

**CT 18-09**  
**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**

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

v.

**JOHN DOE**

**Taxpayer**

**Docket # XXXX-XXXX**

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**RECOMMENDATION FOR DISPOSITION**

Appearances: Danial A. Edelstein, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; JOHN DOE, *pro se*

Synopsis:

On February 20, 2013, agents for the Department of Revenue (“Department”) seized XXXX 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 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 taxpayer admitted that he had possessed the Missouri stamped cigarettes. He argued, however, that the civil penalty should be dismissed because he

pled guilty in a related criminal case to possessing the cigarettes, and he served two years in prison for the crime. He contends that imposing a civil penalty in this case would violate the State and Federal constitutional prohibitions against double jeopardy. For the following reasons, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. On February 20, 2013, after a traffic stop, special agents for the Department's Criminal Investigation Division found and seized XXXX packages of Missouri stamped cigarettes in the van that was driven by the taxpayer. (Dept. Ex. #1; Tr. pp. 8-9)
2. The cigarettes did not have Illinois tax stamps affixed to them. (Dept. Ex. #1)
3. The taxpayer admitted that he possessed the cigarettes. (Dept. Ex. #1, p. 6; Tr. p. 6)
4. The taxpayer is a resident of Illinois. (Dept. Ex. #1, p. 6)
5. The taxpayer is not a licensed distributor or transporter of cigarettes. (Dept. Ex. #1, pp. 6-7)
6. On November 4, 2013, the taxpayer entered a plea of guilty to the criminal offense of Unlawful Transportation of Unstamped Cigarettes with respect to the cigarettes found on February 20, 2013. The criminal offense is a class 3 felony. (Dept. Ex. #2)
7. The taxpayer was sentenced and served 2 years in prison for the criminal offense. (Dept. Ex. #2)

## 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 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 XXXX 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 \$XXXX.<sup>1</sup> Under section 25a, the penalty for the remaining XXXX packs is \$XXXXXX.<sup>2</sup> The total penalty amount for possession of XXXX packs of unstamped cigarettes is \$XXXXXX.

The taxpayer has admitted that he possessed the cigarettes, but he argues that the civil penalties should be dismissed because they violate the double jeopardy clauses of the State and Federal constitutions. He states that he pled guilty to possessing the cigarettes and spent 2 years in prison as a penalty. He also paid a \$XXX court fee. The cigarettes were immediately seized, so they are no longer in his possession. He claims that he has already been punished for bringing the cigarettes into Illinois, and therefore, the penalties should be dismissed.

An administrative agency has no inherent or common law powers; any authority that the agency claims must find its source within the provisions of the statute by which it

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<sup>1</sup> 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.

was created. Department of Revenue v. Illinois Civil Service Commission, 357 Ill. App. 3d 352, 363 (1<sup>st</sup> Dist. 2005); Parliament Insurance Company v. Department of Revenue, 50 Ill. App. 3d 341, 347 (1<sup>st</sup> Dist. 1977). An administrative agency lacks the authority to declare a statute unconstitutional or even to question its validity. Home Interiors and Gifts, Inc. v. Department of Revenue, 318 Ill. App. 3d 205, 210 (1<sup>st</sup> Dist. 2000) *citing* Texaco-Cities Service Pipeline Co. v. McGaw, 182 Ill. 2d 262, 278 (1998); see also Arvia v. Madigan, 209 Ill. 2d 520, 526 (2004). The constitutional issue, however, should be raised at the administrative level in order to preserve the issue for appeal. Texaco-Cities, at 278-279.

The Cigarette Use Tax Act is presumed to be valid, and the penalties must be imposed pursuant to the Act. This tribunal does not have authority to rule upon the taxpayer's constitutional issue. Nevertheless, because the issue has been raised, it is preserved in the event the taxpayer would like to raise it on administrative review.

Recommendation:

For the foregoing reasons, it is recommended that the XXXX packages of unstamped cigarettes be confiscated and forfeited to the State of Illinois, and the penalties in the amount of \$XXXXXXX be imposed.

Linda Olivero  
Administrative Law Judge

Enter: August 17, 2016

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<sup>2</sup> The penalty for the XXXX packs is \$25 each for a total of \$XXXXXXX