

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2010-08-03-02 / NON-PRECEDENTIAL
ID: FD-10-017-H
DATE: AUGUST 3, 2010
DISPOSITION: APPLICATION GRANTED
TAX TYPE: FORFEITURE AND DESTRUCTION
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

DISTRIBUTION COMPANY and/or PROTESTANT d/b/a SMOKE SHOP (collectively “Respondents”) appear 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 March 23, 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 Exhibits A through E attached thereto. On March 23, 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 Respondents, 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 Respondents 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-10-017-H.

On April 22, 2010, at approximately 1:30 p.m., the Show Cause hearing was held as scheduled. The Respondents failed to appear at the hearing.³ 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 Exhibits A through E were 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.

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

² See *Application* filed herein.

³ It was noted for the record that the Respondents had not contacted the Court Clerk regarding the hearing. OTC ATTORNEY announced that she had spoken to a representative of DISTRIBUTION COMPANY after the seizure, but no further communications, oral or written, had been made or received, and there has been no contact with SMOKE SHOP.

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. DISTRIBUTION COMPANY is located at OUT-OF-STATE ADDRESS ("Business Location"). DISTRIBUTION COMPANY holds a license (#####)⁴ issued by the State of Oklahoma as a wholesaler⁵ of cigarettes for the Business Location, which must be renewed annually, with an expiration date of September 7, 2010.⁶

2. SMOKE SHOP is located at BUSINESS ADDRESS ("Business Location") SMOKE SHOP is not licensed by the State of Oklahoma as a wholesaler⁷ of cigarettes or as a retailer⁸ of cigarettes. SMOKE SHOP is a tribal retailer according to information provided to the Tax Commission by the TRIBE.⁹

3. On February 10, 2010, a search warrant¹⁰ ("SW-2010-###") for packages shipped via United Postal Service ("UPS") at the UPS Terminal located at UPS ADDRESS, from DISTRIBUTION COMPANY'S Business Location for delivery to SMOKE SHOP'S Business Location was issued.¹¹

4. The Division determined that UPS was unaware that it was transporting unstamped cigarettes; therefore no report of deliveries had been made by UPS to the Tax Commission.¹²

5. On February 11, 2010, a Search Warrant Return and Inventory was executed by Lieutenant TROOPER, State Trooper, listing the inventory of all items seized during the execution of SW-2010-###.¹³

⁴ OKLA. STAT. ANN. tit. 68, § 304(A) (West Supp. 2010).

⁵ OKLA. STAT. ANN. tit. 68, § 301(3) (West Supp. 2010).

⁶ See *Application* at 2. Testimony of SUPERVISOR. The Administrative Law Judge is taking judicial notice of the Tax Commission website at <http://www.oktax.state.ok.us> to complete the factual details and background of this matter. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

⁷ See Note 5, *supra*.

⁸ OKLA. STAT. ANN. tit. 68, § 304(B) (West Supp. 2010).

⁹ Testimony of SUPERVISOR. See *Application* at 2.

¹⁰ Testimony of SUPERVISOR. See Division's Exhibits A and B. The search warrant was issued by the District Court of COUNTY on February 10, 2010, in Case No. SW-2010-XXX.

¹¹ Testimony of SUPERVISOR. See Division's Exhibits A and B.

¹² See Division's Exhibit A. See also Note 36, *infra*.

¹³ Testimony of SUPERVISOR. See Division's Exhibit C.

6. The Division's Representative identified the cigarettes seized as "Seneca" brand.¹⁴ "Seneca" brand cigarettes are contraband pursuant to Oklahoma law, unlawful to possess, and subject to seizure and forfeiture.¹⁵

7. The shipment was accompanied by DISTRIBUTION COMPANY'S invoice for the sale of 4,440 cartons of "Seneca" brand cigarettes. The name in the "Ship To" box on the invoice was SMOKE SHOP. The Customer ID on the invoice was "XXXXXX."¹⁶

8. When the seizure occurred (February 10, 2010), no one associated with DISTRIBUTION COMPANY and/or SMOKE SHOP was present at the UPS Terminal located at UPS ADDRESS.¹⁷

9. 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 a Representative of UPS.¹⁸ The "usual and ordinary price"¹⁹ of the cigarettes seized is \$103,500.00.²⁰

10. 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.²¹

11. On March 23, 2010, the Division's *Application* was filed with the Court Clerk.

¹⁴ OKLA. STAT. ANN. tit. 68, § 360.3(1) (West Supp. 2010):

1. "Brand family" means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including, but not limited to, "menthol", "lights", "kings", and "100s", and includes any brand name alone or in conjunction with any other word, trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes;

¹⁵ See Note 19, *infra*. It was also noted by the Division's Representatives that no Oklahoma cigarette excise tax stamps were affixed to the "Seneca" cigarettes. Testimony of SUPERVISOR.

¹⁶ Testimony of SUPERVISOR. Division's Exhibit D.

¹⁷ Testimony of SUPERVISOR. See *Application* at 2.

¹⁸ See Note 19, *infra*.

¹⁹ OKLA. STAT. ANN. tit. 68, § 360.7(C)(3) (West Supp. 2010).

²⁰ Division's Exhibit E. The exhibit consists of an Enforcement Survey (one (1) page) and Cigarette and Other Tobacco Inventory List (one (1) page).

²¹ 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).

12. On March 23, 2010, the *Notice* along with a copy of the Division's *Application* was sent to DISTRIBUTION COMPANY'S Business Location by certified mail return receipt requested (XXXX) and to SMOKE SHOP'S Business Location (XXXX).²²

13. On March 25, 2010, the return receipt was signed by DISTRIBUTION COMPANY, through a representative, at its Business Location.²³

14. On March 24, 2010, the return receipt was signed SMOKE SHOP, by a representative, at its Business Location.²⁴

15. During the execution of the search warrant on February 10, 2010, the Division's Field Representative identified items which were being offered for sale by DISTRIBUTION COMPANY and/or SMOKE SHOP which did not comply with the Oklahoma Cigarette Stamp Act²⁵ ("Cigarette Act") and the Master Settlement Agreement Complementary Act ("MSAC Act").²⁶

16. The non-compliant items ("Non-Compliant Items") included "Seneca" brand cigarettes.²⁷

17. On February 10, 2010, the Division's Field Representative seized the Non-Compliant Items after the execution of SW-2010-XXX.²⁸

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.²⁹

²² See *Notices* filed herein.

²³ See return receipt filed with the Court Clerk. According to the U.S. Postal Service "Track & Confirm" service at <http://trkcnfrm1.usps.com>, the *Application and Notice* was delivered at 1:32 PM on March 25, 2010, ADDRESS. The Detailed Results indicates:

- Delivered, March 25, 2010, 1:32 p.m., ADDRESS.
- Notice Left March 25, 2010, 7:45 a.m., ADDRESS.

²⁴ See return receipt filed with the Court Clerk. According to the U.S. Postal Service "Track & Confirm" service at <http://trkcnfrm1.usps.com>, the *Application and Notice* was delivered at 12:03 PM on March 24, 2010 in ADDRESS.

²⁵ OKLA. STAT. ANN. tit. 68, § 301 et seq. (West 2001).

²⁶ OKLA. STAT. ANN. tit. 68, § 360.1 et seq. (West Supp. 2010).

²⁷ See Note 20, *supra*.

²⁸ Testimony of SUPERVISOR.

²⁹ OKLA. STAT. ANN. tit. 68, § 305(E)(2) (West Supp. 2010):

2. Every wholesaler doing business within this state and required to secure a license as provided under Section 304 of this title shall, upon withdrawal from storage, and before making any sale or distribution of cigarettes for consumption thereof, affix or cause the same to have affixed thereto the stamp or stamps as required by the Cigarette Act. It shall be the duty of the wholesaler to supply the necessary stamps to cover any and all drop shipments of cigarettes billed to the retailer or consumer by the wholesaler; and the wholesaler shall be liable to the Oklahoma Tax Commission to perform this service. Wholesalers may apply stamps only to cigarette packages that they have received directly from a manufacturer or importer of cigarettes who possesses a valid and current permit under Section 5712 of Title 26 of the United States Code.³⁰

3. All contraband cigarettes upon which taxes are imposed by the Cigarette Act and all cigarettes stamped, sold, offered for sale, or imported into this state in violation of the provisions of Section 305.1 of this title which shall be 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 Cigarette Act, or with intent to avoid payment of the tax imposed hereunder, and any automobile, truck, conveyance, or other

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. 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.

³⁰ OKLA. STAT. ANN. tit. 68, § 305(A) (West Supp. 2010).

vehicle whatsoever used in the transportation of such cigarettes, and all paraphernalia, equipment or other tangible personal property incident to the use of such purposes, found in the place, building, vehicle or vehicles, where such cigarettes are found, may be seized by any authorized agent of the Tax Commission, or any sheriff, deputy sheriff, constable or other peace officer within the state, without process. The same shall be, from the time of such seizure, forfeited to the State of Oklahoma, and a proper proceeding filed to maintain such seizure and prosecute the forfeiture as herein provided.³¹

4. 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.³²

5. "Stamped cigarettes" means packages of cigarettes which bear the proper tax stamp required by state law.³³

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.³⁴

7. The right of a carrier in this state to carry unstamped cigarettes, as defined in this article, shall not be affected by this article; provided that carriers delivering unstamped cigarettes to any person in this state for the purpose of selling or consuming unstamped cigarettes in this state in violation of the Cigarette Act shall be subject to seizure of the shipments and forfeiture of the inventory pursuant to the provisions of Section 305 of this title.³⁵

8. Carriers transporting cigarettes to a point within the state, or a bonded warehouseman or bailee having possession of cigarettes, are required, under this article and the rules to be prescribed by the Tax Commission, to transmit to the Tax Commission a statement of such consignment of cigarettes, showing the date, point of origin, point of delivery, and to whom delivered, and such other information as the Tax Commission may require. All carriers, bailees or warehousemen shall permit an examination by the Tax Commission, or its agents or legally

³¹ OKLA. STAT. ANN. tit. 68, § 305(E)(1) (West Supp. 2010).

³² OKLA. STAT. ANN. tit. 68, § 305(B) (West Supp. 2010).

³³ OKLA. STAT. ANN. tit. 68, § 348(8) (West 2010).

³⁴ OKLA. STAT. ANN. tit. 68, § 360.7(B) (West Supp. 2010).

³⁵ OKLA. STAT. ANN. tit. 68, § 309(A) (West Supp. 2010).

authorized representatives, of their records relating to the shipment or receipt of cigarettes. Any person who fails or refuses to transmit to the Tax Commission the statements above provided for, or whoever refuses to permit the examination of the records by the Tax Commission, shall be guilty of a misdemeanor.³⁶

9. On March 23, 2010, the *Notice* was sent to the Respondents by certified mail return receipt requested, giving the Respondents the requisite ten (10) day notice of the hearing held on April 22, 2010, at 1:30 p.m.³⁷

10. The Division's Field Representative properly prepared and filed an Enforcement Survey and Inventory List, which reflects the place of the seizure as the UPS Terminal at UPS ADDRESS. The Enforcement Survey and Inventory List properly appraised the cigarettes (at the usual and ordinary retail price of \$103,500.00) for the seized cigarettes.

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

12. In all proceedings before the Tax Commission, the taxpayer has the burden of proof, unless provided by law.³⁸

13. 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.³⁹

DISCUSSION

The Division has met its burden of proof that the Non-Compliant Items ("Seneca" cigarettes) were offered for sale or possessed for sale by DISTRIBUTION COMPANY and/or SMOKE SHOP 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 execution of the Search Warrant on February 10, 2010, and should be forfeited to the State of Oklahoma and destroyed.⁴⁰

³⁶ OKLA. STAT. ANN. tit. 68, § 309(B) (West Supp. 2010).

³⁷ See Notes 23-24, *supra*.

³⁸ See OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999). See also OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999).

³⁹ See *Enterprise Management Consultants, Inc. v. State ex rel Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

⁴⁰ OKLA. STAT. ANN. tit. 68, § 360.7 (West Supp. 2010).

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.

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."