

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2012-02-14-08 / NON-PRECEDENTIAL
ID: FD-11-039-K
DATE: FEBRUARY 14, 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 a representative of RESPONDENT, LLC. 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 April 5, 2011, authorized agents of the Division conducted a cigarette and tobacco enforcement survey at Respondent’s business and confiscated noncompliant other tobacco products. An *Application for Order Forfeiting Seized Other Tobacco Products and Directing the Destruction Thereof* (“Application”) was filed October 25, 2011.

A show cause hearing was scheduled for December 20, 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* issued October 25, 2011. The *Notice* was served on a representative of Respondent on October 26, 2011.

The show cause hearing was held as scheduled. 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 reason for the confiscation. Exhibits A and B were identified, offered and admitted into evidence. At the conclusion of the Division’s presentation of its evidence, the record was closed and the *Application* was submitted for decision.

FINDINGS OF FACT

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

1. Respondent is a licensed retailer of cigarettes and other tobacco products.
2. Respondent is not licensed as a wholesaler of cigarettes or as a purchaser of unstamped other tobacco products.
3. On April 5, 2011, 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 Tobacco Products Act (“Tobacco Act”)¹. The identified items included other tobacco products to which Respondent did not produce invoices or equivalent documentation showing excise taxes were paid on the products.

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

5. Respondent was properly notified of the show cause hearing.

CONCLUSIONS OF LAW

WHEREFORE, premises considered, the undersigned concludes as a matter 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, § 417(C).²

2. The Tax Commission pursuant to § 403.1 of the Tobacco Act abolished the practice of purchasing and affixing stamps to tobacco products³ as payment of the excise tax 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, * * * 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.

3. “No person, dealer, * * * 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 * * * holds a valid Tobacco License”. 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).

4. Retailers of tobacco products are required to maintain copies of invoices or equivalent documentation of every transaction in which they receive or purchase tobacco products at each of their facilities for a period of three (3) years from the date of the transaction. *OAC*, 710:70-5-13(b) and (d).

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

² In general, this provision requires the Oklahoma Tax Commission to hold a hearing to determine whether the seized product should be forfeited to the State; 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.

³ “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).

5. All (untaxed) 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 Tobacco 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, § 417(A).⁴ 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).

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

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the other tobacco products confiscated from Respondent, RESPONDENT 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.”

⁴ The seizure provisions of § 417(A) do not apply “where the tax on such unstamped tobacco products does not exceed One Dollar (\$1.00).”