

**JURISDICTION:** OKLAHOMA TAX COMMISSION DECISION  
**CITE:** 2009-01-20-02 / NON-PRECEDENTIAL  
**ID:** JM-07-002-H  
**DATE:** JANUARY 20, 2009  
**DISPOSITION:** LICENSES RENEWED  
**TAX TYPE:** CIGARETTE LICENSE / UNSTAMPED TOBACCO LICENSE  
**APPEAL:** NO APPEAL TAKEN

### ORDER

The Oklahoma Tax Commission, having reviewed the facts and authorities presented and being fully advised in the premises, finds and orders that the application for Oral Argument before the Oklahoma Tax Commission En Banc in the above captioned matter is hereby denied. 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 28th day of October, 2008, the Commission makes the following Findings of Fact and Conclusions of Law and enters the following order.

### PROCEDURAL HISTORY

On March 5, 2007, the Division filed its *Complaint for Revocation/Cancellation of the Wholesaler Cigarette License and Imposition of Fines and Civil Penalties* (“*Complaint*”) against Licensee with the Administrative Law Judges Office for further proceedings consistent with the *Uniform Tax Procedure Code*<sup>1</sup> and the *Rules of Practice and Procedure Before the Oklahoma Tax Commission*.<sup>2</sup> On March 7, 2007, 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* (“*2007 Notice*”) was mailed to the Licensee by certified mail, with return receipt requested, along with a copy of the Division’s *Complaint* advising a show cause hearing had been set for March 28, 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.<sup>3</sup>

On March 9, 2007, ATTORNEY 1 filed an Entry of Appearance, as counsel of record for the Licensee, along with a *Motion for Change of Date of Hearing*. On March 12, 2007, ATTORNEY 2 filed an Entry of Appearance, as co-counsel of record for the Licensee.

On March 21, 2007, the Licensee withdrew its *Motion for Change of Date of Hearing*. On March 21, 2007, OTC ATTORNEY 1, Assistant General Counsel, filed an Entry of Appearance, as co-counsel of record for the Division, along with an *Unopposed Motion to Continue Hearing*. The procedural history regarding discovery in this matter is omitted herein.

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<sup>1</sup> OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

<sup>2</sup> OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

<sup>3</sup> OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the last-known address of the Licensee, ADDRESS. On March 8, 2007, the return receipt was signed by MEMBER.

On March 23, 2007, the Administrative Law Judge issued an *Order* striking the hearing set for March 28, 2007, at 9:30 a.m., from the docket and directing the parties to submit, on or before April 6, 2007, a mutually agreed hearing date and time.

On April 6, 2007, a *Stipulated Request for Continued Hearing Date* was filed by the Division. On April 9, 2007, an *Order Granting Continuance of Hearing* was issued by the Administrative Law Judge setting the hearing on June 12, 2007, at 9:30 a.m.

On May 23, 2007, the Division filed its *Amended Complaint for Revocation/Cancellation of Wholesale Cigarette License and Unstamped Tobacco Products License and Imposition of Fines and Civil Penalties* (“*Amended Complaint*”), with Exhibits 1 through 23 attached thereto.

On May 29, 2007, the Licensee filed its *Motion for Continuance*. On May 31, 2007, the Division filed its *Withdrawal of Objection to Respondent’s Motion for Continuance and Joinder in Motion for Continuance*. On May 31, 2007, an *Order Granting Motion for Continuance* was issued striking the hearing set for June 12, 2007, at 9:30 a.m., from the docket and resetting the hearing on September 12, 2007, at 9:30 a.m.

On September 12, 2007, the Division filed a *Joint and Stipulated Application for Entry of Agreed Dispositional Order*, with a copy of the “*Dispositional Agreement*,” and proposed *Dispositional Order*, attached thereto. At the request of the Administrative Law Judge, a teleconference with the parties was set on Tuesday, September 18, 2007, at 2:30 p.m.

The teleconference was held as scheduled. Pursuant to the teleconference, the *Joint and Stipulated Application for Entry of Agreed Dispositional Order* was to be presented to the Commissioners for consideration.

On September 15, 2008, a letter was mailed to the parties advising the twelve (12) month provision contained in the *Dispositional Agreement* had elapsed, and the Administrative Law Judge had not received notice of any further violations. The Division was requested to forward a dismissal of the captioned matter or advise how the parties wished to proceed.

On September 29, 2008, the Licensee filed its *Request for Dismissal Pursuant to Settlement Agreement*. On September 29, 2008, the Division filed its *Notice of Intent Not to Renew Cigarette Wholesaler and Unstamped Tobacco Licenses* (“*2008 Notice*”).

On October 2, 2008, the *Notice to Show Cause Why the Cigarette Wholesaler License and Unstamped Tobacco License Should Be Renewed* was mailed to the Licensee, through its attorneys, by certified mail, with return receipt requested.<sup>4</sup>

On October 8, 2008, ATTORNEY 3 and ATTORNEY 4 filed an Entry of Appearance as co-counsel for the Licensee, along with an *Application for Accelerated Show Cause Hearing*.<sup>5</sup>

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<sup>4</sup> On October 3, 2008, the return receipt was signed by a representative of the attorneys representing the Licensee.

On October 13, 2008, an *Order Granting Application for Accelerated Show Cause Hearing* was issued by the Administrative Law Judge changing the date of the hearing to October 16, 2008, at 1:30 p.m.

On October 14, 2008, the Division filed a *Supplemental Notice of Intent Not to Renew Cigarette Wholesaler and Unstamped Tobacco Licenses* (“*Supplemental Notice*”). On October 15, 2008, the Licensee filed a *Response to Notice of Intent Not to Renew Cigarette Wholesaler and Unstamped Tobacco Licenses and Supplemental Notice of Intent Not to Renew Cigarette Wholesaler and Unstamped Tobacco Licenses*.

On October 16, 2008, at 1:30 p.m., the show cause hearing was held as scheduled. The parties and their representatives attended the hearing. The Division called three (3) witnesses: MEMBER, the sole member of the Protestant; SUPERVISOR 1, Supervisor, Compliance Division; and SUPERVISOR 2, Supervisor, Compliance Division, Oklahoma Tax Commission. The Division’s Exhibits 1 through 23 were identified, offered and admitted into evidence. The Licensee called two (2) witnesses: MEMBER and ACCOUNTANT, CPA.<sup>6</sup> The Licensee’s Exhibits 1 and 3 were identified, offered and admitted into evidence. The Administrative Law Judge was requested to take judicial notice of Licensee’s Exhibit 2 (“*2008 Notice*”) and Exhibit 4 (“*Supplemental Notice*”), which are part of the record. Upon conclusion of the hearing, the record was closed and this case was submitted for decision on October 16, 2008.

### FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the filings by the parties, the undersigned finds:

1. OTC Order No. 2007-03-13-04 (March 13, 2007) was issued by the Tax Commission in Case No. JM-06-022-H, which denied the Division’s request to revoke the Licensee’s Cigarette Wholesaler License #873224 and which imposed an administrative penalty of \$1,000.00, in addition to forfeiture of the confiscated cigarettes.<sup>7</sup>
2. In reviewing the Licensee’s Sales Tax Report for April 2007, the Division discovered the Licensee had reported zero sales.<sup>8</sup>

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<sup>5</sup> The clerk was advised ATTORNEY 1 was no longer representing the Licensee or associated with the firm.

<sup>6</sup> ACCOUNTANT testified his office has represented the Licensee since its inception, preparing all reports, returns, etc. and the preparation of MEMBER’S individual income tax returns.

<sup>7</sup> Division’s Exhibit 3.

<sup>8</sup> Division’s Exhibit 14. ACCOUNTANT testified the sales tax report was due to a mistake in his office. The Licensee only made sales for resale. ACCOUNTANT further testified the sales tax report was amended to report the sales made, which still resulted in zero taxable sales. The April 2007 Sales Tax Report was not included in the Dispositional Agreement, set out in detail herein.

3. On June 5, 2007, the Division issued a proposed Tobacco Tax Assessment<sup>9</sup> (“ATT”) from an office audit for the period of April 2007, as follows, to-wit:

Tax:	\$5,165.04
Penalty:	516.50
Interest through 08/04/07:	<u>171.53</u>
Total:	\$5,853.07

4. On September 10, 2007, the parties entered into a “Dispositional Agreement” in this matter,<sup>10</sup> which states as follows, to-wit:

- (1) LICENSEE will pay and discharge all current warrants and assessments of LICENSEE issued by the OTC on or before September 12, 2007: an amended and un-protested tobacco tax assessment outstanding, totaling \$33,011.77. Penalty and interest upon the assessment, in the amount of \$6,683.35, will be paid on or before October 12, 2007. LICENSEE’S request for a waiver of penalty and interest is denied.
- (2) LICENSEE will register, as required, for remittance of withholding tax; file proper returns/reports; and pay all required withholding tax obligations (principal and applicable penalty and interest) for the period October, 2006 through August, 2007, inclusive, on or before September 12, 2007.
- (3) LICENSEE, as a reporting entity, will file a proper return/report and pay any required taxes (principal and applicable penalty and interest) for tax year 2006 on or before September 12, 2007.
- (4) LICENSEE will file proper returns/reports and pay all required taxes (principal and applicable penalty and interest) for sales tax for the period of May, 2007-August, 2007 on or before September 12, 2007.
- (5) MEMBER, who represents himself to be the principal of LICENSEE, has filed an for [sic] an extension of time in which to file a 2006 personal income tax return. A proper return and payment of required taxes (principal and applicable penalty and interest, if any) must be made on or before September 12, 2007.
- (6) All required reports/returns and payments shall be delivered, for filing, to the office of the OTC General Counsel, Attention: OTC ATTORNEY 2, OTC GENERAL COUNSEL ADDRESS.

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<sup>9</sup> Division’s Exhibit 7. The Division *increased and decreased* tobacco products from various invoices for April 2007. ACCOUNTANT testified the assessment resulted from an ongoing problem regarding how to classify some tobacco products for tax purposes. ACCOUNTANT cited examples such as, what is a small cigar versus tobacco and what is a pouch of tobacco versus tobacco used for the purpose of rolling cigarettes, etc. This ATT Assessment was not included in the Dispositional Agreement, set out in detail herein.

<sup>10</sup> The “Dispositional Agreement” was signed by MEMBER, ATTORNEY 1, OTC ATTORNEY 2, and OTC ATTORNEY 1.

- (7) The five above items are material conditions of the agreement. If any of the five conditions are not met, the agreement is breached, with such a result as specified hereafter.
- (8) LICENSEE agrees to the immediate suspension (effective the date of this agreement) of its wholesale cigarette and tobacco products licenses and its sales tax permit, which suspension will be deferred, on a monthly basis, so long as all of the five material conditions are met and no other and further violations are detected by the OTC, which will make such unannounced checks as, in its sole discretion, it deems necessary to determine compliance with the agreement and the laws of the State of Oklahoma with reference to the wholesale sale of cigarettes and tobacco products and the rules and regulations issued by the OTC governing the aforesaid.
- (9) LICENSEE agrees that, if any of the five material conditions are not met, and/or further violations of the Oklahoma law and/or the rules and regulations of the OTC with reference thereto are noticed, its license will be immediately revoked, and LICENSEE will be given 60 days in which to make arrangements to dispose of its business and/or inventory.
- (10) OTC agrees that if, 12 months from entry of the date of an Agreed Order in the proceeding, incorporating the terms of this agreement, LICENSEE has complied with the five material conditions and no further violations of the Oklahoma law and/or rules and regulations of the OTC with reference thereto have been detected, it will dismiss the proceedings.
- (11) Each signatory hereto hereby warrants and represents that:
  - a) such person has authority to bind the party/parties for whom such person acts.
  - b) the claims, suits, rights, and/or interest which are the subject matter hereto are owned by the party asserting same, have not been assigned, transferred or sold, and are free of encumbrance.
- (12) The parties and their counsel agree to cooperate with each other and to promptly draft and execute such additional documents, and take such other actions, if any, as are reasonably required to implement the provisions and spirit of this agreement.
- (13) This agreement is made and performed in COUNTY, OK, and shall be construed, enforced and interpreted in accordance with the laws of the State of Oklahoma.
- (14) Each signatory to this agreement has executed it freely and without duress, after having read and reviewed this agreement and consulted with, or having had the opportunity to consult with, the attorneys of such signatory's choice.
- (15) This agreement is effective as of August 28, 2007, regardless of the date of execution by the parties hereto.

5. On September 25, 2007, the Division sent Licensee a letter regarding the sampling of cigarette brands on September 8, 2007, which were not reported on the Licensee's monthly Cigarette Wholesaler Reports, consisting primarily of the failure to report the purchase of stamped cigarettes. The letter reminded the Licensee it had been advised on two (2) previous occasions of the monthly reporting requirements.<sup>11</sup>

6. On October 2, 2007, the Division conducted a Tobacco Enforcement Survey at the Licensee's place of business. The Division confiscated tobacco products for which the Licensee could not provide invoices.<sup>12</sup>

7. The tobacco products confiscated by the Division on October 2, 2007, were purchased by the Licensee from SUPPLIER. SUPPLIER agreed to voluntarily surrender its licenses and dispose of its inventory in Case No. P-06-044-K. A list of the inventory purchased by the Licensee was attached to the Division's Exhibit 7, the Purchase and Sale Agreement in Case No. JM-06-022.<sup>13</sup>

8. On October 26, 2007, the Division issued a proposed ATT Assessment<sup>14</sup> against the Licensee for the period of October 2007, as follows, to-wit:

ATT Due:	\$15,966.43
Penalty:	1,596.64
Interest:	<u>392.77</u>
Total	\$17,955.85 [sic]

9. On November 7, 2007, the Licensee paid the ATT Assessment to get back the inventory confiscated on October 7, 2007.<sup>15</sup>

10. On November 14, 2007, the Division issued a proposed ATT Assessment<sup>16</sup> against Licensee for the period of August 2007, as follows, to-wit:

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<sup>11</sup> Division's Exhibit 4. The letter also mentions the purchase of two (2) brands of cigarettes, but the letter does not indicate whether the cigarettes were purchased stamped or unstamped.

<sup>12</sup> Division's Exhibit 5.

<sup>13</sup> Testimony of MEMBER. See Division's Exhibit 3.

<sup>14</sup> Division's Exhibit 6.

<sup>15</sup> See Note 14. Attached to Division's Exhibit 6 is a copy of a cashier's check for \$16,359.20, which is the ATT Tax and interest. The assessment was paid within thirty (30) days, so no penalty was imposed.

<sup>16</sup> Division's Exhibit 8. The Division increased Class "C" Cigars purchased by 2000 on CORPORATION Invoice #33119 dated August 10, 2007. See Note 9.

Tax:	\$240.00
Interest:	12.00
Tax and Interest Due Within 60 [sic] Days:	\$252.00
Delinquent Penalty @ 10%:	24.00
Tax, Interest & Penalty Due After 60 Days:	\$276.00

11. In reviewing the Licensee's Sales Tax Report for December 2007, the Division discovered Invoice #8848, dated December 12, 2007, which omitted the purchaser's name and sales tax permit number.<sup>17</sup>

12. On February 27, 2008, the Division issued a proposed ATT Assessment<sup>18</sup> against Licensee for November 2007, as follows, to-wit:

Tax:	\$432.00
Interest through 04/30/08:	24.27
Tax and Interest Due Within 60 [sic] Days:	\$456.27
Delinquent Penalty @ 10%:	43.20
Tax, Interest & Penalty Due After 60 Days:	\$499.47

13. During a compliance check on a retailer April 14, 2008, the Division discovered ten (10) cartons and three (3) packs of unstamped Carnival Full Flavor 100's.<sup>19</sup> The retailer provided the Division with a copy of an invoice, which reflected the retailer had purchased thirty (30) cartons of Carnival Full Flavor 100's from the Licensee on March 10, 2008.<sup>20</sup> During a compliance check on a retailer April 15, 2008, the Division discovered two (2) cartons and two (2) packs of Carnival Full Flavor 100's, which are described by the Division as being "Half-Stamped" with control numbers for stamps purchased by Licensee.<sup>21</sup>

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<sup>17</sup> Division's Exhibit 11. The Licensee's first notice of this allegation was the Division's *Supplemental Notice*. MEMBER testified this invoice was due to a data input error and there was a second invoice in the Licensee's records with the purchaser's name and permit number, but due to the short notice the records of the Licensee could not be researched in time for the hearing.

<sup>18</sup> Division's Exhibit 9. The Division increased Class "C" Cigars purchased by 3600 on CORPORATION Invoice #35580 dated November 5, 2007. *See* Note 9.

<sup>19</sup> Division's Exhibit 21. Testimony of SUPERVISOR 2. It was noted for the record Division's Exhibit 21 had been redacted for the record in compliance with OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2008). The Licensee's first notice of these allegations was the Division's *Supplement Notice*.

<sup>20</sup> Division's Exhibit 22. Invoice #11720 does not reflect the name of the purchaser or the permit number.

<sup>21</sup> Division's Exhibit 20. It was noted for the record Division's Exhibit 20 had been redacted. *See* Note 19. The Licensee's first notice of these allegations was the Division's *Supplemental Notice*. MEMBER testified the Licensee purchased a used stamping machine sometime in 2008, and sometimes it malfunctions if the roll of stamps gets off the tracks or the roll becomes misaligned, but once the stamps go through the machine, which transfers the stamps by heat, they cannot be removed from the roll. MEMBER further testified when the Licensee discovers cigarettes are unstamped or improperly stamped they are re-stamped. Sometimes customers discover the problem and the cigarettes are re-stamped by the Licensee. SUPERVISOR 2 testified in his opinion the "Half-Stamped" did not result from a stamping machine malfunction. *See also* Protestant's Exhibit 1, an example from a roll of stamps, which have gone through the stamping machine. From the example, it appears the machine left

14. On April 15, 2008, MEMBER filed an “Application for Automatic Extension of Time to File U.S. Individual Income Tax Return” with the Internal Revenue Service.<sup>22</sup>

15. In reviewing the Licensee’s Sales Tax Report for April 2008, the Division discovered Invoice #10100, dated April 2, 2008, to STORE, Sales Tax Permit #080132. At the time of the sale STORE’S sales tax permit was invalid.<sup>23</sup>

16. On May 15, 2008, the Licensee filed its September 2007<sup>24</sup> and October 2007<sup>25</sup> Sales Tax Reports reflecting zero sales.

17. The Licensee failed to include in its monthly Cigarette Report for May 2008, all of its purchases of cigarettes reflected by one (1) invoice from WHOLESALER 1 and one (1) invoice from WHOLESALER 2. The report also contains a breakdown of the Licensee’s Inventory of Cigarette Stamps, a breakdown of the Licensee’s inventory of Unstamped Cigarettes and a breakdown of the Licensee’s Stamped Cigarettes. The two (2) invoices omitted from the report were for the purchase of Stamped Cigarettes from WHOLESALER 1 and WHOLESALER 2. No tax is remitted with the monthly Cigarette Reports. It is filed for informational purposes only.<sup>26</sup>

18. In reviewing the Licensee’s Sales Tax Report for July 2008, the Division discovered Invoice #16183, dated July 15, 2008, to STORE, Tax Permit #080132. At the time of the sale, STORE’S sales tax permit was invalid.<sup>27</sup>

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fragments of almost every stamp on the sheet. Some fragments were larger than other fragments. Some fragments would be classified as “Half-Stamps” by the Division. From examining the sheet, it appears heat was applied by the stamping machine to the entire sheet. The stamp fragments appear “bubbled” or “crackled” and the stamps could not be removed from the sheet.

<sup>22</sup> Division’s Exhibit 23.

<sup>23</sup> Division’s Exhibit 12. The Licensee’s first notice of this allegation was the Division’s *Supplemental Notice*. MEMBER testified at hearing he did not know until the Division filed its *Supplemental Notice* STORE’S permit was invalid.

<sup>24</sup> Division’s Exhibit 15. *See* Note 8.

<sup>25</sup> Division’s Exhibit 16. *See* Note 8.

<sup>26</sup> Division’s Exhibits 17, 18, and 19. It was noted for the record Division’s Exhibit 18 had been redacted. *See* Note 19. SUPERVISOR 1 testified the Division manually reviews every wholesaler report filed each month and cross-checks each report with the purchaser’s report; such as the Licensee’s, to make sure the reports match. There are approximately 100 Cigarette Wholesalers and over 130 Tobacco Wholesalers. If the reports do not match, the Division notes it on the purchaser’s report. SUPERVISOR 2 testified that the Licensee’s monthly reports were not always timely filed, but he could not testify to any specific instances the Licensee’s tobacco reports were not timely filed. ACCOUNTANT testified that there is no incentive for the Licensee to fail to report the purchase of stamped cigarettes on purpose, because the tax is paid at the time of purchase.

<sup>27</sup> Division’s Exhibit 13. *See* Note 23.

19. On September 15, 2008, the Administrative Law Judge mailed a letter to the parties, which states as follows, to-wit:

The parties entered into a Dispositional Agreement in the captioned matter, with an effective date of August 28, 2007.

It is my understanding if LICENSEE complied with the five material conditions of the agreement and there were no further violations, the Division would dismiss the pending complaint.

The twelve (12) month period has elapsed and this office has not received notice of any further violations. Please forward a dismissal of the pending matter or advise how the parties wish to proceed on or before fourteen (14) days from the date of this letter.

20. On September 22, 2008, the Tax Commission received the renewal application for the Licensee's Cigarette Wholesaler License, which expired October 5, 2008.<sup>28</sup>

21. On September 22, 2008, the Tax Commission received the Licensee's renewal application for its Unstamped Tobacco License, which expired October 26, 2006.<sup>29</sup>

22. On September 29, 2008, the Licensee filed a *Request for Dismissal Pursuant to Settlement Agreement*, which in pertinent part states as follows, to-wit:

2. LICENSEE submits that it has met all five of the material conditions of the agreement. Therefore, in accordance with the terms and the conditions of the agreement, it is the position of the taxpayer that this case should be dismissed.

23. On or about September 24, 2008, ACCOUNTANT responded to a September 23, 2008, letter from OTC ATTORNEY 2 regarding the Division's position MEMBER had "failed to file a proper return/report for 2007." Enclosed with the letter were checks from the Licensee paying in full the ATT Assessments for October 2006 through January 2007, April 2007, August 2007, and November 2007.<sup>30</sup>

24. On September 29, 2008, the Division filed its *2008 Notice*,<sup>31</sup> which states in pertinent part, as follows, to-wit:

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<sup>28</sup> Division's Exhibit 1.

<sup>29</sup> Division's Exhibit 2.

<sup>30</sup> Division's Exhibit 10. *See* Division's Exhibits 7, 8, and 9. The Division did not introduce into evidence an assessment for the "errors" made by the Licensee on its Tobacco Reports for October 2006 through January 2007. *See also* Licensee Exhibit 3. A copy of the "Application for Automatic Extension of Time to File U.S. Individual Income Tax Return" was attached to the letter.

<sup>31</sup> During the hearing, ATTORNEY 3 requested the Administrative Law Judge to take judicial notice of the Division's filing (Licensee Exhibit 2). OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

...Division is not seeking a determination of material breach. As stated below, Division seeks a hearing on its intent to refuse renewal of LICENSEE'S Cigarette Wholesaler and Unstamped Tobacco Product licenses.

LICENSEE filed Cigarette Wholesaler and Unstamped Tobacco License renewal applications on September 22, 2008. Division hereby notifies the Court that Division intends to refuse renewal of said licenses for the following reasons:

1. MEMBER, as the sole member of LICENSEE, has violated state tax laws by not filing a return for 2007. The extension claimed by MEMBER is not effective as no estimated payment of 2007 tax was made on or before April 15, 2008.

2. LICENSEE had an outstanding tax warrant for additional unpaid tobacco tax due for the period October 2006 through January 2007. The tax due resulted from errors on monthly reports. The balance due on the warrant is \$237.51. This amount was paid on September 26, 2008 after notification to LICENSEE'S counsel.

3. LICENSEE had an unpaid tobacco tax assessment issued June 5, 2007 for April 2007 which is now final. The tax due resulted from errors on the April 2007 monthly report. The balance due with interest calculated through September 18, 2008 is \$6,748.94. This amount was paid on September 26, 2008 after notification to LICENSEE'S counsel.

4. LICENSEE had an unpaid tobacco tax assessment issued November 14, 2007 for August 2007 which is now final. The tax due resulted from errors on August 2007 monthly report. The balance due with interest calculated through September 18, 2008 is \$301.48. This amount was paid on September 26, 2008 after notification to LICENSEE'S counsel.

5. LICENSEE had an unpaid tobacco tax assessment issued February 27, 2008 for November 2007 which is now final. The tax due resulted from errors on November 2007 monthly report. The balance due with interest calculated through September 18, 2008 is \$526.57. This amount was paid on September 26, 2008 after notification to LICENSEE'S counsel.

6. During a routine compliance check of a retailer on or about April 14, 2008, agents of the Oklahoma Tax Commission confiscated half-stamped/improperly stamped cigarettes. The roll of stamps (control number 32364) was determined by the Oklahoma Tax Commission as having been sold to LICENSEE on March 14, 2008.

7. During a routine compliance check of a retailer, on or about April 14, 2008, agents of the Oklahoma Tax Commission confiscated in excess of ten cartons of unstamped Carnival Full Favor [sic] 100's which, according to the invoice provided by the retailer, were purchased from LICENSEE on

March 10, 2008. A copy of the invoice is attached hereto and made a part hereof. The invoice does not comply with rules of the Oklahoma Tax Commission pertaining to wholesaler invoices.

25. On October 14, 2008, the Division filed its *Supplemental Notice*,<sup>32</sup> stating the following additional grounds, as follows, to-wit:

1. Despite two requests made subsequent to the Division's filing on September 29, 2008, Division has not yet received a copy of MEMBER'S 2007 State of Oklahoma and federal individual income tax returns. MEMBER, as the sole member of LICENSEE, has violated state tax laws by not filing a return for 2007 on April 15, 2008 as the extension claimed by MEMBER is not effective as no estimated payment of 2007 tax was made on or before April 15, 2008.

2. LICENSEE, during fiscal year 2008, the majority of LICENSEE'S monthly cigarette tax reports and unstamped tobacco reports were not timely filed. Failure to timely file monthly cigarette tax reports is a violation of 68 O.S. § 312. Failure to time [sic] file monthly unstamped tobacco reports is a violation of 68 O.S. § 413.

3. LICENSEE failed to include in its monthly cigarette tax report for the month of May 2008, all of its purchases of cigarettes. Specifically, LICENSEE failed to include on its May 2008 report, its May 16, 2008 purchase of 3080 cartons of cigarettes from WHOLESALER 1 and its purchases on May 6, 2008, May 7, 2008, and May 28, 2008 of 1470 cartons, 3360 cartons, and 2070 cartons, respectively, from WHOLESALER 2. Furthermore, LICENSEE did not report its sales of the cigarettes purchased. Failure to include all purchases and sales of cigarettes in monthly reports is a violation of 68 O.S. §§ 312 and 312.1.

4. During the months of April and July 2008, LICENSEE made sales of cigarettes to STORE, a purchaser who did not hold an Oklahoma Retail Cigarette License. LICENSEE'S sales to STORE were in violation of 68 O.S. § 304.

5. LICENSEE'S invoices reflecting sales of cigarettes and tangible personal property do not, in all instances, include the name and address of the purchaser. Failure to maintain documentation of each transaction in which LICENSEE is the seller is a violation of 68 O.S. §§ 312 and 312.1. Furthermore, the invoices do not comply with the requirements for sales invoices. See 68 O.S. §§ 1350 *et seq.*

6. LICENSEE failed to timely file sales tax reports for three of the twelve reporting periods in 2007. LICENSEE filed its September 2007 and October 2007 monthly sales tax reports on or about May 15, 2008. Division further

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<sup>32</sup> During the hearing, ATTORNEY 3 requested the Administrative Law Judge to take judicial notice of the Division's filing (Licensee's Exhibit 4). See Note 31.

asserts that the reports for September 2007 and October 2007, as well as the report filed for April 2007 are false and/or fraudulent as each report reflects “Total Sales” of \$0.00.

26. Prior to hearing, the Division was provided with an un-filed copy of MEMBER’S 2007 Oklahoma Individual Income Tax Return, an un-filed copy of MEMBER’S 2007 Federal Individual Income Tax Return, and a copy of the Application for Extension filed with the IRS on April 15, 2008.<sup>33</sup> MEMBER’S home address on the return is incorrectly reflected as INCORRECT ADDRESS. MEMBER’S correct home address is CORRECT ADDRESS.<sup>34</sup>

27. During the last twelve (12) months, the Division has not discovered or confiscated any unstamped or half-stamped cigarettes at the Licensee’s place of business.<sup>35</sup>

28. At the time of the hearing, the Licensee had filed all reports and returns required by Oklahoma State Law and Tax Commission Rules.

29. At the time of the hearing, the Licensee was not delinquent in the payment of any tax, penalty, or interest.

30. The Division did not give the Licensee notice of its intent not to renew its licenses prior to filing the *Notice* and *Supplemental Notice* or give the Licensee sixty (60) days to wind-up its business and dispose of its inventory.

31. The Licensee met all five (5) of the material conditions of the Dispositional Agreement.<sup>36</sup>

32. During 2007, the Licensee paid the Tax Commission taxes totaling \$2,394,052.35 and tobacco tax in 2008 totaling \$124,412.11.<sup>37</sup> Schedule C of MEMBER’S 2007 Federal return reflects gross sales of \$16,675,175.00.<sup>38</sup>

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<sup>33</sup> Division’s Exhibit 23. MEMBER and ACCOUNTANT testified the return had been filed on October 15, 2008, with the full remittance. A file-stamped copy of the return and a copy of the check were not introduced into evidence at the hearing. The copy of the return reflects MEMBER owed \$2,150.00 in tax, \$66.00 in underpayment of estimated tax interest, and \$273.00 for delinquent payment totaling \$2,489.00.

<sup>34</sup> See Division’s Exhibit 23. Testimony of MEMBER. The Administrative Law Judge is taking judicial notice of the COUNTY Assessor’s website to complete the factual details in this matter. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). According to the COUNTY Assessor’s website, MEMBER is the owner of record for the property at PROPERTY ADDRESS, with a mailing address of MAILING ADDRESS. MEMBER is also the owner of record for the property located at MAILING ADDRESS. MEMBER testified he lives in CITY 1, not CITY 2. <http://COUNTY.org/assessor> (Visited October 22, 2008).

<sup>35</sup> Testimony of MEMBER.

<sup>36</sup> See Division’s Notice filed September 29, 2008.

<sup>37</sup> Testimony of ACCOUNTANT. ACCOUNTANT did not have the amount the Licensee had paid in cigarette tax to date during 2008.

<sup>38</sup> Division’s Exhibit 23.

## CONCLUSIONS OF LAW

1. The Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.<sup>39</sup> On October 2, 2008, the statutory notice was mailed to the Licensee, through its attorneys, by certified mail, with return receipt requested, giving the Licensee twenty (20) days notice of the hearing set for October 30, 2008, at 1:30 p.m. The Licensee waived the twenty (20) day notice requirement and requested an accelerated show cause hearing.

2. 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.<sup>40</sup>

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.<sup>41</sup>

4. Upon a finding that a licensee has violated any of the provisions of the Cigarette Tax Stamp Act (“Act”)<sup>42</sup> or the Tobacco Products Tax Act,<sup>43</sup> the Oklahoma Tax Commission may revoke or suspend any license issued pursuant to the Act.<sup>44</sup>

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<sup>39</sup> OKLA. STAT. ANN. tit. 68, § 212 (West 2001).

<sup>40</sup> OKLA. STAT. ANN. tit. 68, § 212 (West 2001).

<sup>41</sup> OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

<sup>42</sup> OKLA. STAT. ANN. tit. 68, § 301 et seq. (West 2001).

<sup>43</sup> OKLA. STAT. ANN. tit. 68, § 401 et seq. (West 2001).

<sup>44</sup> See OKLA. STAT. ANN. tit. 68, § 304(G) (West Supp. 2007). See OKLA. ADMIN. CODE § 710:70-2-4 (May 13, 2004), which states as follows, to-wit:

**Conditions under which a cigarette license may be granted, maintained, or renewed**

(a) *No cigarette license shall be granted, maintained, or renewed pursuant to this Subchapter and Article 3 of Title 68 of the Oklahoma Statutes, if any owner of an interest of ten (10) percent in the applicant, or holder of a license, meets any of the following conditions:*

5. Every retailer in this state, as a condition of carrying on such business, shall secure from the Tax Commission a license and shall pay therefor a fee of Thirty Dollars (\$30.00).<sup>45</sup>

6. All cigarettes sold or held for sale in the State of Oklahoma shall bear one of the prescribed stamps.<sup>46</sup> 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. Cigarette Tax Reports are to be filed no later than the tenth (10<sup>th</sup>) day of each calendar month.<sup>47</sup> No tax is remitted with the Cigarette Tax Report. It is filed for informational purposes only.

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(1) *Applicant owes Five Hundred Dollars (\$500.00) or greater in cigarette taxes that are delinquent;*

(2) *Applicant has been convicted of a crime relating to or for receiving stolen or counterfeit cigarettes;*

(3) *Applicant is a manufacturer, and is not a participating manufacturer as defined in [37 O.S. § 600.22](#);*

(4) *Applicant is not a participating manufacturer as defined [37 O.S. § 600.22](#) and is not in full compliance with [37 O.S. § 600.23\(A\)](#).*

(5) *Applicant is a manufacturer, and cigarettes have been imported into the United States by the applicant in violation of [19 U.S.C. § 1681a](#); or,*

(6) *Applicant is a manufacturer and has manufactured or imported into the United States, cigarettes that do not fully comply with the Federal Cigarette Labeling and Advertising Act, [15 U.S.C. § 1331 et seq.](#) [[68 O.S. § 304\(E\)](#)]*

(b) *In addition to any civil or criminal penalty provided by law, upon a finding that a licensee has violated any provisions of [68 O.S. § 301 et seq.](#), 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 [68 O.S. § 316](#). [[68 O.S. § 304\(G\)](#)] (Emphasis original.)*

<sup>45</sup> OKLA. STAT. tit. 68, § 304(B) (West Supp. 2005).

<sup>46</sup> OKLA. ADMIN. CODE § 710:70-7-4.

<sup>47</sup> OKLA. STAT. tit. 68, § 312 (West Supp. 2001), which states as follows, to-wit:

(a) 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 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. Every wholesaler, jobber, warehouseman or retailer operating in the State of Oklahoma, whose main warehouse or headquarters is in another state shall keep all records of all cigarette transactions made by him at his place of business in Oklahoma, or at a designated place in the State of Oklahoma.

(b) 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

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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. Retailers or consumers purchasing cigarettes in drop shipments shall be required to make monthly reports to the Commission as are required of wholesale dealers.

(c) Every distributing agent shall, except as otherwise provided herein, keep at each place of business in Oklahoma for a period of three (3) years for inspection by the Commission a complete record of all cigarettes received by him, including all orders, invoices, bills of lading, waybills, freight bills, express receipts, and all other shipping records which are furnished to the distributing agent by the carrier and the shipper of said cigarettes, or copies thereof, and, in addition thereto, a complete record of each and every distribution or delivery made by said distributing agent. Such records of distribution or delivery shall include all orders, invoices or copies thereof, all other shipping records furnished by the carrier, and the person ordering distribution or delivery of the cigarettes.

(d) Upon a form to be prescribed by the Commission, every distributing agent in Oklahoma shall report each day, except Sundays and holidays, to the Commission all deliveries of cigarettes made on the preceding day or days. The reports shall show the name of the person ordering the delivery, date of delivery, name and address of the person to whom delivered, the invoice number, bill of lading or waybill number, the number and kind of cigarettes delivered, the means of delivery and/or the transportation agent and the destination of drop shipment, if a drop shipment. However, if the invoice furnished the distributing agent by the manufacturer or other person ordering such delivery, or the bill of lading prepared by said distributing agent to cover the shipment under said invoice, contains all the information required to be reported, it will be sufficient to send a copy of said invoice or invoices, or a copy of said bill of lading or bills of lading, to the Commission.

*See* OKLA. STAT. tit. 68, § 312.1 (West Supp. 2007), which states as follows, to-wit:

A. The Oklahoma Tax Commission, if in its discretion it deems practical and reasonable, may establish procedures for maintaining records and filing reports containing the information required by this section. The exercise by the Tax Commission of the authority granted in this subsection shall be by adoption of rules necessary to establish procedures that increase compliance with the requirements of this article. If the Tax Commission determines to utilize its discretion, the provisions of subsections B through J of this section shall apply.

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 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.

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C. Manufacturers 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 provided separately with respect to each of the facilities operated by the manufacturer and shall include:

1. The quantity of cigarette packages that were distributed or shipped to another manufacturer or to a distributor 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 manufacturer 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 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.

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 seller, purchaser, consignor, consignee, 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.

F. Each retailer shall maintain copies of invoices or equivalent documentation for every transaction in which the retailer receives or purchases cigarettes at each of its facilities. 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 cigarettes were received, the quantity of each brand style received in such transaction and the retail cigarette license number or sales tax license number.

G. Each manufacturer shall maintain copies of invoices or equivalent documentation for each of its facilities for every transaction in which the manufacturer is the seller, purchaser, consignor, consignee, or recipient of cigarettes. The invoices or documentation shall show the name and address of the consignor, seller, purchaser, or consignee, and the quantity by brand style of the cigarettes involved in the transaction.

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.

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.

8. Tobacco Products Tax Reports are to be filed no later than the fifteenth (15<sup>th</sup>) 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, along with the payment of tax due.<sup>48</sup>

9. A valid extension of time in which to file a Federal Income Tax Return automatically extends the due date of the Oklahoma Income Tax Return, unless an Oklahoma liability is owed. A copy of the Federal extension must be attached to the Oklahoma Return. If the due date for filing the Federal Return is not extended or if an Oklahoma liability is owed, an extension of time to file the Oklahoma Return may be granted only by OTC Form 504. Ninety percent (90%) of the tax liability must be paid by the original due date for the return to avoid penalty charges for late payment. Interest will be charged from the original due date of the return.<sup>49</sup>

10. 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. The Division also filed its *Notice* and *Supplemental Notice* in this matter.

## DISCUSSION

The parties entered into a Dispositional Agreement to settle the *Complaint* filed by the Division in this matter, which sought to revoke/cancel the Licensee's Wholesaler Cigarette License and Unstamped Tobacco Products License. The parties agreed "...that if, 12 months from entry of the date of an Agreed Order..., LICENSEE has complied with the five material conditions and no further violations of the Oklahoma law and/or the rules and regulations of the OTC with reference thereto have been detected, it will dismiss the proceedings."

On September 15, 2008, the Administrative Law Judge sent the parties a letter advising the twelve (12) month provision contained in the Dispositional Agreement had elapsed and the Administrative Law Judge had not received notice of any further violations. The Division was requested to forward a dismissal of this matter or advise how the parties wished to proceed.

On September 29, 2008, the Licensee filed its *Request for Dismissal Pursuant to Settlement Agreement*, which stated it "...has met all five of the material conditions of the agreement" and "it is the position of the taxpayer that this case should be dismissed."

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J. The Tax Commission, upon request, shall have access to reports and records required under this act. The Tax Commission at its sole discretion may share the records and reports required by such sections with law enforcement officials of the federal government, other states, or international authorities.

<sup>48</sup> OKLA. ADMIN. CODE § 710:70-5-5.

<sup>49</sup> OKLA. ADMIN. CODE § 710:50-3-4(a).

The Division's position is the Dispositional Agreement is moot because the Licensee's Cigarette Wholesaler License had already expired October 5, 2008, and the Unstamped Tobacco License would expire October 26, 2008.

The Division's *Notice* and *Supplemental Notice* request that the Licensee's applications to renew its licenses be denied.

The Division's grounds for its *Notice* and *Supplemental Notice* can be summarized as follows, to-wit:

- (1) Licensee has not reported timely;
- (2) Licensee has filed incomplete, false, and/or fraudulent reports;
- (3) Licensee has failed to maintain required records;
- (4) Licensee has failed to properly document sales with the purchaser's name and address;
- (5) Licensee has made sales to purchaser(s) without determining that the purchaser holds a license; and
- (6) Licensee has sold unstamped and/or half-stamped cigarettes to customers.

The Division maintains "each of these violations, taken alone, is sufficient grounds under 68 O.S. § 212 to refuse renewal" and "[c]ollectively, these violations evidence a course of conduct which expresses total disregard for the tax laws and rules of the Oklahoma Tax Commission."

The essence of the Division's position is the "holding of a license or permit is a privilege, not a right." The Division stated it has expended resources trying to get this Licensee to comply, but the Licensee continues to make the same mistakes even though the Division has counseled the Licensee about the identical mistakes in the past, and this conduct constitutes a pattern of conduct justifying the Division's refusal to renew the licenses.

The Licensee's position is that it has made a good faith effort to comply and meet its responsibility to make sure reports and returns are proper, timely filed, and complete, with all the required information, and tax timely paid.

The Licensee does not dispute that it has made some mistakes and errors in the past twelve (12) months, but asserts that the level of the errors in comparison with everything it has done right seems to have been overlooked or disregarded by the Division, including the fact that the Licensee is in compliance and the Licensee does not have any outstanding tax liability which remains unpaid.

### ORDER

The Commission orders that Licensee's Wholesale Cigarette License and Unstamped Tobacco License be renewed. The Commission notes that if Licensee engages in any future noncompliance and the Division recommends to the Commission revocation of Licensee's

license or imposition of administrative penalties, it will be appropriate to consider the violations of tax law which have been shown in this proceeding as a backdrop to any future proceedings. Of special concern to the Commission is the possession of improperly stamped cigarettes. This order shall supersede and replace Order No. 2008-11-18-02 of the Oklahoma Tax Commission entered on November 18, 2008.

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.