JURISDICTION: **OKLAHOMA TAX COMMISSION DECISION**
CITE: **2006-09-07-11 / NOT PRECEDENTIAL**
ID: **JM-06-001-K**
DATE: **SEPTEMBER 7, 2006**
DISPOSITION: **DENIED**
TAX TYPE: **REVOCATION OF RETAIL CIGARETTE LICENSE**
APPEAL: **NO APPEAL TAKEN**

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, including the Findings of Fact, Conclusions of Law and Recommendations made and entered by the Administrative Law Judge on the 14th day of June, 2006, the Commission makes the following Findings of Fact and Conclusions of Law and enters the following order.

The Collections Division of the Oklahoma Tax Commission initiated this proceeding by filing a Complaint for Revocation/Cancellation of Retail Cigarette License which requested that the Retail Cigarette License of Licensee, LICENSEE be revoked.

FINDINGS OF FACT

1. Respondent, a corporation (FEI XX-XXXXXXX with a SIC code of G 5411), is a retailer of cigarettes and other tobacco products since 1992 and the holder of retail cigarette license no. XXXXXX-XXX-XXX and sales tax permit no. XXXXXX issued by the Tax Commission for the location of ADDRESS, CITY, Oklahoma. Exhibits A and B. Respondent does not hold a tobacco license issued pursuant to 68 O.S. 2001, § 415. Testimony of OFFICER.

2. According to the first compliance check conduct by FIELD REPRESENTATIVE on June 15, 2005, Respondent was operating with an expired sales tax permit and an expired retail cigarette license, the permit and license having expired as of November 6, 2004. Exhibit A. *See*, 68 O.S. Supp. 2003, § 304(B). OFFICER testified that the permits were not expired. FIELD REPRESENTATIVE stated that she checked the Division's records the day after the first compliance check and the permits were expired. She also stated that Respondent didn't file for renewal of the permits until possibly October 4, 2005.

3. According to the second compliance check conducted by FIELD REPRESENTATIVE on September 1, 2005, Respondent had renewed the sales tax permit and retail cigarette license, the expiration dates of which were renewed to November 6, 2007. Exhibit B.

4. During the first compliance check, FIELD REPRESENTATIVE found 572 packs of various brands of cigarettes with tribal stamps affixed thereto. Exhibit A. These packs of cigarettes with an estimated value of $2,025.74 were confiscated, turned over to the COUNTY Sheriff's Department and a receipt therefor was taken. Exhibit A.

5. During the second compliance check, FIELD REPRESENTATIVE found 17 packs of two (2) different brands of cigarettes with tribal stamps affixed thereto. Exhibit B. FIELD

REPRESENTATIVE also found 53 items of "other tobacco products" (chewing tobacco and cigars samples) for which Respondent could not produce any invoices. Exhibit B. The packs of cigarettes with an estimated value of $44.63 and other tobacco products with an estimated value of $155.50 were confiscated, turned over to the COUNTY Sheriff's Department and a receipt therefor was taken. Exhibit B.

6. According to FIELD REPRESENTATIVE, due to the length of time she was at Respondent's store and the thorough inspection thereof, she does not believe the cigarettes confiscated during the second compliance check were at Respondent's store during the first compliance check.

7. An invoice or other equivalent documentation of any "other tobacco products" shall be maintained by the retailer as long as the "other tobacco products" are on the retailer's shelves. Testimony of FIELD REPRESENTATIVE. *See*, 68 O.S. Supp. 2005 § 420.1(B).

8. Respondent neither operates a tribal store nor is the licensee of a tribe. Testimony of OFFICER and FIELD REPRESENTATIVE. *See*, 68 O.S. 2001, § 346 et seq.

9. OFFICER testified that he didn't know the difference between colors of stamps and didn't know which were tribal and which were regular. He also stated the stamps are tiny and the only thing he can read on the stamps is "Oklahoma."

10. Respondent's distributor of cigarettes and other tobacco products is DISTRIBUTOR ONE. OFFICER testified that someone called him, possibly DISTRIBUTOR TWO, and offered to sell him cigarettes at approximately $2.00 off the wholesale price. He stated that he only purchased cigarettes from this distributor one (1) time and that he has not purchased cigarettes from any other distributor other than DISTRIBUTOR ONE. He further stated that he thought the one distributor was a wholesaler who had held back cigarettes until after the price increase and then offered to sell them for the cheaper price. He further testified that the cigarettes he purchased from this distributor had many different colored stamps including some that were yellow.

11. OFFICER testified that he believes the seventeen (17) packs of cigarettes confiscated during the second compliance check were left over from the first compliance check. He stated that he bought the cigarettes, sold some and got caught. In a letter to the ALJ's Office filed May 15, 2005, OFFICER states:

> On 6/15/2005 unintentionally sold some tribal cigarettes. A vendor came at LICENSEE and offer a cheaper price on cigarette, that were $2.00 cheaper than a whole sale price, I thought it was a bargain price, so I bought [sic] a large quantity of cigarette I did not know, they were tribal cigarette until the [sic] tax commissioner came in [sic] and point out the difference of Green stamp and gray stamps, I could never tell the difference if was not pointed. I did not buy any Tribal cigarette after that, but some cigarette were left over from the last purchase, and wanted get my money back and started [sic] selling them, unfortunately got caught again.

12. OFFICER admits that there were other tobacco products on the premises for which he didn't have invoices. He stated that some of the other tobacco products were samples and the distributor did not leave invoices for these. He stated that the *other* "other tobacco products" had been, on his shelves for several years.

13. OFFICER testified that he paid the assessment of taxes on the cigarettes confiscated during the first compliance check. The proposed assessment was mailed December 13, 2005. The assessment was paid May 1, 2006, after the revocation proceeding were instituted.

14. An assessment for the period ending September, 2005, was also issued against Respondent on December 28, 2005. The assessment, however, was forwarded to the wrong address. The aggregate amount assessed is $67.33, inclusive of tax of $57.34, interest of $4.26 and penalty of $5.73.

ISSUES AND CONTENTIONS

The issue presented for decision is whether the Division sustained its burden of proving[1] that Respondent violated any of the provisions of the Cigarette Stamp Tax Act[2] and/or the Tobacco Products Tax Code[3] or the rules and regulations promulgated by the Tax Commission for the administration and enforcement of the relevant tax laws.

The Division contends that Respondent's retail cigarette license should be revoked given the fact that Respondent's violations of the relevant tax laws constitute a continuing pattern and course of conduct. In support of this contention, the Division alleges that on two (2) separate occasions cigarettes bearing tribal compact cigarette tax stamps were being offered for sale by Respondent although Respondent is neither a compacting Indian tribe or nation, nor a licensee thereof and that on one (1) occasion Respondent failed to provide receipt or purchase invoices for other tobacco products which were at its store. The Division also requests such other and further relief as to which it may be entitled, and which is just, equitable and permissible.

Respondent contends that its retail cigarette license should not be revoked. In support of this contention, Respondent alleges that notwithstanding what happened with the confiscated cigarettes, there was no intention to violate the law. Respondent argues that there was a lack of information from the Tax Commission after the new law was passed to differentiate the different types of stamps affixed to the packages of cigarettes. Respondent further alleges with respect to the other tobacco products that they were samples and the distributor does not invoice samples.

CONCLUSIONS OF LAW

1. The Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding. 68 O.S. 2001, § 212(a) and (b). *See, OAC*, 710:1-5-100. Section 212(a) provides:

> The Tax Commission is authorized to cancel or to refuse the issuance, extension or reinstatement of any license, permit or duplicate copy thereof,

> under the provisions of any state tax law or other law, to any person, firm, or corporation who shall be guilty of:
>
> (1) Violation of any of the provisions of [the Uniform Tax Procedure Code];
> (2) Violation of the provisions of any state tax law;
> (3) Violation of the rules and regulations promulgated by the Tax Commission for the administration and enforcement of any state tax law; or
> (4) Failure to observe or fulfill the conditions upon which the license or permit was issued, or
> (5) Nonpayment of any delinquent tax or penalty.

2. The Cigarette Stamp Tax Act levies an excise tax on "the sale, use, gift, possession, or consumption of cigarettes within the State of Oklahoma". 68 O.S. 2001, § 302 through 302-4 and 68 O.S. Supp. 2004, § 302-5. The tax shall be paid only once on any cigarettes sold, used, received, possessed, or consumed in this state and shall be evidenced by stamps or an impression of such tax by the use of a metering device. 68 O.S. 2001, § 302. The impact of the tax is on the vendee, user, consumer, or possessor of cigarettes in this state, and when the tax is paid by any other person, such payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes (as "part of the gross proceeds or gross receipts from the sale of cigarettes") and recovered from the ultimate consumer or user. Id.

3. "Every retailer who makes sales of cigarettes within this state to persons for use or consumption shall separately show the amount of tax paid as evidenced by appropriate stamps on each package of cigarettes sold, and the tax shall be collected by the retailer from the user or consumer." 68 O.S. 2001, § 302. "The tax shall be evidenced by appropriate stamps attached to each package of cigarettes sold." Id. "All cigarettes sold or held for sale in the State of Oklahoma shall bear one of the following stamps:

> (1) A stamp indicating that the retailer * * * is a federally recognized Indian tribe or nation, or licensee thereof, which has entered into a Compact with the State of Oklahoma and is paying the payments specified thereunder; or
> (2) A stamp indicating that the retailer * * * is a federally recognized Indian tribe or nation, or licensee thereof, which has not entered into a Compact with the State of Oklahoma but has provided the prescribed documentation to qualify for a rate of seventy-five percent (75%) of the cigarette excise tax imposed by 68 0.S. §301 et seq.; or
> (3) A stamp indicating that the retailer * * * does not meet the requirements of one of the above-referenced categories and is paying the tax levied pursuant to 68 O.S. §301 et seq."

OAC, 710:70-7-4.

4. "Any person operating as a * * * retailer, * * * must at all times have an effective unexpired license which has been issued by the Tax Commission." 68 O.S. 2001, § 304(D)(2).

"Such license, * * * must at all time be displayed in a conspicuous place so that it can be seen." 68 O.S. 2001, § 304(B).

5. A retailer of tobacco products shall maintain copies of invoices or equivalent documentation for every transaction in which the retailer receives or purchases tobacco products. 68 O.S. Supp. 2005, § 420.1(B). The invoices or documentation shall show the name and address of the distributor from whom, or the address of another facility of the same retailer from which, the tobacco products were received, the quantity of each brand style received in such transaction and the retail cigarette license number or sales tax license number. Id.

DISCUSSION AND ORDER

Revocation of a retail cigarette license or of any license required for a person to engage in a business is a serious matter[4] which properly involves consideration of a number of factors in making the determination of whether or not such a license should be revoked. Factors which may be considered by the Commission in making a determination regarding revocation of a retail cigarette license include the total number of violations of cigarette or tobacco tax laws which have been committed by the licensee; the time period covered by such violations; whether or not the violations were for the same offense; the dollar amount of the products involved in the violations; the dollar amount of products involved as a percentage of total sales and as a percentage of cigarette and tobacco sales; the number of compliance checks during the relevant time period in which no violations were found and the number of violations of Youth Access to Tobacco laws committed by the licensee. This is not an exhaustive list of factors which the Commission may consider.

In determining the appropriate standards to utilize in making decisions regarding the revocation of a retail cigarette license for violation of state cigarette or tobacco tax laws it is instructive to note the standards which have been established by the Oklahoma Legislature for revocation of a retail cigarette license for other reasons. Section 316 of Title 68 of the Oklahoma Statutes requires the Tax Commission to revoke the retail cigarette license of a person for a third offense of violating the provisions of certain federal laws relating to cigarettes designated for export. Section 600.3 of Title 37 of the Oklahoma Statutes authorizes (but does not require) the suspension for 30 days of the retail cigarette license of a person for a third offense within a two year period of selling cigarettes to persons under 18 years of age and authorizes (but does not require) the suspension for 60 days of the retail cigarette license of a person for a fourth or subsequent offense within a two year period of selling cigarettes to persons under 18 years of age.

The Tax Commission notes that other mechanisms for punishment of violations of cigarette and tobacco products tax laws exist in addition to revocation of a retail cigarette license. Seizure and forfeiture of cigarettes or tobacco products pursuant to Section 305 or 417 of Title 68 is an obvious financial punishment for the retailer who attempts to evade the tax laws with regard to such products. In a proceeding with appropriate notice given to the retailer an administrative fine may be imposed pursuant to Section 316 of Title 68 for violations of the tax laws with regard to cigarettes. Criminal penalties also are available for violation of tax laws with regard to both cigarettes and other tobacco products.[5] The Tax Commission also notes that no

license is required for the sale of other tobacco products and the revocation of the cigarette license of a retailer for violations of laws regarding the sale of other tobacco products will not require a retailer to stop selling other tobacco products.

The Commission finds that the evidence in this matter establishes one violation of the tax laws regulating the sale of other tobacco products in this state and two violations of the tax laws regulating the sale of cigarettes in this state and that under the specific facts and circumstances of this case the revocation of respondent's retail cigarette license is not warranted and denies the request of the Collections Division to revoke the retail cigarette license of respondent LICENSEE.

The Commission further finds that no notice was given to the respondent prior to the hearing in this proceeding that it might be liable for any administrative fines or penalties and therefore no administrative fines or penalties should be assessed in this proceeding. The Commission further finds that in a proceeding with proper notice given to the respondent the imposition of an administrative fine pursuant to Section 316(H) of Title 68 for violation of the Cigarette Stamp Tax Act would be warranted by the evidence presented in this matter.

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[1] The Division acknowledges that the burden of going forward with the evidence and the burden of proof in this proceeding is upon it to show Respondent violated a provision of the tax laws and/or a rule or regulation of the Tax Commission. See, the *Complaint for Revocation/Cancellation of Retail Cigarette License and Sales Tax Permit* and *Amended Complaint for Revocation/Cancellation of Retail Cigarette License*. The standard of proof in this proceeding is "preponderance of evidence." 2 Am.Jur.2d *Administrative Law* § 357. Preponderance of the evidence requires that each element of the claim be supported by such reliable, probative, and substantial evidence of sufficient quality and quantity as to show the existence of the facts supporting the claim are more probable than their nonexistence. Id.

[2] 68 0.S. 2001, § 301 et seq., as amended.

[3] 68 0.S. 2001, § 401 et seq., as amended.

[4] Section 2 of Article II of the Oklahoma Constitution provides "All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry."

[5] OKLA. STAT. ANN. tit. 68, §§ 316 and 418 (West 2001).

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are 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.