

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2009-11-17-05 / NON-PRECEDENTIAL
ID: FD-09-015-H
DATE: NOVEMBER 17, 2009
DISPOSITION: APPLICATION GRANTED
TAX TYPE: FORFEITURE & DESTRUCTION / CIGARETTES
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

RESPONDENT d/b/a STORE (“Respondent”) appears not.¹ The Field Services Section of the Compliance Division (“Division”) of the Oklahoma Tax Commission appears through OTC ATTORNEY, First Deputy General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On September 11, 2009, the Division filed an *Application for Order Forfeiting Seized Cigarettes and Directing the Destruction Thereof* (“*Application*”) with the clerk of the court (“Clerk”), with a copy of Division’s Exhibit A attached thereto. On September 11, 2009, the *Notice to Show Cause Why the Application for Forfeiture of Seized Cigarettes and Destruction Thereof Should Not Be Ordered* (“*Notice*”) was sent by certified mail with return receipt requested to the Respondent, along with a copy of the Division’s *Application*, advising a show cause hearing had been set for October 8, 2009, at 1:30 p.m., at which time the Respondent could appear and show cause why the Division’s *Application* should not be granted.² The *Notice* also advised this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number FD-09-015-H.

The Show Cause Hearing was held as scheduled on October 8, 2009, at approximately 1:30 p.m. The Respondent did not appear at the hearing.³ The Division called one (1) witness, SUPERVISOR, Supervisor, District One, Field Services Section, Compliance Division, Oklahoma Tax Commission, who testified regarding the Division’s *Application*, seizure and forfeiture procedures, and as custodian of the Division’s records. The Division’s Exhibit A was identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record was closed and the case was submitted for decision on October 8, 2009.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibit received into evidence, the Division’s *Application*, and the *Notice*, the undersigned finds:

¹ See Note 3, *infra*.

² See *Application* filed herein.

³ It was noted for the record the Respondent had not contacted the Division or the Clerk concerning the show cause hearing.

1. Respondent holds a current license issued by the State of Oklahoma as a retailer of cigarettes⁴ for the location at ADDRESS (“Business Location”). The effective date of the retail cigarette license (XXX) is October 28, 2008, with an expiration date of October 28, 2011.⁵ The Respondent’s Business Location is not in Indian Country and the Respondent is not licensed as a tribal retailer of cigarettes.⁶

2. During the Compliance Check, the Division’s representative⁷ identified items which were being offered for sale by the Respondent which did not comply with the Oklahoma Cigarette Stamp Act⁸ (“Cigarette Act”) and the Master Settlement Agreement Complementary Act (“MSAC”).⁹

3. The non-compliant items (“Non-Compliant Items”) included cigarettes with Tribal Compact Tax Stamps.¹⁰

4. On April 30, 2009, the Division’s representative seized the Non-Compliant Items. The Division’s representative prepared a Cigarette Enforcement Survey (“Enforcement Survey”) and seizure inventory list (“Inventory List”), which is signed by the Division’s representative and the Respondent. The “usual and ordinary price”¹¹ of the cigarettes seized were \$206.80.¹²

5. The Division’s representative filed the Enforcement Survey and Inventory List with the Division and the seized cigarettes were labeled and stored in a secured area of the Tax Commission’s CITY warehouse.¹³

⁴ OKLA. STAT. tit. 68, § 304(A) (West Supp. 2005).

⁵ See Application at 2. Testimony of SUPERVISOR.

⁶ Testimony of SUPERVISOR. See OKLA. ADMIN. CODE § 710:50-15-2(a)(1) (June 25, 2004), which states:

"Indian Country" means and includes formal 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]

⁷ The Division’s representative was REPRESENTATIVE. See Division’s Exhibit A. Testimony of SUPERVISOR.

⁸ OKLA. STAT. ANN. tit. 68, § 301 et seq. (West 2001).

⁹ OKLA. STAT. ANN. tit. 68, § 360.1 et seq. (West Supp. 2009).

¹⁰ Division’s Exhibit A. Testimony of SUPERVISOR.

¹¹ OKLA. STAT. ANN. tit. 68, § 360.7(C)(3) (West Supp. 2009).

¹² Division’s Exhibit A. The exhibit consists of an Enforcement Survey (one (1) page) and Cigarette Inventory List (one (1) page).

¹³ The Administrative Law Judge is taking judicial notice of SUPERVISOR’S testimony in previous FD cases to complete the factual details and background of this matter. OKLA. ADMIN. CODE § 710:1-5-36 (July 11,

6. On September 11, 2009, the Division's *Application* was filed with the Clerk of the Court.

7. On September 11, 2009, the *Notice* along with a copy of the Division's *Application* were sent to the Respondent by certified mail return receipt requested (NUMBER). On September 16, 2009, the signed and dated return receipt was filed with the Clerk.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.¹⁴

2. Every retailer who has received cigarettes from a manufacturer, wholesaler, jobber, warehouseman or distributor not required to secure a license as provided for under Section 304

1996). The seized cigarettes are placed on pallets, which are shrink wrapped, labeled, and placed in "second level" storage by forklift. This area of the warehouse is not open to the public and there is an on-site guard.

¹⁴ OKLA. STAT. ANN. tit. 68, § 305(E)(2) (West Supp. 2009):

All such cigarettes so seized shall first be listed and appraised by the officer making such seizure and turned over to the Tax Commission and a receipt therefor taken. The person making such seizure shall immediately make and file a written report thereof, 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 appraisal thereof, at the usual and ordinary retail price of such articles received, to the Tax Commission, and the Attorney General, in the case of cigarettes stamped, sold, offered for sale, or imported into this state in violation of the provisions of Section 305.1 of this title. The Tax Commission shall then proceed to hear and determine the matter of whether or not the cigarettes should, in fact, be forfeited to the State of Oklahoma. The owner of the cigarettes shall be given at least ten (10) days' notice of the hearing. In the event the Commission finds that the cigarettes should be forfeited to the State of Oklahoma, it shall make an order forfeiting the cigarettes to the State of Oklahoma and directing the destruction of such cigarettes.

OKLA. STAT. ANN. tit. 68, § 360.7(C)(3) (West Supp. 2009):

All such cigarettes and tobacco products so seized shall first be listed and appraised by the officer making such seizure and turned over to the Tax Commission and a receipt therefor taken. The person making such seizure shall immediately make and file a written report thereof, 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 appraisal thereof, at the usual and ordinary retail price of such articles received, to the Tax Commission, and the Attorney General, in the case of cigarettes stamped, sold, offered for sale, or imported into this state in violation of the provisions of Section 305.1 of this title and tobacco made contraband by this section. The Tax Commission shall then proceed to hear and determine the matter of whether or not the cigarettes and tobacco products should, in fact be forfeited to the State of Oklahoma. The owner of the cigarettes and tobacco products shall be given at least ten (10) days' notice of the hearing. In the event the Commission finds that the cigarettes and tobacco products should be forfeited to the State of Oklahoma, it shall make an order forfeiting the cigarettes and tobacco products to the State of Oklahoma and directing the destruction of such cigarettes and tobacco products.

of this title, or to affix stamps as required under subsection A of this section, shall, within seventy-two (72) hours, excluding Sundays and holidays, from the time such cigarettes come into the retailer's possession, and before making any sale or distribution for consumption thereof, affix stamps upon all cigarette packages in the proper denomination and amount, as required by Section 302 of this title.¹⁵

3. "Stamped cigarettes" means packages of cigarettes which bear a tax stamp required by state law.¹⁶

4. Effective January 1, 2005, the non-tribal cigarette stamp tax rate is \$1.03 per pack and is applicable to all non-tribal sales.¹⁷

5. The Claimant's Business Location is not located in Indian Country. The statutory cigarette stamp tax rate for the Claimant's Business Location is the non-tribal rate of \$1.03 per pack and is applicable to all non-tribal sales.

6. Any cigarettes 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 MSAC Act, shall be deemed contraband pursuant to the MSAC Act. Those cigarettes shall be subject to seizure and forfeiture as provided by this section and all cigarettes so seized and forfeited shall be destroyed as provided by this section and not resold.¹⁸

7. On September 11, 2009, the *Notice* was sent to the Respondent by certified mail, with return receipt requested, giving the Respondent the requisite ten (10) day notice of the hearing held on October 8, 2009, at 1:30 p.m. The Respondent failed to file a response to the Division's *Application* or appear at the show cause hearing.

8. The Division's representative properly prepared and filed an Enforcement Survey and Inventory List, which reflects the place of the seizure as the Respondent's Business Location. The Enforcement Survey and Inventory List properly appraised the cigarettes (at the usual and ordinary retail price) for the seized cigarettes. The Respondent was present during the Compliance Check and the Respondent signed the Enforcement Survey and Inventory List.¹⁹

9. The Enforcement Survey and Inventory List properly describe the seized cigarettes as being in violation of the Cigarette Act and MSAC Act.²⁰

¹⁵ OKLA. STAT. tit. 68, § 305(B) (West Supp. 2008).

¹⁶ OKLA. STAT. ANN. tit. 68, § 348(8) (West 2001).

¹⁷ OKLA. ADMIN. CODE § 710:70-2-9(c) (June 25, 2005).

¹⁸ OKLA. STAT. tit. 68, 360.7 (West Supp. 2008).

¹⁹ See Note 13, *supra*.

²⁰ Division's Exhibit A.

10. In all proceedings before the Tax Commission, the taxpayer has the burden of proof, unless provided by law.²¹ In this matter, the Division filed the *Application* seeking the forfeiture and destruction of the seized cigarettes, shifting the burden of proof to the Division.²²

11. The Division has met its burden of proof the *Application* should be granted and the seized cigarettes on the Enforcement Survey and the Inventory List should be forfeited to the State of Oklahoma and destroyed.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, the Division's *Application* should be granted.

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.

²¹ See OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999). See also OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999).

²² See *Enterprise Management Consultants, Inc. v. State ex rel Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.