

CT 18-03

Tax Type: Cigarette and Cigarette Use Tax

Tax Issue: Possession of Unstamped Cigarettes

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

THE DEPARTMENT OF REVENUE)	Docket No.	XXXX-XXXX
OF THE STATE OF ILLINOIS)	IBT No.	XXXX-XXXX
v.)		
ABC, INC.,)	John E. White	
Respondent)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Daniel Edelstein, Special Assistant Attorney General, appeared for the Illinois Department of Revenue; JOE SMITH, appeared for ABC, INC.

Synopsis: This matter arose after agents of the Illinois Department of Revenue's (Department) Criminal Investigations Division (CID) conducted an inspection of the retail store operated by ABC, INC. (Respondent), and seized XXX packages of little cigars which did not bear tax stamps as required by the Tobacco Products Tax Act (TPTA). The Department thereafter notified Respondent that a hearing would be held to determine whether the seized little cigars were subject to forfeiture, and whether Respondent was liable for civil penalties, pursuant to the TPTA.

The hearing was held at the Department's Office of Administrative Hearings in Chicago. I have considered the evidence presented at hearing, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the Director

declare the seized little cigars to be forfeit to the State, and that penalties in the amount of \$X,XXX.XX be assessed against Respondent.

Findings of Fact:

1. On MONTH DATE, YEAR, agent Lightle of the Department's CID conducted an inspection of Respondent's retail store, where he discovered and seized XXX packages of little cigars which did not have Illinois tax stamps affixed to them. Department Ex. 1 (copy of Lightle's summary inspection report), p. 2; Hearing Transcript (Tr.), pp. 7 (Lightle), 12-13 (SMITH).
2. At the time of the inspection, MARY SMITH, one of its two owners, was present at Respondent's store. Department Ex. 1, p. 2.
3. During the inspection, Lightle interviewed Ms. SMITH regarding the seized little cigars. Department Ex. 1, p. 2.
4. In his report, Lightle wrote that, during his interview with Ms. SMITH, she told him that she and her husband were the registered owners of Respondent. Department Ex. 1, p. 2. She said she was not sure exactly when her husband purchased the little cigars, but that it was likely years ago. *Id.* She also told him that she was not aware of any recent change in Illinois law regarding how little cigars were required to be stamped and marked. *Id.*
5. On MONTH DATE, YEAR, Lightle interviewed JOE SMITH, regarding the little cigars seized at Respondent's store. Department Ex. 1, p. 3.

6. In his report, Lightle wrote that, during that interview, Mr. SMITH told Lightle that he and his wife were the registered owners of Respondent. Department Ex. 1, p. 3. He said he was not aware of any recent change in Illinois law regarding how little cigars were required to be stamped and marked. *Id.* He said he believed he bought the little cigars two years ago, from CITY BUSINESS (CITY). He told Lightle his customers do not often buy little cigars, and the last time the store sold a carton of little cigars was about a year ago. *Id.* Finally, Mr. SMITH told Lightle that he did not recall anyone from CITY informing him of any changes regarding the stamping or marking of little cigars. *Id.*
7. Lightle requested information regarding Respondent from the Illinois Secretary of State and from the Department's Taxpayer Records Section. Department Ex. 1, p. 3. Based on these respective requests, Lightle determined that Respondent was properly registered and in good standing with the Secretary of State, and that it was not licensed by the Department as a distributor or transporter of cigarettes. Department Ex. 1, pp. 3-4.
8. At hearing, Mr. SMITH offered three receipts reflecting, respectively, Respondent's purchases of property for resale from CITY, on MONTH DATE, YEAR, and from MUNICIPAL BUSINESS (MUNICIPAL), on MONTH DATE, YEAR and on MONTH DATE, YEAR. Taxpayer Exs. 1-3.
9. Each of those receipts reflects Respondent's purchase of AAA tobacco products. Taxpayer Exs. 1-3. On the bottom of the receipt from CITY, the retailer included the statement, "IL taxes paid on all tobacco purchases[.]" Taxpayer Ex. 1.

10. Respondent offered no evidence that the little cigars Lightle seized on MONTH DATE, YEAR, were the little cigars Respondent purchased from CITY on MONTH DATE, YEAR.

Conclusions of Law:

The first issue is whether the little cigars seized from Respondent's business should be declared forfeit, and made subject to disposal by the Department. 35 ILCS 143/10-45; 35 ILCS 143/10-58; 35 ILCS 130/18-18c. The TPTA incorporates several sections of the Cigarette Tax Act (CTA), 35 ILCS 130/1 *et seq.*, including §§ 18-18c of that Act. 35 ILCS 143/10-45. Section 18 of the CTA provides:

Any duly authorized employee of the Department may arrest without warrant any person committing in his presence a violation of any of the provisions of this Act, and may without a search warrant inspect all cigarettes located in any place of business and seize any original packages of contraband cigarettes and any vending device in which such packages may be found, and such original packages or vending devices so seized shall be subject to confiscation and forfeiture as hereinafter provided.

35 ILCS 130/18. Section 18a of the CTA provides, in part:

After seizing any original packages of cigarettes, or cigarette vending devices, as provided in Section 18 of this Act, the Department shall hold a hearing and shall determine whether such original packages of cigarettes, at the time of their seizure by the Department, were not tax stamped or tax imprinted underneath the sealed transparent wrapper of such original packages in accordance with this Act,

If, as the result of such hearing, the Department shall determine that the original packages of cigarettes seized were at the time of seizure not tax stamped or tax imprinted underneath the sealed transparent wrapper of such original packages as required by this Act, ... the Department shall enter an order declaring such original packages of cigarettes or such cigarette vending devices confiscated and forfeited to the State, and to be held by the Department for disposal by it as provided in Section 21 of this Act.

35 ILCS 130/18a.

There is no dispute that, at the time they were seized by CID agent Lightle, the little cigars seized at Respondent's store did not have Illinois tax stamps affixed to them. Department Ex. 1, p. 2; Tr. pp. 12-13 (SMITH). Thus, under § 10-5 of the TPTA, as amended by Public Act 98-273, the seized little cigars were contraband little cigars on the date seized. 35 ILCS 143/10-5 (definition of contraband little cigars); P.A. 98-273, § 15 (eff. August 9, 2013). Therefore, I conclude that the seized little cigars should be declared forfeit to the State, and to be held by the Department for disposal, pursuant to § 10-58 of the TPTA. 35 ILCS 143/10-45; 35 ILCS 143/10-58.

The second issue is whether Respondent is liable for penalties set forth within §§ 18b and 18c of the CTA, as incorporated into the TPTA.

Section 18b of the CTA provides:

Possession of more than 100 original packages of contraband cigarettes; penalty.

With the exception of licensed distributors and transporters, as defined in Section 9c of this 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 contraband cigarettes contained in original packages is liable to pay, to the Department for deposit in 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. This penalty is in addition to the taxes imposed by this Act. 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. With the exception of licensed distributors, anyone possessing cigarettes contained in original packages which are not tax stamped as required by this Act, or which are improperly tax stamped, shall be liable to pay, to the Department for deposit in the State Treasury, a penalty of \$15 for each such package of cigarettes in excess of 100 packages. Such penalty may be recovered by the Department in a civil action.

35 ILCS 130/18b. Section 18c provides:

Possession of not less than 10 and not more than 100 original packages of contraband cigarettes; penalty.

With the exception of licensed distributors and transporters, as defined in Section 9c of this 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 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 \$10 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. The provisions of the Uniform Penalty and Interest Act do not apply to this Section.

35 ILCS 130/18c.

At hearing, SMITH testified that the little cigars were not contraband when Respondent purchased them. Tr. pp. 13, 15, 17 (SMITH). The implication SMITH suggests is that the little cigars seized by Lightle were either the same ones Respondent purchased on the dates reflected on Taxpayer Exhibits 1-3, or were purchased at or about the same time such receipts were made. This implication, in turn, is directed to the fact that the TPTA was amended, effective August 9, 2013. P.A. 98-273, § 15 (eff. August 9, 2013). Following the amendments made by P.A. 98-273, the Illinois legislature began to prohibit Illinois retailers from possessing, at their stores, little cigars which did not bear the tax stamps required by the TPTA. 35 ILCS 143/10-27(a) (“Retailers are prohibited from possessing unstamped packages of little cigars containing 20 or 25 little cigars at locations where retailers make sales of little cigars to consumers or users. ****”); P.A. 98-273, § 15.

But SMITH did not offer any credible evidence to show that the seized little cigars were, in fact, purchased by Respondent prior to the effective date of the pertinent

amendment to the TPTA. Moreover, no evidence was offered to show that the unstamped little cigars were not, in fact, being offered for sale at Respondent's store. Instead, the evidence clearly shows that, on MONTH DATE, YEAR, Respondent knowingly possessed, at the place where it sold tobacco products to consumers or users, unstamped little cigars. Department Ex. 1, pp. 1-3; Tr. pp. 12-13 (SMITH). This was more than a year after the TPTA began to prohibit retailers from possessing unstamped little cigars at a retail store. 35 ILCS 143/10-27(a); P.A. 98-273, § 15. In any event, whether Respondent purchased the unstamped little cigars Lightle seized at a time when they were not subject to Illinois tax is not material to whether Respondent knowingly possessed them in its store on MONTH DATE, YEAR.

Finally, I note that two of the three types of minimum books and records the Retailers' Occupation Tax Act (ROTA) requires all retailers to keep include: copies of all vendors' invoices and purchase orders, which must be retained serially and in sequence as to date; and a record of an annual inventory of the stock the retailer purchased for resale at retail. 86 Ill. Admin. Code § 130.805(a)(2)-(3). Here, during cross-examination, SMITH was asked whether he had purchased little cigars after Illinois law had changed. Tr. pp. 21-22. He said yes, but that he did not have any such receipts with him at hearing. *Id.* But, assuming Respondent continued to purchase little cigars from Illinois distributors, which is what SMITH said Respondent did (Tr. p. 12), such receipts would have certainly notified him — before Lightle's inspection — that Respondent had begun to pay Illinois tax on such little cigars, after the passage of P.A. 98-273. Tr. p. 17 (SMITH) (“Now it's the law. It wasn't a law when I bought these. They do now, but not before.”).

Additionally, since more than a year passed between the effective date of P.A. 98-273's amendments to the TPTA, and the date of Lightle's inspection, Respondent, as a registered retailer, was obliged to have conducted an inventory of its stock. SMITH offered no reasonable explanation why Respondent chose to keep in its inventory — for more than a year after Illinois law had been changed — tobacco products which Illinois law had begun to classify as contraband. 35 ILCS 143/10-27(a); P.A. 98-273, § 15. I conclude that Respondent has not offered evidence sufficient to conclude that the penalties imposed by §§ 18b and 18c of the CTA, as incorporated by the TPTA, should be abated for reasonable cause. Pursuant to § 18b and 18c of the CTA, Respondent is liable for penalties in the respective amounts of \$XXX.XX and \$XXX.XX, for a total of \$X,XXX.XX. 35 ILCS 130/18b-18c ((XX x 25) + (XX x 10) = XXX + XXX = X,XXX).

Conclusion:

I recommend that the XXX packages of unstamped little cigars seized from Respondent's store on MONTH DATE, YEAR be declared forfeit to the State, to be held by the Department for disposal, pursuant to TPTA §§ 10-45 and 10-58. I further recommend that Respondent be found liable for penalties, authorized by §§ 18b-18c of the CTA, in the amount of \$X,XXX.XX.

August 8, 2017
Date



John E. White, Administrative Law Judge