

CT 18-04

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**

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| THE DEPARTMENT OF REVENUE |) | Docket No. | ****_**** |
| OF THE STATE OF ILLINOIS |) | IBT No. | ****_**** |
| v. |) | | |
| ABC CORPORATION, |) | John E. White, | |
| Respondent |) | Administrative Law Judge | |

RECOMMENDATION FOR DISPOSITION

Appearances: Michael Fox, Fox Law Practice, appeared for ABC Corp.; Ashley Forte, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

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 Corp. (Respondent), and seized XXXX packages of little cigars which did not bear tax stamps like those required by the Tobacco Products Tax Act (TPTA), as amended by Public Act (P.A.) 98-273. 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 offices in Chicago. Respondent offered documentary evidence, as well as the testimony of two witnesses. I have considered the evidence and arguments presented at hearing, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the Director find that the little cigars were contraband when seized, and should be forfeit to the State. I also recommend that the Director find Respondent liable for penalties authorized by §§ 18b-c of the

Cigarette Tax Act (CTA), as incorporated by § 10-45 of the TPTA.

Findings of Fact:

1. John Smith incorporated ABC Corporation with the Illinois Secretary of State (ISOS) on April 28, 2014. Department Ex. 1 (copy of Pannier's summary inspection report, with attached exhibits), pp. 9-12 (copies of, respectively, completed ISOS Illinois Domestic/Foreign Annual Report for Respondent, signed by Smith, as president, on April 1, 2015; two ISOS certificates of records regarding Respondent; copy of ISOS form BCA 2.10, Articles of Incorporation, regarding Respondent).
2. Respondent is registered with the Department as a retailer, and operates a grocery store doing business as City Grocery. Department Ex. 1, p. 2; Hearing Transcript (Tr.) pp. 30 (testimony of James Doe (James)), 59 (testimony of Mary Doe (Mary)).
3. On January 5, 2016, Kevin Pannier (Pannier) and Jason Key (Key), agents of the Department's CID, conducted an inspection of Respondent's retail store. Department Ex. 1.
4. During the January 5, 2016 inspection of Respondent's store, Pannier observed and subsequently seized XXXX packages of little cigars which did not have Illinois tax stamps affixed to them. Department Ex. 1 (copy of Pannier's summary inspection report), p. 2; Tr. pp. 13 (testimony of Pannier), 39-40 (James).
5. The little cigars seized were in packages of 20. Department Ex. 1; Tr. p. 14 (Pannier).
6. Pannier seized the little cigars from two areas of Respondent's store. Department Ex. 1, p. 2. He seized XX packages of miscellaneous brands of little cigars from a sales rack where they were displayed for sale, and XXX cartons (with each carton containing 10 packages) from the back room of the store. Department Ex. 1, p. 2, 16 (copy of Department CID form ID-14-C); Tr. pp. 13, 22 (Pannier). Pannier also

observed cases of heavy weight little cigars in the back room of Respondent's store, which he did not seize. Department Ex. 1, p. 3.

7. During the course of the agents' inspection, Mary, Respondent's manager, was called and subsequently arrived at Respondent's store. Department Ex. 1, p. 2; Tr. p. 30 (James).
8. During the inspection, Pannier interviewed Mary regarding the seized little cigars. Department Ex. 1, pp. 2-4.
9. In his report, Pannier wrote that, during his interview with Mary, she told him, among other things, that she was Respondent's store manager, and that she was trying to sell all of the old little cigars in the store's inventory. Department Ex. 1, p. 3.
10. On the date seized, Respondent did not have invoices regarding its purchase of the little cigars seized. Department Ex. 1, pp. 2-3; Tr. pp. 31-32 (James).
11. Following the seizure, Pannier 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, Pannier 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 cigarette distributor, secondary cigarette distributor, or transporter of cigarettes. Department Ex. 1, p. 2.
12. Prior to Respondent's incorporation, and its commencement doing business as City Groceries, Suburban Corp. (Suburban) conducted business as Dollar Foods, at the same location at which Respondent later began to conduct business. Tr. pp. 59-63 (Mary); Taxpayer Exs. 2-4. Mary owned Suburban. Tr. p. 59 (Mary); Respondent Ex. 3.

13. On or about February 28, 2012, Suburban completed Cook County floor tax schedules, and paid Cook County floor tax regarding little cigars, and other tobacco products, which Suburban possessed at Dollar Foods. Respondent Exs. 2-4.
14. In approximately May 2014, Suburban lost its cigarette retailer's license. Tr. pp. 32 (James), 60-63 (Mary).
15. After Suburban lost its license, James and Mary, who are husband and wife (Tr. p. 16 (Pannier)), removed all tobacco products from Dollar Foods and put such products in the basement of their home. Tr. pp. 32-34, 46-49 (James), 62-63 (Mary).
16. In August 2014, Mary filed a claim for property losses with her insurance company, which claim included her report of the loss of "\$3240.00 6 case of cigar box 60x6x9.00" Respondent Ex. 1 (copy of two page email exchange between Mary and an individual at an insurance company claims section). p. 1; Tr. pp. 32-34, 46-49 (James), 62-63 (Mary).
17. At hearing, James estimated that, after a flood damaged 360 cartons of the little cigars he and Mary removed from Suburban's Dollar Foods' store and stored in their basement, there were about 268 cartons of little cigars remaining. Tr. pp. 38-39 (James).
18. At or about the last week of May 2014, Suburban and/or Mary entered into an agreement with Respondent, pursuant to which the unstamped little cigars that James and Mary had been storing in their basement were sold to Respondent, and moved back to the location where Dollar Foods had previously operated, and at which Respondent had begun to operate City Foods. Tr. pp. 61-63 (Mary).

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 Department argues that the evidence shows that, on the date Pannier seized the little cigars from Respondent's store, the original packages of those little cigars did not bear Illinois tax stamps, as required by § 10-10 of the TPTA. Tr. pp. 5-7 (opening statement). Respondent, on the other hand, contends that the evidence shows that the little cigars seized from the store were purchased before Illinois law defined unstamped little cigars as contraband. Tr. pp. 7-8 (opening statement). Since the unstamped little cigars were not contraband when purchased, Respondent reasons, the subsequent amendments to the TPTA cannot authorize the Department to declare the little cigars later seized from its store forfeit. *Id.*, pp. 7-8, 63-67 (closing argument).

Before more directly addressing the evidence and the arguments offered at hearing, I will first describe the amendments P.A. 98-273 made to the TPTA, which became effective on August 9, 2013. P.A. 98-273, §§ 15, 99 (eff. August 9, 2013). Section 15 of P.A. 98-273 provided that: “[t]he [TPTA] of 1995 is amended by changing Sections 10-5, 10-10, 10-15, 10-30, and 10-45 and by adding Sections 10-26, 10-27, 10-28, 10-29, and 10-36” P.A. 98-273 § 15. Section 10-5 is the definitions section of the TPTA, and the additions made to that section by P.A. 98-273 include, among other things, the underlined text quoted below:

Sec. 10-5. Definitions. For purposes of this Act:

“Contraband little cigar” means:

(1) packages of little cigars containing 20 or 25 little cigars that do not bear a required tax stamp under this Act;

(2) packages of little cigars containing 20 or 25 little cigars that bear a fraudulent, imitation, or counterfeit tax stamp;

(3) packages of little cigars containing 20 or 25 little cigars that are improperly tax stamped, including packages of little cigars that bear only a tax stamp of another state or taxing jurisdiction; or
(4) packages of little cigars containing other than 20 or 25 little cigars in the possession of a distributor, retailer or wholesaler, unless the distributor, retailer, or wholesaler possesses, or produces within the time frame provided in Section 10-27 or 10-28 of this Act, an invoice from a stamping distributor, distributor, or wholesaler showing that the tax on the packages has been or will be paid.

“Stamp” or “stamps” mean the indicia required to be affixed on a package of little cigars that evidence payment of the tax on packages of little cigars containing 20 or 25 little cigars under Section 10-10 of this Act. These stamps shall be the same stamps used for cigarettes under the Cigarette Tax Act.

“Stamping distributor” means a distributor licensed under this Act and also licensed as a distributor under the Cigarette Tax Act or Cigarette Use Tax Act.

“Tobacco products” means any cigars, including little cigars; cheroots; stogies; periques; granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff (including moist snuff) or snuff flour; cavendish; plug and twist tobacco; fine-cut and other chewing tobaccos; shorts; refuse scraps, clippings, cuttings, and sweeping of tobacco; and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking; but does not include cigarettes or tobacco purchased for the manufacture of cigarettes by cigarette distributors and manufacturers defined in the Cigarette Tax Act and persons who make, manufacture, or fabricate cigarettes as a part of a Correctional Industries program for sale to residents incarcerated in penal institutions or resident patients of a State operated mental health facility.

35 ILCS 143/10-5 (2013); P.A. 98-273, § 15 (eff. August 9, 2013).

With the enactment of P.A. 98-273, Illinois began to impose tobacco products tax regarding products commonly referred to as little cigars. 35 ILCS 143/10-10 (2013); P.A. 98-273, § 15 (eff. August 9, 2013). The tax remained imposed on distributors, as measured by the wholesale price for little cigars sold or otherwise disposed of in Illinois. *Id.* More specifically, P.A. 98-273 made the following changes, set forth as underlined text, to the text of TPTA § 10-10:

Sec. 10-10. Tax imposed.

(a) Except as otherwise provided in this Section with respect to little cigars, on the first day of the third month after the month in which this Act becomes law, a tax is imposed on any person engaged in business as a distributor of tobacco products, as defined in Section 10-5, at the rate of (i) 18% of the wholesale price of tobacco products sold or otherwise disposed of to retailers or consumers located in this State prior to July 1, 2012 and (ii) 36% of the wholesale price of tobacco products sold or otherwise disposed of to retailers or consumers located in this State beginning on July 1, 2012; except that, beginning on January 1, 2013, the tax on moist snuff shall be imposed at a rate of \$0.30 per ounce, and a proportionate tax at the like rate on all fractional parts of an ounce, sold or otherwise disposed of to retailers or consumers located in this State. The tax is in addition to all other occupation or privilege taxes imposed by the State of Illinois, by any political subdivision thereof, or by any municipal corporation. However, the tax is not imposed upon any activity in that business in interstate commerce or otherwise, to the extent to which that activity may not, under the Constitution and Statutes of the United States, be made the subject of taxation by this State, and except that, beginning July 1, 2013, the tax on little cigars shall be imposed at the same rate, and the proceeds shall be distributed in the same manner, as the tax imposed on cigarettes under the Cigarette Tax Act. The tax is also not imposed on sales made to the United States or any entity thereof.

(b) Notwithstanding subsection (a) of this Section, stamping distributors of packages of little cigars containing 20 or 25 little cigars sold or otherwise disposed of in this State shall remit the tax by purchasing tax stamps from the Department and affixing them to packages of little cigars in the same manner as stamps are purchased and affixed to cigarettes under the Cigarette Tax Act, unless the stamping distributor sells or otherwise disposes of those packages of little cigars to another stamping distributor. Only persons meeting the definition of "stamping distributor" contained in Section 10-5 of this Act may affix stamps to packages of little cigars containing 20 or 25 little cigars. Stamping distributors may not sell or dispose of little cigars at retail to consumers or users at locations where stamping distributors affix stamps to packages of little cigars containing 20 or 25 little cigars.

(c) The impact of the tax levied by this Act is imposed upon distributors engaged in the business of selling tobacco products to retailers or consumers in this State. Whenever a stamping distributor brings or causes to be brought into this State from without this State, or purchases from without or within this State, any packages of little cigars containing 20 or 25 little cigars upon which there are no tax stamps affixed as required by this Act, for purposes of resale or disposal in this State to a person not a stamping distributor, then such stamping distributor shall pay the tax to the Department and add the amount of the tax to the price of such packages sold by such stamping distributor. Payment of the tax shall be evidenced by a stamp or stamps affixed to each package of little cigars containing 20 or 25 little cigars.

Stamping distributors paying the tax to the Department on packages of little cigars containing 20 or 25 little cigars sold to other distributors, wholesalers or retailers shall add the amount of the tax to the price of the packages of little cigars containing 20 or 25 little cigars sold by such stamping distributors.

(d) Beginning on January 1, 2013, the tax rate imposed per ounce of moist snuff may not exceed 15% of the tax imposed upon a package of 20 cigarettes pursuant to the Cigarette Tax Act.

(e) All moneys received by the Department under this Act from sales occurring prior to July 1, 2012 shall be paid into the Long-Term Care Provider Fund of the State Treasury. Of the moneys received by the Department from sales occurring on or after July 1, 2012, except for moneys received from the tax imposed on the sale of little cigars, 50% shall be paid into the Long-Term Care Provider Fund and 50% shall be paid into the Healthcare Provider Relief Fund. Beginning July 1, 2013, all moneys received by the Department under this Act from the tax imposed on little cigars shall be distributed as provided in subsection (a) of Section 2 of the Cigarette Tax Act.

35 ILCS 143/10-10 (2013); P.A. 98-273, § 15 (eff. August 9, 2013).

In addition to the new statutory definitions and imposition of tax on little cigars, P.A. 98-273 also added new sections to the TPTA. P.A. 98-273, § 15 (eff. August 9, 2013). The three sections particularly relevant to this dispute are §§ 10-27, 10-28 and 10-36, each of which provide as follows:

Sec. 10-27. Retailers; purchase and possession of little cigars.

(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.** Retailers that are also stamping distributors are prohibited from possessing unstamped little cigars at locations where those retailers make sales of packages of little cigars containing 20 or 25 little cigars to consumers or users. **Retailers that are not stamping distributors shall purchase stamped packages of little cigars containing 20 or 25 little cigars for resale only from stamping distributors, distributors, or wholesalers. Retailers who are not stamping distributors may not purchase or possess unstamped packages of little cigars containing 20 or 25 little cigars.** A retailer must be a stamping distributor to make tax exempt sales of packages of little cigars containing 20 or 25 little cigars for use outside of this State. A retailer who is a stamping distributor making sales of stamped packages of little cigars for use outside of this State may file a claim for credit for such sales with the Department on forms and in the manner provided by the Department.

(b) **For purchases of packages of little cigars containing other than 20 or 25 little cigars, retailers who are not stamping distributors**

may not purchase or possess such packages of little cigars, unless the retailer receives an invoice from a stamping distributor, distributor, or wholesaler stating the tax on the packages has been or will be paid. Retailers shall retain such invoices for inspection by the Department. If a retailer maintaining multiple retail locations notifies the Department in writing that it maintains its invoices at a centralized business location, the Department shall have the authority to inspect invoices at the centralized business location at all times during the usual business hours of the day and the Department may grant the retailer 3 business days to produce the invoices at the retail location at which the request was made. A retailer must be a stamping distributor to make tax exempt sales of packages of little cigars containing other than 20 or 25 little cigars for use outside of this State. A retailer who is a stamping distributor making sales of packages of little cigars containing other than 20 or 25 little cigars for use outside of this State on which the tax has been or will be paid by another stamping distributor or was paid by the retailer may file a claim for credit for such sales with the Department on forms and in the manner provided by the Department.

(c) Notwithstanding anything to the contrary in this Act, a retailer unknowingly possessing contraband little cigars obtained from a stamping distributor, distributor, or wholesaler or other person engaged in the business of selling tobacco products or knowingly possessing contraband little cigars obtained from a stamping distributor is not subject to penalties for such purchase or possession if the retailer, within 48 hours after discovering that the little cigars are contraband little cigars, excluding Saturdays, Sundays, and holidays: (i) notifies the Department and the person from whom the little cigars were obtained, orally and in writing, that he or she possesses contraband little cigars; (ii) places the contraband little cigars in one or more containers and seals those containers; and (iii) places on the containers the following or similar language: "Contraband Little Cigars. Not For Sale." All contraband little cigars in the possession of a retailer remain subject to forfeiture under the provisions of this Act.

35 ILCS 143/10-27 (2013); P.A. 98-273, § 15 (eff. August 9, 2013) (emphasis added).

Sec. 10-29. Invoices; packages of little cigars.

(a) Every sales invoice for packages of little cigars containing other than 20 or 25 little cigars issued by a stamping distributor to a person who is not a stamping distributor shall contain both the stamping distributor's Tobacco Products License number and Cigarette Tax Distributor's License number or Cigarette Use Tax Distributor's License number and state that the tax imposed by the Act has been or will be paid or that the sale is exempt in whole or in part and the exemption which is claimed.

(b) Any stamping distributor, distributor or wholesaler who knowingly falsely states on the invoice that the tax imposed by this Act has been

or will be paid, or any officer or employee of a corporation, member or employee of a partnership, or manager, member or employee of a limited liability company that is a stamping distributor, distributor, or wholesaler, who, as such officer, employee, manager, or member, knowingly causes to be issued an invoice on behalf of such entity, that such person knows falsely states that the tax imposed by the Act has been or will be paid, is guilty of a Class 4 felony.

(c) Whenever any sales invoice issued by a stamping distributor, distributor or wholesaler for the sale of packages of little cigars containing other than 20 or 25 little cigars does not comply with subsection (b) of Section 10-28 or subsection (a) of this Section by indicating that the tax has been or will be paid or that the sale is exempt in whole or in part, a prima facie presumption shall arise that the tax imposed by Section 10-10 of this Act has not been paid on the little cigars listed on the sales invoice. A person who is not a stamping distributor and is unable to rebut this presumption is in violation of this Act and is subject to the penalties provided in this Act.

35 ILCS 143/10-28 (2013); P.A. 98-273, § 15 (eff. August 9, 2013) (emphasis added).

Sec. 10-36. Recordkeeping by retailers. **Every retailer shall keep complete and accurate records of tobacco products held and purchased, and tobacco products sold or otherwise disposed of, and shall preserve and keep all invoices, bills of lading, sales records, and copies of bills of sale.** Books, records, papers, and documents that are required by this Act to be kept shall, at all times during the usual business hours of the day, be subject to inspection by the Department or its duly authorized agents and employees. The books, records, papers, and documents for any period with respect to which the Department is authorized to issue a notice of tax liability shall be preserved until the expiration of that period.

35 ILCS 143/10-36 (2013); P.A. 98-273, § 15 (eff. August 9, 2013) (emphasis added).

Finally, and while the TPTA had previously incorporated certain sections of the Cigarette Tax Act (CTA), 35 ILCS 130/1 *et seq.*, for the first time, P.A. 98-273 incorporated §§ 18a-18c of the CTA into the TPTA. 35 ILCS 143/10-45 (2013); P.A. 98-273, § 15 (eff. August 9, 2013). 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.

Read together, the amendments made by P.A. 98-273 not only manifest the legislature's intent to begin to impose tobacco products tax on distributors¹ regarding their sale or disposition of little cigars in Illinois. 35 ILCS 143/10-10; 35 ILCS 143/10-27(a)-(b); P.A. 98-273, § 15 (eff. August 9, 2013). The related amendments also manifest the legislature's intent to prohibit a retailer from possessing packages of 20 or 25 little cigars which were not affixed with Illinois tax stamps, or regarding packages of little cigars in amounts other than 20 or 25 for which the retailer did not obtain and keep invoices showing that Illinois tax had been or would be paid by a stamping distributor, distributor or wholesaler from which they were obtained. 35 ILCS 143/10-5; 35 ILCS 143/10-27(a)-(b); P.A. 98-273, § 15 (eff. August 9, 2013). In this way, the legislature sought to more strictly regulate the supply chain of little cigars from stamping distributors to retailers, to make sure that tax was being collected by such stamping distributors from other distributors, wholesalers, and retailers. 35 ILCS 143/10-10(b)-(c) (2013); 35 ILCS 143/10-28 (2013); 35 ILCS 143/10-29 (2013); P.A. 98-273, § 15 (eff. August 9, 2013).

In a nutshell, P.A. 98-273 created two, basic, categories of little cigars which could be contraband: those contained in packages of 20 to 25, and those contained in packages of other than 20 to 25. 35 ILCS 143/10-5(1)-(4), 35 ILCS 143/10-27(a); P.A. 98-273, § 15 (eff. August 9, 2013). The former were contraband unless they were stamped in the same

¹ The TPTA's statutory definition of "distributor" has always included "[a]ny retailer who receives tobacco products on which the tax has not been or will not be paid by another distributor." 35 ILCS 143/10-5 (1995); P.A. 89-21, Art. 10, § 10-1 (eff. June 6, 1995).

manner as cigarettes, under the CTA. 35 ILCS 143/10-27(a); P.A. 98-273, § 15 (eff. August 9, 2013). The latter were not required to bear Illinois tax stamps, but were contraband unless a retailer had obtained — and kept, for presentment — an invoice from the stamping distributor, distributor, or wholesaler from which it obtained them, stating that tax had been or would be paid. 35 ILCS 143/10-27(b); P.A. 98-273, § 15 (eff. August 9, 2013).

After taking into account the amendments P.A. 98-273 made to the TPTA, I now address Respondent’s argument that the Department may not find and conclude that the packages of little cigars seized by Pannier should be declared forfeit, because such packages of little cigars were purchased before they became subject to Illinois tax.

Illinois law is clear that, “[a]s a general rule a taxpayer has no vested right in the continued existence of a taxing statute.” In re Application of Skidmore, 75 Ill. 2d 33, 38, 387 N.E.2d 290, 292 (1979). Before P.A. 98-273 became effective, little cigars were not subject to the tax imposed by the TPTA; after its effective date, they were. 35 ILCS 143/10-10; P.A. 98-273, § 15 (eff. August 9, 2013). Before P.A. 98-273 became effective, there was no such thing as “contraband little cigars” in Illinois. After the effective date of August 9, 2013, two broad classes of little cigars were declared to be contraband. 35 ILCS 143/10-5; P.A. 98-273 § 15 (eff. August 9, 2013). In short, the law had changed. *Id.* The seizure, moreover, took place more than two years after P.A. 98-273 became effective. Department Ex. 1; 35 ILCS 143/10-5; P.A. 98-273 § 15 (eff. August 9, 2013). Respondent has cited no precedent which persuades me that the amendments made by P.A. 98-273 cannot properly be applied, as written, regarding Respondent’s knowing possession, on January 5, 2016, of unstamped packages of little cigars at the location at which it sold tobacco products at retail. 35 ILCS 143/10-5; 35 ILCS 143/10-27; P.A. 98-273 § 15 (eff. August 9, 2013).

And while Respondent's litigation position was that it purchased the little cigars seized from its store at a time when little cigars were not subject to tax, the documentary and other evidence admitted at hearing clearly proves otherwise. First, at hearing, James testified that all of the little cigars that Pannier seized were purchased in 2012 and early 2013. Tr. pp. 30, 38-40, 43-44 (James). Notwithstanding that testimony, however, the documentary evidence shows that Respondent was incorporated in Illinois on April 28, 2014. Department Ex. 1, pp. 9-12. There is no evidence that Respondent previously existed, in some corporate or other form, before it was incorporated with the Illinois Secretary of State. Thus, even if Respondent were able to prove — beyond all doubt — that each and every package of little cigars seized had, in fact, been purchased from a distributor or wholesaler prior to the effective date of P.A. 98-273, Respondent could not have been the person that purchased them in 2012 or 2013. Department Ex. 1, pp. 9-12.

Second, even before Respondent was incorporated, the TPTA had begun to require retailers of tobacco products who were not stamping distributors to purchase stamped packages of little cigars containing 20 or 25 little cigars for resale only from stamping distributors, distributors, or wholesalers. 35 ILCS 143/10-27(a); P.A. 98-273 § 15 (eff. August 9, 2013). Respondent was not a stamping distributor. Department Ex. 1, p. 2. At hearing, moreover, Respondent's witnesses acknowledged that Suburban, a different corporation, was the person that had purchased unstamped little cigars prior to the effective date of P.A. 98-273, and that Respondent actually obtained the packages of little cigars at issue from Suburban, or its owner, at or about the time Respondent bought Suburban's business and stock in trade. Tr. pp. 61-63 (Mary); *see also id.*, pp. 30-32, 36-40, 49-50, 52 (James).

As a practical matter, Respondent's litigation position concedes that, at the time Pannier seized the little cigars from Respondent's store, the original packages of those

little cigars did not have Illinois tax stamps affixed to them. Tr. pp. 39-40 (James). James and Mary both testified, moreover, that the little cigars seized were the same little cigars regarding which Suburban had previously paid the Cook County other tobacco products tax. Taxpayer Exs. 2-4; Tr. pp. 44-46 (James), 59-61 (Mary). That Cook County tax, I note, was and remains imposed on little cigars without regard to how many little cigars are contained in a single package. Ord. No. 11-O-24, § 74-433(d)(1)(c), (2)(c) (adopted Feb. 16, 2011, and in effect on January 1, 2013) (different versions of Cook County's other tobacco tax ordinance are searchable at the County's website at https://library.municode.com/il/cook_county/codes/code_of_ordinances) (last viewed on October 24, 2017). The evidence, moreover, shows that the seized little cigars were in packages which contained 20 units. Tr. p. 14 (Pannier).

Based on the evidence, and Respondent's own litigation position, I make the following conclusions. On January 5, 2016, the little cigars Pannier seized from Respondent's store, and Respondent, were subject to the TPTA, including the amendments made by P.A. 98-273. 35 ILCS 143/10-5 (2013); 35 ILCS 143/10-27(a)-(b) (2013); 35 ILCS 143/10-29(a) (2013); P.A. 98-273, § 15 (eff. August 9, 2013). The original packages of the little cigars Pannier seized from Respondent's store each held 20 little cigars, and those original packages did not bear Illinois tax stamps. Department Ex. 1, pp. 2-3, 16; Tr. pp. 14 (Pannier), 39-40 (James). Respondent obtained the unstamped packages of little cigars Pannier seized in a manner that was other than the manner required by the amendments made to the TPTA by P.A. 98-273. *Compare* Tr. p. 61 (Mary) *with* 35 ILCS 143/10-27(a)-(b) (2013); P.A. 98-273, § 15 (eff. August 9, 2013). Finally, Respondent did not possess invoices required by §§ 10-27(b), 10-29(a) and 10-36 of the TPTA, regarding the packages of little cigars Pannier seized. Department Ex. 1, pp. 2-3; Tr. pp. 31-32 (James).

In sum, the evidence supports the Department claim that the XXXX packages of little cigars Pannier seized from Respondent's store were contraband little cigars on the date seized. Department Ex. 1; 35 ILCS 143/10-5; P.A. 98-273, § 15 (eff. August 9, 2013); In re Application of Skidmore, 75 Ill. 2d at 38, 387 N.E.2d at 292. Therefore, I conclude that the seized little cigars should be declared forfeit to the State, 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.

Given the clarity of TPTA §§ 10-27 and 10-36, a reasonably prudent retailer who intended to make a good faith effort to determine and pay its proper TPTA liability would have made sure to purchase little cigars from a stamping distributor, distributor or wholesaler, and thereby, armed itself with the required documentary evidence (that is, stamps or invoices) showing that the tax imposed by the TPTA had been paid. 35 ILCS 143/10-27(a)-(b) (2013); 35 ILCS 143/10-29(a) (2013); P.A. 98-273, § 15 (eff. August 9, 2013). But Respondent did not do so. Instead, Respondent obtained a quantity of unstamped little cigars, which were later seized by Pannier, after the effective date of P.A. 98-273, and in a manner that was prohibited by § 10-27 of the TPTA. Tr. pp. 61-63 (Mary); 35 ILCS 143/10-27 (2013); P.A. 98-273, § 15 (eff. August 9, 2013). Thereafter, Respondent knowingly kept and possessed such unstamped little cigars at its retail store, where it sold tobacco products, and where it offered them to persons for sale at retail. Department Ex. 1, pp. 2-3.

The evidence admitted at hearing supports the Department's request that Respondent be found liable for the penalties authorized by §§ 18b and 18c of the CTA, as incorporated by the TPTA. Based on the number of packages seized, I recommend that Respondent be found liable for penalties in the respective amounts of \$36,400.00 and

\$900.00, for a total of \$37,300.00. 35 ILCS 130/18b-18c; 35 ILCS 143/10-45 ((1,456 x 25) + (90 x 10) = 36,400 + 900 = 37,300).

Conclusion:

I recommend that the Director find that the XXXX packages of little cigars seized from Respondent's store on January 5, 2016 were contraband little cigars, pursuant to TPTA § 10-5, and are forfeit to the State, for use or disposal by the Department. I further recommend that the Director find that Respondent is liable for penalties in the amount of \$37,300.00.



November 14, 2017
Date

John E. White, Administrative Law Judge