

CT 18 -05

Tax Type: Cigarette and Cigarette Use Tax

Tax Issue: Possession of Unstamped Cigarettes

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

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

v.

JANE DOE

Possessor of Contraband Cigarettes

No. XXXX-XXXX

RECOMMENDATION FOR DISPOSITION

Appearances: Matthew Crain, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Michael J. Costello of Costello Law Office for JANE DOE

Synopsis:

On July 30, 2015, agents for the Department of Revenue (“Department”) seized 837 packages of cigarettes from an apartment located at XXXX East XXXXXX Street in Springfield, Illinois. 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.*). JANE DOE

(“respondent”) was leasing the apartment at the time of the seizure.¹ The Department seeks forfeiture of the cigarettes, and it also seeks to impose a civil penalty pursuant to the Act. An evidentiary hearing was held during which the respondent stated that she was not aware of the cigarettes. She argued that the civil penalty should be dismissed because the cigarettes were not hers. For the following reasons, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. On July 30, 2015, the Department’s Criminal Investigation Division received a call from the University of Illinois at Springfield Police Department regarding cigarettes that the police found in an apartment located at XXXX East XXXXXX Street in Springfield, Illinois. (Tr. pp. 11-12)
2. Doug Glanert, a Special Agent from the Department’s Criminal Investigation Division, went to the apartment. (Tr. p. 12)
3. Special Agent Glanert found 837 packages of unstamped cigarettes in the apartment. (Tr. p. 15)
4. The cigarettes did not have Illinois tax stamps affixed to them, but the cigarettes had Florida and Alabama tax stamps affixed to them. (Tr. p. 33)
5. At the time of the search, the respondent was leasing the apartment at XXXX East XXXXXX in Springfield, Illinois. She had been living there 3 or 4 years. (Tr. pp. 16, 20, 26; Dept. Ex. #1, pp. 16-31)
6. The majority of the cigarettes were found in luggage that was in a closet. (Tr. pp. 13, 20)

¹ FRED FINE was in the apartment at the time the illegal cigarettes were discovered. A default order was entered against Mr. FINE.

7. At the time of the search, the respondent had just returned from a trip to Florida.
(Tr. p. 30)
8. The respondent is not a licensed distributor or transporter of cigarettes. (Dept. Ex. #1, p. 14)

CONCLUSIONS OF LAW:

Section 2 of the 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 a 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 unstamped original packages of cigarettes. 35 ILCS 135/3. Any duly authorized employee of the Department may seize any original packages of contraband cigarettes. 35 ILCS 135/24.

Section 25 of the Act states that if, after a hearing, it is determined that the original packages seized were not tax stamped at the time of seizure, then an order must be entered declaring the original packages confiscated and forfeited to the State. 35 ILCS 135/25. The respondent 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 837 packages seized be forfeited to the State.

In addition, 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 \$1,800.² Under section 25a, the penalty for the remaining 737 packs is \$18,425.³ The total penalty amount for possession of 837 packs of unstamped cigarettes is \$20,225.

The respondent argues that the Department has not “proven a nexus” between the respondent and the cigarettes. The respondent testified that the cigarettes were not hers and that the luggage in which the cigarettes were found was not hers. She testified that she did not know who owned the luggage or where the cigarettes came from. (Tr. pp. 29-

² There is no penalty for the first 10 packs. The penalty for the remaining 90 packs is \$20 each for a total penalty of \$1,800 for the first 100 packs.

³ The penalty for the 737 packs is \$25 each for a total of \$18,425.

30) She testified that her boyfriend, FRED FINE, occasionally stayed at her apartment, but he lived in Chicago. She said that Mr. FINE did not travel with her to Florida.

The penalties imposed under the Act are based on “possession” of contraband cigarettes, not ownership. Under Illinois law, “[p]ossession may be established by evidence of actual physical possession or constructive possession.” People v. Alexander, 202 Ill. App. 3d, 20, 24 (3rd Dist. 1990). “Constructive possession” requires a showing that the respondent controlled the premises upon which the contraband is found. *Id.*

In this case, the respondent admitted that she was leasing the apartment where the cigarettes had been found and had been living there 3 to 4 years. She controlled the premises upon which the contraband cigarettes were found and had constructive possession of the cigarettes. In addition, the evidence shows that she admitted to just returning from a trip to Florida, the majority of the cigarettes were found in luggage, and all of the cigarette packages had Florida and Alabama tax stamps affixed to them. This evidence is sufficient to find that she is liable for the penalty.

Recommendation:

For the foregoing reasons, it is recommended that the 837 packages of unstamped cigarettes be confiscated and forfeited to the State of Illinois, and a penalty in the amount of \$20,225 be imposed.

Linda Olivero
Administrative Law Judge

Enter: July 31, 2017