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| JURISDICTION: | OKLAHOMA TAX COMMISSION |
| CITE: | 2007-03-27-75 (NON-PRECEDENTIAL) |
| ID: | JM-06-023-K |
| DATE: | MARCH 27, 2007 |
| DISPOSITION: | LICENSE REVOKED |
| TAX TYPE: | CIGARETTE LICENSE REVOCATION |
| APPEAL: | NONE |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent, COMPANY, is represented by ATTORNEY, Attorney at Law. Complainant, the Audit Division of the Oklahoma Tax Commission, is represented by OTC ATTORNEY, First Deputy General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

## PROCEDURAL HISTORY

On December 15, 2006, the Complainant filed its *Complaint for Revocation/Cancellation of Wholesaler Cigarette License and Sales Tax Permit and Imposition of Fines and Civil Penalties* with the Office of the Administrative Law Judge. The complaint was verified, under oath, by MANAGER, Revenue Unit Manager I, Audit Division, Oklahoma Tax Commission.

A hearing on the complaint was scheduled for January 8, 2007, by *Notice to Show Cause Why the Complaint for Revocation/Cancellation of Wholesaler Cigarette License and Sales Tax Permit and Imposition of Fines and Civil Penalties should not be Ordered* issued December 19, 2006. The hearing was continued on two separate occasions, one pursuant to the request of Respondent's representative and the other due to unforeseen circumstances. The hearing was ultimately rescheduled for January 22, 2007, by *Notice of Hearing* issued January 11, 2007.

A closed[1] show cause hearing was held as rescheduled. Complainant called two (2) witnesses, MANAGER, who testified regarding the records of the Tax Commission pertaining to Respondent, and AUDITOR, Field Auditor, who testified with respect to an attempted audit of Respondent's records and a compliance check conducted at Respondent's business premises on June 2, 2006. Respondent called one (1) witness, WITNESS, who testified with respect to the alleged violations.

## FINDINGS OF FACT

Upon review of the file and records, including the tape recording of the hearing, the undersigned finds:

[1] 68 O.S. Supp. 2005, § 205.

1. Respondent is a domestic for profit business corporation[2], and since May, 2004, is a licensed cigarette wholesaler. Respondent also holds a sales tax permit issued by the Oklahoma Tax Commission.

2. Respondent's failure to file monthly cigarette tax reports and non-participating manufacturer reports has been the subject of two (2) previous show cause proceedings. In May, 2006, Respondent was cited for failure to file twenty-three (23) delinquent reports. Respondent subsequently filed those reports, but during the interim its cigarette stamp tax purchase discount was suspended. In August, 2006, Respondent was cited for failure to file the required monthly reports due subsequent to the May, 2006 show cause proceeding. Respondent filed those reports prior to the date of the show cause proceeding which effectuated the cancellation of that proceeding.

3. The current show cause proceeding was necessitated by Respondent's failure to timely file the required monthly reports due subsequent to the August, 2006 notice. The cigarette tax reports for the months of September, 2006 through December, 2006 were filed January 9, 2007. Based on information available to Complainant from shipping companies of cigarette shipments to Respondent, Respondent failed to report some cigarettes and these reports are consequently incorrect or incomplete. Further, not only the information available to Complainant, but the filed reports show that Respondent purchased cigarettes from other than the manufacturer or first importer of the cigarettes. Also, a single report for each of the non-participating manufacturers Respondent did business with during 2006 was improperly filed on January 9, 2007, rather than monthly non-participating manufacturer reports.

4. The Complainant has attempted to conduct an audit of Respondent's business since May, 2006. Records to conduct the audit have been requested on four (4) separate occasions. The only requested record Respondent has provided is parts of a general ledger which at least part of only show deposit summaries. Respondent has not provided sales invoices, a customer list or a sales tax permit list. Also, Respondent has not provided any back-up documentation in support of the deposit summaries.

5. Although, Complainant observed items, such as novelties (NASCAR memorabilia, Big XII school emblems and logos) in Respondent's warehouse during its inspection of Respondent's premises on June 2, 2006, which would be subject to sales tax rather than cigarette or tobacco products taxes, Respondent has never filed a sales tax report. In May, 2004, when Respondent was issued its license and sales tax permit, cigarettes were subject to sales taxes and Respondent was required to have a sales tax permit to conduct business. Respondent admits that it has sold approximately $750.00 of OU and OSU memorabilia items (key rings) during its existence.

6. Respondent purchased cigarettes from SUPPLIER 1, a licensed Oklahoma cigarette wholesaler and was instructed to report the sale of those cigarettes because Respondent purchased the tax stamps notwithstanding that the tax stamps were applied to the cigarettes before Respondent purchased them.

[2] Secretary of State, State of Oklahoma, website – www.sooneraccess.state.ok.us.

7. Respondent believes that except for the sales invoices it is attempting to reconstruct, it has provided sufficient documentation to conduct the audit.

## CONCLUSIONS OF LAW

Wherefore, premises considered, the undersigned concludes as a matter of law that:

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding. 68 O.S. 2001, § 212.

2. The violation of any of the provisions of the Uniform Tax Procedure Code[3], any state tax law, or the rules and regulations promulgated for the administration and enforcement of any state tax law is grounds for the cancellation of any license, permit or duplicate copy thereof issued under the provisions of any state tax law or other law. 68 O.S. 2001, § 212(a).

3. In accordance with the procedures applicable to the revocation of a license set forth in § 316 of the Oklahoma Cigarette Tax Stamp Act ("Act")[4], and in addition to any civil or criminal penalty provided by law, the Tax Commission upon a finding that a licensee has violated any provision of the Act may revoke or suspend the license of the licensee issued pursuant to the Act. 68 O.S. Supp. 2005, § 304(G). The applicable license revocation procedures of Section 316 are set forth in subsection F which provides in pertinent part:

> The Tax Commission shall immediately revoke the license of a person punished for a violation pursuant to the provisions of paragraph 3 of subsection D of this section or a person punished for a violation pursuant to the provision of subsection E of this section.

Section 316(D)(3) is applicable to retailers and requires a third or subsequent violation of the provisions of § 305.1 of the Act. Section 316(E) is applicable to wholesalers, jobbers and warehousemen who commit a single violation of the provisions of § 305.1 of the Act.

4. The Act sets forth procedures for maintaining records and filing reports, including the information required in the reports. 68 O.S. Supp. 2005 § 312.1.[5] Section 312.1 provides in pertinent part:

> B. Every wholesaler and distributor receiving cigarettes shall submit periodic reports containing the information required by this subsection. In each case, the information required shall be itemized so as to disclose clearly the brand style of the product. The reports shall be

[3] 68 O.S. 2001, § 201 et seq.

[4] 68 O.S. 2001, § 301 et seq.

[5] *See, OAC*, 710:70-2-11(a), (c) and (d).

provided separately with respect to each of the facilities operated by the wholesaler and distributor and shall include:

1. The quantity of cigarette packages that were distributed or shipped to another distributor or to a retailer within the borders of Oklahoma during the reporting period and the name and address of each person to whom those products were distributed or shipped;

2. The quantity of cigarette packages that were distributed or shipped to another facility of the same distributor within the borders of Oklahoma during the reporting period; and

3. The quantity of cigarette packages that were distributed or shipped within the borders of Oklahoma to Indian tribal entities or instrumentalities of the federal government during the reporting period and the name and address of each person to whom those products were distributed or shipped.

D. The Tax Commission shall establish the reporting period, which shall be no longer than three (3) calendar months and no shorter than one (1) calendar month. Reports shall be submitted electronically as prescribed by the Tax Commission.[6]

E. Each distributor shall maintain copies of invoices or equivalent documentation for each of its facilities for every transaction in which the distributor is the sell, purchaser, consignor, or recipient of cigarettes. The invoices or documentation shall show the name, address, phone number and wholesale license number of the consignor, seller, purchaser, or consignee, and the quantity by brand style of the cigarettes involved in the transaction.[7]

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[6] *See*, 68 O.S. 2001, § 312(b) which provides in pertinent part:

> Every wholesaler and retailer receiving unstamped cigarettes shall file a report with the Commission on or before the 10th day of each month covering the previous calendar month, on forms prescribed and furnished by the Commission, disclosing the beginning and closing inventory of unstamped cigarettes, the beginning and closing inventory of stamped cigarettes, the beginning and closing inventory of cigarette stamps, the number and denomination of cigarette stamps affixed to packages of cigarettes, and all purchases of cigarettes by showing the invoice number, name and address of the consignee or seller, the date, and the number of cigarettes purchased, and such other information as may be required by the Tax Commission.

Footnote added.

[7] *See*, 68 O.S. 2001, § 312(a) which provides in pertinent part:

> Every person subject to the payment of a tax hereunder shall keep in Oklahoma accurate records covering the business carried on and shall for three (3) years, and more if required by the rules and regulations of the Tax Commission, keep and preserve all

> H. Records required under subsections E through G of this section shall be preserved on the premises described in the license in such a manner as to ensure permanency and accessibility for inspection at reasonable hours by authorized personnel of the Oklahoma Tax Commission. With the permission of the Tax Commission, manufacturers, distributors, and retailers with multiple places of business may retain centralized records, but shall transmit duplicates of the invoices or the equivalent documentation to each place of business within twenty-four (24) hours upon the request of the Tax Commission.
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> I. The records required by subsections E through G of this section shall be retained for a period of three (3) years from the date of the transaction.
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> J. The Tax Commission, upon request, shall have access to reports and records required under this act.

Footnote omitted.

5. The Tax Commission is also authorized to revoke or suspend the license of any "stamping agent"[8] who has violated the provisions of § 360.6 of the Master Settlement Agreement Complementary Act. 68 O.S. Supp. 2004, § 360.7(A). Section 360.6(A) sets forth the procedures for the submission of information by stamping agents to the Tax Commission. This subsection provides:

> Not later than twenty (20) calendar days after the end of each calendar month, and more frequently if so directed by the Oklahoma Tax Commission, each stamping agent shall submit any information the Oklahoma Tax Commission requires to facilitate compliance with the Master Settlement Agreement Complementary Act, including, but not limited to, a list by brand families of the total number of cigarettes, or in the case of roll-your-own tobacco, the equivalent stick count, for which the stamping agent affixed stamps during the previous calendar month or

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> invoices, showing all purchases and sales of cigarettes; and such invoices and stock of cigarettes shall at all times be subject to the examination and inspection of any member or legally authorized agent or representative of the Commission, in the enforcement of this article.

Footnote added.

[8] Defined to mean "any entity that is authorized under subsection A of Section 304 of Title 68 of the Oklahoma Statutes to affix any tax stamps issued by the Oklahoma Tax Commission to packages of cigarettes, or any entity authorized pursuant to Section 415 of Title 68 of the Oklahoma Statutes to pay to the Oklahoma Tax Commission any tobacco products tax". 68 O.S. Supp. 2004, § 360.3(8).

> otherwise paid the tax due for such cigarettes. The stamping agent shall maintain, and make available to the Oklahoma Tax Commission and the Attorney General, all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the Oklahoma Tax Commission for a period of five (5) years.

In addition to the information required to be submitted under § 360.6(A), and in addition to any return presently required to be filed, the Tax Commission requires each "tobacco taxpayer"[9] to report, for each non-participating manufacturer, all purchases and all units sold in Oklahoma of cigarettes (including all roll-your-own tobacco unit-equivalent). *OAC*, 710:70-9-3. This rule further provides:

> The Tobacco Taxpayer shall report the required information to the Oklahoma Tax Commission, on forms prescribed by the Commission, no later than the twentieth day of each calendar month for the preceding calendar month's activity. The following information must be reported monthly, regardless of whether any applicable sales have been made, for each non-participating manufacturer:
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> 1. The month of activity;
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> 2. The name and address of the non-participating manufacturer from whom the cigarettes or roll-your-own tobacco originated;
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> 3. The band name of the cigarettes or roll-your-own tobacco sold; and
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> 4. The number of units sold, as defined by 710:70-9-2, of cigarettes and roll-your-own tobacco unit-equivalents.

6. The Tax Commission is authorized to revoke or suspend a sales tax permit whenever the holder of the permit fails to comply with any provision of the Oklahoma Sales Tax Code ("Code")[10]. 68 O.S. Supp. 2003, § 1364(J). Under the Code, it is the duty of all tax remitters to deliver to the Tax Commission sales tax reports signed under oath, showing the gross receipts or gross proceeds arising from all sales taxable or nontaxable under the Code either monthly or semiannually, including the sales value of all tangible personal property which has been purchased for resale, and withdrawn from stock in trade for use or consumption (68 O.S.

[9] Defined to mean "every wholesaler, distributor, retailer, manufacturer or any other person, firm, corporation, club, or association; selling, receiving, distributing, storing, or using cigarettes or roll-your-own tobacco products, or both, in the State of Oklahoma, whether qualified to do business in this state or not, and without regard to whether the person is licensed or permitted, as required by any tax law." *OAC*, 710:70-9-2.

[10] 68 O.S. 2001, § 1350 et seq.

Supp. 2004, § 1362(D)) and remit the tax due there under. 68 O.S. Supp. 2004, § 1365(A) and (E). If the tax is not paid with the timely filed report, the tax becomes delinquent. Id. It is also the duty of every tax remitter to keep and preserve suitable records of the gross daily sales together with invoices of purchases and sales, bills of lading, bills of sale and other pertinent records and documents which may be necessary to determine the amount of tax due and such other records of goods, wares and merchandise, and other subjects of taxation as will substantiate and prove the accuracy of any return. 68 O.S. Supp. 2004, § 1365(F). Every person who makes sales for resale is required to keep records of such sales. Id.

9. Here, the evidence shows that Respondent has habitually and incessantly violated the provisions of: (1) § 312(a) and (b) and § 312.1(B), (E) and (H) of the Oklahoma Cigarette Tax Stamp Act; (2) § 360.6(A) of the Master Settlement Agreement Complementary Act; (3) *OAC*, 710:70-9-3; and (4) §§ 1365 (E) and (F) of the Oklahoma Sales Tax Code. Accordingly, Respondent's wholesale cigarette license and sales tax permit should be revoked.

## DISPOSITION

THEREFORE, based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the wholesale cigarette license and sales tax permit of Respondent, COMPANY, be revoked.

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.