

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2015-06-23-04 / NON-PRECEDENTIAL
ID: FD-15-020-K
DATE: JUNE 23, 2015
DISPOSITION: APPLICATION GRANTED
TAX TYPE: FORFEITURE AND DESTRUCTION, TOBACCO
APPEAL: NONE TAKEN

ORDER

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 29th day of May, 2015, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED JUN. 23, 2015

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

NOW on this ____ day of May, 2015, the above styled and numbered cause comes on for decision pursuant to assignment regularly made by the Oklahoma Tax Commission to ADMINISTRATIVE LAW JUDGE, Administrative Law Judge. Notice of the forfeiture proceedings was served on the Respondent, RESPONDENT. 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 and INTERN, Licensed Legal Intern, General Counsel’s Office, Oklahoma Tax Commission.

STATEMENT OF THE CASE

During a cigarette and tobacco enforcement survey conducted at Respondent’s retail location on July 1, 2014, an authorized agent of the Oklahoma Tax Commission (“Commission”) seized certain cigarettes and other tobacco products, listed and appraised the same and turned the same over to the Commission. An *Application for Order Forfeiting Seized Cigarettes and Other Tobacco Products and Directing the Destruction Thereof* (“Application”) was filed May 5, 2015.

A show cause hearing was scheduled for May 20, 2015, by *Notice to Show Cause Why the Application for Forfeiture of Cigarettes and Other Tobacco Products and Directing Destruction Thereof should not be Ordered* (“Notice”). The Notice was served on May 5, 2015.

The hearing was held as scheduled. Respondent did not appear at the hearing or respond to the Notice. MANAGER, Unit Manager, Strategic Response Team 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 and B were identified, offered and admitted into evidence. Upon conclusion of the hearing, 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 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 July 1, 2014, an authorized agent of the Commission 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 Cigarette Stamp Act ("Stamp Act")¹ and the 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 the applicable excise taxes were paid on the products.
4. The noncompliant cigarettes and tobacco products were seized, and a *Cigarette and Tobacco Enforcement Survey* was prepared and executed showing the name of the person making the seizure, the location of the seizure, and the person from whom the items were seized. *Confiscation Inventory Lists* were also prepared and executed showing the items and an appraisalment thereof based on the usual and ordinary retail price or value of the articles.
5. On July 16, 2014, a portion of the confiscated other tobacco products was returned to Respondent upon Respondent's submission of purchase invoices showing the product was purchased from licensed tobacco wholesalers.
6. The remaining confiscated cigarettes and tobacco products are currently held in the Commission's warehouse.

CONCLUSIONS OF LAW

1. Jurisdiction of the parties and subject matter of this proceeding is vested in the Oklahoma Tax Commission. 68 O.S. 2011, §§ 305(E)(2) and 417(C).³

¹ 68 O.S. 2011, § 301 et seq., as amended.

² 68 O.S. 2011, § 401 et seq., as amended.

³ In general, these provisions require the Commission to hold a hearing to determine whether the seized product should be forfeited to the State of

2. It is unlawful for any person to sell or consume cigarettes⁴ 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 stamp⁵ evidencing payment of the tax imposed by the Stamp Act. 68 O.S. 2011, § 305(C).

3. Cigarette packages which bear no evidence of the tax stamp required by state law or bear stamps not in the proper denomination and amount applicable to the retail establishment at which the cigarettes are sold, regardless of identity of the establishment which the cigarette has been sold, shipped, consigned or delivered are “unstamped cigarettes”. 68 O.S. 2011, § 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. 2011, § 348(8).

4. “Contraband cigarettes” are unstamped cigarettes required to bear stamps, 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 licensed wholesaler. 68 O.S. 2011, § 348(7).

5. The 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,

Oklahoma; giving the owner thereof at least ten (10) days notice, and if after hearing it is determined the seized cigarettes and tobacco products 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. 2011, § 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. 2011, § 301(8).

⁶ “Tobacco products” is defined by the Tobacco Act to “mean any cigars,

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 or retailer 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*, amended at *30 Ok Reg 1473*, eff. 7-1-13. No other person, 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*.

6. Every retailer or consumer purchasing tobacco products subject to tax in drop shipments⁷ upon which the tobacco excise tax has not been paid shall report those purchases to the Commission on monthly tobacco products tax reports as required of licensed manufacturers, wholesalers, retailers or consumers. *OAC 710:70-5-8(a)(1)*.

7. “Any authorized agent of the Commission * * * may seize all tobacco products subject to the tobacco products excise tax, found in the possession, custody or control of any person required to file monthly reports or to pay said taxes, if:

- (1) The person has failed to timely file a required monthly report; or
- (2) The person has failed to timely pay said taxes when due; or
- (3) The Commission has determined that the person is attempting to evade or avoid payment of the tobacco excise tax; or
- (4) The Commission has determined the person has violated any of the provisions of the Tobacco Products Tax Act or the Rules of the Oklahoma Tax Commission.”

OAC 710:70-5-11(a).

8. Intent to evade or avoid payment of tobacco products taxes may be presumed upon:

(1) failure to timely file reports or to timely pay taxes; or (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. *OAC 710:70-511(b)*.

9. Retailers of tobacco products shall keep copies of invoices or equivalent documentation for every transaction in which the retailer receives or purchases tobacco products for

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 Defined to mean and include “any delivery of cigars or tobacco products received by any person within the state when payment for such cigars or tobacco products is made to the shipper or seller by or through a person other than the consignee.” 68 O.S. 2011, § 401(j).

a period of three (3) years from the date of the transaction. *OAC 710:70-5-13(b) and (d)*.

10. All contraband cigarettes and (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 Acts, or with intent to avoid payment of the tax may be seized. 68 O.S. 2011, §§ 305(E)(1) and 417(A)⁸.

11. The uncontroverted evidence shows the confiscated cigarettes and other tobacco products which are remaining in the custody and control of the Commission were properly seized and should be forfeited to the State of Oklahoma for destruction.

⁸ The seizure provisions of § 417(A) do not apply “where the tax on such unstamped tobacco products does not exceed One Dollar (\$1.00).”

RECOMMENDATIONS

Based on the above and foregoing findings of fact and conclusions of law, it is recommended that the cigarettes and other tobacco products confiscated from Respondent, RESPONDENT which remain in the custody and control of the Commission be forfeited 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. 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.”