

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2012-06-28-01 / NON-PRECEDENTIAL  
**ID:** FD-11-041-K  
**DATE:** JUNE 28, 2012  
**DISPOSITION:** APPLICATION GRANTED  
**TAX TYPE:** FORFEITURE AND DESTRUCTION  
**APPEAL:** NO APPEAL TAKEN

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Notices of these proceedings were forwarded to Respondent, RESPONDENT, at his last known address. 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 August 24, 2011, an authorized agent of the Division conducted a cigarette and tobacco enforcement survey at Respondent’s business and confiscated cigarettes and other tobacco products. An *Application for Order Forfeiting Seized Cigarettes and Other Tobacco Products and Directing the Destruction Thereof* (“*Application*”) was filed November 16, 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* (“*Notice*”) issued November 17, 2011. The *Notice* was transmitted to Respondent’s last known address, but was returned unclaimed with the notation “moved left no address, unable to forward, return to sender”.

The show cause hearing was held as scheduled. Respondent did not appear. 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 through D were 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.

An *Order Reopening Record* was issued on January 19, 2012, directing the Division to amend the *Application* and correct the *Notice*. The *Amended Application* was filed February 2, 2012. The *Corrected Notice* scheduling the forfeiture hearing for March 27, 2012, was forwarded to Respondent’s last known address on February 3, 2012, and was returned February 8, 2012 with the notation “moved left no address, unable to forward, return to sender”.

Pursuant to the *Corrected Notice*, the forfeiture hearing was held as scheduled. Respondent did not appear. SUPERVISOR again testified with respect to the confiscation. The record was closed and the *Amended Application* was submitted for decision.

### FINDINGS OF FACT

Upon review of the file and records, including the recording of both forfeiture hearings, the exhibits received into evidence, and the *Application* and *Amended Application*, the undersigned finds:

1. At the time of the compliance visit, Respondent was licensed as a retailer of cigarettes and other tobacco products.
2. A cigarette and tobacco enforcement survey was conducted by an authorized agent of the Oklahoma Tax Commission at Respondent's business location on August 24, 2011.
3. During the compliance visit, the agent determined that Respondent was no longer operating the business. The agent further determined that the people presently operating the business were not associated with Respondent and that they had not obtained retail cigarette and other tobacco licenses in their own name, but were operating the business under Respondent's licenses. The compliance survey shows that the people operating the business did not produce invoices showing excise taxes were paid on the other tobacco products on hand. According to SUPERVISOR, the packages of cigarettes on the premises were properly stamped, but the people operating the business indicated the cigarettes were not theirs. SUPERVISOR also testified that the people operating the business indicated that they acquired the inventory of cigarettes and other tobacco products from a prior owner of the business, but they did not produce any documentation showing a transfer of the product.
4. The cigarettes and other tobacco products on hand 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. 68 O.S. 2011, § 208.

### 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. 2009, § 305(E)(2)<sup>1</sup>; 68 O.S. Supp. 2008, § 417(C)<sup>2,3</sup>.

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<sup>1</sup> Laws 2009, c. 434, § 3, eff. Jan. 1, 2010.

<sup>2</sup> Laws 2008, c. 378, § 10, emerg. eff. June 4, 2008.

<sup>3</sup> In general, these provisions require the 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.

2. The Cigarette Stamp Tax Act (“Stamp Act”)<sup>4</sup> provides that “[e]very retailer<sup>5</sup> (of cigarettes<sup>6</sup>) in this state, except Indian tribal entities or licenses of Indian tribal entities, as a condition of carrying on such business, shall secure from the Tax Commission a license.” 68 O.S. Supp. 2009, § 304(B). Retail cigarette licenses are nonassignable and nontransferable. 68 O.S. Supp. 2009, § 304(D)(1). “Any person operating as a \* \* \*, retailer, \* \* \* must at all times have a valid license which has been issued by the Tax Commission.” 68 O.S. Supp. 2009, § 304(D)(2). “No person or entity licensed pursuant to the provisions of [Section 304] shall purchase cigarettes from or sell cigarettes to a person or entity required to obtain a license unless such person or entity has obtained such license.” 68 O.S. Supp. 2009, § 304(F).

3. “All contraband cigarettes<sup>7</sup> upon which taxes are imposed by [the Stamp Act] \* \* \* which shall be 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 hereunder, \* \* \* may be seized by any authorized agent of the Tax Commission \* \* \* within the state, without process.” 68 O.S. Supp. 2009, § 305(E)(1). Section 305(E)(1) further provides that “[t]he same (contraband cigarettes and all cigarettes stamped, sold, offered for sale, or imported into this state in violation of the provisions of Section 305.1 of the Stamp Act) shall be, from the time of such seizure, forfeited to the State of Oklahoma, and a proper proceeding filed to maintain such seizure and prosecute the forfeiture as herein provided.”

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<sup>4</sup> 68 O.S. 2001, § 301 et seq., as amended.

<sup>5</sup> Defined as: “(a) a person who comes into the possession of cigarettes for the purpose of selling, or who sells them at retail, or (b) a person, not coming within the classification of wholesaler, distributor and/or jobber as herein defined, having possession of more than one thousand cigarettes”. 68 O.S. Supp. 2003 § 301(4).

<sup>6</sup> Defined as “all rolled tobacco or any substitute therefor, wrapped in paper or any substitute therefor and weighing not to exceed (3) pounds per thousand cigarettes”. 68 O.S. Supp. 2003, § 301(1).

<sup>7</sup> Defined by Article 3B of Title 68, SALE OF CIGARETTES AT TRIBALLY OWNED OF LICENSED STORES; 68 O.S. 2001, § 346 et seq., to mean “unstamped cigarettes which are required by the provisions of Sections 348 through 351 of this title or Section 301 et seq. of this title to bear stamps and which are in the possession, custody or control of any person, for the purpose of being consumed, sold, offered for sale or consumption or transported to any person in this state other than a wholesaler licensed under Section 304 of this title; provided, contraband cigarettes shall not include unstamped cigarettes sold to veterans’ hospitals, to state-operated domiciliary homes for veterans or to the United States for sale or distribution by said entities in accordance with Sections 321 through 324 of this title”. 68 O.S. Supp. 2009, § 348(7). The phrase “unstamped cigarettes” is defined to mean “packages of cigarettes which bear no evidence of the tax stamp required by state law and includes cigarettes bearing an improper tax stamp applicable to the retail establishment at which the cigarette is sold, regardless of the identity of the establishment which the cigarette has been sold, shipped, consigned or delivered.” 68 O.S. Supp. 2009, § 348(6). The phrase “stamped cigarettes” is defined to mean “packages of cigarettes which bear the proper tax stamp required by state law”. 68 O.S. Supp. 2009, § 348(8). The term “Stamp” means “the stamp or stamps by use of which:

- a. the tax levied pursuant to the provisions of Section 301 et seq. of this title is paid,
- b. the tax levied pursuant to the provisions of Section 309 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 Oklahoma Tobacco Products Act (“Tobacco Act”)<sup>8</sup> abolished the practice of purchasing and affixing stamps to tobacco products<sup>9</sup> 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.

5. “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”. 68 O.S. Supp. 2009, 403.1(2). 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. *OAC*, 710:70-5-10(1).

6. “Every retailer (of tobacco products) in this state, as a condition of carrying on such business shall secure from the Tax Commission a license.” 68 O.S. Supp. 2010, § 415(B).<sup>10</sup> Retail tobacco licenses are nonassignable and nontransferable. 68 O.S. Supp. 2010, § 415(E)(1). “Any person operating as a \* \* \*, retailer, \* \* \* must at all times have an effective unexpired license which has been issued by the Tax Commission.” 68 O.S. Supp. 2010, § 415(E)(2). “No person or entity licensed pursuant to the provisions of [Section 415] shall purchase tobacco products from or sell tobacco products to a person or entity required to obtain a license unless such person or entity has obtained such license.” 68 O.S. Supp. 2010, § 315(G).

7. 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. 68 O.S. Supp. 2005, § 420.1(B); *OAC*, 710:70-5-13(b) and (d). The invoices or documentation shall show the name and address of the distributor from whom, or the address of another facility of the same retailer from which, the tobacco products were received, the quantity of each brand style received in such transaction and the retail cigarette license number or sales tax licenses number. *Id.*

8. “All (untaxed) tobacco products upon which a tax is levied by Section 401 et seq. of [the Tobacco Act] \* \* \* 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

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<sup>8</sup> 68 O.S. 2001, § 401 et seq., as amended.

<sup>9</sup> “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).

<sup>10</sup> Laws 2010, c. 412, § 22, eff. July 1, 2010.

evading or violating the provisions of [the Tobacco Act], or with intent to avoid payment of the tax imposed thereunder, may be seized by any authorized agent of the Oklahoma Tax Commission \* \* \* within the state.” 68 O.S. Supp. 2008, § 417(A).<sup>11</sup> Section 417(A) further provides: “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 [untaxed] tobacco products does not exceed One Dollar (\$1.00).”

9. The forfeiture provisions of the Tobacco Act 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).

10. The evidence shows the cigarettes and other tobacco products were properly seized or confiscated as the people operating the business at the time of the compliance check did not have valid cigarette and tobacco products licenses issued to them by the Tax Commission. The evidence further shows that the other tobacco products should be forfeited to the State of Oklahoma for destruction since neither Respondent nor the people operating the business have produced invoices or other equivalent documentation showing excise taxes were paid on the products. The evidence, however, does not show the confiscated cigarettes are subject to forfeiture and destruction.

### DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it is ORDERED that the confiscated other tobacco products be forfeited to the State of Oklahoma and destroyed.

### 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>11</sup> Laws 2008, c. 378, § 10, emerg. eff. June 4, 2008.