JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2012-01-10-05 / NON-PRECEDENTIAL**
ID: **FD-11-005-K**
DATE: **JANUARY 10, 2012**
DISPOSITION: **APPLICATION DENIED**
TAX TYPE: **FORFEITURE AND DESTRUCTION**
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 30th day of November, 2011, and being fully advised in the premises, the Commission hereby enters the following Order.

STATEMENT OF THE CASE

On December 10, 2009, an agent of the Compliance Division of the Oklahoma Tax Commission conducted a cigarette and tobacco enforcement survey at Respondent's business and confiscated noncompliant cigarettes and other tobacco products. An *Application for Order Forfeiting Seized Cigarettes and Other Tobacco Products and Directing the Destruction Thereof ("Application")* was filed September 29, 2011.

A show cause hearing was scheduled for October 31, 2011, by *Notice to Show Cause Why the Application for Forfeiture of Seized Cigarettes and Other Tobacco Products and Destruction Thereof should not be Ordered ("Notice").* The *Notice* was served on October 27, 2011.

The hearing was held as scheduled. A representative of Respondent did not appear at the hearing. SUPERVISOR, Field Supervisor, District 1 of the Field Services Section of the Division testified with respect to the records of the Division and the reasons for the confiscations. Exhibit A was identified, offered and admitted into evidence. Upon conclusion of the Division's presentation of its evidence, the record was closed and the *Application* was submitted for decision.

FINDINGS OF FACTS

Upon review of the file and records, including the recording of the hearing, the exhibit received into evidence and the *Application*, the undersigned finds:

1. Respondent was a licensed retailer of cigarettes for its business location in CITY, Oklahoma.

2. Respondent was not licensed as a wholesaler of cigarettes or as a purchaser of unstamped other tobacco products.

3. On December 10, 2009, an authorized agent of the Division conducted a compliance check at Respondent's business, and identified unstamped packages of cigarettes for sale, cigarettes for sale in quantities less than an individual package and other tobacco products for sale to which Respondent could not produce purchase invoices showing excise taxes paid on said products.

4. The noncompliant cigarettes and other tobacco products were confiscated, and *Confiscation Inventory Lists* were prepared and executed showing the items seized and the estimated retail value of the items.

5. The Division seeks an order of forfeiture and destruction of the noncompliant cigarettes and other tobacco products.

6. Notice of the forfeiture hearing was given to the Respondent by delivering a copy of the *Application for Order Forfeiting Seized Cigarettes and Other Tobacco Products and Directing Destruction Thereof* and the *Notice to Show Cause Why the Application for Order Forfeiting Seized Cigarettes and Other Tobacco Products and Directing Destruction Thereof Should Not Be Ordered* to the spouse of Respondent at Respondent's home address at HOME ADDRESS on October 27, 2011.

7. The forfeiture hearing was held October 31, 2011.

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, §§ 305(E)(2) and 417(C).[1]

2. Every retailer, like any unlicensed consumer who purchases or receives cigarettes[2] to which are not affixed the stamps[3] required by the Stamp Act is required to purchase and affix stamps upon all such cigarette packages in the "proper denomination and amount" as required by § 302 of the Stamp Act prior to making any sale or distribution for

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[1] In general, these provisions require the Tax 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.

[2] "The term 'cigarette' is defined to mean and include all rolled tobacco or any substitute therefor, wrapped in paper or any substitute therefor and weighing not to exceed three (3) pounds per thousand cigarettes". 68 O.S. 2001, § 301(1)

[3] "The term 'stamp' as herein used shall mean the stamp or stamps by use of which:
a. the tax levied pursuant to the provisions of § 301 et seq. of this title is paid,
b. the tax levied pursuant to the provisions of § 349 of this title is paid, or
c. the payment in lieu of taxes authorized pursuant to a compact entered into by the State of Oklahoma and federally recognized Indian tribe or nation pursuant to the provisions of subsection C of Section 346 of this title is paid".
68 O.S. Supp. 2003, § 301(8).

consumption thereof. 68 O.S. Supp. 2008, § 305(B) and (C). It is unlawful for any person to sell or consume cigarettes on which the tax, as levied by the Stamp Act, has not been paid, and which are not contained in packages to which are securely affixed the "proper" stamps evidencing payment of the tax imposed by the Stamp Act. 68 O.S. Supp. 2008, § 305(C).

3. All unstamped cigarettes 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 Stamp 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, §§ 305(E)(1). "The same shall be, from the time of such seizure, forfeited to the State of Oklahoma." Id.

4. Cigarette packages to which are affixed stamps not in the proper denomination and amount applicable to the retail establishment are unstamped. See, 68 O.S. Supp. 2003, § 301(8); 68 O.S. 2001, § 401(i) and Senate Bill No. 608, § 8(6), effective Jan. 1, 2010.

5. The Tax Commission pursuant to § 403.1 of the Tobacco Act abolished the practice of purchasing and affixing stamps to tobacco products[4] as payment of the excise tax levied on the sale, distribution, use, exchange, barter or possession of tobacco products 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, 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. No other person, wholesaler, warehouseman, distributor, jobber 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.

6. No person, dealer, distributing agent or wholesaler 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, distributing agent or wholesaler holds a valid tobacco license. 68 O.S. 2001 § 403.1(2); *OAC*, 710:70-5-10. 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).

7. Retailers of tobacco products are required to maintain copies of invoices or equivalent documentation for every transaction in which the retailer receives or purchases tobacco products for a period of three (3) years from the date of the transaction. *OAC*, 710:70-5-10(b) and (d).

8. All unstamped cigarettes and (untaxed) other 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

[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).

provisions of the Acts, 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, §§ 305(E)(1) and 417(A).[5] See *OAC*, 710:70-5-11(a). Intent to evade or avoid payment of tobacco products taxes may be presumed upon, 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. *OAC*, 710:70-5-11(b)(2). 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).

9. Section 305(E) of title 68 which authorizes the seizure and forfeiture of cigarettes requires that a hearing be held to determine the matter of whether or not the cigarettes should, in fact, be forfeited to the State of Oklahoma. This statute also requires that the owner of the cigarettes shall be given at least ten (10) days' notice of the hearing.

10. Section 417 of title 68 which authorizes the forfeiture of other tobacco products requires that a hearing be held to determine the matter of whether or not the other tobacco products should, in fact, be forfeited to the State of Oklahoma. This statute also requires that the owner of the other tobacco products shall be given at least ten (10) days' notice of the hearing.

11. Section 208 of title 68 requires any notice required by any state tax law to be given by the Tax Commission to be in writing and allows it to be given personally or by mail. It does not require the notice to be given by registered or certified mail. If mailed, it must be addressed to the person to be notified at the last known address of such person. "Last known address" means the last address given for such person as it appears on the records of the division of the Tax Commission giving such notice, or if no address appears on the records of that division, the last address given as appears on the records of any other division of the Tax Commission. If notice has been mailed as provided in Section 208, the failure of the person to receive such notice shall neither invalidate nor be grounds for invalidating any action taken pursuant thereto.

12. The Supreme Court of Oklahoma in *Oklahoma Alcoholic Beverage Control Bd. v. Parkhill Restaurants, Inc.*, 183 OK 77, 669 P.2d 265 found that when the government undertakes a forfeiture of private property pursuant to a section of law which does not contain specific provisions for notice of a hearing, the constitutional requirement of due process of law requires that the statute should be construed to contain a requirement for some form of notice adequate under our Code of Civil Procedure, and, hence, under both the State and Federal Constitution. The Court found that such a requirement could be met by complying with the statutory provisions of the Code of Civil Procedure. The forfeiture statue in *Parkhill* contained no notice requirement. The only "statutory" notice discussed by the Court in *Parkhill* was the notice requirement contained in the statutes setting out the Code of Civil Procedure. Although the Court in *Parkhill* held that notice adequate under the Code of Civil Procedure would comply with the Constitutional requirement of due process, the Court found that the "actual" notice received by Parkhill was constitutionally sufficient and the failure of Parkhill to receive the statutory notice set forth in the Code of Civil Procedure was not a deprivation of due process.

[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)."

DISCUSSION AND ORDER

The Oklahoma Supreme Court, in *Parkhill*, found that actual notice satisfied the constitutional requirement of due process and the property owner could not be heard to complain about the failure to meet the statutory requirements for notice under the Code of Civil Procedure. In this case, unlike the situation in *Parkhill*, the statutes authorizing the forfeiture of property require ten (10) days' notice to the owner of the property. The Legislature, by its failure to require, in the statute authorizing forfeiture, any notice prior to a hearing on the forfeiture of property, may not do away with the constitutional requirement of notice contained in the due process clause of the constitution. The Legislature may, however, impose requirements for greater notice than is mandated by the constitution.

The notice given to Respondent in this matter occurred four (4) days prior to the forfeiture hearing. The statutory provisions authorizing the forfeiture of cigarettes and other tobacco products both require that the owner be given at least ten (10) days' notice of the forfeiture hearing. The decision of the Oklahoma Supreme Court in *Parkhill* supports the conclusion that actual notice given to the owner would satisfy the Constitutional requirement of due process. Compliance with the constitutional requirement of due process does not relieve the duty to comply with the statutory requirement for ten (10) days' notice.

Even if the requirement for at least ten (10) days' notice would be satisfied by actual notice prior to the hearing, the record in this case does not support a finding that the Respondent had actual notice. The record indicates that the notice of the hearing was left with the Respondent's spouse. Although service of process by leaving a copy with a person who is fifteen (15) years of age or older at the person's dwelling house or usual place of abode is considered "good service" under the Oklahoma Pleading Code,[6] it is not actual notice.

The Application of the Compliance Division for an Order Forfeiting Seized Cigarettes and Other Tobacco Products and Directing Their Destruction is denied for failure to provide at least ten (10) days' notice of the forfeiture hearing as required by Sections 305 and 417 of title 68 of the Oklahoma Statutes.

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

[6] 68 O.S. § 2004(C)(1)(c)

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."