JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2007-03-13-04 (NON-PRECEDENTIAL)
ID:	JM-06-022-H
DATE:	MARCH 13, 2007
DISPOSITION:	DENIED
TAX TYPE:	CIGARETTE PERMIT REVOCATION
APPEAL:	NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

LICENSEE ("Licensee") appears by and through its attorneys, ATTORNEY 1, and ATTORNEY 2 of LAW FIRM. The Collections Division ("Division"), Oklahoma Tax Commission, appears by and through OTC ATTORNEY, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On December 12, 2006, the Division filed its Complaint for Revocation/Cancellation of Wholesaler Cigarette License and Imposition of Fines and Civil Penalties ("Complaint") with this office for further proceedings consistent with the Uniform Tax Procedure Code[1] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[2] On December 15, 2006, a Notice to Show Cause Why the Complaint for Revocation/Cancellation of Wholesaler Cigarette License and Imposition of Fines and Civil Penalties Should Not Be Ordered ("Notice") was mailed to the Licensee by certified mail, with return receipt requested, along with a copy of the Division's "Complaint" advising that a show cause hearing had been set for January 8, 2007, at 9:30 a.m., at which time the Licensee could appear and show cause why the Division's request for relief should not be granted.[3]

The Show Cause Hearing was held as scheduled on January 8, 2007, at approximately 9:30 a.m. The Division called three (3) witnesses, OWNER, SUPERVISOR, Field Supervisor, Collections Division, Oklahoma Tax Commission, and MANAGER, Revenue Unit Manager, Audit Division, Oklahoma Tax Commission. The Division's Exhibits A through I were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record was closed and the case was submitted for decision on January 8, 2007.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the Division's Complaint, the undersigned finds:

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[1] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[2] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47 (June 11. 2005).

[3] The notice was mailed to the last known address of the Licensee, BUSINESS ADDRESS. The returned receipt was signed on December 16, 2006.

1. The Licensee, a Limited Liability Company ("LLC"),[4] is located at BUSINESS ADDRESS.

2. The Licensee is a single member LLC, with OWNER as the sole member.[5]

3. On October 9, 2006, the Licensee entered into a Purchase and Sale Agreement ("Agreement")[6] with COMPANY[7] for the purchase of COMPANY'S inventory[8] located at BUSINESS ADDRESS. A Bill of Sale was executed on behalf of COMPANY by MEMBER 1, as a member of COMPANY.[9] On October 9, 2006, the Licensee entered into a Lease Agreement with COMPANY for the property located at BUSINESS ADDRESS for a term of two (2) years at $5,000.00 monthly.[10] OWNER was formerly an employee of COMPANY.[11]

4. On October 5, 2006, probationary sales tax permit #XXX and wholesaler license #XXX were issued by the Tax Commission to the Licensee, with an expiration date of April 30, 2007. The Licensee also posted a $1,000.00 bond for the wholesaler license.[12]

5. Sometime after October 5, 2006, the Division conducted a cigarette and tobacco enforcement survey ("Compliance Check") at the licensed location for contraband cigarettes.[13]

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[4] Division's Exhibit E. On October 5, 2006, the Licensee's Articles of Organization of an Oklahoma Limited Liability Company and Certificate of Limited Liability Company were filed with the Oklahoma Secretary of State.

[5] Division's Exhibit F and Testimony of OWNER.

[6] Division's Exhibit G. Testimony of OWNER.

[7] At the time of the purchase, COMPANY held Oklahoma Sales Tax Permit No. ZZZ and Oklahoma Tobacco Wholesalers License No. ZZZ. *See* Division's Exhibit G.

The Administrative Law Judge is taking judicial notice that COMPANY was the subject of the "Complaint" filed by the Division in Case No. JM-06-020-H. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

[8] *See* the forty (40) page attachment to Division's Exhibit G. The inventory purchased from COMPANY not only included cigarette and tobacco products, but all types of general merchandise stocked by convenience stores. The Agreement recites that the Licensee paid COMPANY Twenty Thousand Dollars ($20,000.00) and promised to make thirty-two (32) payments of Ten Thousand Dollars ($10,000.00) monthly.

[9] Division's Exhibit H. The Bill of Sale recites that the sale price is $398,000.00, with $20,000.00 down and thirty-two (32) monthly payments of $10,000.00 beginning November 1, 2006.

[10] Division's Exhibit I.

[11] Testimony of OWNER. OWNER also testified that the members of COMPANY, MEMBER 1 and MEMBER 2 are not related. MEMBER 1 is OWNER'S brother, not MEMBER 2'S. OWNER also testified that he was an employee of COMPANY from approximately March 2006 to October 2006 and that his duties with COMPANY did not include the purchase or stamping of cigarettes.

[12] Division's Exhibit F.

[13] Testimony of OWNER and SUPERVISOR.

No contraband cigarettes were found at the licensed location.[14] Some defective machine stamped cigarettes were found, but were not confiscated by the Division.[15] OWNER was given the opportunity to either return the cigarettes or properly stamp the packs.[16]

6. On November 21, 2006, the Division conducted a Compliance Check at the licensed location of BUSINESS ADDRESS.[17] Upon entering the licensed location the Division's "Field Representatives," FIELD REP. and SUPERVISOR, identified themselves and that the Division was conducting a Compliance Check.[18]

7. During the Compliance Check the Division discovered 136 packs of cigarettes with one-half (½) of an Oklahoma Tax Stamp ("Half-Stamped Cigarettes") affixed to each pack.[19] The total estimated retail value of the Half-Stamped Cigarettes was $272.00.[20] All of the stamps used on the Half-Stamped Cigarettes were purchased from the Tax Commission, over-the-counter in sheets, with the Inventory Control Number XXX.[21] The Division does not know who purchased the stamps.

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[14] Testimony of SUPERVISOR.

[15] Testimony of SUPERVISOR. SUPERVISOR testified that "Half-Stamping" cannot occur with machine stamped cigarettes because of the way the machine transfers the stamps to the packs of cigarettes.

[16] Testimony of SUPERVISOR.

[17] Testimony of OWNER and SUPERVISOR.

[18] There was a third Field Representative, who was not identified during the hearing. Testimony of SUPERVISOR.

[19] Division's Exhibit D, which is a sheet with copies of eight (8) examples of Half-Stamped Cigarettes. The Confiscation Inventory List prepared by SUPERVISOR reflects that there were fifty-four (54) packs of Ace Menthol Box 100's and eighty-two (82) packs of Ace Full Flavor Box 100's confiscated. The list is signed by SUPERVISOR and OWNER. A Statement of Understanding (Division's Exhibit C) was also signed by SUPERVISOR and OWNER. Paragraph two (2) of the statement was crossed out by SUPERVISOR because the confiscation did not include tobacco products. SUPERVISOR also crossed out paragraph three (3), which states:

> 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.

SUPERVISOR testified that this paragraph was crossed out due to a change in policy by the Tax Commission sometime in October or November 2006, before the November 21, 2006, Compliance Check. The Division no longer refers any confiscations to the Audit Division for assessment. MANAGER confirmed SUPERVISOR'S testimony.

At the time of hearing the Division produced the box containing all 136 packs of Ace cigarettes. OWNER examined the entire box and picked out four (4) packs, which he asserted, were the result of incorrectly hand stamping the cigarettes. The majority of the packs in the box had the top half of the stamp which read "OKLAHOMA TAX PAID" and the bottom half of the stamp which had the Inventory Control Number of "72706 20 CIGARETTES." *See* Division's Exhibit D.

[20] Division's Exhibit B.

[21] *See* Division's Exhibit D. Testimony of SUPERVISOR and MANAGER.

8. All sheets of stamps purchased over-the-counter have the same Inventory Control Number and the Tax Commission does not track the person or entity that purchased the stamps. Only whole rolls of stamps have a distinct Inventory Control Number which is tracked by the Tax Commission.[22]

9. The Half-Stamped Cigarettes confiscated[23] by the Division[24] were Ace Menthol Box 100's and Ace Full Flavor Box 100's ("Aces").[25] There is no evidence that the Half-Stamps on the Aces were purchased by the Licensee.[26]

10. At the time of the November 21, 2006, Compliance Check there were approximately 4000 cartons of cigarettes or 40,000 packs of cigarettes at the licensed location. The Division checked all Ace cigarettes and sampled the remaining inventory.[27]

11. The Licensee purchases stamped cigarettes from two (2) distributors, "DISTRIBUTOR 1" and DISTRIBUTOR 2. Stamped and unstamped cigarettes, including "Aces" were purchased from one (1) distributor, "DISTRIBUTOR 3."[28] DISTRIBUTOR 3 is not a manufacturer of cigarettes or importer of cigarettes which possesses a valid and current permit under Section 5712 of Title 26 of the United States Code.[29]

12. OWNER hand-stamps all unstamped cigarettes purchased by the Licensee, with what was described as a "travel iron." The "travel iron" heat transfers stamps on two (2) packs at a

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[22] Testimony of SUPERVISOR and MANAGER. MANAGER testified that sheets are not usually purchased to stamp standard size packs of cigarettes, but are usually purchased to hand stamp odd sized packs of cigarettes.

[23] OKLA. STAT. ANN. tit. 68, § 305 (West Supp. 2007). *See* OKLA. ADMIN. CODE § 710:70-5-11.

[24] Division's Exhibit B. The Confiscation Inventory List was prepared by FIELD REP. and signed on behalf of the Licensee by OWNER.

[25] Testimony of OWNER.

[26] Testimony of SUPERVISOR and MANAGER.

[27] Testimony of OWNER and SUPERVISOR.

[28] *See* Division's Exhibit A and the testimony of OWNER. MANAGER also testified that during the month of November 2006, the Licensee purchased $91,950 in stamps. Before the November 21, 2006, Compliance Check the Licensee purchased $42,000.00 in stamps and after the November 21, 2006, Compliance Check the Licensee purchased $49,950.00 in stamps. According to MANAGER'S testimony, during the month of November 2006, the percentage of stamped cigarettes purchased by the Licensee was higher than its purchase of unstamped cigarettes.

[29] The Administrative Law Judge is taking judicial notice of MANAGER'S testimony regarding DISTRIBUTOR 3 in Case No. JM-06-014-H for the purpose of completing the factual details and background of this matter. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). DISTRIBUTOR 3 is the holder of Oklahoma Wholesaler License #YYY and Oklahoma Unstamped Tobacco Products License #YYY issued by the Oklahoma Tax Commission.

time. OWNER testified that in the beginning, due to his inexperience, some of the cigarettes were improperly stamped, but that "Half-Stamping" was not done on purpose.

13. The Licensee trades cigarettes with customers for different "flavors." In the beginning OWNER was not checking cigarettes traded with customers to ensure that the packs were properly stamped, but OWNER now opens all cartons of cigarettes and checks the cigarettes traded for proper stamping. OWNER could not offer an explanation as to how or why the 136 packs of Aces were Half-Stamped.[30] All of the stamps applied to the Aces have the same Inventory Control No. of xxx.[31]

14. The Division will not refer the confiscation in this matter to the Audit Division for assessment of any additional tax.[32]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[33] On December 12, 2006, the statutory notice was mailed to the Licensee by certified mail, with return receipt requested, giving the Licensee twenty (20) days notice of the hearing held on January 8, 2007, at 9:30 a.m.

2. Pursuant to Section 212(a) of Title 68, the violation of any provision of the Uniform Tax Procedure Act,[34] the violation of any state tax law, or violation of the rules and regulations promulgated for the administration and enforcement of any state tax law is grounds for the cancellation of any license issued under any state tax law or other state law.

3. The Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement, and collection of cigarette excise taxes.[35]

4. 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.[36]

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[30] Testimony of OWNER. OWNER testified that he does not maintain any invoices on cigarettes that are traded with the Licensee's customers. The traded cigarettes are simply placed in the Licensee's inventory.

[31] At the request of the undersigned, the box containing the 136 packs of Aces were retained for examination. Once findings are issued, the box will be returned to the Division.

[32] Testimony of SUPERVISOR.

[33] OKLA. STAT. ANN. tit. 68, § 212 (West 2001).

[34] OKLA. STAT. ANN. tit 68, § 201 et seq. (West 2001).

[35] OKLA. STAT. ANN. tit. 68, § 322 (West 2001).

[36] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

5. In addition to any other criminal or civil penalty, upon a finding that a licensee has violated any of the provisions of the Cigarette Tax Stamp Act ("Act"),[37] the Oklahoma Tax Commission may revoke or suspend any license issued pursuant to the Act.[38]

6. All cigarettes sold or held for sale in the State of Oklahoma shall bear one of the prescribed stamps.[39] The Act and Tax Commission Rules require that cigarettes bear the appropriate stamps, which indicate that the Licensee is paying the right amount of tax.

7. The Licensee was in possession of 136 packs of Ace cigarettes bearing one-half (½) of an Oklahoma Cigarette Tax Stamp.[40] The Division properly confiscated[41] the 136 packs of Aces, which are also forfeited under the provisions of the Act.[42]

8. In all proceedings before the Tax Commission, the taxpayer has the burden of proof unless otherwise provided by law. In this matter, the Division filed a complaint seeking the revocation/cancellation of the Licensee's wholesaler cigarette license, and imposition of fines and civil penalties, shifting the burden of proof to the Division.

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

> Being in possession of 136 packs of cigarettes bearing unauthorized, false or altered stamps in violation of § 317 of Title 68 of the Oklahoma Statutes.[43]

The Division has met its burden of proving that the Licensee has violated the provisions of the Cigarette Tax Stamp Act by possessing Half-Stamped Cigarettes.[44] In cases such as this many factors are considered in the decision as to whether a license or permit should be revoked for violation(s) under the Act. These factors, although not exhaustive, have included 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

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[37] OKLA. STAT. ANN. tit. 68, § 301 et seq. (West 2001).

[38] *See* OKLA. STAT. ANN. tit. 68, § 304(G) (West Supp. 2007).

[39] OKLA. ADMIN. CODE § 710:70-7-4.

[40] OKLA. STAT. ANN. tit. 68, § 317 (West 2001). *See also* OKLA. STAT. ANN. tit. 68, § 316 (West Supp. 2007).

[41] OKLA. STAT. ANN. tit. 68, § 305 (West Supp. 2007).

[42] *See* Note 41.

[43] The Licensee also violated the Act by purchasing the unstamped Aces from DISTRIBUTOR 3, which is not a manufacturer or importer of cigarettes possessing a valid permit under 26 U.S.C. § 5712. However, this violation was not alleged in the Division's Complaint.

[44] Although it was not alleged in the Division's Complaint, the Licensee purchases unstamped Ace cigarettes from DISTRIBUTOR 3, which is not a manufacturer of cigarettes or importer of cigarettes possessing a valid and current permit under Section 5712 of Title 26 of the United States Code, which is also a violation of the Act.

same offense; the dollar amount of the products involved in the violation(s); and the dollar amount of products involved as a percentage of total sales and as a percentage of cigarette and tobacco sales.[45]

The evidence in this matter establishes one (1) violation of the Act and that under the specific facts and circumstances of this case the revocation of the Licensee's wholesaler license is not warranted.

However, the Tax Commission has also found that in a proceeding with proper notice given to the Licensee the imposition of an administrative penalty pursuant to Section 316(H) of Title 68 for violation of Act could be imposed.[46] In this matter the Division's gave the proper notice to the Licensee that fines and penalties could be imposed.

DISPOSITION

It is the ORDER of the undersigned, based on the specific facts and circumstances of this case, that the Division's request to revoke the Licensee's cigarette wholesaler license #XXX should be denied.

It is further the ORDER of the undersigned, based on the specific facts and circumstances of this case that the mandatory[47] administrative penalty of $1,000.00 be imposed upon the Licensee for its violation of the Act,[48] in addition to the forfeiture of the confiscated cigarettes.

OKLAHOMA TAX COMMISSION

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.

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[45] *See* Commission Order No. 2006-09-05-07 (September 5, 2006).

[46] *See* Commission Order No. 2006-09-05-09 (September 5, 2006).

[47] Generally, when the legislature uses the term "shall," it signifies a mandatory directive or command. *See Keating v. Edmondson*, 2001 OK 110, 37 P.3d 882.

[48] *See* OKLA. STAT. ANN. tit. 68, § 316(H) (West Supp. 2007):

> H. Whoever knowingly omits, neglects, or refuses to comply with any duty imposed upon the person by Section 301 et seq. of this title, or to do, or cause to be done, any of the things required by Section 301 et seq. of this title, or does anything prohibited by Section 301 et seq. of this title, ***shall***, in addition to any other penalty provided in Section 301 et seq. of this title, pay an administrative penalty of One Thousand Dollars ($1,000.00). [Emphasis added.]