**JURISDICTION:** **OKLAHOMA TAX COMMISSION DECISION**
**CITE:** **2009-02-03-11 / NON-PRECEDENTIAL**
**ID:** **JM-08-004-K**
**DATE:** **FEBRUARY 3, 2009**
**DISPOSITION:** **LICENSE REVOKED**
**TAX TYPE:** **CIGARETTE LICENSE REVOCATION**
**APPEAL:** **NO APPEAL TAKEN**

## ORDER

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 21st day of November, 2008, the Commission makes the following Findings of Fact and Conclusions of Law and enters the following order.

## STATEMENT OF THE CASE

On September 19, 2008, the Division filed a verified *Complaint for Revocation/Cancellation of Wholesaler Cigarette and Unstamped Tobacco License and Imposition of Fines and Civil Penalties ("Complaint")* against Respondent.[1] The *Complaint* was docketed as Case No. JM-08-004-K and assigned to ALJ, Administrative Law Judge.[2]

In accordance with § 212(b) of the Uniform Tax Procedure Code[3] and the Rules of Practice and Procedure before the Oklahoma Tax Commission[4], a *Notice to Show Cause Why the Application for Revocation of Your Wholesale (Sic) Cigarette and Tobacco Products Licenses should not be Ordered* was served by certified mail on Respondent. The show cause hearing was scheduled for October 21, 2008.[5] The *Notice* duly set forth the violations alleged against Respondent, and attached thereto and incorporated therein the verified *Complaint* of the Division.

The hearing was held as scheduled. The Division questioned Respondent's representative who also gave a statement. Division's Exhibits 1 through 7; 9, and 11 through 13 were identified, offered and admitted into evidence. The Division also called MANAGER, Revenue Unit Manager, Excise Tax Section of the Division, who testified regarding the timely filing of cigarette, tobacco products and non-participating tobacco manufacturer reports. At the conclusion of the hearing, the record was closed and the case was submitted for decision.[6]

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[1] Rule 710:1-5-100 of the *Oklahoma Administrative Code* ("*OAC*").

[2] *OAC*, Rule 710:1-5-22(b).

[3] 68 O.S. 2001, § 201 et seq.

[4] *OAC*, 710:1-5-20 through 710:1-5-47.

[5] *See*, Note 1 and 68 O.S. 2001, § 212(b).

[6] *OAC*, 710:1-5-39(a).

## FINDINGS OF FACT

Upon review of the file and records, including the tape recording of the show cause hearing, the exhibits and the arguments of the parties, the undersigned finds:

1. Respondent's representative has owned and operated a wholesale cigarette and other tobacco products business at a location in CITY A, Oklahoma since approximately 1999; first as a sole-proprietorship and, since January, 2005, as a domestic corporation. Respondent also had a business location in CITY B, Oklahoma from October, 2007 to March, 2008. Testimony of REPRESENTATIVE.

2. Respondent admits that the July and August, 2008 monthly cigarette reports for the CITY A location were not timely filed and became delinquent. Division's Exhibit 9[7]. The reports were filed October 13, 2008.

3. Respondent admits that the October, November and December, 2007; and January, 2008 monthly cigarette and other tobacco products reports for the CITY B location were not timely filed and became delinquent. Division's Exhibit 11[8] and 12[9]. REPRESENTATIVE testified that the monthly cigarette and other tobacco products reports for the CITY A location for the months at issue include the business at the CITY B location; and, that approximately two to three months after he was advised he could not file combined reports, he filed separate reports for the CITY B location.

4. On June 11, 2008, Respondent was notified that the April and May, 2008 monthly cigarette and non-participating manufacturers' reports for the CITY B location had not been received. Division's Exhibit 13. The CITY B location was closed in March, 2008.

5. Respondent admits that the March and April, 2008 monthly other tobacco products reports for the CITY A location failed to report its purchases from SUPPLIER, that amended reports for those months have not been filed and that the taxes attributable to said purchases have not been paid. Division's Exhibits 5, 6 and 7.

6. Three (3) compliance checks of Respondent's CITY A location were conducted by the Division, to-wit: September 22nd, October 11th and November 2nd, 2007. Exhibits 2, 3 and 4.

7. During the first compliance check, the auditor found one (1) carton of cigarettes with the stamps scraped off the packages and six (6) packages of contraband cigarettes. The confiscated items have an estimated retail value of $16.00. Division's Exhibit 2. REPRESENTATIVE testified that the carton was given to him as a sample, that it was in a cabinet in his office and that he does not know how the stamps became scraped off. He also stated he was aware that Skydancer had become contraband product approximately one (1) year prior to the compliance check and that he could not sell the packages of cigarettes.

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[7] Letter of the Division dated September 12, 2008. The letter advises that the cigarette stamp purchase discount had been suspended pending compliance with all filing requirements.

[8] Fax of the Division sent January 16, 2008.

[9] Letter of the Division dated February 28, 2008.

8. During the second compliance check, the auditor found eleven (11) bags of contraband roll-your-own tobacco and one (1) package of contraband cigarettes. The confiscated items have an estimated retail value of $89.00. Division's Exhibit 3. The auditor's note indicates that the confiscated product was missed on the first compliance check. REPRESENTATIVE testified that since taxes had been paid on the roll your own tobacco products, he thought he could sell them.

9. During the third compliance check, the auditor found roll-your-own and other tobacco products in Respondent's inventory for which Respondent did not have invoices. The confiscated items have an estimated value of $503.50. Division's Exhibit 4. REPRESENTATIVE testified that he did not have invoices for the products because they were given to him as free samples. He also stated that the Ariva Cigarlette pieces were given to him approximately five to six years earlier and that he never sold any of them.

## ISSUES AND CONTENTIONS

The issue presented for decision is whether the Division sustained its burden of proving[10] that Respondent violated the provisions of the Cigarette Stamp Tax Act ("Act")[11] and/or the Tobacco Products Tax Code ("Code")[12] or the rules and regulations promulgated by the Tax Commission for the administration and enforcement of the applicable revenue laws; and, if so, what punishment should be imposed for such violations.

The Division seeks imposition of administrative penalties against Respondent in the sum of $45,000.00, forfeiture of Respondent's bond in the amount of $1,000.00 and revocation of Respondent's wholesale cigarette and other tobacco products licenses. In support of its prayer for relief, the Division argues that the evidence shows Respondent knowingly filed late reports on several occasions and has filed false reports. The Division also argues that Respondent has been in possession of contraband tobacco products on at least three (3) occasions.

Respondent does not want its licenses revoked. Although Respondent admits to the violations, Respondent argues that it did not intentionally commit the violations.

## CONCLUSIONS OF LAW

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

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

[11] 68 O.S. 2001, § 301 et seq., as amended.

[12] 68 O.S. 2001, § 401 et seq., as amended.

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

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

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

3. 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).

4. Every person subject to the payment of the tax levied by the Act is required to keep in Oklahoma accurate records covering the business carried on and to keep and preserve for three (3) years 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 by the Commission. 68 O.S. 2001, § 312(a). Every wholesaler receiving unstamped cigarettes is required to file a report on or before the 10th day of each month covering the previous calendar month, 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 Commission. 68 O.S. 2001, § 312(b).

5. The procedures for maintaining records and filing reports, including the information required in the reports is set forth in § 312.1[13], wherein it 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 provided separately with respect to each of the facilities operated by the wholesaler and distributor and shall include:
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> 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;
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> 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
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> 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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> 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.
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> 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.
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> 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.

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

> 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.

6. The Tax Commission is also authorized to revoke or suspend the license of any "stamping agent"[14] 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 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"[15] 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

[14] 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).

[15] 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.

whether any applicable sales have been made, for each non-participating manufacturer:

1. The month of activity;

2. The name and address of the non-participating manufacturer from whom the cigarettes or roll-your-own tobacco originated;

3. The brand name of the cigarettes or roll-your-own tobacco sold; and

4. The number of units sold, as defined by 710:70-9-2, of cigarettes and roll-your-own tobacco unit-equivalents.

7. "Whoever knowingly omits, neglects, or refuses to comply with any duty imposed upon the person by [the Act], or to do, or cause to be done, any of the things required by [the Act], or does anything prohibited by [the Act], shall, in addition to any other penalty provided in [the Act], pay an administrative penalty of One Thousand Dollars ($1,000.00)." 68 O.S. Supp. 2003, § 316(H).

8. Whoever fails to pay any tax imposed by the Act at the time prescribed by law or rules, in addition to any other penalty imposed by the Act, is liable to a penalty of five hundred percent (500%) of tax due but unpaid. 68 O.S. Supp. 2003, § 316(I).

9. Here, the Division sustained its burden of proving that Respondent knowingly violated the filing and records requirement of the Act and wrongfully possessed prohibited product on more than one occasion. Accordingly, the Division's *Complaint for Revocation/Cancellation of [Respondent's] Wholesaler Cigarette and Unstamped Tobacco License and Imposition of Fines and Civil Penalties* should be sustained.

Based on the above and foregoing findings of fact and conclusions of law the wholesaler cigarette and unstamped tobacco products licenses of Respondent, RESPONDENT are hereby revoked. An administrative penalty of One Thousand Dollars ($1,000.00) is imposed against Respondent and Respondent's bond in the sum of $1,000.00 is forfeited. Additionally, and in accordance with 68 O.S. 2001 § 212(c), all accrued taxes, interest and penalties are ordered to be paid.

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.