

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2012-02-07-10 / NON-PRECEDENTIAL  
**ID:** FD-11-031-H  
**DATE:** FEBRUARY 7, 2012  
**DISPOSITION:** APPLICATION GRANTED  
**TAX TYPE:** FORFEITURE AND DESTRUCTION  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

RESPONDENT, an Individual, (“Respondent”) appears not. The Field Services Section, Compliance Division (“Division”) of the Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

### PROCEDURAL HISTORY

On October 19, 2011, the Division filed with the Court Clerk,<sup>1</sup> an *Application for Order Forfeiting Seized Cigarettes and Directing the Destruction Thereof* (“*Application*”), with a copy of Exhibit A attached thereto. On October 19, 2011, the *Notice to Show Cause Why the Application for Forfeiture of Seized Cigarettes and Destruction Thereof Should Not Be Ordered* (“*Notice*”) was sent to the Respondent by certified mail return receipt requested (#####) at ADDRESS. On November 21, 2011, the *Notice* was hand-delivered by a Field Representative to the Respondent’s last-known address, along with a copy of the Division’s *Application*, advising that a show cause hearing had been set for December 8, 2011, at 1:30 p.m., at which time the Respondent could appear and show cause why the Division’s *Application* should not be granted.<sup>2</sup>

The *Notice* also advised that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number FD-11-031-H. On November 30, 2011, the Division filed the *Return of Service*,<sup>3</sup> with the *Affidavit of Service* attached thereto.

On December 8, 2011, at approximately 1:30 p.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 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 C were identified, offered, and admitted into evidence. Upon conclusion of the hearing, the record was held open for the Division to provide copies of the Affidavit in Support of Request for Issuance of Search Warrant and the Search

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

<sup>2</sup> Testimony of SUPERVISOR. See *Application* filed herein.

<sup>3</sup> See Note 21, *infra*.

Warrant, which would be identified and admitted into evidence as ALJ's Exhibit 1. On December 14, 2011, the Division filed ALJ's Exhibit 1 with the Court Clerk. The record in this matter was closed and this case was submitted for decision on December 15, 2011.

On January 19, 2012, an Order Withdrawing Findings, Conclusions and Recommendations filed on December 20, 2011, was issued upon the motion of the undersigned.

### 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's residence and BUSINESS ("BUSINESS") are located at ADDRESS ("Residence").<sup>4</sup>

2. Respondent is not licensed by the State of Oklahoma as a wholesaler of cigarettes<sup>5</sup> or as a wholesaler<sup>6</sup> of unstamped tobacco products.<sup>7</sup>

3. Respondent is not licensed by the State of Oklahoma as a retailer<sup>8</sup> of Cigarettes for his Residence and/or BUSINESS.<sup>9</sup>

4. On June 1, 2010, the Division obtained a "Search Warrant" in the District Court of Oklahoma County for the Respondent's Residence and BUSINESS based upon the information contained in the Affidavit in Support of Request for Issuance of Search Warrant executed by SUPERVISOR.<sup>10</sup>

5. On June 4, 2010, the Search Warrant was executed by a Deputy Sheriff of the Oklahoma County Sheriff's Department, who searched Respondent's Residence and BUSINESS, and discovered cases of Cigarettes in the BUSINESS, which the Respondent was using as a "private warehouse." The Division's representatives<sup>11</sup> identified items being offered

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<sup>4</sup> *Id.*

<sup>5</sup> OKLA. STAT. ANN. tit. 304(A) (West Supp. 2012).

<sup>6</sup> OKLA. STAT. ANN. tit. 68, § 401(c) (West 2001).

<sup>7</sup> *Id.*

<sup>8</sup> OKLA. STAT. ANN. tit. 68, § 401(d) (West 2001).

<sup>9</sup> *Id.*

<sup>10</sup> ALJ's Exhibit 1. On June 1, 2010, the Search Warrant was approved by the Honorable, JUDGE, District Court Judge of COUNTY County. Testimony of SUPERVISOR.

<sup>11</sup> The Division's representatives were Field Agents, AGENT 1 and SUPERVISOR.

for sale by the Respondent which were not in compliance (“Non-Compliant Items”) with the Oklahoma Cigarette Stamp Act<sup>12</sup> (“Cigarette Act”) and the Master Settlement Agreement Complementary Act (“MSAC Act”).<sup>13</sup> The Cigarettes were either unstamped or the stamps had been altered.<sup>14</sup>

6. The Division’s representatives prepared a Cigarette 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.<sup>15</sup> The Tax Commission, by and through its representatives, seized the Non-Compliant Items. The “usual and ordinary retail price”<sup>16</sup> of the Cigarettes seized was \$10,268.00.<sup>17</sup>

7. The Division’s representatives filed the Enforcement Survey and Confiscation 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.<sup>18</sup>

8. On October 19, 2011, the Division’s *Application* was filed with the Court Clerk, with Exhibit A attached thereto.

9. On October 19, 2011, the *Notice* along with a copy of the Division’s *Application* was sent by certified mail return receipt requested (#####) to the Respondent at ADDRESS, which is the last-known residential address of the Respondent according to the records of the Tax Commission. On December 2, 2010, the mailing was returned by the U.S. Postal Service as “Unclaimed.”<sup>19</sup>

10. On November 21, 2011, the *Notice* along with a copy of the Division’s *Application* was served upon the Respondent by AGENT, Field Representative, at ADDRESS, which is the

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<sup>12</sup> OKLA. STAT. ANN. tit. 68, § 301 *et seq.* (West 2001).

<sup>13</sup> OKLA. STAT. ANN. tit. 68, § 360.1 *et seq.* (West 2001).

<sup>14</sup> *See* Note 18, *infra*. Some of the Cigarettes had stamps which were taped to packs of Cigarettes. As described by SUPERVISOR, the Respondent was attempting to reuse stamps which had previously been on other packs of Cigarettes.

<sup>15</sup> *Id.*

<sup>16</sup> OKLA. STAT. ANN. tit. 68, § 360.7(C)(3) (West Supp. 2012).

<sup>17</sup> Division’s Exhibits A and B. The exhibit consists of an Enforcement Survey (one (1) page) and Confiscation Inventory List (one (1) page).

<sup>18</sup> The seized Cigarettes 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).

<sup>19</sup> Division’s Exhibit C.

last-known residential address of the Respondent according to the records of the Tax Commission.<sup>20</sup>

### CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.<sup>21</sup>

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<sup>20</sup> Testimony of SUPERVISOR. *See Return of Service and Affidavit of Service* filed herein. *See also* OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2012). The *Affidavit of Service* reflects that the Field Representative delivered the *Notice* to a woman, who identified herself as the spouse of the Respondent, who also lived at the Residence.

<sup>21</sup> OKLA. STAT. ANN. tit. 68, § 305(E)(2) (West Supp. 2012):

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. 2012):

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. 2012):

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

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.<sup>22</sup>

3. "Stamped cigarettes" means packages of cigarettes which bear a tax stamp required by state law.<sup>23</sup> The Cigarettes seized by the Division's representatives during the compliance check were either unstamped or altered.<sup>24</sup>

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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, 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.

<sup>22</sup> OKLA. STAT. ANN. tit. 68, § 305(B) (West Supp. 2012).

<sup>23</sup> OKLA. STAT. ANN. tit. 68, § 348(8) (West 2001).

<sup>24</sup> *See* Note 18, *supra*.

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 and all the Cigarettes so seized and forfeited shall be destroyed and not resold.<sup>25</sup>

5. On October 19, 2011, the *Notice* along with a copy of the Division's *Application* was sent by certified mail return receipt requested (#####) to the Respondent at ADDRESS, which is the last-known residential address of the Respondent according to the records of the Tax Commission. On December 2, 2010, the mailing was returned by the U.S. Postal Service as "Unclaimed." On November 21, 2011, the *Notice* along with a copy of the Division's *Application* was served upon the Respondent by AGENT, Field Representative at ADDRESS, which is the last-known residential address of the Respondent according to the records of the Tax Commission, giving the Respondent the requisite ten (10) days notice of the hearing held on December 8, 2011, at 1:30 p.m.<sup>26</sup>

6. Section 208 of Title 68<sup>27</sup> provides that if the *Notice(s)* have 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. The Division's October 19<sup>th</sup> and November 21<sup>st</sup> *Notices* gave the Respondent the requisite notice in compliance with Sections 208, 305(E)(2), 360.7(C)(3), and 417 of Title 68 and Tax Commission Rule.<sup>28</sup>

7. 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 Residence and BUSINESS.<sup>29</sup> The Enforcement Survey and Confiscation Inventory List properly

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<sup>25</sup> OKLA. STAT. ANN. tit. 68, § 360.7(B) (West Supp. 2012).

<sup>26</sup> See Notes 20 and 22, *supra*. See also Note 28, *infra*.

<sup>27</sup> OKLA. STAT. ANN. tit. 68, § 208 (West Supp. 2012):

Any notice required by this article, or any state tax law, to be given by the Tax Commission shall be in writing and may be served personally or by mail. If mailed, it shall be addressed to the person to be notified at the last-known address of such person. As used in this article or any other state tax law, "last-known address" shall mean 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 no such address appears, the notice shall be mailed to such address as may reasonably be obtainable. If the Tax Commission receives an address from the United States Postal Service as a result of a change of address submitted to the United States Postal Service, "last-known address" shall mean the address provided to the United States Postal Service. The mailing of such notice shall be presumptive evidence of receipt of the same by the person to whom addressed. If the notice has been mailed as provided in this section, failure of the person to receive such notice shall neither invalidate nor be grounds for invalidating any action taken pursuant thereto, nor shall such failure relieve any taxpayer from any tax or addition to tax or any interest or penalties thereon.

<sup>28</sup> *Id.* See Note 22, *supra*.

<sup>29</sup> See Note 18, *supra*.

appraised the Cigarettes (at the usual and ordinary retail price) for the seized Cigarettes in the amount of \$10,268.00.<sup>30</sup>

8. The Enforcement Survey and Confiscation Inventory List properly describe the seized Cigarettes as being in violation of the Cigarette Act<sup>31</sup> and MSAC Act.<sup>32</sup>

9. The seized Cigarettes include improperly stamped cigarettes, which are in violation of the Cigarette Act<sup>33</sup> and the MSAC Act.<sup>34</sup>

10. In all proceedings before the Tax Commission, the taxpayer has the burden of proof, unless otherwise provided by law.<sup>35</sup>

11. 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.<sup>36</sup>

### DISCUSSION

SUPERVISOR testified that during the Compliance Check, the Division's representatives discovered unstamped Cigarettes or Cigarettes with altered stamps for sale,<sup>37</sup> but the Respondent is not licensed by the State of Oklahoma as a wholesaler and/or retailer of unstamped Cigarettes.<sup>38</sup>

The Division has met its burden of proof that the Cigarettes were offered for sale or possessed for sale in this state in violation of the Cigarette Act and MSAC Act, and should be deemed contraband pursuant to the MSAC Act. The Cigarettes were properly seized by the

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<sup>30</sup> *Id.*

<sup>31</sup> *See* Note 13, *supra*.

<sup>32</sup> *See* Note 14, *supra*.

<sup>33</sup> *See* Note 13, *supra*.

<sup>34</sup> *See* Note 14, *supra*.

<sup>35</sup> *See* OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999). *See also* OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999).

<sup>36</sup> *See Enterprise Management Consultants, Inc. v. State ex rel Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

<sup>37</sup> SUPERVISOR testified that the Respondent is also the subject of another FD case currently pending with the Office of Administrative Law Judges. In that case, the Respondent is doing business as STORE located at STORE ADDRESS. The Administrative Law Judge is taking judicial notice of Case No. FD-11-014-H to complete the factual details and background of this matter. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999).

<sup>38</sup> *See* Note 3, *supra*.

Division during the Compliance Check and should be forfeited to the State of Oklahoma and destroyed in the amount of \$10,268.00.<sup>39</sup>

### 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 as set forth herein.

### 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."

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<sup>39</sup> *See* Note 18, *supra*.