO PRODUCTS**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now on this 13th day of December, 2001, the above styled and number cause comes on for decision pursuant to a show cause hearing held in accordance with 68 O.S. 1991, § 344 on October 9, 2001. Respondent is represented by AN Interpreter. The Audit Division of the Tax Commission ("Division") is represented by AN Assistant General Counsel, General Counsel's Office of the Tax Commission.

At the show cause hearing, Respondent offered testimony regarding his business practices during the audit period, the complaint filed by COMPLAINTANT A of "A" RETAIL CIGARETTE ESTABLISHMENT and COMPLAINTANT B of "B" RETAIL CIGARETTE ESTABLISHMENT, and the alleged violation of the Unfair Cigarette and Tobacco Product Sales Act, 68 O.S. 1991, § 326, et seq.

The Division's witness offered testimony concerning the investigation of the complaint and the audit of the alleged violation. Complainants A AND B did not appear. Exhibits A through F were offered and admitted into evidence.

Upon review of the file and records, including the record of the hearing and the exhibits received into evidence, the undersigned finds:

FINDINGS OF FACT

1. Respondent began selling cigarette and tobacco products on or about November 1, 1998.

2. On April 7, 1999, the General Counsel's Office of the Tax Commission received a Request for Price Audit regarding Respondent's pricing practices from Complainants. Enclosed with the request was a photograph and cash register receipt. The photograph is dated March 19, 1999 and is a picture of the store front of Respondent's business. The photograph shows an advertisement for Camel cigarettes at a price of $17.11 per carton. The cash register receipt which Respondent admitted was from his business is dated March 30, 1999 and reports a sale of a tobacco product at a price of $17.11.

3. The record does not reveal a date when the complaint was forwarded to the Audit Division for investigation. The Audit Lead Sheet, however, reports a date of October 19, 2000. Two sets of notes from the auditor are also inconclusive, one set reporting a date of March 26, 1999, the other reporting a date of April 16, 2001.

4. In investigating the complaint, the auditor was able to obtain from Respondent copies of invoices from ANONYMOUS Wholesale Co., Inc. to Respondent dated March 8, 1999 and March 30, 1999. The invoices report a per unit cost of $22.36 for a carton of Camel cigarettes and manual credits of 70 Cents for some units and 60 Cents for other units.

5. The auditor calculated a minimum retail price of $17.18 for a carton of Camel cigarettes utilizing the reported invoice price, an average damage credit of 65 Cents, a buy down credit of $5.50 and the statutory six percent (6%) cost of doing business.

6. Further investigation of the complaint by THE Auditor revealed the appropriate damage credit for Camel cigarettes during the audit period was 70 Cents per carton. Utilizing a damage credit of 70 Cents, the minimum retail price for a carton of Camel cigarettes during the audit period was $17.13.

7. THE AUDITOR testified that she is unaware of how the buy down amount of $5.50 was determined, however, in her opinion the amount is typical if not generous. She also testified that during the investigation the Division did not come across any evidence of a greater buy down amount.

8. Respondent testified that he ran the special on Camel cigarettes only as a part of his grand opening to entice customers with the low price. He also testified that he raised the prices on other brands of cigarettes during this period to offset the price for the Camel cigarettes.

9. Respondent did not present any evidence to show that his cost of doing business was less than the statutory six percent (6%) nor to show a buy down credit greater than the amount allowed by the Division.

10. No other complaints have been received by the Tax Commission regarding Respondent's pricing practices.

ISSUE AND CONTENTIONS

The issue presented for decision is whether Respondent's retail sales price for Camel cigarettes during the audit period violated the provisions of the Unfair Cigarette and Tobacco Sales Act, 68 O.S. 1991, § 326, et seq.

Respondent contends that his license to sell cigarettes and/or tobacco products should not be suspended or revoked. In support of this contention, Respondent argues that he only sold Camel cigarettes at the discounted price during his grand opening. He further argues that he offset the price for Camel cigarettes with the price of other cigarettes during this period.

The Division contends that Respondent's retail sales price for Camel cigarettes during the audit period violated the provisions of the Unfair Cigarette and Tobacco Products Sales Act. In support of this contention, the Division argues that the period audited for violation of the Act was well beyond any legitimate grand opening of the business. The Division further argues that the Act does not permit a retailer to lawfully offset the difference in price of one brand of cigarettes with the price of another brand.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 1991, § 344.

2. The license to sell cigarettes and/or tobacco products of any retailer may be revoked or suspended whenever the licensee fails to comply with any provision of the Unfair Cigarette and Tobacco Products Sales Act (hereinafter "Act") or any rule or regulation promulgated by the Tax Commission thereunder. 68 O.S. 1991, § 344.

3. Advertising, offering to sell or selling, at retail, cigarettes and tobacco products at less than cost to the retailer with the intent to injure competitors or destroy or substantially lessen competition, violates the Act and consequently constitutes a failure to comply with the provisions of the Act. See, 68 O.S. 1991, § 328(a). Evidence of advertisement, offering to sell, or sale of cigarettes and tobacco products at less than cost is prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition. 68 O.S. 1991, § 328(b).

4. "Cost to the retailer" is defined by the Act to mean "the 'basic cost of cigarettes and tobacco products' to the retailer plus the 'cost of doing business by the retailer'". 68 O.S. 1991, § 330(a). The cost of doing business by a retailer of cigarettes and tobacco products, in absence of proof to the contrary, is presumed to be six percent (6%) of the "basic cost of cigarettes and tobacco products" to the retailer. 68 O.S. 1991, § 330(b).

5. "Basic costs of cigarettes and tobacco products" is defined by the Act to mean "the invoice cost of cigarettes and tobacco products to the retailer * * *, within thirty (30) days prior to the date of sale in the quantity last purchased, * * *, less all trade discounts, except the customary discount for cash, to which shall be added the full face value of any tax stamps [required by law], if not already included by the manufacturer in the price." 68 O.S. 1991, § 327(m).

6. Certain sales of cigarettes and tobacco products are excepted from the provisions of the Act pursuant to Section 334, which provides:

> The provisions of this Act shall not apply to sales at retail or sales at wholesale made (a) in an isolated transaction and not in the usual course of business; (b) where cigarettes and tobacco products are advertised, offered for sale, or sold in bona fide clearance sales for the purpose of discontinuing trade in such cigarettes and tobacco products, and said advertising, offer to sell, or sale shall state the reason thereof and the quantity of such cigarettes and tobacco products advertised, offered for sale, or to be sold; (c) where cigarettes or tobacco products advertised, offered for sale, or sold as imperfect or damaged, and said advertising, offer to sell, or sale shall state the reason therefor and the quantity of such cigarettes and tobacco products advertised, offered for sale, or to be sold; (d) where cigarettes and tobacco products are sold upon the final liquidation of a business; or (e) where cigarettes and tobacco products are advertised, offered for sale, or sold by any fiduciary or other officer acting under the order or direction of any court.

7. The Act does not permit a licensee to advertise, offer to sell or sale one brand of cigarettes or tobacco products at less than cost to the licensee by offsetting the price or cost of such cigarettes or tobacco products by the price or cost of other brands of cigarettes or tobacco products. See, 68 O.S. 1991, §§ 327(m), 334 and 335. The Act clearly provides that no cigarettes or tobacco products shall be advertised, offered for sale or sold at less than cost of the cigarettes or tobacco products to the licensee. See, 68 O.S. 1991, §§ 328 and 330.

8. Here, Respondent advertised, offered to sell or sold Camel cigarettes at a price below cost of the cigarettes to him for approximately four and one-half to five months. Such advertising, offer to sell or sale of Camel cigarettes was not an isolated transaction and out of the usual course of business of Respondent. Accordingly, the advertising, offer to sell, or sale of the Camel cigarettes by Respondent was not excepted from the provisions of the Act.

9. Respondent's advertising, offer to sell, or sale of Camel cigarettes during the audit period violated the provisions of Section 328 of the Act and consequently constitutes a failure by Respondent to comply with the provisions of the Act. However, due to the delay in charging Respondent with the failure to comply and the fact that no other complaints have been alleged against Respondent, Respondent's license to sell cigarettes and tobacco products should neither be revoked nor suspended.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is DETERMINED that the license to sell cigarettes and tobacco products of Respondent BE neither revoked nor suspended.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are not generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.