JURISDICTION:	**OKLAHOMA TAX COMMISSION DECISION**
CITE:	**2009-03-19-04 / NON-PRECEDENTIAL**
ID:	**JM-08-009-K**
DATE:	**MARCH 19, 2009**
DISPOSITION:	**DENIED**
TAX TYPE:	**FORFEITURE AND DESTRUCTION**
APPEAL:	**NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent, RESPONDENT, is represented by REPRESENTATIVE. The Compliance Division (hereinafter "Division") is represented by OTC ATTORNEY 1, First Deputy General Counsel, and OTC ATTORNEY 2, Assistant General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On December 3, 2008, Division filed an *Application for Order Forfeiting Seized Cigarettes and Other Tobacco Products and Directing the Destruction Thereof ("Application")* against Respondent.[1] The *Application* was docketed as Case Number JM-08-009-K and assigned to ALJ, Administrative Law Judge.[2]

In accordance with the procedures set forth in 68 O.S. Supp. 2008, §§ 305(E)(2), 360.7(C)(3), and 417(C), a *Notice to Show Cause Why the Application for Forfeiture of Seized Cigarettes and Other Tobacco Products and Destruction Thereof Should not be Granted ("Notice")* was served by certified mail on Respondent.[3] The show cause hearing was scheduled for January 13, 2009. The *Notice*, which set forth the grounds for forfeiture and destruction, was received by Respondent on or about December 8, 2008, more than ten (10) days before the date of the scheduled hearing.[4]

The hearing was held as scheduled. SUPERVISOR, Supervisor testified with respect to the facts and circumstances surrounding the seizure of the cigarettes and other tobacco products from Respondent's premises. Division's Exhibit "A" was identified, offered and admitted into evidence. Respondent's representative, REPRESENTATIVE, was sworn, inquired about the definition of Indian Country and gave a statement. Respondent's Exhibit 1 was admitted.

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[1] The *Application* commenced the proceedings contemplated by 68 O.S. Supp. 2008, §§ 305(E)(2), 360.7(C)(3), and 417(C).

[2] Rule 710:1-5-22(b) of the *Oklahoma Administrative Code* ("*OAC*").

[3] The *Notice* was addressed to Respondent's business location and its mailing address provided to the Commission on Respondent's Business Registration Application.

[4] 68 O.S. Supp. 2008, §§ 305 E.2, 360.7 C.3, and 417 C.

FINDINGS OF FACTS

Upon review of the file and records, including the tape recording of the hearing and the exhibit received into evidence, the undersigned finds:

1. Respondent holds a license issued by the State of Oklahoma as a retailer of cigarettes. See, 68 O.S. 2001, § 304(B). The licensed location is not within Indian Country.[5] The applicable cigarette tax rate for Respondent's location is $1.03 per package of twenty (20) cigarettes. Testimony of SUPERVISOR.

2. On October 15, 2008, Respondent did not have a cigarette compact with the State of Oklahoma. Prior to determining Respondent's licensed location was not within Indian Country, the Division's tribal retailers list reflected Respondent as a Non-Compact Indian tribe with an applicable cigarette tax rate of $0.7575 per pack of twenty (20) cigarettes. Testimony of SUPERVISOR.

3. On October 15, 2008, the Division by and through its authorized agents conducted a compliance check at Respondent's business location. The agents identified items in Respondent's retail inventory and offered for sale which did not comply with the Oklahoma Cigarette Stamp Act ("Stamp Act")[6]. The items were cigarettes bearing exception rate cigarette tax stamps ($.0575 per pack of twenty (20) cigarettes), contraband cigarettes which bore no Oklahoma cigarette tax stamps, and contraband other tobacco products. Testimony of SUPERVISOR and Exhibit A.

4. The cigarettes identified as "contraband" are brands which were not included in the directory maintained by the Attorney General ("Directory") in accordance with the Master Settlement Agreement Complementary Act ("Master Settlement Act")[7]. The other tobacco products identified as "contraband"; classified as cigarettes for purposes of the Master Settlement Act, are also brands not included in the Directory. Testimony of SUPERVISOR.

5. The improperly stamped cigarettes, contraband cigarettes and contraband other tobacco products were seized and a *Cigarette and Tobacco Enforcement Survey* ("*Survey*") was

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[5] *OAC*, Rule 710:50-15-2(a) defines "Indian Country", "Informal reservations" and "Dependent Indian communities" to respectively mean and include:

> (1) [F]ormal and informal reservations, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished, whether restricted or held in trust by the United States.[**See:** 18 U.S.C. § 1151]
> (2) [L]ands held in trust for a tribe by the United States and those portions of a tribe's original reservation which were neither allotted to individual Indians, nor ceded to the United States as surplus land, but were retained by the tribe for use as tribal lands.
> (3) [A] limited category of Indian lands that are neither reservations nor allotments, and that satisfy the following two requirements: (A) They have been set aside by the federal government for the use of the Indians as Indian land; and (B) They are under federal superintendence.

[6] 68 O.S. 2001, § 301 et seq.

[7] 68 O.S. Supp. 2004, § 360.1 et seq.

prepared.[8] The *Survey* lists the seized items and the "usual and ordinary retail price" of such items (the "*Inventory List*"). The *Inventory List* was executed by authorized agents of the Division on behalf of the Commission and MANAGER, Manager, on behalf of Respondent. The estimated value of the seized cigarettes was $82,857.42. The estimated value of the seized other tobacco products was $123.75.

6. The seized cigarettes and other tobacco products were transported to the Oklahoma City office of the Tax Commission.

7. On December 3, 2008, the *Application* of forfeiture was filed.

8. On December 5, 2008, the *Notice* and a copy of the *Application*, *Survey* and *Inventory List* were forwarded to Respondent by certified mail, return receipt requested. On or about December 8, 2008, the return receipts were signed by SIGNEE 1 at Respondent's business location and SIGNEE 2 at the mailing address provided by Respondent on its Business Registration Application.

CONCLUSIONS OF LAW

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. Supp. 2008, §§ 305(E)(2) and 360.7(C)(3).[9]

2. Every retailer, like any unlicensed consumer who purchases or receives cigarettes[10] to which are not affixed the stamps[11] required by the Stamp Act is required to purchase and affix stamps upon all such cigarette packages in the proper denomination and amount as required by § 302 of the Stamp Act prior to making any sale or distribution for consumption thereof. 68 O.S. Supp. 2008, § 305(B) and (C). It is unlawful for any person to sell or consume cigarettes on which the tax, as levied by the Stamp Act, has not been paid, and which are not contained in packages to which are securely affixed the stamps evidencing payment of the tax imposed by the Stamp Act. 68 O.S. Supp. 2008, § 305(C).

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[8] Exhibit "A" is comprised of a "Cigarette and Tobacco Enforcement Survey" and 36 pages with the heading "Confiscation Inventory List".

[9] In general, these provisions require the Tax Commission to hold a hearing to determine whether the seized product should be forfeited to the State of Oklahoma; giving the owner thereof at least ten (10) days notice, and if after hearing it is determined the seized product should be forfeited, to make an order of forfeiture and destruction.

[10] "The term 'cigarette' is defined to mean and include all rolled tobacco or any substitute therefor, wrapped in paper or any substitute therefor and weighing not to exceed three (3) pounds per thousand cigarettes".

[11] "The term 'stamp' as herein used shall mean the stamp or stamps by use of which:

a. the tax levied pursuant to the provisions of § 301 et seq. of this title is paid,
b. the tax levied pursuant to the provisions of § 349 of this title is paid, or
c. the payment in lieu of taxes authorized pursuant to a compact entered into by the State of Oklahoma and a federally recognized Indian tribe or nation pursuant to the provisions of subsection C of Section 346 of this title is paid". 68 O.S. Supp. 2003, § 301(8).

3. Any cigarettes[12] that have been sold, offered for sale, or possessed for sale in this state or imported for personal consumption in this state, in violation of the Master Settlement Act, are deemed contraband and are subject to seizure and forfeiture. 68 O.S. Supp. 2008, § 360.7(B). "All cigarettes so seized and forfeited shall be destroyed and not resold." Id. It is unlawful for any person to: (1) affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the Directory of participating and non-participating tobacco product manufacturers; and (2) sell, offer, or possess for sale, in this state, or import for personal consumption in this state, cigarettes of a tobacco product manufacturer or brand family not included in the Directory. 68 O.S. Supp. 2004, § 360.4(C).

4. All unstamped cigarettes, and contraband cigarettes and other tobacco products[13] found in the possession, custody or control of any person, for the purpose of being consumed, sold or transported from one place to another in this state, for the purpose of evading or violating the provisions of the Acts, or with intent to avoid payment of the tax imposed may be seized by any authorized agent of the Tax Commission without process. 68 O.S. Supp. 2008, §§ 305(E)(1) and 360.7(B). "The same shall be, from the time of such seizure, forfeited to the State of Oklahoma. Id.

5. The person making the seizure is required to list and appraise the unstamped cigarettes, contraband cigarettes and other tobacco products, turn such seized items over to the Tax Commission and take a receipt therefor. 68 O.S. Supp. 2008, §§ 305(E)(2) and 360.7(C)(3). The person making the seizure is also required to immediately make and file a written report thereof with the Tax Commission, showing the name of the person making such seizure, the place where and the person from whom such property was seized, and an inventory and appraisement thereof, at the usual and ordinary retail price of such articles received. Id.

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[12] Defined to have the same meaning as defined in 37 O.S. 2001, § 600.22(4) which provides:

> 'Cigarette' means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains:
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> a. any roll of tobacco wrapped in paper or in any substance not containing tobacco,
> b. tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette, or
> c. any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph a of this paragraph.
>
> The term 'cigarette' includes 'roll-your-own' (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of 'cigarette', nine one-hundredths (0.09) of an ounce of 'roll-your-own' tobacco shall constitute one individual 'cigarette'.

[13] "Tobacco products" is defined by the Tobacco Act to "mean any cigars, cheroots, stogies, smoking tobacco (including granulated, plug cut, crimp cut, ready rubbed and any other kinds and forms of tobacco suitable for smoking in a pipe or cigarette), chewing tobacco (including cavendish, twist, plug, scrap and any other kinds and forms of tobacco suitable for chewing), however prepared; and shall include any other articles or products made of tobacco or any substitute therefor." 68 O.S. 2001, § 401(g).

6. Cigarette packages and other tobacco product packages to which are affixed stamps not in the proper denomination and amount are unstamped. See, 68 O.S. Supp. 2003, § 301(8) and 68 O.S. 2001, § 401(i). As of January 1, 2005, the cigarette stamp tax rate applicable to all non-tribal sales is $1.03 per package of twenty (20) cigarettes. *OAC*, 710:70-2-9(c).

7. Here, the Division sustained its burden of proving that the cigarettes and other tobacco products were unstamped and/or contraband. Accordingly; such items were properly seized.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the cigarettes and other tobacco products seized from Respondent, RESPONDENT, be forfeited to the State of Oklahoma and destroyed.

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.