

CT 17-01

Type of Tax: Cigarette and Cigarette Use Tax

Issue: Possession of Unstamped Cigarettes

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF
REVENUE
OF THE STATE OF ILLINOIS**

v.

**JOHN DOE,
Taxpayer**

**No. XXXX-XXXX
CIGARETTE USE TAX ACT
SEIZURE and PENALTY**

**Ted Sherrod
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Daniel A. Edelstein, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Mable Taylor, Esq., Law Office of Table Maylor for John Doe.

Synopsis:

On December 21, 2014, the Illinois State Police seized 1,110 packages of cigarettes from John Doe (“Taxpayer”). The packages did not have Illinois tax stamps affixed to them as mandated by the Cigarette Use Tax Act (“Act”) (35 ILCS 135/1 *et seq.*). The Illinois Department of Revenue (“Department”) seeks to impose a civil penalty pursuant to the Act.

An evidentiary hearing was held on October 14, 2014 during which the Taxpayer admitted that he had possessed cigarettes that were not affixed with Illinois tax stamps. He argued, however, that the civil penalty should be dismissed because the seizure of cigarettes from the Taxpayer was unconstitutional. For the following reasons, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. On January 5, 2015, the Department’s Criminal Investigation Division issued an Investigative Summary Report averring that, on December 21, 2014, John Doe (“Taxpayer”) was in possession of 1,110 packages of Missouri stamped cigarettes in Illinois. Department Group Exhibit (“Ex.”) 3 marked as “Exhibit 1” of this group exhibit. The Department’s Investigative Summary Report further avers that these packages of cigarettes did not have Illinois tax stamps affixed to them and, therefore, that the possession of these improperly stamped cigarettes constituted a violation of the Act. *Id.*
2. An evidentiary hearing to determine whether the Taxpayer unlawfully possessed cigarettes as averred in the Department’s Investigative Summary Report was held on October 14, 2016. During this hearing, the Taxpayer admitted that on December 21, 2014 he possessed “more than one thousand” packages of cigarettes in Illinois that did not have Illinois tax stamps as required by Illinois law. Tr. pp. 16-18.
3. The Taxpayer is a resident of Illinois. Department Ex. 3.
4. The Taxpayer is not a licensed distributor or transporter of cigarettes. Tr. pp. 18,

45.

5. On June 3, 2015, the Taxpayer entered a plea of guilty to the criminal offense of unlawful possession of cigarettes with respect to the cigarettes the Department avers the Taxpayer unlawfully possessed in its Investigative Summary Report.

Tr. pp. 62, 63; Department Ex. 1. The criminal offense is a class 3 felony.

Department Ex. 1.

6. The Taxpayer was sentenced to 30 days in prison for the criminal offense. Tr. pp. 62, 63; Department Ex. 1.
7. On June 21, 2016, the Taxpayer filed a *Motion in Limine* seeking to bar from the record in this case physical evidence the Taxpayer alleged was unlawfully seized in violation of the Taxpayer's rights under the 4th Amendment of the United States Constitution. This motion was granted on July 20, 2016.

CONCLUSIONS OF LAW:

Section 2 of the Cigarette Use Tax Act ("Act") imposes a tax upon the privilege of using cigarettes in Illinois. 35 ILCS 135/2. "Use" means the exercise by any person of any right or power over cigarettes incident to the ownership or possession thereof. 35 ILCS 135/1. Payment of the tax is evidenced by an Illinois tax stamp affixed to each package. 35 ILCS 135/3. Only distributors licensed under the Act and transporters (as defined in section 9c of Cigarette Tax Act) may possess original packages of cigarettes to which Illinois tax stamps have not been affixed. 35 ILCS 135/25a. The Department alleges that the Taxpayer has engaged in conduct that violates the prohibition against persons other than licensed distributors or transporters possessing unstamped cigarettes and seeks to impose a penalty for this violation in the amount of \$XX.XXX.

Pursuant to the pre-trial order entered in this case, the parties have agreed that the sole issue to be decided in this matter is “whether (Taxpayer) was properly assessed civil penalties in the amount of \$XX,XXX based on 1,110 packages of Missouri stamped cigarettes [i.e. cigarettes not having Illinois tax stamps] seized ...December 21, 2014.”

The Department alleges in an Investigative Summary Report issued January 5, 2015 pertaining to the Taxpayer that on December 21, 2014, the Taxpayer was found to be in possession of 1,110 packages of cigarettes lacking Illinois tax stamps (hereinafter “unstamped cigarettes”). Sections 25a and 25b of the Act contain civil penalty provisions, which provide as follows:

Sec. 25a. Possession of more than 100 original packages of contraband cigarettes; penalty. With the exception of licensed distributors or transporters, as defined in Section 9c of the Cigarette Tax Act, possessing unstamped original packages of cigarettes, and licensed distributors possessing original packages of cigarettes that bear a tax stamp of another state or taxing jurisdiction, anyone possessing more than 100 packages of contraband cigarettes contained in original packages is liable to pay, to the Department for deposit into the Tax Compliance and Administration Fund, a penalty of \$25 for each such package of cigarettes in excess of 100 packages, unless reasonable cause can be established by the person upon whom the penalty is imposed. Reasonable cause shall be determined in each situation in accordance with rules adopted by the Department. The provisions of the Uniform Penalty and Interest Act do not apply to this Section.

Sec. 25b. Possession of not less than 10 and not more than 100 original packages not tax stamped or improperly tax stamped; penalty. With the exception of licensed distributors and transporters, as defined in Section 9c of the Cigarette Tax Act, possessing unstamped packages of cigarettes, and licensed distributors possessing original packages of cigarettes that bear a tax stamp of another state or taxing jurisdiction, anyone possessing not less than 10 and not more than 100 packages of contraband cigarettes contained in original packages is liable to pay to the Department, for deposit into the Tax Compliance and Administration Fund, a penalty of \$20 for each such package of cigarettes, unless reasonable cause can be established by the person upon whom the penalty is imposed. Reasonable cause shall be determined in each situation in accordance with rules adopted by the

Department. Any person who purchases and possesses a total of 9 or fewer original packages of unstamped cigarettes per month is exempt from the penalties of this Section. The provisions of the Uniform Penalty and Interest Act do not apply to this Section.

Under section 25b, the penalty for the first 100 packs is \$1,820.¹ Under section 25a, the penalty for the remaining 1,110 packs is \$25,250.² The total penalty amount for possession of 1,110 packs of unstamped cigarettes is \$27,070. The Department alleges that a penalty approximating the foregoing amount is due based upon the Taxpayer's unlawful possession of cigarettes.

On July 20, 2016, the Taxpayer's *Motion in Limine* seeking to suppress physical evidence obtained from the Taxpayer during a traffic stop on December 21, 2014 in violation of the Taxpayer's Fourth Amendment rights under the United States Constitution was granted. The Taxpayer argues that, as a result of the suppression of evidence illegally seized by the Department, which could not be introduced in support of the Department's case, the record contains insufficient evidence to establish that the Taxpayer possessed unstamped cigarettes in violation of the Act as the Department alleges.

During the hearing, the Administrative Law Judge disallowed all evidence obtained as a result of the illegal confiscation of cigarettes engaged in by the Department in accordance with the Taxpayer's *Motion in Limine*. However, during testimony, the

¹ There is no penalty for the first 9 packs. The penalty for the remaining 91 packs is \$20 each for a total penalty of \$1,820 for the first 100 packs.

² The penalty for the 1,010 packs is \$25 each for a total of \$25,250.

Taxpayer freely admitted to the possession of unstamped cigarettes on December 21, 2014 in the approximate amount the Department alleges. Specifically, the Taxpayer testified as follows:

Q. ... On December 21st, 2014, isn't it true that you possessed more than 1,000 packages of Missouri-stamped cigarettes? A. Yes.

Q. Did you possess them in Illinois?

A. Yes.

Q. And did you ever apply for a distributor's license or a transporter's permit with the Department of Revenue?

A. No. ...

Tr. pp. 17, 18.

The foregoing testimony constituted an admission of possession and was not barred from the record by the Administrative Law Judge's order granting the *Motion in Limine* which only barred the cigarettes illegally seized by the Department and testimony related to the Department's unlawful search and seizure.

In a criminal proceeding, the Taxpayer could have refused to answer questions concerning his unlawful possession of cigarettes by asserting his right under the U.S.

Constitution Fifth Amendment's bar against compelled self-incriminating testimony.

However, section 135/19 of the Act, 35 **ILCS** 135/19 provides as follows:

§19. No person shall be excused from testifying or from producing any books, papers, records, documents or memoranda in any investigation or upon any hearing, when ordered to do so by the Department or any officer or employee thereof, upon the ground that the testimony or evidence, documentary or otherwise, may tend to incriminate him or subject him to a criminal penalty[.]

35 **ILCS** 135/19

Pursuant to the foregoing, the Taxpayer could not have asserted the Fifth Amendment as a bar to the testimony concerning his possession of contraband cigarettes noted above.

The Taxpayer's admission of possession comports with other evidence contained in the record. Specifically, the record includes a plea agreement indicating that the Taxpayer pled guilty to possession of unstamped cigarettes as alleged by the Department, and that a sentence of 30 days confinement was imposed for this offense. The offense to which the Taxpayer pled guilty is a class 3 felony. 35 **ILCS** 130/24. The nature of the felony charge indicates that the Taxpayer illegally possessed no less than 1001 packages of contraband cigarettes (*id*), which is consistent with the Department's charge that the Taxpayer was liable for a penalty for possession of 1,110 packages of cigarettes.³

Section 135/8 of the Act, 35 **ILCS** 135/8 provides as follows:

Whenever any original package of cigarettes is found in the place of business or in the possession of any person who is not a licensed distributor under this Act without proper stamps affixed thereto or an authorized substitute therefor imprinted thereon, underneath the sealed transparent wrapper of such original package, as required by this Act, the prima facie presumption shall arise that such original package of cigarettes is kept therein or is held by such person in violation of the provisions of this Act.

Section 135/8 establishes a presumption that any person found to be in possession of unstamped cigarettes possesses them in violation of the Act. I find that the evidence summarized above is not proscribed by the ruling in this case granting the Taxpayer's *Motion in Limine*, and is sufficient to establish that the Taxpayer was found to be in possession of 1,110 packages of cigarettes on December 21, 2014 as alleged by the Department. As a consequence, the evidence of record is sufficient to give rise to the presumption indicated at section 135/8 that the Taxpayer's possession of these cigarettes

³ Section 130/24 of the Cigarette Tax Act, 35 **ILCS** 130/24 states as follows: "(d) Possession or sale of more than 1,000 packages of contraband cigarettes [...] With the exception of licensed distributors, licensed secondary distributors, or licensed transporters, as defined in Section 9c of this Act, any person who has in their possession or sells more than 1,000 packages of contraband cigarettes is guilty of a Class 3 felony."

violated section 135/25a of the Act.

Once the presumption of a violation of the Act is established, the burden of proof shifts to the Taxpayer to show why the penalty prescribed by section 135/25a should not apply. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1st Dist. 1988). Since section 135/25a provides for the abatement of penalties for “reasonable cause”, The Taxpayer could carry this burden by showing mitigating factors giving rise to “reasonable cause” excusing the Taxpayer’s violation. In the instant case, the Taxpayer presented no such evidence of “reasonable cause” that would rebut the presumption of a violation of the Act. The Taxpayer’s sole rebuttal argument is that no inference of guilt for possession can be drawn from the Taxpayer’s plea agreement because the Taxpayer lacked sufficient familiarity with the legal process to understand what he was pleading to or what the consequences of this plea agreement would be. Tr. pp. 20-22, 74-76. I find this argument insufficient to rebut the Department’s presumption of liability. Even if the plea agreement were ignored, the record would still contain sufficient evidence of the Taxpayer’s illegal possession of contraband cigarettes as a result of the Taxpayer’s admission that he did indeed illegally possess cigarettes as alleged by the Department.

In sum, the Department, by showing that the Taxpayer knowingly possessed unstamped cigarettes presented sufficient evidence to create a presumption that the Taxpayer violated the Act as a consequence of section 135/8 of the Act. The evidence further shows that the Taxpayer presented insufficient evidence to rebut the presumption that the Department correctly assessed penalties against the Taxpayer as a result of this unlawful possession.

RECOMMENDATION

Section 25 of the Cigarette Use Tax Act states that if it is determined after hearing that original packages of cigarettes have been seized and that at the time of seizure these packages were not tax stamped, then an order must be entered declaring the original packages confiscated and forfeited to the State. 35 ILCS 135/25. The Taxpayer in the present case did not dispute the fact that the packages did not have Illinois tax stamps. Therefore it must be ordered that the packages of cigarettes seized be forfeited to the State. Moreover, for the reasons enumerated above, it is recommended that the penalties assessed the Taxpayer in the instant case be upheld.

A handwritten signature in black ink that reads "Ted Sherrod". The signature is written in a cursive style and is positioned above a horizontal line.

Ted Sherrod
Administrative Law Judge

Enter: February 6, 2017