

CT 16-02
Tax Type: Cigarette 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.

**JOHN DOE,
ABC BUSINESS, LLC and
XYZ BUSINESS, INC.**

Taxpayers

Docket # XXXX
Docket # XXXX

RECOMMENDATION FOR DISPOSITION

Appearances: Matthew Crain, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; John Doe, *pro se*, for ABC Business, LLC and XYZ Business, Inc.

Synopsis:

The Department of Revenue (“Department”) seized XXXX packs of little cigars from the premises of ABC Business, LLC (“taxpayer”) and XXX packs of little cigars from the premises of XYZ Business, Inc. (“taxpayer”). Both businesses are located in Illinois, and John Doe (“taxpayer”) is the owner of both businesses. The packages did not have Illinois tax stamps affixed to them as mandated by the Tobacco Products Tax Act of 1995 (“Tobacco Act”) (35 ILCS 143/10-1 *et seq.*). The Department seeks forfeiture of the little cigars and seeks to impose civil penalties pursuant to the Tobacco Act. Because both businesses have the same owner, the cases were consolidated for purposes of the evidentiary hearing. During the hearing, the taxpayers asked that the penalties be abated because the owner claimed that the little cigars at

ABC Business, LLC were purchased prior to the date that Illinois began to impose the tax, and he claimed that the little cigars at XYZ Business, Inc. were purchased by the previous owner. For the following reasons, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. On December 5, 2014, a Special Agent for the Department's Criminal Investigation Division found XXXX packs of unstamped little cigars at ABC Business, LLC. The unstamped little cigars were found in multiple areas, including on sales racks behind the sales counter, on the sales floor, and in a bucket labeled for sale. (Dept. Ex. #1; Tr. pp. 10, 19)
2. On December 5, 2014, a Special Agent for the Department's Criminal Investigation Division found XXX packs of unstamped little cigars at XYZ Business, Inc. They were found on a sales rack in the general floor area. (Dept. Ex. #2; Tr. p. 14)
3. The little cigars did not have Illinois stamps affixed to them. (Dept. Ex. #1, #2)
4. The Department's agent seized the packs of little cigars. (Dept. Ex. #1, #2)
5. The taxpayers are not licensed distributors or stamping distributors of little cigars. (Dept. #1, #2)

CONCLUSIONS OF LAW:

Section 10-27 of the Tobacco Act provides, in part, as follows:

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. (35 ILCS 143/10-27(a)).

Section 10-45 of the Tobacco Act incorporates by reference various provisions of the Cigarette Tax Act (“CTA”) (35 ILCS 130/1 *et seq.*), including sections 18a, 18b, and 18c. Section 10-45 includes the following: “References in the incorporated Sections to sales of cigarettes mean sales of little cigars in packages of 20 or 25 little cigars.” (35 ILCS 143/10-45)

Section 18a of the CTA states that if it is determined, after a hearing, 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 130/18a. The taxpayers 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 packs of little cigars from the premises of ABC Business, LLC and the XXX packs of little cigars from the premises of XYZ Business, Inc. that were seized be forfeited to the State.

In addition, sections 18b and 18c of the CTA contain civil penalty provisions, which provide as follows:

Sec. 18b. 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.

Sec. 18c. 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 130/18b, 18c.

For ABC Business, LLC, under section 18c, the penalty for the first 100 packs is \$900.¹ Under section 18b, the penalty for the remaining 957 packs is \$23,925.² The total penalty amount for possession of 1,057 packs of unstamped little cigars is \$24,825. For XYZ Business, Inc., under section 18c, the penalty for the 23 packs is \$130.³

The owner of the businesses has asked that the penalties be abated due to reasonable cause. With respect to ABC Business, LLC, he argues that the little cigars were purchased prior to December 2012 when the tax was not yet imposed on little cigars. He said that the little cigars were a flavor that did not sell very well. He presented an invoice that shows that tobacco products, including little cigars, were purchased on September 23, 2012, and he claims this is proof that the little cigars were purchased at a time when there was no tax due on them. He also claims that a judge in Cook County issued an injunction to allow retailers to continue to sell little cigars without tax stamps on them if they were purchased when the tax was not due. With

¹ There is no penalty for the first 10 packs. The penalty for the remaining XX packs is \$XX each for a total penalty of \$XXXX for the first XXXX packs.

² The penalty for the remaining XXXX packs is \$XXX each for a total of \$XXXX.

³ There is no penalty for the first 10 packs. The penalty for the remaining XXX packs is \$XXX each for a total penalty of \$XXX.

respect to XYZ Business, Inc., the taxpayer argues that the little cigars were already on the premises when he purchased the business in February of 2014.

This evidence is not sufficient to establish reasonable cause for abating the penalties against the businesses. Although section 10-27 of the Tobacco Act did not become effective until August 9, 2013, on that date it became illegal for retailers to possess unstamped packages of little cigars. Subsection (c) of section 10-27 provides as follows:

(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(c).

Mr. John Doe, as the owner of the businesses, admitted to knowingly possessing contraband little cigars, and he did not take the steps necessary, under the statute, to ensure that the penalties would not be imposed. The retailers are responsible for selling tobacco products with the proper Illinois tax stamps on them. Nothing in the evidence indicates that the retailers took reasonable steps to make sure that there were no contraband little cigars on the premises of the businesses. These facts do not warrant abating the penalties.

With respect to Mr. John Doe personally, the Tobacco Act prohibits only retailers and wholesalers from possessing unstamped packages of little cigars. See 35 ILCS 143/10-27(a); 10-28. The Department has not presented evidence that Mr. John Doe individually acted as a retailer or wholesaler. The penalties, therefore, are not imposed on him personally.

Recommendation:

For the foregoing reasons, it is recommended that for ABC Business, LLC, the XXXX packs of little cigars that were seized by the Department on December 5, 2014 be confiscated and forfeited to the State of Illinois. In addition, it is recommended that a civil penalty of \$XXXX be assessed against ABC Business, LLC.

It is further recommended that for XYZ Business, Inc., the XXX packs of little cigars that were seized by the Department on December 5, 2014 be confiscated and forfeited to the State of Illinois. It is also recommended that a civil penalty of \$XXX be assessed against XYZ Business, Inc.

Enter: December 16, 2015

Linda Olivero
Administrative Law Judge