

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2014-10-09-23 / NON-PRECEDENTIAL
ID: FD-14-001-H
DATE: OCTOBER 9, 2013
DISPOSITION: DENIED
TAX TYPE: TOBACCO
APPEAL: NO APPEAL TAKEN

ORDER

COMPANY d/b/a CONVENIENCE STORE (“Respondent”) appears not.¹ The Compliance Division (“Division”), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On July 17, 2014, the Division filed with the Court Clerk (“Clerk”),² an *Application for Order Forfeiting Seized Cigarette and Other Tobacco Products and Directing the Destruction Thereof* (“*Application*”), with Exhibits A through D, attached thereto. On July 21, 2014, the *Notice to Show Cause Why the Application for Forfeiture of Seized Cigarette and Other Tobacco Products and Destruction Thereof Should Not Be Ordered* (“*Notice*”) was sent to the Respondent by certified mail return receipt requested (ID NUMBER) at the Respondent’s last-known address,³ along with a copy of the Division’s *Application*, advising that a show cause hearing had been set for August 20, 2014, at 9:30 a.m., at which time the Respondent could appear and show cause why the Division’s *Application* should not be granted. The *Notice* also advised that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number FD-14-001-H. On July 28, 2014, the Division filed the “*Return of Service*” with the Clerk.⁴

¹ The ALJ is taking judicial notice of the Tax Commission’s website at www.okstate.state.ok.us to complete the factual details of this matter. OKLA. ADMIN. CODE § 710:1-5-36 (July 11, 2013). The Respondent is doing business as CONVENIENCE STORE, not INCORRECT NAME. The ALJ changed the style of this matter accordingly. See Note 5, *infra*.

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

³ OKLA. STAT. ANN. tit. 68, § 208 (West 2014). The Division mailed the *Notice* to the Respondent at BUSINESS ADDRESS.

⁴ See Notes 15 and 29, *infra*. On July 23, 2014, “SIGNEE” signed the Return Receipt. On the July 17, 2013, Cigarette and Tobacco Enforcement Survey, the Respondent’s contact is listed and signed by SIGNEE.

On August 20, 2014, at approximately 9:30 a.m., the ALJ held the Show Cause Hearing as scheduled. The Respondent failed to appear at the hearing. The ALJ noted for the record that the Respondent had not contacted the Division or the Clerk concerning the hearing. The Division called one (1) witness, MANAGER, Unit Manager (“Unit Manager”), Strategic Response Team, 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 identified and offered Exhibits A through E, which the ALJ admitted into evidence. Upon conclusion of the hearing, the ALJ closed the record and this case submitted for decision on August 20, 2014.

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*, and the "*Return of Service*," the undersigned finds:

1. Respondent operates a convenience store located at BUSINESS ADDRESS ("Business Location").⁵

2. Respondent is not licensed by the State of Oklahoma as a wholesaler of cigarettes⁶ or as a wholesaler⁷ of unstamped tobacco products.⁸ Respondent holds License SLP 1015518602 (Cigarette Retail) and License STS 1015518605 (Other Tobacco Products) issued by the State of Oklahoma as a retailer⁹ of Cigarettes and Other Tobacco Products ("OTP") for the Business Location.¹⁰

3. On July 17, 2013, the Division's representative¹¹ conducted a Compliance Check at the Respondent's Business Location. During the Compliance Check, the Division's representative identified items offered for sale by the Respondent, which were not in compliance ("Non-Compliant Items") with the Tobacco Products Tax Act ("Tobacco Act"),¹² and the Master Settlement Agreement Complementary Act ("MSAC Act").¹³ The Respondent could not produce invoices for the purchase of the OTP,¹⁴ which reflected that the Respondent had paid OTP tax.

4. The Division's representative prepared a Cigarette and Tobacco Enforcement Survey ("Enforcement Survey") and Confiscation Inventory List, which is signed on

⁵ Division's Exhibits A and B.

⁶ OKLA. STAT. ANN. tit. 304(A) (West 2014).

⁷ OKLA. STAT. ANN. tit. 68, § 401(c) (West 2014).

⁸ *Id.*

⁹ OKLA. STAT. ANN. tit. 68, § 401(d) (West 2014).

¹⁰ *Id.*

¹¹ The Division's representative was Field Agent, FIELD AGENT.

¹² OKLA. STAT. ANN. tit. 68, § 401 *et seq.* (West 2014).

¹³ OKLA. STAT. ANN. tit. 68, § 360.1 *et seq.* (West 2014).

¹⁴ OKLA. STAT. ANN. tit. 68, § 401(9) (West 2014).

behalf of the Tax Commission by the Division's representative and by the Respondent or on behalf of the Respondent, by and through a representative.¹⁵ The Tax Commission, by and through its representative, seized the Non-Compliant Items. The "usual and ordinary retail price"¹⁶ of the OTP seized was \$622.98.¹⁷

5. The Division's representative filed the Enforcement Survey and Confiscation Inventory List with the Division. The Division's representative labeled and stored the seized OTP in the "Evidence Room" of the Tax Commission's Tulsa office.¹⁸

2. 6. On September 4, 2013, the Division's representative¹⁹ conducted a Compliance Check at the Respondent's Business Location. During the Compliance Check, the Division's representative identified items offered for sale by the Respondent, which were not in compliance ("Non-Compliant Items") with the Oklahoma Cigarette Stamp Act ("Cigarette Act"),²⁰ the Tobacco Products Tax Act ("Tobacco Act"),²¹ and the Master Settlement Agreement Complementary Act ("MSAC Act").²² The Respondent offered for sale "Unstamped" Cigarettes, and the Respondent could not produce invoices for the purchase of the OTP, which reflected that the Respondent had paid OTP tax.

¹⁵ *Id.*

¹⁶ OKLA. STAT. ANN. tit. 68, § 360.7(C)(3) (West 2014).

¹⁷ See Note 15, *supra*. See also Division's Exhibit C. The exhibits consist of an Enforcement Survey (one (1) page), with attachments thereto. The Confiscation Inventory List (two (2) pages). Also attached are two (2) pages of the OTP returned to the Respondent.

¹⁸ UNIT MANAGER, a Unit Manager, Compliance Division has the only key to the "Evidence Room." The OTP was eventually transferred and is currently in the Tax Commission Oklahoma City warehouse. The seized OTP 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 Unit Manager's testimony in previous FD cases to complete the factual details and background of this matter. See Note 1, *supra*.

¹⁹ The Division's representative was Unit Manager.

²⁰ OKLA. STAT. ANN. tit. 68, § 301 *et seq.* (West 2014).

²¹ See Note 12, *supra*.

²² See Note 13, *supra*.

7. The Division's representative prepared a Cigarette and Tobacco Enforcement Survey ("Enforcement Survey") and Confiscation Inventory List, which is signed on behalf of the Tax Commission by the Division's representative and by the Respondent or on behalf of the Respondent, by and through a representative. The Tax Commission, by and through its representative, seized the Non-Compliant Items. The "usual and ordinary retail price" of the "Unstamped" Cigarettes (\$88.11) and OTP (\$742.21) seized were \$830.32.²³
8. The Division's representative filed the Enforcement Survey and Confiscation Inventory List with the Division. The Division's representative labeled and stored the seized Cigarettes and OTP in Evidence Room of the Tax Commission's Tulsa office.²⁴
9. On August 22, 2013 and October 4, 2013, the Respondent produced invoices for OTP (\$327.61 plus \$667.68 equals \$995.29), which Unit Manager returned to the Respondent.²⁵
10. On July 17, 2014, the Division filed its *Application*, with Exhibits A through D, attached thereto.²⁶
11. On July 21, 2014, the *Notice* was sent to the Respondent by certified mail return receipt requested (ID NUMBER) to the Business Location.²⁷
12. On July 28, 2014, the Division filed the "Return of Service" signed by the Respondent or on behalf of the Respondent by a representative on July 23, 2014.²⁸

CONCLUSIONS OF LAW

1. The Legislature vested the Oklahoma Tax Commission with jurisdiction over the parties and subject matter of this proceeding.²⁹

²³ See Division's Exhibits B and D.

²⁴ See Note 19, *supra*.

²⁵ See Notes 15 and 24, *supra*.

²⁶ See *Application* filed herein.

²⁷ See *Notice* filed herein.

²⁸ Division's Exhibit E. The Return Receipt is signed by SIGNEE, as Agent.

²⁹ OKLA. STAT. ANN. tit. 68, § 305(E)(2) (West 2014):

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 2014):

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 2014):

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 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

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.³⁰

3. "Stamped cigarettes" means packages of cigarettes, which bear a tax stamp required by state law.³¹ The Cigarettes seized by the Division's representatives during the Compliance Check were "Unstamped."³²

4. There shall be levied, assessed, collected, and paid in respect to the articles containing tobacco enumerated in the Tobacco Act, a tax.³³

5. At the time of the Compliance Check, the Respondent failed to produce any invoices to prove the tax imposed by the Tobacco Act had been paid on the OTP seized by the Division.³⁴

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.

³⁰ OKLA. STAT. tit. 68, § 305(B) (West 2014).

³¹ OKLA. STAT. ANN. tit. 68, § 348(8) (West 2014).

³² *See* Note 21, *supra*.

³³ *See* OKLA. STAT. ANN. tit. 68, § 402 *et seq.* (West 2014) and OKLA. STAT. tit. 68, § 402-3 *et seq.* (West 2014). *See also* OKLA. ADMIN. CODE § 710:70-5-12 (June 25, 2009).

6. Any Cigarettes and OTP 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 and OTP shall be subject to seizure and forfeiture and all the Cigarettes and OTP so seized and forfeited shall be destroyed and not resold.³⁵

7. On July 23, 2014, the *Notice* along with a copy of the Division's *Application* was served by certified mail return receipt requested (ID NUMBER), which is the last-known 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 August 20, 2014, at 9:30 a.m.³⁶

8. The Division's representatives properly prepared and filed an Enforcement Survey and Confiscation Inventory Lists, which reflects the place of the seizures as the Respondent's Business Location.³⁷ The Enforcement Survey and Confiscation Inventory Lists properly appraised the Cigarettes and OTP (at the usual and ordinary retail price) for the seized Cigarettes (\$88.11) and OTP (\$1,365.19) totaling \$1,453.30 less the OTP returned (\$995.29) equals \$458.01.³⁸

9. The Enforcement Survey and Confiscation Inventory Lists properly describe the seized Cigarettes and OTP as being in violation of the Cigarette Act,³⁹ the Tobacco Act,⁴⁰ and MSAC Act.⁴¹

10. The seized Cigarettes include "Unstamped" Cigarettes, which are in violation of the Cigarette Act⁴² and the MSAC Act.⁴³

³⁴ Testimony of Unit Manager.

³⁵ OKLA. STAT. ANN. tit. 68, § 360.7(B) (West 2014).

³⁶ See Notes 15-18 and 21-24, *supra*.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Note 21, *supra*.

⁴⁰ See Note 12, *supra*.

⁴¹ See Note 13, *supra*.

⁴² See Note 21, *supra*.

⁴³ See Note 13, *supra*.

11. During the Compliance Check, the Respondent did not have proof that the tax on the seized OTP had been paid in accordance with the Tobacco Act.⁴⁴

12. In all proceedings before the Tax Commission, the taxpayer has the burden of proof, unless otherwise provided by law.⁴⁵

13. In this matter, the Division filed the *Application* seeking the forfeiture and destruction of the seized Cigarettes and OTP, shifting the burden of proof to the Division.⁴⁶

DISCUSSION

Unit Manager testified that during the Compliance Check, the Division's representative discovered "Unstamped" Cigarettes for sale, but the Respondent is not licensed by the State of Oklahoma as a wholesaler of "Unstamped" Cigarettes.⁴⁷ Initially, the Respondent could not produce any invoices reflecting the tobacco tax had been paid for the OTP seized and that the Respondent is not licensed by the State of Oklahoma as a wholesaler.⁴⁸

Pursuant to Tax Commission Rule 710:70-5-11(b),⁴⁹ the intent to evade or avoid payment of tobacco products taxes may be presumed upon:

...

(2) 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. The burden of proof shall be on the person, taxpayer or reporter to prove otherwise.

It is the Division's policy if a wholesaler is the holder of a valid Oklahoma Tobacco License that the applicable tobacco taxes are presumed to have been paid. The Division verifies

⁴⁴ See Note 12, *supra*.

⁴⁵ See OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999). See also OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999).

⁴⁶ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

⁴⁷ See Note 24, *supra*.

⁴⁸ *Id.*

⁴⁹ OKLA. ADMIN. CODE § 710:70-5-11(b).

that wholesalers and/or retailers who have valid Oklahoma Tobacco Licenses are properly filing reports and remitting the applicable tobacco tax.⁵⁰

Unlicensed wholesalers and/or retailers like the Respondent do not file monthly reports or remit tobacco tax, so the presumption contained in Tax Commission Rule 710:70-5-11(b)⁵¹ arises and the burden of proof is on the Respondent to prove the tobacco tax has been paid.

The intent to evade or avoid payment of tobacco products taxes by the Respondent, who does not hold valid Oklahoma Tobacco Licenses (wholesaler), may be presumed upon the OTP. The burden of proof shifted to the Respondent to prove otherwise. The Respondent has failed to meet his burden of proof that the applicable tobacco tax has been paid on the remaining OTP, which were confiscated by the Division during the Compliance Check.

The Division has met its burden of proof that the Cigarettes and the remaining OTP were offered for sale or possessed for sale in this state in violation of the Cigarette Act,⁵² the Tobacco Act,⁵³ and the MSAC Act,⁵⁴ and should be deemed contraband pursuant to the MSAC Act. The Division properly seized the Cigarettes and OTP during the Compliance Checks and should be forfeited to the State of Oklahoma and destroyed for \$458.01.⁵⁵

DISPOSITION

The OKLAHOMA TAX COMMISSION ORDERS granting the Division's Application based upon the facts and circumstances of this case 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.

⁵⁰ See Note 1, *supra*.

⁵¹ See Note 50, *supra*.

⁵² See Note 21, *supra*.

⁵³ See Note 12, *supra*.

⁵⁴ See Note 13, *supra*.

⁵⁵ See Note 39, *supra*.

STAT. ANN. tit.68, § 221(G) (West Supp. 2014) 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.”