JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2010-07-13-05 / NON-PRECEDENTIAL**
ID: **FD-10-002-H**
DATE: **JULY 13, 2010**
DISPOSITION: **APPLICATION GRANTED**
TAX TYPE: **FORFEITURE AND DESTRUCTION**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

RESPONDENT d/b/a BUSINESS ("Respondent") appears not. The Field Services Section, 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 February 25, 2010, the Division filed an *Application for Order Forfeiting Seized Tobacco Products and Directing the Destruction Thereof* ("*Application*") with the Court Clerk,[1] with a copy of Division's Exhibit A attached thereto. On February 26, 2009, the *Notice to Show Cause Why the Application for Forfeiture of Seized Tobacco Products and Destruction Thereof Should Not Be Ordered* ("*Notice*") was sent by certified mail return receipt requested to the Respondent, along with a copy of the Division's *Application*, advising a show cause hearing had been set for April 22, 2010, 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 that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number FD-10-002-H.

On April 22, 2010, at approximately 1:30 p.m., a Show Cause hearing was held as scheduled. The Respondent failed to appear at the hearing. The Division called one (1) witness, 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 this case was submitted for decision on April 22, 2010.

FINDINGS OF FACT

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

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[1] OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

[2] *See Application* filed herein.

1. The Respondent is located at BUSINESS ADDRESS ("Business Location"). The Respondent holds a license[3] issued by the State of Oklahoma as a retailer[4] of cigarettes for the Business Location.[5]

2. On October 23, 2008, AGENT 1 and AGENT 2, Field Representatives[6] of the Division, conducted a compliance check ("Compliance Check") at Respondent's Business Location.

3. During the Compliance Check, the Division's Field Representatives identified items which were being offered for sale by the Respondent which did not comply with the Oklahoma Tobacco Tax Act[7] ("Tobacco Act") and the Master Settlement Agreement Complementary Act ("MSAC Act").[8]

4. The non-compliant items ("Non-Compliant Items") included other tobacco products. The Respondent *could not produce invoices* for the other tobacco products reflecting that tax had been paid in accordance with the Tobacco Act.[9]

5. On October 23, 2008, the Division's Field Representatives seized the Non-Compliant Items. The Division's Field Representatives prepared a Cigarette and Tobacco Enforcement Survey ("Enforcement Survey") and seizure inventory list ("Inventory List"), which is signed by the Division's Field Representatives and by the Respondent.[10] The "usual and ordinary price"[11] of the other tobacco products seized was $708.54[12]

6. The Division Field Representatives filed the Enforcement Survey and Inventory List with the Division and the other tobacco products were labeled and stored in a secured area of the Tax Commission's Oklahoma City warehouse.[13]

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[3] OKLA. STAT. ANN. tit. 68, § 304(B) (West Supp. 2010).

[4] OKLA. STAT. ANN. tit. 68, § 301(4) (West Supp. 2010).

[5] *See* Application at 2. Testimony of SUPERVISOR.

[6] Testimony of SUPERVISOR. *See* Note 12, *infra.*

[7] OKLA. STAT. ANN. tit. 68, § 401 et seq. (West 2001).

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

[9] Testimony of SUPERVISOR.

[10] *See* Note 12, *infra.*

[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 and Other Tobacco Inventory List (three (3) pages). Division's Exhibit A contains several mathematical errors.

[13] The seized other tobacco products 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.

7. On October 27, 2008, the Respondent produced invoice(s) for a portion of the other tobacco products, which were returned by SUPERVISOR to the Respondent. The "usual and ordinary price" of the other tobacco products returned to the Respondent was $162.84.[14]

8. On February 25, 2010, the Division's *Application* was filed with the Court Clerk.

9. On February 26, 2010, the *Notice* along with a copy of the Division's *Application* was sent to the Respondent by certified mail return receipt requested (XXXX) to the Business Location.

10. On March 3, 2010, the envelope containing the *Notice* was returned by the U.S. Postal Service reflecting that the certified mailing had been "refused."[15]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[16]

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 (June 25, 1999).

[14] Testimony of SUPERVISOR. *See* the last two pages of Division's Exhibit A.

[15] *See* return receipt filed with the Court Clerk on March 3, 2010. The U.S. Postal Service's Track and Confirm service at http://trkcnfrm1.smi.usps.com reflects that "Your item was refused by the addressee at 10:21 A.M. on February 27, 2010 in CITY, OK ZIP and is being returned to the sender. No further information is available for this item."

[16] OKLA. STAT. ANN. tit. 68, § 360.7(C)(3) (West Supp. 2010):

> 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 appraisement 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.

OKLA. STAT. ANN. tit. 68, § 417 (West Supp. 2010):

> A. All unstamped tobacco products upon which a tax is levied by Section 401 et seq. of this title and all tobacco products stamped, sold, offered for sale, or imported into this state in violation of the provisions of Section 403.2 of this title, found in the possession, custody or control of any person for the purpose of being consumed, sold or transported from one place

2. There shall be levied, assessed, collected, and paid in respect to the articles containing tobacco enumerated in the Tobacco Act, a tax.[17]

3. At the time of the Compliance Check, the Respondent failed to produce any invoices to prove the tax imposed by the Tobacco Act had been paid on the other tobacco products seized by the Division.[18]

4. Any cigarettes and other tobacco products 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 and other tobacco products shall be subject to seizure and forfeiture as provided by this section and all cigarettes and other tobacco products so seized and forfeited shall be destroyed as provided by this section and not resold.[19]

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to another in this state, for the purpose of evading or violating the provisions of Section 401 et seq. of this title, or with intent to avoid payment of the tax imposed thereunder, may be seized by any authorized agent of the Oklahoma Tax Commission or any sheriff, deputy sheriff or police within the state. Tobacco products from the time of seizure shall be forfeited to the State of Oklahoma. A proper proceeding shall be filed to maintain such seizure and prosecute the forfeiture as herein provided; the provisions of this section shall not apply, however, where the tax on such unstamped tobacco products does not exceed One Dollar ($1.00).

B. All such 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 taken therefor.

C. The person making such seizure shall immediately make and file a written report thereof to the Tax Commission, showing the name of the person making such seizure, the place where seized, the person from whom seized, the property seized and an inventory and appraisement thereof, which inventory shall be based on the usual and ordinary retail price or value of the articles seized, and the Attorney General, in the case of tobacco products stamped, sold, offered for sale, or imported into this state in violation of the provisions of Section 403.2 of this title. The Tax Commission shall then proceed to hear and determine the matter of whether or not the tobacco products should, in fact be forfeited to the State of Oklahoma. The owner of the tobacco products shall be given at least ten (10) days' notice of the hearing. In the event the Commission finds that the tobacco products should be forfeited to the State of Oklahoma, it shall make an order forfeiting the tobacco products to the State of Oklahoma and directing the destruction of such tobacco products.

D. The seizure of such tobacco products shall not relieve the person from whom such tobacco products were seized from prosecution or the payment of penalties.

E. The forfeiture provisions of Section 401 et seq. of this title shall only apply to persons having possession of or transporting tobacco products with intent to barter, sell or give away the same.

[17] *See* OKLA. STAT. ANN. tit. 68, § 402 et seq. (West 2001) and OKLA. STAT. ANN. tit. 68, § 402-3 et seq. (West Supp. 2010). *See also* OKLA. ADMIN. CODE § 710:70-5-12 (June 25, 2009).

[18] Testimony of SUPERVISOR.

[19] OKLA. STAT. ANN. tit. 68, § 360.7 (West Supp. 2010).

5. On February 26, 2010, 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 April 22, 2010, at 1:30 p.m., which was refused by the Respondent.[20]

6. The Division's Field Representatives 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 other tobacco products (at the usual and ordinary retail price of $708.54)[21] for the seized other tobacco products. The Respondent signed the Enforcement Survey and Inventory List.[22]

7. The Enforcement Survey and Inventory List properly describe the other tobacco products as being in violation of the Tobacco Act and MSAC Act.[23]

8. Each retailer of tobacco products, as defined in Section 401 of Title 68 of the Oklahoma Statutes, shall maintain copies of invoices or equivalent documentation for every transaction in which the retailer receives or purchases tobacco products at each of its facilities. The invoices or documentation shall 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.[24]

9. At the time of the Compliance Check, the Respondent did not have proof that the tax on the seized other tobacco products had been paid in accordance with the Tobacco Act.

10. In all proceedings before the Tax Commission, the taxpayer has the burden of proof, unless provided by law.[25]

11. In this matter, the Division filed the *Application* seeking the forfeiture and destruction of the seized other tobacco products, shifting the burden of proof to the Division.[26]

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[20] *See* Note 15, *supra.*

[21] *See* Note 12, *supra*.

[22] *Id.*

[23] *Id*.

[24] OKLA. STAT. ANN. tit. 68, § 420.1(B) (West Supp. 2010).

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

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

DISCUSSION

On October 27, 2008, the Respondent produced invoice(s) for a portion of the other tobacco products, which were returned by SUPERVISOR to the Respondent. The "usual and ordinary price" of the other tobacco products returned to the Respondent was $162.84.[27] The Respondent failed to produce invoice(s) for the remaining other tobacco products seized, which are valued at their "usual and ordinary price" of $545.70.

The Division has met its burden of proof that the other tobacco products offered for sale or possessed for sale in this state in violation of the Tobacco Act and MSAC Act, and should be deemed contraband pursuant to the MSAC Act. The other tobacco products were properly seized by the Division during the Compliance Check and should be forfeited to the State of Oklahoma and destroyed ($545.70).[28]

DISPOSITION

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

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.

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."

[27] Testimony of SUPERVISOR. *See* the last two pages of Division's Exhibit A.

[28] OKLA. STAT. ANN. tit. 68, § 360.7 (West Supp. 2010).