

CT 96-3
Tax Type: CIGARETTE TAX
Issue: Possession of Unstamped Cigarettes

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

THE DEPARTMENT OF REVENUE)	CIGARETTE CONFISCATION
OF THE STATE OF ILLINOIS)	Case No.
v.)	
TAXPAYER)	John E. White,
Taxpayer)	Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearance: Harry Stinespring, Stinespring, Lambert & Associates, Chicago, appeared for Taxpayer.

Synopsis:

This matter arose after Illinois Department of Revenue ("Department") agents seized 1950 cartons of unstamped cigarettes from Berwyn, Illinois, which was the business location of TAXPAYER ("TAXPAYER" or "Taxpayer").

A hearing was held on February 1, 1996 at the Department's Office of Administrative Hearings. Taxpayer appeared by and through its attorney, and Special Agent James Kinsella appeared as a witness for the Department. The two issues presented for hearing were whether the cigarettes seized should be subject to confiscation and forfeiture, pursuant to Illinois' Cigarette Tax Act ("CTA" or "the Act"), 35 ILCS 130/1 et seq. (1994), and whether a penalty authorized by the Act should be imposed against Taxpayer. I am including in the recommendation findings of fact and conclusions of law. I conclude that no penalty should be imposed against Taxpayer, and that the cigarettes should be confiscated and forfeited.

Findings of Fact:

1. From 7/1/94 to 6/30/95, Taxpayer held Cigarette Distributor's License No. C-1403, which was issued by the Department. Taxpayer Ex. No. 1.
2. Taxpayer filed a cigarette tax return for 4/95 on which it indicated that return was the final return to be filed by Taxpayer. See Department Ex. No.

- 1, exhibit 1 thereto;¹ Hearing Transcript ("Tr.") p. 19 (Taxpayer's closing statement).
3. Taxpayer ceased business operations on or about April or May, 1995. Tr. p. 18; see also, Department Ex. No. 1, exhibit 7, p. 3 (last day of work for most of TAXPAYER's employees was April 14, 1995).
 4. On May 4, 1995, counsel for Taxpayer, as executor of the estate of Taxpayer's sole shareholder, agreed to have Taxpayer's property sold at auction, as part of the winding-up of the corporation. See Department Ex. No. 1, exhibits 8-10; Taxpayer Ex. No. 4.
 5. On 5/23/95, a public viewing was held at Taxpayer's place of business regarding an auction of the real and tangible personal property owned by Taxpayer. Department Ex. No. 1, exhibits 1, 9.
 6. The auction was scheduled for 5/24/95. *Id.*; Tr. p. 16.
 7. Agents of the Department's Bureau of Criminal Investigation were present at the public viewing held on 5/23/95, and observed a quantity of unstamped cigarettes displayed as property being offered for sale at auction. Department Ex. No. 1, exhibit 1. Thereafter, the agents seized 1590 cartons of unstamped cigarettes, and tendered a receipt for them to an agent of the auctioneer. *Id.*, exhibits 1-3.
 8. The Department did not revoke, suspend, or cancel Taxpayer's cigarette distributor's license prior to 6/30/95.
 9. At the time of seizure, the unstamped cigarettes were in the possession of TAXPAYER A ("TAXPAYER A"). Department Ex. No. 1, exhibits 2-3, 9; Taxpayer Ex. No. 4; Tr. pp. 11-12.

¹ Department Ex. No. 1 consists of 10 separate exhibits, which are detailed here:

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|-------------|--|
| Exhibit 1: | Activity Report dated 5/23/95 |
| Exhibit 2: | Evidence Inventory and Receipt dated 5/23/95 |
| Exhibit 3: | Revenue Investigative Report [regarding] Contraband Cigarettes, date 5/23/95 |
| Exhibit 4: | Activity Report dated 5/24/95 |
| Exhibit 5: | Activity Report dated 6/9/95 |
| Exhibit 6: | Department Memorandum dated 7/7/95 regarding Discontinued License |
| Exhibit 7: | Activity Report dated 7/10/95 |
| Exhibit 8: | Activity Report dated 8/10/95 |
| Exhibit 9: | handwritten contract to sell property of TAXPAYER Wholesalers to TAXPAYER A |
| Exhibit 10: | check in the amount of \$36,000.00, dated 5/4/95, from TAXPAYER A to estate of XXXXX |

10. No evidence was introduced at hearing that TAXPAYER A was directed to, or intended to restrict its auction of the unstamped cigarettes to bids offered by licensed cigarette distributors.

Conclusions of Law:

Issue 1:

I will address the penalty issue first. Section 18b of the CTA provides:

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 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 4 of the Act provides, in part:

All licenses issued by the Department under this Act shall be valid for not to exceed one year after issuance **unless** sooner revoked, cancelled or suspended as provided in this Act.

35 ILCS 130/4. Section 6 of the Act provides, in part:

The Department may, after notice and hearing as provided for by this Act, revoke, cancel or suspend the license of any distributor for the violation of any provision of this Act, or for noncompliance with any provision herein contained, or for any noncompliance with any lawful rule or regulation promulgated by the Department under Section 8 of this Act, or because the licensee is determined to be ineligible for a distributor's license for any one or more of the reasons provided for in Section 4 of this Act. **However, no such license shall be revoked, cancelled or suspended, except after a hearing by the Department with notice to the distributor, as aforesaid, and affording such distributor a reasonable opportunity to appear and defend**, and any distributor aggrieved by any decision of the Department with respect thereto may have the determination of the Department judicially reviewed, as herein provided. Notice of such hearing shall be in writing and shall contain a statement of the charges preferred against the distributor.

35 ILCS 130/6.

The clear and unequivocal language of section 4 of the Act provides that licenses such as Taxpayer's distributor's license "shall be valid for not to exceed one year after issuance *unless* sooner revoked, cancelled or suspended as

provided in this Act." 35 **ILCS** 130/4 (emphasis added). A licensed distributor may, in fact, cease to engage in the business of selling cigarettes before the date on which its distributor's license expires. The fact that the licensee ceases such business, however, has no effect on the continuing validity of the license which has been issued. Therefore, I reject the assertion that when Taxpayer filed a monthly return marked final, its distributor's license ceased to be in effect. Compare Department Ex. No. 1, exhibit 1 (Activity Report dated 5/23/95), exhibit 6 (7/7/95 internal Department memorandum regarding Taxpayer's "Discontinued License" based on Taxpayer's final return); Tr. p. 17, with, 35 **ILCS** 130/6 (before the Department may suspend, cancel or revoke a license issued under the CTA, the Department must first provide the licensee with notice of the proposed action and the alleged violation, and an opportunity to be heard).

Because Taxpayer's distributor's license was never revoked, cancelled or suspended as provided in the CTA, and because it did not expire until 6/30/95, that license remained valid on 5/23/95. Taxpayer Ex. No. 1; 35 **ILCS** 130/4. As a licensed distributor at the time of seizure, Taxpayer is not liable for the penalty imposed by section 18b of the Act. 35 **ILCS** 130/18b; Department of Revenue v. Jamb Discount, 13 Ill. App. 3d 430, 436 (2d Dist. 1973).

Issue 2:

As to the ultimate disposition of the unstamped cigarettes seized, section 18a of the CTA provides:

After seizing any original package 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, were not tax stamped or tax imprinted . . . in accordance with this Act

If, as a result of such hearing, the Department shall determine that the original packages of cigarettes seized were at the time of seizure not tax stamped . . . as required by this Act, . . . the Department shall enter an order declaring such original packages of cigarettes . . . 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. It is undisputed that the cigarettes, at the time of seizure, were not tax stamped.

Additionally, and while the cigarettes were seized from Taxpayer's place of business, Taxpayer had ceased doing business from that location by 5/23/96. At the time of their seizure, the unstamped cigarettes were in the possession of TAXPAYER A. See, e.g., Department Ex. No. 1, exhibits 2-3, 9-10; Taxpayer Ex. No. 4 (Auction Agreement); 86 Ill. Admin. Code § 130.2015 (auctioneers entrusted with possession of goods to be sold have duty to file Retailers' Occupation Tax returns regarding such sales). Section 13 of the CTA provides:

Whenever any original package of cigarettes is found in the place of business or in the possession of any person who is not a licensed distributor under this Act without proper stamps affixed thereto, or an authorized substitute therefor imprinted thereon, . . . the prima facie presumption shall arise that such original package of cigarettes is kept therein or is held by such person in violation of the provisions of this Act.

35 **ILCS** 130/13.

TAXPAYER A was not a licensed cigarette distributor (see Tr. pp. 11-12), and it possessed the unstamped cigarettes with the intent to offer those unstamped cigarettes for sale in apparent violation of section 24 of the CTA. See 35 **ILCS** 130/24(a). The Auction Agreement between Taxpayer and TAXPAYER A expressed no restrictions regarding TAXPAYER A's auction of the unstamped cigarettes (see Taxpayer Ex. No. 4), and no evidence was introduced at hearing that bids for the unstamped cigarettes would be restricted to those made by licensed cigarette distributors. Neither TAXPAYER A, the agent, nor Taxpayer, the principal, were entitled to offer unstamped cigarettes for sale to the public. 35 **ILCS** 130/2; 35 **ILCS** 130/3; 35 **ILCS** 130/24(a). The unstamped cigarettes, therefore, were presumptively being held in violation of the provisions of the CTA.

Conclusion:

Based on the record before me, I conclude that the unstamped cigarettes seized in this matter should be confiscated, forfeited and disposed of according to law. See 35 **ILCS** 130/21.

Date

Administrative Law Judge