

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2010-07-20-20 / NON-PRECEDENTIAL
ID: FD-10-001-H
DATE: JULY 20, 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 Cigarettes and Directing the Destruction Thereof* (“*Application*”) with the Court Clerk,¹ with a copy of Division’s Exhibit A attached thereto. On February 26, 2010, 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 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-10-001-H.

On April 22, 2010, at approximately 1:30 p.m., the 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:

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

² See *Application* filed herein.

1. The Respondent is located at ADDRESS (“Business Location”). The Respondent holds a license (#####)³ issued by the State of Oklahoma as a retailer⁴ of cigarettes for the Business Location with an effective date of October 23, 2007.⁵

2. The Respondent’s Business Location is not located in Indian Country and is not licensed as a Tribal Retailer of cigarettes.⁶ The applicable cigarette rate for the Respondent’s Business Location is \$1.03 per pack of twenty (20) cigarettes.⁷

3. On July 22, 2008, FIELD AGENT, a Field Representative of the Division, conducted a compliance check (“Compliance Check”) at the Respondent’s Business Location.

4. During the Compliance Check, the Division’s Field Representative 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 Act”).⁹

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

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 OKLA. ADMIN. CODE § 710:50-15-2(a) (June 25, 2004):

Definitions. The following words and terms, when used in this Section, shall have the following meaning, unless the context clearly indicates otherwise:

(1) “**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](#)]

(2) “**Informal reservations**” means and includes lands 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) “**Dependent Indian communities**” means and refers to 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.

⁷ OKLA. ADMIN. CODE § 710:70-2-9(c) (June 25, 2005).

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

⁹ OKLA. STAT. ANN. tit. 68, § 360.1 et seq. (West Supp. 2010).

¹⁰ The Division’s *Application* incorrectly states the Non-Compliant Items were “unstamped” cigarettes.

6. On July 22, 2008, the Division's Field Representative seized the Non-Compliant Items. The Division's Representative prepared a Cigarette and Tobacco Enforcement Survey ("Enforcement Survey") and seizure inventory list ("Inventory List"), which is signed by the Division's Field Representative and by the owner or a representative on behalf of the Respondent.¹¹ The "usual and ordinary price"¹² of the cigarettes seized were \$658.00.¹³

7. The Division's Field 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 Oklahoma City warehouse.¹⁴

8. The cigarettes confiscated were stamped with Tribal Compact Cigarette Tax Stamps.¹⁵

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

10. 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.

11. On March 1, 2010, the return receipt was signed by a representative on behalf of the Respondent at the Business Location.¹⁶

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.¹⁷

¹¹ The signature of the person who signed on behalf of the Respondent is completely illegible.

¹² OKLA. STAT. ANN. tit. 68, § 360.7(C)(3) (West Supp. 2010).

¹³ Division's Exhibit A. The exhibit consists of an Enforcement Survey (one (1) page) and Cigarette and Other Tobacco Inventory List (one (1) page).

¹⁴ The seized cigarettes were 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. 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).

¹⁵ Testimony of SUPERVISOR. *See* Note 13, *supra*.

¹⁶ *See* return receipt filed with the Court Clerk on March 4, 2010. The return receipt does not reflect a delivery date. According to the U.S. Postal Service "Track & Confirm" service at <http://trkcnfrm1.usps.com>, the *Application* and *Notice* were delivered at 10:06 a.m. on March 1, 2010, in CITY, OK 77777.

¹⁷ OKLA. STAT. ANN. tit. 68, § 305(E)(2) (West Supp. 2010):

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

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 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.¹⁸

3. "Stamped cigarettes" means packages of cigarettes which bear the proper tax stamp required by state law.¹⁹

4. 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.²⁰

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. 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 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.

¹⁸ OKLA. STAT. ANN. tit. 68, § 305(B) (West Supp. 2010).

¹⁹ OKLA. STAT. ANN. tit. 68, § 348(8) (West 2010).

²⁰ OKLA. STAT. ANN. tit. 68, § 360.7(B) (West Supp. 2010).

5. On February 26, 2010, the *Notice* was sent to the Respondent by certified mail 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.²¹

6. The Division's Field 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.

7. The Enforcement Survey and Inventory List properly describe the seized cigarettes as being in violation of the Cigarette Act and MSAC Act.²²

8. In all proceedings before the Tax Commission, the taxpayer has the burden of proof, unless provided by law.²³

9. 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.²⁴

DISCUSSION

The Division has met its burden of proof that the Non-Compliant Items were offered for sale or possessed for sale by the Respondent in this state in violation of the Cigarette Act and MSAC Act, and shall be deemed contraband pursuant to the MSAC Act. These cigarettes were properly seized by the Division during the Compliance Check and should be forfeited to the State of Oklahoma and destroyed.²⁵

DISPOSITION

It is the ORDERED of the undersigned OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that 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-

²¹ See Note 16, *supra*.

²² See Note 13, *supra*.

²³ See OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999). See also OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999).

²⁴ See *Enterprise Management Consultants, Inc. v. State ex rel Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

²⁵ OKLA. STAT. ANN. tit. 68, § 360.7 (West Supp. 2010).

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.”