JURISDICTION: **OKLAHOMA TAX COMMISSION DECISION**
CITE: **2009-02-05-02 / NON-PRECEDENTIAL**
ID: **JM-08-007-H**
DATE: **FEBRUARY 5, 2009**
DISPOSITION: **LICENSE REVOKED**
TAX TYPE: **CIGARETTE LICENSE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

LLC d/b/a BUSINESS ("Licensee") appears pro se.[1] The Excise Tax Section of the Compliance Division ("Division") of the Oklahoma Tax Commission appears through OTC ATTORNEY 1, First Deputy General Counsel, and OTC ATTORNEY 2, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On October 13, 2008, the Division filed its *Complaint for Revocation/Cancellation of Wholesaler Cigarette License and Imposition of Fines and Civil Penalties* ("*Complaint*") with the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*[2] and the *Rules of Practice and Procedure Before the Oklahoma Tax Commission*.[3] Verification was attached to the Division's *Complaint*, which was duly sworn under oath on behalf of the Division by MANAGER, Revenue Unit Manager, Excise Tax Section, Compliance Division of the Oklahoma Tax Commission.

On October 14, 2008, a *Notice to Show Cause Why the Complaint for Revocation/Cancellation of Your Wholesaler Cigarette License and Imposition of Fines and Civil Penalties Should Not Be Ordered* ("*Notice*") was sent by certified mail, with return receipt requested, to the Licensee, along with a copy of the Division's *Complaint*, advising a show cause hearing had been set for November 12, 2008, at 1:30 p.m., at which time the Licensee could appear and show cause why the Division's *Complaint* should not be granted.[4]

On November 12, 2008, the Division filed a Motion for Continuance to allow the Licensee "…time to review and investigate the allegations contained in the Complaint…." On

[1] "**pro se**" (proh **say** *or* **see**), *adv.* & *adj.* [Latin] For oneself; on one's own behalf; without a lawyer <the defendant proceeded pro se> <a pro se defendant>. -- Also termed *pro persona*; *in propria persona*; *propria persona*; *pro per*. See PROPRIA PERSONA. BLACK'S LAW DICTIONARY (8th ed. 2004), available at *http://westlaw.com*. (March 16, 2006).

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

[3] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[4] The notice was sent by certified mail to the last-known address of the Licensee at LAST KNOWN ADDRESS. On November 20, 2008, the "green card" was returned "unclaimed."

November 13, 2008, an Order Granting Motion for Continuance was issued continuing the hearing to December 10, 2008, at 9:30 a.m.[5]

On November 24, 2008, the Division filed a Motion for Continuance "…to accommodate the previously planned vacation schedule of the Division's primary witness." On November 25, 2008, an Order Granting Motion for Continuance was issued continuing the hearing to December 18, 2008, at 9:30 a.m.[6]

On December 18, 2008, at 9:30 p.m., the Show Cause Hearing was held as scheduled. The Licensee did not appear at the hearing.[7] The Division called one (1) witness, MANAGER, Revenue Unit Manager of the Excise Tax Section, Compliance Division, Oklahoma Tax Commission, who testified regarding the Licensee's wholesale cigarette account and as custodian of the Division's records. The Division's Exhibits A through K, were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record in this matter was closed and this case submitted for decision on December 18, 2008.

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:

1. The Licensee is a Foreign Limited Liability Company registered with the Oklahoma Secretary of State, with an effective date of January 16, 2007.[8]

2. The Licensee is the holder of Wholesaler Cigarette License #### issued by the Tax Commission, with an effective date of May 23, 2008, and expiration date of May 23, 2009.[9]

3. On September 27, 2007, the Division mailed the Licensee a letter noting the Cigarette Reports ("ACX Reports") for June 2007, July 2007, and August 2007 were delinquent.[10]

---

[5] The order was sent by certified mail to the Licensee at LAST KNOWN ADDRESS. On November 24, 2008, the "green card" was signed by a representative of the Licensee.

[6] *See* Note 5. On November 28, 2008, the "green card" was signed by a representative of the Licensee.

[7] It was noted for the record OTC ATTORNEY had spoken with a representative of the Licensee, who indicated no one intended to appear on the Licensee's behalf at the hearing.

[8] The Administrative Law Judge is taking judicial notice of Oklahoma Secretary of State's website to complete the factual details and background of this matter. OKLA. ADMIN. CODE § 710:1-5-36 (July 11, 1996). The Oklahoma Secretary of State is listed as the Licensee's Registered Agent, available at https://www.sooneraccess.state.ok.us/corp , last visited December 23, 2008.

[9] Testimony of MANAGER. The initial license was issued with an effective date of May 23, 2007, and expiration date of May 23, 2008. The renewal form is automatically sent out by the computer system, even if a Licensee is not in compliance. The reports are not on the computer system. To stop the automatic renewal, the Division would have to stop the renewal from being mailed manually.

[10] Division's Exhibit A.

4. On October 29, 2007, the Division faxed the Licensee a current list of tribal smoke shops and the blank forms to file delinquent ACX Reports for June 2007 through September 2007.[11]

5. On October 29, 2007, the Division received the ACX Reports for May 2007 through September 2007, by facsimile, indicating "no activity."[12]

6. On January 4, 2008, the Division mailed the Licensee a letter advising the monthly ACX Reports for June 2007 through November 2007 and Monthly Schedule of Purchase and Sale of Non-Participating Manufacturer's Products ("Non-Participating Manufacturers' Reports) for June 2007 through November 2007 were delinquent. The letter also states in pertinent part,[13] as follows, to-wit:

> We are requesting that we receive these delinquent reports no later than January 30, 2008. Oklahoma Statute 68-§324 states that failure or refusal to comply shall constitute grounds for revocation of license and you will be scheduled to show cause why your licenses to do business in Oklahoma should not be canceled.

7. On January 16, 2008, the Division sent the Licensee a facsimile stating the ACX Reports for October through December 2007 were delinquent. The Licensee was also informed if it did not have any business during these months, the Out-of-State Consolidated Monthly Cigarette Report (Form 16-5) notated "No Activity" for each month was sufficient.[14]

8. On February 12, 2008, the Division received the ACX Reports for October 2007 through January 2008, by facsimile.[15]

9. On April 15, 2008, the Division sent the Licensee a facsimile noting the ACX Report for February 2008 was past due.[16]

10. On April 23, 2008, the Division mailed the Licensee a letter advising the ACX Reports for February 2008 and March 2008 were delinquent. The letter[17] also states in pertinent part, as follows, to-wit:

---

[11] Division's Exhibit B, which is the cover sheet of the facsimile.

[12] Division's Exhibit K. Testimony of MANAGER.

[13] Division's Exhibit C.

[14] Division's Exhibit D.

[15] *See* Note 12.

[16] Division's Exhibit E.

[17] Division's Exhibit F.

> According to Oklahoma Statute §68-317.5(b), "every wholesaler shall file a report with the Commission on or before the 10th day of each month covering the previous calendar month". Being that your company now has two months past due reports we are suspending the discount to your stamp purchases according to Oklahoma Statute §68-311, which states, "if a purchase fails to comply with the laws of the State of Oklahoma, the Tax Commission shall require the full face value for stamps purchased until such time as the person has complied with the provisions of the law".

11. On June 9, 2008, the Licensee timely filed its ACX Report for May 2008.[18]

12. On May 10, 2008, the Division mailed the Licensee a letter stating the ACX Reports for February 2008 through April 2008 and Non-Participating Manufacturers' Reports for January 2008 through April 2008 were delinquent.[19]

13. On May 14, 2008, the Division received the ACX Reports for February 2008 through April 2008, by facsimile.[20]

14. The Licensee timely filed its ACX Report for June 2008.[21]

15. On July 18, 2008, the Division mailed a letter to the Licensee, which states in pertinent part,[22] as follows, to-wit:

> I am writing this letter after this office tried several times to contact your via phone. We have discovered inconsistencies in your monthly cigarette reports that we need to discuss with you. It is imperative that we hear from you no later than July 25, 2008.

16. On August 19, 2008, the Division mailed the Licensee a letter noting the ACX Reports for June 2008 and July 2008 were delinquent. The letter states, in pertinent part,[23] as follows, to-wit:

> …We have attempted to get you to respond to our request for these reports but we have received no reply. There are also several discrepancies in some of

[18] *See* Note 12.

[19] Division's Exhibit G. The letter also contains a paragraph similar to the paragraph cited from Division's Exhibit C. The letter also states the Cigarette Wholesaler License expires May 23, 2008. *See* Note 13.

[20] *See* Note 12.

[21] Testimony of MANAGER.

[22] Division's Exhibit H. Attached to the exhibit is an Audit Report of the Licensee's cigarette stamp purchases from May 23, 2007, through May 31, 2008.

[23] Division's Exhibit I.

> the earlier reports you have filed that we have tried to contact you in regards to but have also have received no reply.
>
> According to Oklahoma Statute §68-317.5(b), "every wholesaler shall file a report with the Commission on or before the 10th of each month covering the previous calendar month". Being that your company now has two months past due reports we are suspending the discount to your stamp purchases according to Oklahoma Statute §68-311, …
>
> Failure to submit these reports and to contact this office by August 27, 2008 shall constitute grounds for revocation of your license according to O.S. 68-§324 and you will be scheduled to show cause why your license to do business in Oklahoma should not be cancelled.

17. On December 1, 2008, the Division received the ACX Reports for July 2008 through October 2008.[24]

18. At the time of the hearing, the Division had not received the ACX Report for November 2008.[25]

19. At hearing, the Division requested allegation #12 in its *Complaint* be stricken. The Licensee paid the monies due on October 27, 2008.[26]

20. From May 2007 through October 2008, the Licensee has failed to file its Non-Participating Manufacturers' Reports despite the Division's requests by letter and by phone.[27]

CONCLUSIONS OF LAW

1. The Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[28] On October 14, 2008, the statutory notice was mailed to the last-known address of the Licensee by certified mail, with return receipt requested, giving the Licensee twenty (20) days notice of the hearing.[29]

2. Pursuant to Section 212(a) of Title 68, the violation of any provision of the *Uniform Tax Procedure Act*,[30] the violation of any state tax law, or violation of the rules and regulations

---

[24] *See* Note 12.

[25] Testimony of MANAGER.

[26] Testimony of MANAGER.

[27] Testimony of MANAGER. *See* Division's Exhibits C and G.

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

[29] *See* Notes 4-6.

[30] *See* Note 2.

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.[31]

3. The Tax Commission has promulgated rules as provided by law to facilitate the administration, enforcement, and collection of cigarette excise taxes.[32]

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.[33]

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"),[34] the Tax Commission may revoke or suspend any license issued pursuant to the Act.[35]

6. 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).[36]

7. 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 the *Uniform Tax Procedure Code*;

(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.[37]

---

[31] *See* Note 28.

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

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

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

[35] *See* Note 34.

[36] OKLA. STAT. ANN. tit. 68, § 316(H) (West Supp. 2008).

[37] *See* Note 28. *See also* OKLA. ADMIN. CODE § 710:2-4 (May 13, 2004).

8. ACX Reports are to be filed no later than the tenth (10th) day of each calendar month.[38]

9. In addition to any information currently reported, and in addition to any return presently required to be filed, each Tobacco Taxpayer[39] shall report, for each non-participating manufacturer,[40] all purchases and all units[41] sold in Oklahoma of cigarettes (including all roll-your-own tobacco unit-equivalents).[42] The Tobacco Taxpayer shall report the required information to the Tax Commission, on forms (Form 16-37) prescribed by the Tax Commission (Non-Participating Manufacturers' Report), no later than the twentieth (20) day of each calendar month for the preceding calendar month's activity.[43]

The following information must be reported monthly, *regardless of 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.

---

[38] OKLA. STAT. ANN. tit. 68, § 312 (West 2001). *See* OKLA. STAT. ANN. tit. 68, § 312.1 (West Supp. 2008).

[39] OKLA. ADMIN. CODE § 710:70-9-2(B) (June 27, 2002), which in pertinent part states:

> "Tobacco taxpayer" means 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.

[40] *See* cite *supra* Note 39:

> "Non-participating manufacturer" means any tobacco product manufacturer, as the term is defined by 37 O.S. § 600.22(9), selling products to consumers within Oklahoma, whether directly or through a distributor, retailer or similar intermediary or intermediaries, who does **not** elect to become a participating manufacturer, pursuant to 37 O.S. § 600.23(A)(1), and thus incurs the duty to place funds into a qualified escrow fund, as required by the provisions of 37 O.S. § 600.23(A)(2).

[41] *See* cite *supra* Note 39:

> "Units sold" means the number of individual cigarettes (including the quantity of calculated unit-equivalents of roll-your-own tobacco) manufactured by a non-participating manufacturer and sold in the state each month, either directly, or through a distributor, retailer, or similar intermediary or intermediaries.

[42] OKLA. STATE. ANN. tit. 37, § 600.22 (West Supp. 2009).

[43] OKLA. ADMIN. CODE § 710:70-9-3 (June 27, 2002).

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 its *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.

DISCUSSION

The grounds for the Division's *Complaint* can be summarized as follows, to-wit:

(1) Licensee has consistently failed to timely file its monthly ACX Reports;
(2) Licensee's ACX Reports contain inconsistencies, which the Division has contacted Licensee, with no response;
(3) Licensee has failed to file its Non-Participating Manufacturers' Reports from May 2007 through October 2008;

The Division maintains each of these violations, taken alone, is sufficient grounds to revoke or cancel the Licensee's Wholesaler Cigarette License, and collectively, these violations evidence a course of conduct which expresses total disregard for the tax laws and rules of the Tax Commission. The Licensee has failed to respond and address any of the allegations made in the Division's *Complaint*.

The Licensee has failed to file its Non-Participating Manufacturers' Reports, which are required by Tax Commission Rule,[44] and The Master Settlement Agreement Complementary Act.[45]

The Tax Commission has found 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 the Act could be imposed.[46] In this matter, the Division gave the proper notice to the Licensee fines and penalties could be imposed.

The Division has met its burden of proof the Licensee's Wholesaler Cigarette License #### should be revoked. The Division has also met its burden of proof that the imposition of administrative penalties for each of the Licensee's failure to file its Non-Participating Manufacturers' Reports is warranted in this matter.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based on the facts and circumstances of this case, the Licensee's Wholesaler Cigarette License #### should be revoked.

---

[44] *See* Note 43. *See also* OKLA. STAT. tit. 68, § 360.1 et seq. (West Supp. 2004).

[45] *Supra* Note 32.

[46] OKLA. STAT. ANN. tit. 68, § 316(H) (West 2001).

It is further the ORDER of the OKLAHOMA TAX COMMISSION, based on the facts and circumstances of this case, an administrative penalty of $1,000.00 for each violation be imposed upon the Licensee for the failure to file its Non-Participating Manufacturers' Reports from May 2007 through October 2008, totaling $18,000.00.

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.