

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2009-12-03-13 / NON-PRECEDENTIAL  
**ID:** FD-09-005-K  
**DATE:** DECEMBER 3, 2009  
**DISPOSITION:** APPLICATION GRANTED  
**TAX TYPE:** FORFEITURE & DESTRUCTION / TOBACCO  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Notice of these proceedings was served on Respondent, RESPONDENT, but Respondent neither filed a response to the notice nor appeared at the scheduled hearing. The Compliance Division of the Oklahoma Tax Commission (“Division”) is represented by OTC ATTORNEY, First Deputy General Counsel, Office of the General Counsel, Oklahoma Tax Commission.

### STATEMENT OF THE CASE

On December 10, 2008, an authorized agent of the Oklahoma Tax Commission confiscated tobacco products valued at \$727.57 from Respondent’s retail location. On September 11, 2009, the Division filed an *Application for Order Forfeiting Seized Tobacco Products and Directing the Destruction Thereof* (“Application”) in regard to the tobacco products seized from Respondent.

On September 12, 2009, the *Notice to Show Cause Why the Application for Forfeiture of Seized Tobacco Products and Destruction Thereof should not be Ordered* (“Notice”) was by certified mail, served on Respondent. The show cause hearing was scheduled for October 8, 2009.

The hearing was held as scheduled. Respondent neither filed a response to the *Notice* nor appeared at the hearing. FIELD AGENT, Field Supervisor, District 1 of the Field Services Section of the Division testified in regard to the confiscation, the records of the Division and the return of some of the confiscated tobacco products to Respondent. Exhibit A was identified, offered and admitted into evidence. Upon conclusion of the Division’s presentation, the record was closed and the *Application* was submitted for decision.

### FINDINGS OF FACT

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

1. Respondent operates a convenience store known as STORE in ANY TOWN, Oklahoma. Respondent sells cigarettes, cigars, moist tobacco (dip, chew), snuff, and roll your own tobacco at the business location. Exhibit A, page 1, CIGARETTE & TOBACCO Enforcement Survey. Respondent has not been issued a tobacco license. Public listing of

unstamped tobacco licensees, as of November 1, 2009.<sup>1</sup>

2. On December 10, 2008, the Division's field representative conducted a compliance check at Respondent's business location. During the compliance check, the agent identified items constituting other tobacco products in Respondent's retail inventory and offered for sale which could not be traced to a purchase invoice showing taxes were paid on the tobacco products. Exhibit A, page 1, CIGARETTE & TOBACCO Enforcement Survey.

3. The non-compliant other tobacco products were seized, a CIGARETTE & TOBACCO Enforcement Survey was prepared and executed, and a Confiscation Inventory List was prepared reporting the estimated retail value of the non-compliant items at an amount of \$727.57. Exhibit A, pages 1-4.

4. On or about January 2, 2009, Respondent submitted purchase invoice(s) for some of the confiscated items and said items were returned. Exhibit A, pages 5-7, Confiscation Inventory List.

5. The Division in this matter seeks an order of forfeiture and destruction of other tobacco products with a retail value of \$252.37.

### 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, § 417(C).<sup>2</sup>

2. The Tax Commission pursuant to § 403.1 of the Tobacco Products Tax Act<sup>3</sup> ("Tobacco Act") abolished the practice of purchasing and affixing stamps to tobacco products<sup>4</sup> as payment of the excise tax levied on the sale, distribution, use, exchange, barter or possession of tobacco products and instead requires the payment of the excise taxes through monthly tobacco product tax reports by the licensed manufacturer, wholesaler, warehouseman, distributor, or jobber first possessing, selling, using, distributing, exchanging, bartering, or in any manner dealing with such tobacco products in this State. OAC, 710:70-5-1(a) and (b); and 710:70-5-2. No other person, wholesaler, warehouseman, distributor, jobber or retailer shall first possess, use, sell, exchange,

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<sup>1</sup> <http://www.oktax.onenet.net/rpt/p/orejob01/oreciglc/76/2009110120091101051152.txt>. A tobacco license is required to be secured annually at a cost of \$5.00. 68 O.S. 2001, § 415.

<sup>2</sup> In general, this provision requires the Oklahoma 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.

<sup>3</sup> 68 O.S. 2001, § 401 et seq., as amended.

<sup>4</sup> "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).

distribute, barter or in any manner deal with such tobacco products in this State upon which the excise tax has not been paid. *OAC*, 710:70-5-2.

3. No person, dealer, distributing agent or wholesaler shall possess, sell, use, exchange, barter, give away or in any manner deal with any tobacco products within this State upon which the tax is levied and unpaid, unless the person, dealer, retailer, distributing agent or wholesaler holds a valid tobacco license. 68 O.S. 2001 § 403.1(2); *OAC*, 710:70-5-10. Any such tobacco products (products upon which the tax is levied and unpaid) obtained from other than an Oklahoma tobacco license holder are subject to seizure proceedings. See *OAC*, 710:70-5-10(1).

4. Any authorized agent of the Oklahoma Tax Commission may seize all (untaxed) tobacco products found in the possession, custody or control of any person within this state 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 Tobacco Act, or with intent to avoid payment of the tax imposed by the Tobacco Act. 68 O.S. Supp. 2008, § 417(A).<sup>5</sup> See *OAC*, 710:70-5-11(a). Intent to evade or avoid payment of tobacco products taxes may be presumed upon, receipt of possession, control or custody, within this State, of any tobacco products, upon which the tobacco products tax has not been paid, from any person not holding a valid Oklahoma tobacco license. *OAC*, 710:70-5-11(b)(2).

5. Retailers of tobacco products are required to maintain copies of invoices or equivalent documentation for every transaction in which the retailer receives or purchases tobacco products for a period of three (3) years from the date of the transaction. *OAC*, 710:70-5-10(b) and (d). The invoices or documentation must show the name and address of the distributor from whom, or the address of another facility of the same retailer from which, the tobacco products were received, the quantity of each brand style received in such transaction, and the retail cigarette license number or sales tax license number. *OAC*, 710:70-5-10(b). See 68 O.S. Supp. 2005, § 420.1.

6. The person making the seizure is required to list and appraise the unstamped tobacco products, turn such seized items over to the Tax Commission and take a receipt therefor. 68 O.S. Supp. 2008, § 417(B). 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 appraisal thereof, at the usual and ordinary retail price of such articles received. 68 O.S. Supp. 2008, § 417(C).

7. Here, Respondent has not produced invoices showing the remaining confiscated tobacco products were purchased from an Oklahoma tobacco licensee. Further, Respondent has not come forward with any evidence to show taxes were paid on the balance of the confiscated tobacco products. Accordingly, the remainder of the confiscated tobacco products should be forfeited to the State of Oklahoma. *OAC*, 710:70-5-11.

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<sup>5</sup> The seizure provisions of § 417(A) do not apply “where the tax on such unstamped tobacco products does not exceed One Dollar (\$1.00).”

**DISPOSITION**

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the balance of the tobacco products confiscated from Respondent, RESPONDENT d/b/a STORE, 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.