

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2012-01-10-04 / NON-PRECEDENTIAL
ID: FD-11-014-H
DATE: JANUARY 10, 2010
DISPOSITION: APPLICATION GRANTED
TAX TYPE: FORFEITURE AND DESTRUCTION, TOBACCO
APPEAL: NO APPEAL TAKEN

ORDER

The above matter comes on for entry of an order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, including the Findings of Fact, Conclusions of Law and Recommendations made and entered by the Administrative Law Judge on the 2nd day of December, 2011, and being fully advised in the premises, the Commission hereby enters the following Order.

PROCEDURAL HISTORY

On October 13, 2011, the Compliance Division of the Oklahoma Tax Commission filed with the Court Clerk,¹ an *Application for Order Forfeiting Seized Cigarettes and Other Tobacco Products and Directing the Destruction Thereof* (“*Application*”), with a copy of Exhibit A attached thereto. On October 13, 2011, the *Notice to Show Cause Why the Application for Forfeiture of Seized Cigarettes and Other Tobacco Products and Destruction Thereof Should Not Be Ordered* (“*Notice*”) was sent to the Respondent by certified mail return receipt requested (###) to the Respondent’s last-known address. On November 1, 2011, the *Notice* was hand-delivered by a Field Representative to the Respondent’s last-known address (residential), along with a copy of the Division’s *Application*, advising that a show cause hearing had been set for November 17, 2011, at 9:30 a.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-11-14-H. On November 3, 2011, the Division filed the *Return of Service* with the Court Clerk.³

On or about November 6, 2011, the *Notice* sent by certified mail return receipt requested (####) was returned as “Unclaimed” by the U.S. Postal Service.⁴

On November 17, 2011, at approximately 9:30 a.m., the Show Cause Hearing was held as scheduled. The Respondent failed to appear at the hearing. It was noted for the record that the Respondent had not contacted the Division or the Court Clerk concerning the hearing. The Division called one (1) witness, SUPERVISOR, Field Audit Supervisor (District One (1)), Field

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

² Testimony of SUPERVISOR. See *Application* filed herein.

³ See Note 22, *infra*.

⁴ See copy of envelope filed with the Court Clerk on November 29, 2011.

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 B were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record was closed and this case was submitted for decision on November 17, 2011. On November 29, 2011, the record was opened for the Division to file a copy of the envelope, which contained the *Notice* mailed on October 13, 2011. The record was closed and this case was submitted for decision on November 30, 2011.

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*, the *Notice*, the *Return of Service*, and the *Affidavit of Service*, the undersigned finds:

1. Respondent operates a convenience store located at STORE ADDRESS ("Business Location").⁵

2. Respondent is not licensed by the State of Oklahoma as a wholesaler of cigarettes⁶ or as a wholesaler⁷ of unstamped tobacco products.⁸

3. Respondent holds License Number ##### issued by the State of Oklahoma as a retailer⁹ of Cigarettes and Other Tobacco Products for his Business Location.¹⁰

4. On October 27, 2009, the Division's representatives¹¹ conducted a compliance check at the Respondent's Business Location. During the compliance check, the Division's representatives identified items being offered for sale by the Respondent which were not in compliance ("Non-Compliant Items") with the Oklahoma Cigarette Stamp Act¹² ("Cigarette Act"), the Tobacco Products Tax Act ("Tobacco Act"),¹³ and the Master Settlement Agreement Complementary Act ("MSAC Act").¹⁴ The Respondent could not produce invoices for the

⁵ *Id.*

⁶ OKLA. STAT. ANN. tit. 304(A) (West Supp. 2011).

⁷ OKLA. STAT. ANN. tit. 68, § 401(c) (West 2001).

⁸ *Id.*

⁹ OKLA. STAT. ANN. tit. 68, § 401(d) (West 2001).

¹⁰ *Id.*

¹¹ The Division's representatives were Field Agents, AGENT 1 and AGENT 2.

¹² OKLA. STAT. ANN. tit. 68, § 301 et seq. (West 2001).

¹³ OKLA. STAT. ANN. tit. 68, § 401 et seq. (West 2001).

¹⁴ OKLA. STAT. ANN. tit. 68, § 360.1 et seq. (West 2001).

purchase of the Other Tobacco Products,¹⁵ which reflected that Other Tobacco Products tax had been paid.¹⁶

5. The Division's representatives prepared a Cigarette and Tobacco Enforcement Survey ("Enforcement Survey") and Confiscation Inventory List, which is signed on behalf of the Tax Commission by the Division's representatives and by the Respondent or on behalf of the Respondent, by and through a representative.¹⁷ The Tax Commission, by and through its representatives, seized the Non-Compliant Items. The "usual and ordinary retail price"¹⁸ of the "Unstamped" Cigarettes (\$116.59) and Other Tobacco Products (\$1,736.31) seized were \$1,852.90.¹⁹

6. The Division's representatives filed the Enforcement Survey and Confiscation Inventory List with the Division and the seized Cigarettes and Other Tobacco Products were labeled and stored in a secured area of the Tax Commission's Oklahoma City warehouse.²⁰

7. On October 13, 2011, the Division's *Application* was filed with the Court Clerk, with Exhibit A attached thereto.

8. On October 13, 2011, the *Notice* was sent to the Respondent by certified mail return receipt requested (#####) to the Business Location.²¹

9. On November 1, 2011, the *Notice* along with a copy of the Division's *Application* was served by FIELD AGENT, Field Representative at HOME ADDRESS, by leaving them in a clip that is mounted on the outside door frame at the front of the residence.²²

10. On or about November 6, 2011, the *Notice* mailed on October 13, 2011, by certified mail return receipt requested (#####) was returned as "Unclaimed" by the U.S. Postal Service.²³

¹⁵ OKLA. STAT. ANN. tit. 68, § 401(9) (West 2001).

¹⁶ Testimony of SUPERVISOR. Division's Exhibit A.

¹⁷ *Id.* See Division's Exhibit B.

¹⁸ OKLA. STAT. ANN. tit. 68, § 360.7(C)(3) (West Supp. 2011).

¹⁹ Division's Exhibits A and B. The exhibit consists of an Enforcement Survey (one (1) page) and Confiscation Inventory List (eight (8) pages). There is a mathematical error on the Enforcement Survey. The total for Other Tobacco Products is \$1,736.31, not \$1,646.31.

²⁰ The seized Cigarettes and 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. 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).

²¹ See *Notice* filed herein.

²² Testimony of SUPERVISOR. See *Return of Service* and *Affidavit of Service* filed herein.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.²⁴

²³ See Note 4, *supra*.

²⁴ OKLA. STAT. ANN. tit. 68, § 305(E)(2) (West Supp. 2009):

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. 2011):

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.

OKLA. STAT. ANN. tit. 68, § 417 (West Supp. 2011):

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 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,

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.²⁵

3. "Stamped cigarettes" means packages of cigarettes which bear a tax stamp required by state law.²⁶ The Cigarettes seized by the Division's representatives during the compliance check were "Unstamped."²⁷

4. There shall be levied, assessed, collected, and paid in respect to the articles containing tobacco enumerated in the Tobacco Act, a tax.²⁸

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 appraisal 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.

See OKLA. ADMIN. CODE § 710:70-5-11.

²⁵ OKLA. STAT. tit. 68, § 305(B) (West Supp. 2008).

²⁶ OKLA. STAT. ANN. tit. 68, § 348(8) (West 2001).

²⁷ *See* Note 19, *supra*.

²⁸ *See* OKLA. STAT. ANN. tit. 68, § 402 *et seq.* (West 2001) and OKLA. STAT. tit. 68, § 402-3 *et seq.* (West Supp. 2011). *See also* OKLA. ADMIN. CODE § 710:70-5-12 (June 25, 2009).

5. 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.²⁹

6. 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 and all the Cigarettes and Other Tobacco Products so seized and forfeited shall be destroyed and not resold.³⁰

7. Section 208 of title 68 provides that if notice has been mailed to a person's last known address, failure of the person to receive such notice shall neither invalidate nor be grounds for invalidating any action taken pursuant thereto. More than ten (10) days' notice of the hearing as required by Sections 305 and 417 of title 68 was given to the Respondent in accordance with the provisions of Section 208 of title 68 by mailing to the last known address of the Respondent on October 13, 2011.

8. The Division's representatives properly prepared and filed an Enforcement Survey and Confiscation Inventory List, which reflects the place of the seizure as the Respondent's Business Location.³¹ The Enforcement Survey and Confiscation Inventory List properly appraised the Cigarettes and Other Tobacco Products (at the usual and ordinary retail price) for the seized Cigarettes (\$116.59) and Other Tobacco Products (\$1,736.31) in the amount of \$1,852.90.³²

9. The Enforcement Survey and Confiscation Inventory List properly describe the seized Cigarettes and Other Tobacco Products as being in violation of the Cigarette Act,³³ the Tobacco Act,³⁴ and MSAC Act.³⁵

10. The seized Cigarettes include "Unstamped" Cigarettes, which are in violation of the Cigarette Act³⁶ and the MSAC Act.³⁷

²⁹ Testimony of SUPERVISOR.

³⁰ OKLA. STAT. ANN. tit. 68, § 360.7(B) (West Supp. 2011).

³¹ See Note 19, *supra*.

³² *Id.*

³³ See Note 12, *supra*.

³⁴ See Note 13, *supra*.

³⁵ See Note 14, *supra*.

³⁶ See Note 12, *supra*.

³⁷ See Note 14, *supra*.

11. During 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.³⁸

12. In all proceedings before the Tax Commission, the taxpayer has the burden of proof, unless otherwise provided by law.³⁹

13. In this matter, the Division filed the *Application* seeking the forfeiture and destruction of the seized Cigarettes and Other Tobacco Products, shifting the burden of proof to the Division.⁴⁰

DISCUSSION

SUPERVISOR testified that during the Compliance Check, the Division's representatives discovered "Unstamped" Cigarettes for sale, but the Respondent is not licensed by the State of Oklahoma as a wholesaler of "Unstamped" Cigarettes.⁴¹ The Respondent also could not produce any invoices reflecting the tobacco tax had been paid for the Other Tobacco Products seized and that the Respondent is not licensed by the State of Oklahoma as a wholesaler.⁴²

Pursuant to Tax Commission Rule 710:70-5-11(b),⁴³ the intent to evade or avoid payment of tobacco products taxes may be presumed upon:

(2) 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. The burden of proof shall be on the person, taxpayer or reporter to prove otherwise.

It is the Division's policy if a wholesaler is the holder of a valid Oklahoma Tobacco License that the applicable tobacco taxes are presumed to have been paid. SUPERVISOR further testified that the Excise Tax Section of the Compliance Division verifies that wholesalers and/or retailers who have valid Oklahoma Tobacco Licenses are properly filing reports and remitting the applicable tobacco tax.⁴⁴

³⁸ See Note 13, *supra*.

³⁹ See OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999). See also OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999).

⁴⁰ See *Enterprise Management Consultants, Inc. v. State ex rel Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

⁴¹ See Note 2, *supra*.

⁴² *Id.*

⁴³ OKLA. ADMIN. CODE § 710:70-5-11(b).

⁴⁴ See Note 20, *supra*.

Unlicensed wholesalers and/or retailers like the Respondent do not file monthly reports or remit tobacco tax, so the presumption contained in Tax Commission Rule 710:70-5-11(b)⁴⁵ arises and the burden of proof is on the Respondent to prove the tobacco tax has been paid.

The intent to evade or avoid payment of tobacco products taxes by the Respondent, who does not hold valid Oklahoma Tobacco Licenses (wholesaler), may be presumed upon the Other Tobacco Products. The burden of proof shifted to the Respondent to prove otherwise. The Respondent has failed to meet his burden of proof that the applicable tobacco tax has been paid on the Other Tobacco Products, which were confiscated by the Division during the Compliance Check.

The Division has met its burden of proof that the Cigarettes and Other Tobacco Products were offered for sale or possessed for sale in this state in violation of the Cigarette Act, the Tobacco Act, and the MSAC Act, and should be deemed contraband pursuant to the MSAC Act. The Cigarettes and Other Tobacco Products were properly seized by the Division during the Compliance Check and should be forfeited to the State of Oklahoma and destroyed in the amount of \$1,852.90.⁴⁶

The Division's *Application for Order Forfeiting Seized Cigarettes and Other Tobacco Products and Directing the Destruction Thereof* should be and hereby is 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."

⁴⁵ *See* Note 44, *supra*.

⁴⁶ *See* Note 19, *supra*.