

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2012-02-02-07 / NON-PRECEDENTIAL
ID: FD-11-024-K
DATE: FEBRUARY 2, 2012
DISPOSITION: APPLICATION GRANTED
TAX TYPE: FORFEITURE AND DESTRUCTION, TOBACCO
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Notice of the forfeiture proceedings was served on the Respondent, COMPANY. Respondent did not respond to the notice or appear at the hearing. The Compliance Division of the Oklahoma Tax Commission (“Division”) is represented by OTC ATTORNEY, Assistant General Counsel, General Counsel’s Office, Oklahoma Tax Commission.

STATEMENT OF THE CASE

On July 12, 2010, agents of the Division 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 October 18, 2011.

A show cause hearing was scheduled for December 8, 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 November 21, 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. Exhibits A through C were identified, offered and admitted into evidence. Upon conclusion of the Division’s presentation, 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 exhibits received into evidence and the *Application*, the undersigned finds:

1. Respondent is a licensed retailer of cigarettes.
2. Respondent is not licensed as a wholesaler of cigarettes or as a purchaser of unstamped other tobacco products.
3. On July 12, 2010, authorized agents of the Division conducted a compliance check at

Respondent's business, and identified items in Respondent's retail inventory and offered for sale which did not comply with the Oklahoma Cigarette Stamp Act ("Stamp Act")¹ and the Oklahoma Tobacco Products Act ("Tobacco Act")². The identified items included unstamped packages of cigarettes, and other tobacco products to which Respondent did not produce invoices or equivalent documentation showing they were purchased from a licensed Oklahoma wholesaler and taxes were paid on the 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. Respondent was properly notified of the forfeiture hearing.

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).³

2. Every retailer, like any unlicensed consumer who purchases or receives cigarettes⁴ to which are not affixed the stamps⁵ 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 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. 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.

¹ 68 O.S. 2001, § 301 et seq., as amended.

² 68 O.S. 2001, § 401 et seq., as amended.

³ 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.

⁴ "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)

⁵ "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 a 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).

4. The Tax Commission pursuant to § 403.1 of the Tobacco Act abolished the practice of purchasing and affixing stamps to tobacco products⁶ 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.

5. 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).

6. 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).

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 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).⁷ See *OAC*, 710:70-5-11(a). The unstamped cigarettes and untaxed other tobacco products are deemed forfeited to the State from the time of seizure. *Id.*

9. The uncontroverted evidence shows the cigarettes and other tobacco products were properly seized and should be forfeited to the State of Oklahoma for destruction.

⁶ “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).

⁷ The seizure provisions of § 417(A) do not apply “where the tax on such unstamped tobacco products does not exceed One Dollar (\$1.00).”

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the cigarettes and other tobacco products confiscated from Respondent, COMPANY, be forfeited and destroyed.

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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.”