

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2010-06-29-10 / NON-PRECEDENTIAL
ID: FD-09-009-K
DATE: JUNE 29, 2010
DISPOSITION: APPLICATION GRANTED
TAX TYPE: FORFEITURE AND DESTRUCTION
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Notice of a show cause hearing was forwarded by certified mail to the Member of Respondent, COMPANY. The notice was delivered and received by the Member on March 15, 2010. No one responded to the notice nor appeared at the show cause hearing on behalf of Respondent. The Compliance Division of the Oklahoma Tax Commission (“Division”) is represented by OTC ATTORNEY, Acting General Counsel, General Counsel’s Office, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On January 13, 2009, agents of the Division conducted a cigarette and tobacco enforcement survey at Respondent’s business location in ANYTOWN, Oklahoma and confiscated noncompliant other tobacco products with an estimated retail value of \$2,328.69. An *Application for Order Forfeiting Seized Tobacco Products and Directing the Destruction Thereof* (“Application”) was filed September 11, 2009.

A show cause hearing was scheduled for October 8, 2009, by *Notice to Show Cause Why the Application for Forfeiture of Seized Tobacco Products and Destruction Thereof should not be Ordered* (“First Notice”) issued September 11, 2009. The *First Notice* was forwarded by certified mail to MEMBER, Member of Respondent. The *First Notice* was returned on October 9, 2009, unclaimed. At the show cause hearing, the Division withdrew the *Application* because neither the return receipt nor the mailing had been returned by the date of the hearing.

The show cause hearing was rescheduled for April 22, 2010, by *Notice to Show Cause Why the Application for Forfeiture of Seized Tobacco Products and Destruction Thereof should not be Ordered* (“Second Notice”) issued February 25, 2010. The *Second Notice* was also forwarded by certified mail to the Member of Respondent. The *Second Notice* was delivered and received by MEMBER on March 15, 2010.

The show cause hearing was held as scheduled. No one appeared on behalf of Respondent at the hearing. SUPERVISOR, Field Supervisor testified with respect to the records of the Division and the reason for the confiscation of the tobacco products. Exhibit A (Cigarette and Tobacco Enforcement Survey and Confiscation Inventory Lists) was identified, offered and admitted into evidence. At the conclusion of the Division’s presentation of its evidence, 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 show cause hearing, the exhibit received into evidence and the *Application*, the undersigned finds:

1. Respondent operates a convenience store located in ANYTOWN, Oklahoma.
2. Respondent is licensed as a cigarette retailer and sells cigarettes, cigars and moist tobacco (dip, chew).
3. Respondent has not been issued a tobacco products license.¹
4. On January 13, 2009, authorized agents of the Division conducted a compliance check at Respondent's business, and identified other tobacco products to which Respondent could not produce purchase invoices showing taxes were paid on said product.
5. The noncompliant other tobacco products were confiscated, and a *Confiscation Inventory List* consisting of four (4) pages was prepared and executed showing an estimated retail value of \$1,848.74² for the confiscated product.
6. The Division seeks the forfeiture of the noncompliant other tobacco products confiscated from Respondent.
7. Respondent was properly notified of the hearing. 68 O.S. Supp. 2009, § 208.

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).³
2. The Tax Commission pursuant to § 403.1 of the Tobacco Act abolished the practice of purchasing and affixing stamps to tobacco products⁴ as payment of the excise tax 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,

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

² This amount is incorrect due to an addition error. The correct amount is \$2,328.69.

³ In general, this provision requires the 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.

⁴ "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).

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.

3. “No other person, * * * or retailer shall first possess, use, sell, exchange, 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.

4. “No person, dealer, * * * 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 * * * holds a valid Tobacco License”. 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).

5. Retailers of tobacco products are required to maintain copies of invoices or equivalent documentation of every transaction in which they receive or purchase tobacco products at each of their facilities for a period of three (3) years from the date of the transaction. *OAC*, 710:70-5-13(b) and (d).

6. All (untaxed) tobacco products 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 Tobacco Act, 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, § 417(A).⁵ The forfeiture provisions only apply to persons having possession of or transporting tobacco products with intent to barter, sell or give away the same. 68 O.S. Supp. 2008, § 417(E).

7. The uncontroverted evidence shows that Respondent had possession of and sought to sell untaxed other tobacco products. These other tobacco products were properly confiscated and should be forfeited to the State of Oklahoma for destruction.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the other tobacco products confiscated from Respondent, COMPANY, be forfeited to the State of Oklahoma for destruction.

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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.

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

NOTE: The distinction between a Commission Order designated as “Precedential” or “Non-Precedential” has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just “Precedential” Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2009) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is “clear and unambiguous.”