

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 2006-10-31-04 / NOT PRECEDENTIAL
ID: JM-06-014-H
DATE: OCTOBER 31, 2006
DISPOSITION: GRANTED
TAX TYPE: REVOCATION OF WHOLESALER CIGARETTE LICENSE,
UNSTAMPED TOBACCO LICENSE AND SALES TAX PERMIT
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 26th day of September, 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 Wholesaler Cigarette License, Unstamped Tobacco License and Sales Tax Permit which requested that the Wholesaler Cigarette License, Unstamped Tobacco License and Sales Tax Permit of LICENSEE be revoked.

FINDINGS OF FACT

1. On November 1, 2005, the Division was conducting a cigarette and tobacco enforcement survey ("Compliance Check") at CONVENIENCE STORE, owned by CONVENIENCE STORE OWNER, a retailer of cigarettes and tobacco products, located ADDRESS, TOWN ONE, Oklahoma. Upon entering CONVENIENCE STORE, FIELD REPRESENTATIVE, the Division's Field Representative, identified herself and advised CONVENIENCE STORE OWNER that the Division was conducting a Compliance Check. The Licensee was asked to produce invoices for all tobacco products at the licensed location.

2. During the Compliance Check at CONVENIENCE STORE, FIELD REPRESENTATIVE discovered a back room that contained a large quantity of "Unstamped Cigarettes," "Half Stamped Cigarettes," "Tobacco Products," "Altered" and "Unaltered" Oklahoma Cigarette Stamps, and two (2) types of glue.¹

3. CONVENIENCE STORE OWNER advised FIELD REPRESENTATIVE that the contents of the back room at CONVENIENCE STORE belonged to LICENSEE, ADDRESS, TOWN TWO, Oklahoma ZIP CODE. FIELD REPRESENTATIVE contacted LICENSEE by telephone and LICENSEE confirmed that he was the owner of the contents in the back room at CONVENIENCE STORE. FIELD REPRESENTATIVE waited approximately two (2) hours for LICENSEE to travel from TOWN TWO, Oklahoma, in COUNTY TWO to CONVENIENCE STORE in TOWN ONE, Oklahoma, in COUNTY ONE.²

4. Upon arrival at CONVENIENCE STORE, LICENSEE reconfirmed that he was the owner of the “Unstamped Cigarettes,” “Half Stamped Cigarettes,” “Tobacco Products,” “Altered” and “Unaltered” Oklahoma Cigarette Stamps, and two (2) types of glue. CONVENIENCE STORE OWNER and LICENSEE did not offer any explanation to FIELD REPRESENTATIVE as to the situation in which they found themselves.³ All LICENSEE would say was that “he was ‘fixin’ them.”⁴

5. LICENSEE is a wholesaler⁵ of cigarettes⁶ and tobacco products⁷ and the holder of Wholesaler Cigarette License #XXXXXX⁸ and Unstamped Tobacco License #XXXXXX issued by the Tax Commission, with effective dates of October 14, 2005, for the location at ADDRESS, TOWN TWO, Oklahoma ZIP CODE.⁹

6. LICENSEE does not hold any licenses for the back room of CONVENIENCE STORE, located ADDRESS, TOWN ONE, Oklahoma. LICENSEE also could not provide any invoices on the tobacco products which reflected that the applicable tobacco products tax (“ATT”) had been paid.¹⁰

7. FIELD REPRESENTATIVE confiscated¹¹ the “Unstamped Cigarettes,” “Half Stamped Cigarettes,” “Tobacco Products,” “Altered” and “Unaltered” Oklahoma Cigarette Stamps, and two (2) types of glue. FIELD REPRESENTATIVE prepared a Confiscation Inventory List,¹² with a total estimated retail value for the cigarettes and tobacco products confiscated in the amount of \$22,302.88.¹³ The total estimated retail value of the “Oklahoma Cigarettes Stamps” was \$56.73 and the two (2) types of glue were valued at \$2.00.¹⁴ All of the confiscated products were turned over to DEPUTY of the COUNTY ONE Sheriffs Department.¹⁵

8. The full text of the “Statement of Understanding”¹⁶ signed by the Licensee and FIELD REPRESENTATIVE on November 1, 2005, is as follows, to-wit:

I understand the following:

1. The cigarettes and/or other tobacco products listed on the attached list were seized in accordance with state law for the reason that the cigarettes were improperly stamped and/or the documentation that appropriate tax was paid on other tobacco products was not available.
2. If invoices corresponding to the product seized are not provided to field agent, FIELD REPRESENTATIVE, at pager # (XXX) XXX-XXXX within 20 days of this notice the product will be forfeited.
3. The seizure and forfeiture of the product does not relieve me of payment of the tax on the product. I will receive a letter that will set forth the tax on the seized product and am expected to pay the assessment according to the terms of the letter.
4. The Oklahoma Tax Commission will continue to monitor for cigarette and other tobacco products tax compliance. A subsequent violation could result in the cancellation of licenses issued by the Oklahoma Tax Commission. A new cigarette license can not be issued for two years after a cigarette license is cancelled.¹⁷

5. The Oklahoma Tax Commission may set a hearing that will be held in Oklahoma City. The hearing will be set for a date no earlier than 20 days after notice of the hearing is issued.

9. On November 18, 2005, LICENSEE faxed the Division copies of two (2) invoices from DISTRIBUTOR, ADDRESS, CITY, Kansas ZIP CODE, on October 25, 2005.¹⁸

10. Invoice #2035 appears to be a copy of the Licensee's purchase of tobacco products from DISTRIBUTOR on October 25, 2005, in the amount of \$2,957.00. The billing and shipping addresses are both for LICENSEE, ADDRESS, TOWN TWO, Oklahoma ZIP CODE.¹⁹

11. Invoice #2035A appears to be a copy of an invoice reflecting that DISTRIBUTOR was returning \$324.00 in assorted brands of cigarettes on which DISTRIBUTOR had affixed cigarette stamps to the packs for the Licensee using the Licensee's cigarette stamps.²⁰

12. DISTRIBUTOR is the holder of an Oklahoma Wholesaler Cigarette License #XXXXXX and Oklahoma Unstamped Tobacco Products License #XXXXXX issued by the Oklahoma Tax Commission.²¹

13. DISTRIBUTOR is not a manufacturer²² of cigarettes or importer of cigarettes which possesses a valid and current permit under Section 5712 of Title 26 of the United States Code.²³

14. According to the records of the Tax Commission, the Licensee filed his initial reports for October 2005, which were incorrect and incomplete. Despite numerous phone calls and letters from the Division, the Licensee is also delinquent in the filing of his monthly Tobacco Products Tax Reports, Wholesaler Cigarette Tax Reports, and Non-Participating Manufacturers Reports for November 2005 to the present.²⁴

15. On November 30, 2005, the COUNTY ONE Sheriffs Office, through DEPUTY, released to FIELD REPRESENTATIVE SUPERVISOR the sealed evidence box containing the "Altered" and "Unaltered" Oklahoma Cigarette Stamps and the two (2) types of glue.²⁵

16. On August 18, 2006, a "Notice to Show Cause Why the Complaint for Revocation/Cancellation of the Wholesaler Cigarette License, Unstamped Tobacco License and Sales Tax Permit Should Not Be Ordered" was sent to the Licensee by certified mail.²⁶ The notice advised the Licensee that a hearing had been scheduled for September 12, 2006, at 9:30 a.m. at which time the Licensee could appear and show cause why the Division's complaint should not be granted. A copy of the Division's "Complaint" was enclosed with the notice.

17. Oklahoma Cigarette Stamps are designed to be heat transferred to individual packs of cigarettes through the use of a stamping machine or "iron" designed for the same purpose. A roll of Oklahoma Cigarette Stamps contains fifteen (15) stamps per row, with two thousand (2000) rows for a total of thirty thousand (30,000) stamps per roll. The stamps in this matter cost \$1.03 each,²⁷ with a roll costing \$30,900.00. The rolls are designed in such a way that the stamping machine can heat transfer fifteen (15) stamps at a time to individual packs of cigarettes contained in three (3) cartons of cigarettes.²⁸

18. The Oklahoma Cigarette Stamps confiscated by the Division on November 1, 2005, clearly reflect that the Licensee used some type of instrument or device to transfer the stamps by rubbing the stamps like some type of decal.²⁹

19. The transfer process utilized by the Licensee was ineffective. All of the sheets cut from a roll of stamps were cut into smaller, more manageable sheets.³⁰ Some sheets were cut into strips with one (1) stamp on a strip, or two (2) strips with one-half (1/2) of a stamp on each strip. Other strips indicate that only one-half (1/2) of the stamp was rubbed off, leaving the remaining one-half (1/2) of the stamp on the strip or partial sheet. All of the sheets have easily identifiable portions or fragments of the stamps still on the partial sheets and strips cut from a roll.³¹

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.³² On August 16, 2006, the notice was sent to the Licensee by certified mail, with return receipt requested, giving the Licensee the requisite twenty (20) day notice of the hearing held on September 12, 2006, at 9:30 a.m.

2. The Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement, and collection of taxes and other levies enacted by the Oklahoma Legislature with respect to cigarettes, tobacco, and tobacco products.³³

3. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.³⁴

4. The Oklahoma Cigarette Tax Stamp Act³⁵ (“Cigarette Act”) provides that “[i]n addition to any civil or criminal penalty provided by law, upon a finding that the a licensee has violated any provision of [the Act], the Tax Commission may revoke or suspend the license or licenses of the licensee pursuant to the procedures applicable to revocation of a license set forth in Section 316 of [the Act].”³⁶

5. The Cigarette Act provides that the Tax Commission shall have the right to inspect any premises where cigarettes are sold, offered for sale or exchange, and to examine all of the records required by the Cigarette Act to be kept or any other records that may be kept incident to the conduct of the cigarette business.³⁷

6. The Tobacco Act provides that the Tax Commission shall have the right to enter upon the premises of any taxpayer to examine, or cause to be examined any books, invoices, papers, records, or memoranda bearing upon the amount of taxes payable, and to secure other information directly concerned with the enforcement of the Tobacco Act.³⁸

7. Beginning July 1, 2005, each distributor of tobacco products, as defined by the Tobacco Act, shall maintain copies of invoices or equivalent documentation for every transaction in which the distributor is the seller, purchaser, consignor, consignee, or recipient of tobacco products. The invoices or documentation shall contain the distributor’s tobacco license number

and the quantity by brand style of the tobacco products involved in the transaction.³⁹ It is undisputed that on November 1, 2005, the Licensee could not produce invoices for the tobacco products in the back room of CONVENIENCE STORE, TOWN ONE, Oklahoma.⁴⁰ The Division properly confiscated the tobacco products.

8. Every wholesaler or distributor of cigarettes in this state, as a condition of carrying on such business, shall annually secure from the Oklahoma Tax Commission a written license, and shall pay an annual fee of Twenty-five Dollars (\$25.00). This license, which will be for the ensuing year, must at all times be displayed in a conspicuous place so that it can be seen. Persons operating more than one place of business must secure a license for each place of business.⁴¹ The Licensee did not hold any licenses for the operation of a wholesale business in the back room of CONVENIENCE STORE, in TOWN ONE, Oklahoma.⁴²

9. Oklahoma Cigarette Stamps and Oklahoma Tribal Stamps may be applied only to cigarette packages that the wholesaler, jobber, distributor, or wholesaler has received directly from either a manufacturer or importer of cigarettes, provided that manufacturer or importer possesses a valid permit under 26 U.S.C. § 5712.⁴³ It is undisputed that the Licensee received “Unstamped Cigarettes” from DISTRIBUTOR, which is not a manufacturer or importer of cigarettes possessing a valid permit under 26 U.S.C. 5712.⁴⁴ The Division properly confiscated the “Unstamped Cigarettes,” “Half Stamped Cigarettes,” “Altered” and “Unaltered” Oklahoma Cigarette Stamps, and the two (2) types of glue.

10. The excise tax levied upon the sale, use, distribution, exchange, barter, or possession of tobacco products in this State shall be paid on a monthly basis by the licensed manufacturer, wholesaler, warehouseman, distributor, or jobber, (except a distributor bonded in accordance with 68 O.S. § 405) first possessing, selling, using, distributing, exchanging, bartering, or in any manner dealing with such tobacco products in this State. No other person, wholesaler, warehouseman, distributor, jobber, or retailer shall first possess, use, sell, exchange, distribute, barter, or in any manner deal with such tobacco products in this State upon which the excise tax has not been paid.⁴⁵

11. Every licensed manufacturer, and every wholesaler, jobber, distributor, retailer, and consumer, licensed by the Oklahoma Tax Commission, to possess, use, or in any manner deal with tobacco products subject to the excise tax, upon which such tax has not been paid, shall report, to the Oklahoma Tax Commission, all purchases and invoices of all such tobacco products and merchandise subject to such excise tax monthly, on the Monthly Tobacco Products Tax Report form prescribed by the Commission.⁴⁶ Each monthly report shall include the following information:

- (1) Name, business address and Tobacco License Number of the tax reporter;
- (2) All purchases or deliveries, stated separately according to the dates of delivery in the State, of all tobacco products received, possessed, used or in any manner dealt with in the previous calendar month;
- (3) Invoice numbers of all purchases or deliveries of such products for the previous calendar month;
- (4) Name and business address of each consignee and consignor; and

- (5) Copy of each invoice of all purchases or deliveries of such products for the previous month attached to the monthly report form. Copies of invoices submitted shall be subject to destruction upon completion of an office audit of the monthly report and shall not discharge the reporter from the statutory duty to maintain records and files of all such transactions.

It is undisputed that the Licensee is delinquent in the filing of the requisite reports due from November 2005 to the present.⁴⁷

12. Any Monthly Tobacco Products Tax Report form filed with the Business Tax Division of the Oklahoma Tax Commission shall include, and have attached thereto, the minimum information specified in 68 O.S. §413 and 710:70-5-3. Any such monthly report form that does not include these minimum requirements shall not constitute the mandatory report. And, in the event a proper, complete monthly report is not filed on or before the due dates in accordance with 710:70-5-5,⁴⁸ the discount of two percent (2%) of the tax due for maintaining and collecting such tax, shall not be allowed, and the report shall be delinquent.⁴⁹ It is undisputed that the Licensee's initial reports filed for October 2005 are incomplete and incorrect.⁵⁰

In all proceedings before the Tax Commission, the taxpayer has the burden of proof, unless provided by law.⁵¹ In this matter the Division filed a Complaint seeking the revocation of the licenses enumerated therein, shifting the burden of proof to the Division.⁵²

In summary, the Division's Complaint alleges violations by the Licensee of the Cigarette Act and Tobacco Act, as follows, to-wit:

1. Operating at a "place of business" without a license for the location in violation of § 304(A) of Title 68 of the Oklahoma Statutes;
2. Being in possession of package(s) containing cigarettes bearing unauthorized, false, or altered stamps in violation of § 317 of Title 68 of the Oklahoma Statutes.
3. Affixing Oklahoma Cigarette Tax Stamps to cigarette packages which were not received directly from a manufacturer holding a valid and current permit in violation of § 305(A) of Title 68 of the Oklahoma Statutes; and
4. Failing to file monthly cigarette tax reports, tobacco products tax reports, and non-participating manufacturers tax reports in violation of §§ 312.1, 313, 403.1, and 413 of Title 68 of the Oklahoma Statutes and OAC 710:70-5-3.

The Division has met its burden of proof for each of the violations enumerated herein. The Licensee has failed to come forward and present any evidence and has cited no authority that the Division's request to revoke the Licensee's Wholesaler Cigarette License #XXXXXXX and Unstamped Tobacco License #XXXXXXX should not be granted.

DISCUSSION AND ORDER

Revocation of a Wholesaler Cigarette License, an Unstamped Tobacco License or any license required for a person to engage in a business is a serious matter⁵³ 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 such licenses 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 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 license. Seizure and forfeiture of cigarettes or tobacco products pursuant to Section 305 or 417 of Title 68 is an obvious financial punishment for a licensee who attempts to evade the tax laws with regard to such products. In a proceeding with appropriate notice given to the licensee 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.⁵⁴ The Commission finds that the evidence in this matter establishes five violations of the tax laws regulating the sale of cigarettes in this state and two violations of the tax laws regulating the sale of other tobacco products in this state and that under the specific facts and circumstances of this case the revocation of licensee's Wholesale Cigarette License and licensee's Unstamped Tobacco License is warranted and hereby revokes and cancels licensee's Wholesale Cigarette License #XXXXXX and licensee's Unstamped Tobacco License #XXXXXX effective immediately.

¹ Testimony of FIELD REPRESENTATIVE. The Half Stamped Cigarettes had residue from the glue used to affix one-half (1/2) of a cigarette stamp to the pack of cigarettes.

² Testimony of FIELD REPRESENTATIVE.

³ Testimony of FIELD REPRESENTATIVE.

⁴ Testimony of FIELD REPRESENTATIVE.

⁵ OKLA. STAT. ANN. tit. 68, § 301(3) (West Supp. 2006):

For purposes of Section 301 et seq. of this title:

...

3. The term “wholesaler”, “ distributor” and/or “jobber” is defined to mean and include a person, firm or corporation organized and existing, or doing business, primarily to sell cigarettes to, and render service to retailers in the territory such person, firm or corporation chooses to serve, and that:

- a. purchases cigarettes directly from the manufacturer,
- b. at least seventy-five percent (75%) of whose gross sales are made at wholesale,
- c. handles goods in wholesale quantities and sells through salespersons, advertising and/or sales promotion devices,
- d. carries at all times at its principal place of business a representative stock of cigarettes for sale, and
- e. comes into the possession of cigarettes for the purpose of selling them to retailers or to persons outside or within the state who might resell or retail such cigarettes to consumers.

In addition to the foregoing, and irrespective of the percentage or type of sales, the term “wholesaler”, “distributor” and/or “jobber” shall also include all purchasers of cigarettes making purchases directly from the manufacturer for distribution at wholesale or retail sale and this shall not affect the requirements relating to retail licenses;

OKLA. STAT. ANN. tit. 68, § 401(c) (West 2001):

For the purpose of this article:

...

(c) The word “wholesaler” shall include dealers whose principal business is that of a wholesale dealer or jobber, and who is known to the trade as such, who shall sell any cigars or tobacco products to licensed retail dealers only for the purpose of resale, or giving them away, or exposing the same where they may be taken or purchased, or otherwise acquired by the retailer.

(d) The word “retailer” shall include every dealer, other than a wholesale dealer as defined above, whose principal business is that of selling merchandise at retail, who shall sell, or offer for sale, cigars or tobacco products, irrespective of quantity, number of sales, giving the same away or exposing the same where they may be taken, or purchased, or otherwise acquired by the consumer.

⁶ OKLA. STAT. ANN. tit. 68, § 301(1) (West Supp. 2006):

For purposes of Section 301 et seq. of this title:

...

1. The term “cigarette” is defined to mean and include all rolled tobacco or any substitute therefor, wrapped in paper or any substitute therefor and weighing not to exceed three (3) pounds per thousand cigarettes;

See OKLA. ADMIN. CODE § 710:70-2-2 (May 13, 2004).

⁷ OKLA. STAT. ANN. tit. 68, § 401(g) (West 2001):

For purposes of this article:

...

(g) The words “tobacco products” shall mean any cigars, cheroots, stogies, smoking tobacco (including granulated, plug cut, crimp cut, ready rubbed and any other kinds and forms of tobacco suitable for smoking in a pipe or cigarette), chewing tobacco (including cavendish, twist, plug, scrap and any other kinds and forms of tobacco suitable for chewing), however prepared; and shall include any other articles or products made of tobacco or any substitute therefor.

⁸ OKLA. STAT. ANN. tit. 68, § 304(A) (West Supp. 2006):

A. Every manufacturer, wholesaler, warehouseman, jobber or distributor of cigarettes in this state, as a condition of carrying on such business, shall annually secure from the Oklahoma Tax Commission a written license, and shall pay therefor an annual fee of Twenty-five Dollars (\$25.00). This license, which will be for the ensuing year, must at all times be displayed in a conspicuous place so that it can be seen. Persons operating more than one place of business must secure a license for each place of business. “Place of business” shall be construed to include the place where orders are received, or where cigarettes are sold. If cigarettes are sold on or from any vehicle, the vehicle shall constitute a place of business and the regular license fee of Twenty-five Dollars (\$25.00) shall be paid with respect thereto. However, if the vehicle is owned or operated by a place of business for which the regular Twenty-five Dollars (\$25.00) is paid, the annual fee for the license with respect to such vehicle shall be only Ten Dollars (\$10.00). The expiration for such vehicle license shall expire on the same date as the current license of the place of business.

Provided, that the Tax Commission shall not authorize the use of a stamp-metering device by any manufacturer, wholesaler, warehouseman, jobber or distributor who does not maintain a warehouse or wholesale establishment or place of business within the State of Oklahoma from which cigarettes are received, stocked and sold and where such metering device is kept and used; but the Tax Commission may, in its discretion, permit the use of such metering device by manufacturers, wholesalers, warehousemen, jobbers or distributors of cigarettes residing wholly within another state where such state permits a licensed Oklahoma resident, manufacturer, wholesaler, warehouseman, jobber or distributor of cigarettes the use of the metering device of such state without first requiring that such manufacturer, wholesaler, warehouseman, jobber or distributor establish a place of business in such other state. The provisions of this subsection relating to metering devices shall not apply to states which do not require the affixing of tax stamps to packages of cigarettes before same are offered for sale in such states.

⁹ Testimony of FIELD REPRESENTATIVE and AUDIT SUPERVISOR.

¹⁰ Division’s Exhibit A and testimony of FIELD REPRESENTATIVE.

¹¹ OKLA. STAT. ANN. tit. 68, § 417 (West 2001):

A. All unstamped tobacco products upon which a tax is levied by Section 401 et seq. of this title and all tobacco products stamped, sold, offered for sale, or imported into this state in violation of the provisions of Section 4 of this act, found in the possession, custody or control of any person for the purpose of being consumed, sold or transported from one place to

another in this state, for the purpose of evading or violating the provisions of Section 401 et seq. of this title, or with intent to avoid payment of the tax imposed thereunder, may be seized by any authorized agent of the Oklahoma Tax Commission or any sheriff, deputy sheriff or police within the state. Tobacco products from the time of seizure shall be forfeited to the State of Oklahoma. A proper proceeding shall be filed in the district court of the county of seizure, to maintain such seizure and prosecute the forfeiture as herein provided; the provisions of this section shall not apply, however, where the tax on such unstamped tobacco products does not exceed One Dollar (\$1.00).

B. All such tobacco products so seized shall first be listed and appraised by the officer making such seizure and turned over to the sheriff of the county in which the seizure is made, and a receipt taken therefor.

C. The person making such seizure shall immediately make and file a written report thereof to the Tax Commission, showing the name of the person making such seizure, the place where seized, the person from whom seized, the property seized and an inventory and appraisal thereof, which inventory shall be based on the usual and ordinary retail price or value of the articles seized, or the Attorney General, in the case of tobacco products stamped, sold, offered for sale, or imported into this state in violation of the provisions of Section 4 of this act. The district attorney of the county in which such seizure is made shall, at the request of the Tax Commission or Attorney General, file in the district court forfeiture proceedings in the name of the State of Oklahoma against the owner or person in possession of the property seized, if known, and if unknown, against the property seized. The clerk of the court shall issue summons to the owner or person in whose possession such property was found. Summons so issued and all procedure thereafter shall be governed by statutes relating to procedure in civil actions. If personal service cannot be had, or if suit be filed against the property seized, service may be obtained by the posting of notices in five public places within the county. The notice shall direct the owner, or if the owner be unknown, the person in possession of the property seized, to answer the petition filed within twenty (20) days from the date of the posting of such notices. The district attorney shall within three (3) days after the posting of the notices cause a copy of the same to be mailed to any defendant on whom personal service was not had, addressed to the defendant's last-known address. If, after a full hearing upon the petition, the court finds that the property seized is forfeited to the State of Oklahoma, the court shall direct to the sheriff to sell the property at public auction ten (10) days after the posting of notices of sale in five public places within the county; provided, tobacco products as described in Section 4 of this act shall only be sold for export outside the United States or as otherwise permitted by federal law. The proceeds of the sale shall be deposited with the clerk of the court who shall, after deducting costs including the cost of the sale, pay same to the Tax Commission as tobacco products tax collected, or in the case of tobacco products seized as being in violation of the provisions of Section 4 of this act, to the Attorney General. The Attorney General shall remit the amount of tobacco products tax, if any be due, including all penalties and interest due, to the Tax Commission as tobacco products tax collected and shall deposit the remainder to the revolving fund created in Section 7 of this act.

D. The seizure and sale of such tobacco products shall not relieve the person from whom such tobacco products were seized from prosecution or the payment of penalties. The purchaser of forfeited tobacco products shall pay the regular tobacco products tax and shall place proper stamps thereon before any of such tobacco products are sold or consumed.

See OKLA. ADMIN. CODE § 710:70-5-11 (Text current through June 1, 2006).

¹² Division's Exhibit A. The Confiscation Inventory List describes each kind of tobacco product, the quantity, and the estimated retail value.

¹³ Division’s Exhibit A. The Confiscation Inventory List, dated November 1, 2005, was signed by FIELD REPRESENTATIVE, LICENSEE, and DEPUTY, COUNTY ONE County Sheriff’s Office. See Division’s “Corrected” Exhibit A filed September 21, 2006. Page 4 of Exhibit A was corrected to reflect that eight (8) cartons of Marlboro Lights were confiscated in the amount of \$304.00, not eight (8) packs. There was also a mathematical error on page 4. The twenty-four (24) cartons of Carnival Full Flavor Soft Packs were valued at \$672.00, not \$6,720.00.

¹⁴ Testimony of FIELD REPRESENTATIVE. See Note 16.

¹⁵ Testimony of FIELD REPRESENTATIVE. See Note 16.

¹⁶ Division’s Exhibit C.

The statement is untitled, but is uniformly referred to by the Division as the “Statement of Understanding” form.

¹⁷ OKLA. STAT. ANN. tit. 68, § 304(E) (West Supp. 2006):

No license may be granted, maintained or renewed if any of the following conditions applies to the applicant. For purposes of this section, “applicant” includes any combination of persons owning directly or indirectly, in the aggregate, more than ten percent (10%) of the ownership interests in the applicant:

1. The applicant owes Five Hundred Dollars (\$500.00) or more in delinquent cigarette taxes;
2. The applicant had a cigarette manufacturer, retailer or distributor license revoked by the Tax Commission within the past two (2) years;
3. The applicant has been convicted of a crime relating to stolen or counterfeit cigarettes, or receiving stolen or counterfeit cigarettes;

...

See OKLA. ADMIN. CODE § 710:70-2-4 (May 13, 2004).

¹⁸ Division’s Exhibit D.

¹⁹ Division’s Exhibit D.

²⁰ Division’s Exhibit D. There are two notations on the invoice. The first is “NOTE: USED CUST. STAMPS!!!” The second notation states, “Cigarettes were sent back from customer for us to stamp, using customers stamps, as he does not have a stamp machine yet.”

²¹ Testimony of AUDIT SUPERVISOR. Division’s Exhibit D and Exhibit E.

²² OKLA. STAT. ANN. tit. 68, § 301(15) (West Supp. 2006):

For purposes of Section 301 et seq. of this title:

...

The term “manufacturer” means any person who manufactures, fabricates, assembles, processes, or labels a finished cigarette; or imports, either directly or indirectly, a finished cigarette for sale or distribution in this state;

...

²³ Testimony of AUDIT SUPERVISOR.

See 26 U.S.C.A. § 5712:

Every person, before commencing business as a manufacturer or importer of tobacco products or as an export warehouse proprietor, and at such other time as the Secretary shall by regulation prescribe, shall make application for the permit provided for in section 5713. The application shall be in such form as the Secretary shall prescribe and shall set forth, truthfully and accurately, the information called for on the form. Such application may be rejected and the permit denied if the Secretary, after notice and opportunity for hearing, finds that—

- (1) the premises on which it is proposed to conduct the business are not adequate to protect the revenue;
- (2) the activity proposed to be carried out at such premises does not meet such minimum capacity or activity requirements as the Secretary may prescribe, or
- (3) such person (including, in the case of a corporation, any officer, director, or principal stockholder and, in the case of a partnership, a partner) is, by reason of his business experience, financial standing, or trade connections, not likely to maintain operations in compliance with this chapter, or has failed to disclose any material information required or made any material false statement in the application therefor.

26 U.S.C.A. § 5713:

- (a) Issuance.--A person shall not engage in business as a manufacturer or importer of tobacco products or as an export warehouse proprietor without a permit to engage in such business. Such permit, conditioned upon compliance with this chapter and regulations issued thereunder, shall be issued in such form and in such manner as the Secretary shall by regulation prescribe, to every person properly qualified under sections 5711 and 5712. A new permit may be required at such other time as the Secretary shall by regulation prescribe.

²⁴ Testimony of AUDIT SUPERVISOR.

²⁵ Division's Exhibit B.

²⁶ The notice was sent to the Licensee by certified mail to ADDRESS, TOWN TWO, Oklahoma ZIP CODE. The Licensee, through EMPLOYEE, signed the return receipt on August 21, 2006.

²⁷ OKLA. ADMIN. CODE § 710:70-2-9 (June 25, 2005):

- (a) Designation of rates. Tax rates set out in this Section are for packages of twenty (20) cigarettes. Rates for packages of twenty-five (25) cigarettes are One Hundred Twenty-five percent (125%) greater than the rates for the twenty-unit packages.
- (b) Inventories in stock. The rates set out in this Section shall only be applicable to inventories of cigarettes acquired on or after January 1, 2005.
- (c) Rates effective January 1, 2005, applicable to non-tribal sales. The non-tribal rate is \$1.03 per pack and is applicable to all non-tribal sales.

²⁸ Testimony of AUDIT SUPERVISOR. *See* Division's Exhibit E.

²⁹ Testimony of FIELD REPRESENTATIVE and AUDIT SUPERVISOR. *See* Division's Exhibit E.

³⁰ Testimony of AUDIT SUPERVISOR.

³¹ Division's Exhibit E.

³² OKLA. STAT. ANN. tit. 68, § 212 (West 2001), which states in pertinent part:

(a) 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 this article;
- (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.

(b) Before any license, permit or duplicate copy thereof may be canceled, or the issuance, reinstatement, or extension thereof refused, the Tax Commission shall give the owner of such license or permit, or applicant therefor, twenty (20) days' notice by registered mail or certified mail with return receipt requested, of a hearing before said Tax Commission, granting said person an opportunity to show cause why such action should not be taken. If the notice has been mailed as required by this section, failure of the person to have received actual notice of the hearing shall neither invalidate nor be grounds for invalidating any action taken at the hearing or pursuant to the hearing.

...

See OKLA. ADMIN. CODE § 710:1-5-100 (June 25, 1999):

When a Tax Division contests the taxpayer's compliance with State tax laws or Commission Rules, the Division may cause notice to be issued to the taxpayer requiring him to appear before the Administrative Law Judge or an Administrative Hearing Officer to show why his license or permit should not be cancelled. The notice shall contain a date certain for the hearing. Failure to appear at the hearing may result in the cancellation of license or permit. The taxpayer may represent himself or be represented by an attorney, an accountant or other representative approved by the Commission. The taxpayer is to bring all reports and payments for delinquent taxes, penalty and interest to the hearing. Evidence and testimony of witnesses may be presented at the hearing.

³³ OKLA. ADMIN. CODE § 710:70-1-1 (Text current through June 1, 2006) and OKLA. ADMIN. CODE § 10:70-70-2 (May 13, 2004).

³⁴ OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

³⁵ OKLA. STAT. ANN. tit. 68, § 301 et seq. (West 2001). The purpose of the tax is to provide revenue for the expense of the state government. *See* OKLA. STAT. ANN. tit. 68, § 303 (West 2001).

³⁶ OKLA. STAT. ANN. tit. 68, § 304(G) (West Supp. 2006):

In addition to any civil or criminal penalty provided bylaw, upon a finding that a licensee has violated any provision of Section 301 et seq. of this title, the Tax Commission may revoke or suspend the license or licenses of the licensee pursuant to the procedures applicable to revocation of a license set forth in Section 316 of this title.

³⁷ OKLA. STAT. ANN. tit. 68, § 315 (West 2001):

For the purpose of enabling the Oklahoma Tax Commission to determine the tax liability of a distributor, wholesale dealer, retail dealer, distributing agent or any other person dealing in cigarettes, or to determine whether a tax liability has been incurred, it shall have the right to inspect any premises where cigarettes are manufactured, produced, made, stored, transported, sold, or offered for sale or exchange, and to examine all of the records required herein to be kept or any other records that may be kept incident to the conduct of the cigarette business of such distributor, wholesale dealer, retail dealer, distributing agent, or any other person dealing in cigarettes. The authorized agent of the Oklahoma Tax Commission shall also have the right, as an incident, to determine the said tax liability, or whether a tax liability has been incurred, to examine all stocks of cigarette stamps, and for the foregoing purpose such authorized agent shall also have the right to remain upon the premises for such length of time as may be necessary to fully determine such tax liability, or whether a tax liability has been incurred; and it shall be unlawful for any of the foregoing persons to fail to produce upon demand by the Tax Commission, or any of its authorized agents, any records herein required to be kept, or to hinder or prevent in any manner the inspection of said records, or the examination of said premises.

³⁸ OKLA. STAT. ANN. tit. 68, § 410 (West 2001):

The Tax Commission shall administer and enforce all provisions of this Article. It shall have the power to enter upon the premises of any taxpayer and to examine, or cause to be examined by an agent or representative designated by it for such purpose, any books, invoices, papers, records or memoranda bearing upon the amount of taxes payable, and to secure other information directly concerned in the enforcement of this Article.

³⁹ OKLA. STAT. ANN. tit. 68, § 420.1(A) (West Supp. 2006):

Each distributor of tobacco products, as defined in Section 401 of Title 68 of the Oklahoma Statutes, shall maintain copies of invoices or equivalent documentation for each of its facilities for every transaction in which the distributor is the seller, purchaser, consignor, consignee, or recipient of tobacco products. The invoices or documentation shall contain the distributor's tobacco license number and the quantity by brand style of the tobacco products involved in the transaction.

⁴⁰ Testimony of FIELD REPRESENTATIVE.

⁴¹ OKLA. STAT. ANN. tit. 68, 304(A) (West Supp. 2006).

⁴² Testimony of FIELD REPRESENTATIVE and AUDIT SUPERVISOR.

⁴³ OKLA. ADMIN. CODE § 710:70-2-3 (May 13, 2004).

⁴⁴ Testimony of FIELD REPRESENTATIVE and AUDIT SUPERVISOR. AUDIT SUPERVISOR testified that some of the confiscated cigarettes, like "Marlboros," were manufactured by Phillip Morris, USA. Under the terms of the Master Tobacco Settlement Agreement, Philip Morris, USA's production was limited by the agreement, and as a result, Phillip Morris, USA has not taken on any new customers for several years. The only way the Licensee could obtain cigarettes like "Marlboros" was from another distributor, like DISTRIBUTOR, which is prohibited by the Cigarette Act.

⁴⁵ OKLA. ADMIN. CODE § 710:70-5-2 (Text current through June 1, 2006).

⁴⁶ OKLA. ADMIN. CODE § 710:70-5-3 (Text current through June 1, 2006).

⁴⁷ Testimony of AUDIT SUPERVISOR.

⁴⁸ OKLA. ADMIN. CODE § 710:70-5-5 (Text current through June 1, 2006):

(a) On or before the fifteenth (15th) day of the calendar month immediately following the calendar month in which the tobacco products subject to taxation were first received, delivered, possessed, used or in any manner dealt with in this State, the Monthly Tobacco Products Tax Reports and payment of the tax due shall be submitted to the Oklahoma Tax Commission. If such due date is a Saturday, Sunday or a holiday recognized by the executive department of this State, then the due date shall be the next official working day for the Oklahoma Tax Commission immediately following the Saturday, Sunday or holiday.

(b) Any report or payment mailed and postmarked by the United States Postal Service on or prior to the due date shall be considered to have been filed or paid on the due date.

(c) All excise tax or monthly reports due and not paid or submitted to the Commission on or before the due date shall be delinquent.

⁴⁹ OKLA. ADMIN. CODE § 710:70-5-4 (Text current through June 1, 2006).

⁵⁰ Testimony of AUDIT SUPERVISOR.

⁵¹ OKLA. ADMIN. CODE § 710:1-5-47 (2004), which states:

In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE 710:1-5-77(b) (2004), provides in pertinent part:

...“**preponderance of the evidence**” means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

⁵² See *Enterprise Management Consultants, Inc. v. State ex rel Oklahoma Tax Com ‘n*, 1988 OK 91, 768 P.2d 359.

⁵³ 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.”

⁵⁴ 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.

